

REVIEW OF THE 2ND INTERNATIONAL CONFERENCE ON TAXPAYER RIGHTS, VIENNA, 2017

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The conference was held in Vienna on March 13-14, 2017. In their opening remarks, Nina Olson, the National Taxpayer Advocate (IRS, Washington, D.C.), and Prof. Michael Lang (WU: Vienna University of Economics and Business) welcomed the participants and introduced the members of the first panel, "The Framework and Justification for Taxpayer Rights", which was moderated by Prof. Peter Essers (Tilburg University, The Netherlands).

The panellists – Ian Young (Institute of Chartered Accountants, UK), Elaine Benn (HMRC, UK), Prof. John Bevacqua (La Trobe University, Australia), and Prof. Alice Abreu and Prof. Richard Greenstein (both from Temple University, USA) – reviewed the constitutional, statutory and administrative sources of taxpayer rights. Ian Young noted the exceptional place of taxes: although human rights include the right to own property, a special protocol (the First Protocol (1952) to the European Convention for the Protection of Human Rights) makes an exception with regard to taxes, as a state can deprive its citizens of their property in order to ensure taxes to fund public goods are paid. His overview of the Taxpayer's Charter, introduced in the UK during the 1990s as a means to set out taxpayers' rights and detail how these should be protected, was continued by Elaine Benn, who referred to an updated version produced by HMRC, "Your Charter". The issue of tax exceptionalism, and its effect on taxpayers' rights, was raised by John Bevacqua, who talked about the "chill factor" effect and the tendency of judges to extend the immunity of tax officials. Alice Abreu and Richard Greenstein discussed the IRS's Taxpayer Bill of Rights (TBOR). An important point, they emphasised, is whether there is a mechanism in place by which to implement these rights, as well as procedures for enforcement, compliance and retribution. Another important issue relates to the different levels of power possessed by different taxpayers: should the protection of rights be differentiated? An obvious practical problem is that wealthier taxpayers are better able to protect themselves. The next issue is extraterritoriality: does the U.S.A violate the sovereignty of other states when extending protection of rights and justice to its taxpayers in other countries?

Several issues were raised in the discussion that followed: the panellists and the audience exchanged their views on the following:

- Who is responsible for taxpayers' rights –, the revenue service or the ombudsman?
- How many taxpayers are aware of their rights and how often do they invoke them?
- What are the biggest practical problems with taxpayers' rights in the U.S.A?

Nina Olson pointed out that before the TBOR was codified, it was impossible to say that rights were being violated. Now that it is law, the next step is to work with courts and create precedents. The responsibility for taxpayers' rights should be taken jointly and these rights must become the substance of the law. According to Nina Olson's estimates, less than half (about 40%) of American taxpayers are aware of their rights, but before 2014 (when the TBOR was adopted) only 11% knew what their rights were. Elaine Benn and Ian Young noted that many taxpayers do not complain and

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do not wish to be involved with tax system. The National Taxpayer Advocate's annual report has identified about twenty practical problems; one is that tax practitioners must be better informed about taxpayers' rights.

The second panel, on "Privacy and Transparency", which was moderated by Christopher Rizek (Caplin & Drysdale, Washington, D.C.), was led by Maryte Somare (PhD Candidate, WU, Vienna), Ali Noroozi (Inspector-General for Taxation, Sydney, Australia), and Robert Goulder (Special Counsel, Tax Analysts, Arlington, Virginia, U.S.A). The central issue discussed by the panellists was the use of information about the taxpayer which has been collected by and shared among tax authorities in different jurisdictions.

Maryte Somare talked about the links between tax transparency and financial transparency, and a trend from anti-money laundering to tax crimes. She touched upon the difficulty in identifying tax evasion and tax fraud as opposed to aggressive tax planning. Further, she compared the framework for cross-border exchange of information between tax authorities and financial intelligence units (FIUs): although the issues seem to be more complex in tax matters, tax authorities make extensive use of information provided by FIUs; for example, about 40 percent of cases in Jersey reported by FIUs were investigated by tax authorities and only a small number were investigated by the FIUs.

Ali Noroozi focussed on the challenge that tax authorities are facing in striking the balance between transparency and the right for privacy, especially in the corporate sector. Nowadays, tax authorities cooperate globally, as tax advisors used to do before. An important issue is the cost of litigation: individual taxpayers are less likely than large corporate taxpayers to take issues of "substance" to court. Moreover, the courts are more likely to come down on the side of the tax authority, even if the use of private information was arguably excessive. Ali Noroozi also noted that pre-filled tax returns may result in extra compliance costs for taxpayers if they contain mistakes. Finally, he pointed out that transparency, or voluntary disclosure, may not be understood or correctly interpreted by the media and the public.

Robert Goulder spoke about the role of the media. He emphasised that there should be no secret law: more recently, disclosures have occurred, not by law, but by whistle-blowing and stolen information, which raises ethical issues. Headline cases, such as that of the Swiss investment bank, UBS, have led to changes in the information exchange system. The Panama Papers case was based on stolen documents: the journalists involved have acknowledged that this was a breach of privacy but claimed that the end justified the means. The question is do "tax cheaters" deserve less protection? Can socially beneficial reform be caused by a breach of law?

Several issues concerning the exchange of information (EOI) were discussed, in particular, its extent and automatic cross-border exchange. It has been pointed out that EOI is transparency between tax authorities. In relation to the role of the media, the discussants noted that many journalists do not understand tax terminology and blame taxpayers for availing of the possibilities afforded by law; they need to be educated or encouraged to learn. For example, "fair share of tax" is often mentioned in the media but what is it? Instead, the lawmakers should turn to the law. Other issues discussed by the panellists and the audience included the relationship between the transparency and crisis of trust and integrity of state leaders, and the possibility of establishing a "benchmark" for what to expect from different taxpayers in different jurisdictions. In particular, it

was noted that it would be hard to come up with a benchmark for large, complex, corporate taxpayers, as perceptions of fairness differ between small and large taxpayers.

"Protection of Taxpayer Rights in Multi-Jurisdictional Disputes" was the topic of the third panel, which was moderated by Philip Baker, QC (Field Court Tax Chambers, London, UK). The panellists were Mary Bennett (Baker McKenzie, Washington, D.C.), Cora O'Brien (Irish Tax Institute, Dublin, Ireland), Katerina Perrou (IBFD, Amsterdam, The Netherlands), and Michael Sell (Taxation Directorate-General, Berlin, Germany). The discussion focussed on the framework for an effective multi-jurisdictional dispute resolution and the adequate protection of taxpayer rights between jurisdictions.

Cora O'Brien talked about double taxation and cross-border disputes. She pointed out that since the introduction of the base erosion and profit shifting (BEPS) action plan by the Organisation for Economic Co-operation and Development (OECD), almost 91 percent of companies surveyed expected more double taxation. Tax authorities are more reluctant to give rulings because situations can change in the future, but business taxpayers want more certainty for future operations. A possible alternative to dispute resolution is the double tax convention. Taxpayers' experiences of dispute resolution under the Mutual Agreement Procedure (MAP) have been characterised by exclusion, uncertainty and cost. Exclusion arises because, in multi-jurisdictional disputes, taxpayers do not participate in disputes between countries. The costs are associated with having to deal with documentation from many years ago which is located in other countries; this can attract additional fees, and sometimes a requirement for upfront payments, as is the case in the UK, plus payment of interest. Thus, the costs exceed the potential benefits, especially for small and medium-sized businesses (SMBs).

Mary Bennett noted that more than 90 percent of disputes under MAP are resolved with full relief from double taxation; however, it is difficult for SMBs to file disputes. The problem facing the MAP framework is the growing number of cases in its inventories. The major barrier to MAP is its cost, while the outcome is uncertain. She also noted that the only action of OECD BEPS favourable to the taxpayer is action 14, on minimum standards.

Katerina Perrou talked about a fair and inclusive system for the resolution of international tax disputes. Her central argument was that the right to a fair trial is a universal civil right. However, in international, cross-border disputes, access to this is difficult, there is no equal control and achieving an effective remedy is difficult, because two countries involved can make different decisions. MAP and arbitration can provide effectiveness and independence, but do not always provide access.

Continuing the discussion, Cora O'Brien quoted a list of relevant rights from the Charter of Fundamental Rights of the European Union and touched upon an imbalance of power between taxpayers and tax authorities: taxpayers often fear to assert their rights because of concerns about potential repercussions and future audits. Mary Bennett also spoke about access to MAP and arbitration, and the prevention of unilateral allegations of abuse or tax avoidance, as well as the prohibition of forced settlements.

During the subsequent discussion, Philip Baker mentioned a MAP case that went on for more than 17 years and was, in the end, left unresolved, and Cora O'Brien noted that SMBs prefer to settle with tax authorities rather than taking their cases to MAP or arbitration, based on the cost-benefit analysis. A new development, akin to baseball arbitration and termed "final offer" has been described, in which two sides present their "scores" and the arbitrator picks one without explanation; however, this may have no benefit in terms of providing information to other taxpayers, because the taxpayer involved keeps details confidential. Other issues raised included the opportunities for taxpayers to know the MAP criteria before starting the process and the possibility of extending this framework to non-business taxpayers.

The fourth panel was on "Access to Rights: the Right to Quality Service in an Era of Reduced Agency Budgets" and was moderated by Nina E. Olson (National Taxpayer Advocate, Internal Revenue Service, Washington D.C., United States). The panellists were Dr. Sebastian Beer (Austrian National Bank), Prof. Leslie Book (Villanova University, USA), Michael Hallsworth (Behavioural Insights, UK), and Dr. Matthias Kasper (University of Vienna, Austria).

Michael Hallsworth argued that, in a world of tight budgets and complex tax environments, in order to maintain high-quality services, tax authorities need to draw on the findings from behavioural sciences with regard to understanding taxpayers' behaviour. He outlined three opportunities for tax authorities: to maximise the effectiveness of existing forms of communication (e.g. by listing call centre opening times in the letters to taxpayers); to make better use of new communications channels (e.g. sending taxpayers reminders by SMS [text messages]); and to improve the design of digital services (e.g. the location of the information on the screen).

Sebastian Beer spoke about the experimental evidence of the impact of complexity in tax law on taxpayers' behaviour. He noted that issues of particular concern are the outsourcing of outreach and education to the private sector and the replacement of personal contact between the tax administration and taxpayers by automated procedures, which are likely to increase the cost of tax knowledge and the perceived complexity of tax system. Theory and experimental studies suggest that risk-averse taxpayers tend to evade less in more complex environments, which appears to justify spending cuts in outreach and education. At the same time, increase in complexity leads to discrimination against less wealthy, less privileged taxpayers, who cannot afford private tax preparers and thus become over-compliant.

Matthias Kasper talked about his research with co-authors into the potential negative effects of cost-saving shifts in services on taxpayers' perceptions of their competence and attitude towards compliance. The research was based on a sample of about 22,000 taxpayers in 14 Central and Eastern European countries.

A question was raised about the seeming contradiction in the outcomes of increasing tax complexity: higher evasion and higher over-compliance. However, as a survey of self-employed people in Germany and Austria has indicated, tax knowledge is positively correlated with tax planning. Other related questions were about simplification as opposed to complexity and about the revenue effect in contrast to compliance effect.

Leslie Book talked about the benefits administered through the tax system, or tax expenditures. Earned Income Tax Credit (EITC), he argued, is often criticised as being ridden with fraud and overpayments. The deficiencies in EITC are worse than in similar non-tax programmes. This raises the question of why tax authorities should have the same missions as benefit agencies. During the discussion, it was pointed out that taxpayers would prefer a better tax outcome over tax simplicity (Ali Noroozi).

The fifth panel, the final on the first day of the conference, was on "Challenges of Scrutineering Entities", and was presented as a "fireside chat with Inspectors General, Ombuds, and Advocates". The main issues raised during the discussion were how ombudsman services or taxpayers' advocates operate in changing tax environments, and how to get the right balance between service and enforcement, especially when tax authorities in many countries face budget cuts. The panel was moderated by Prof. Jeffrey Owens (WU, Vienna, Austria) and included Sherra Profit (Office of the Taxpayers' Ombudsman, Canada), Ali Noroozi (Inspector-General of Taxation, Sydney, Australia), Hanyana Eric Mkhawane (South Africa Tax Ombudsman), Nina Olson (National Taxpayer Advocate, Washington, D.C.), Anders Bengtsson (Swedish Tax Ombuds) and Diana Bernal (Prodecon, Mexico). Among other issues, the participants talked about the taxpayers' expectations of better services and "fairer" treatment, and whether or not taxpayers are becoming more aggressive in pursuing their rights.

The second day of the conference started with a panel on "Penalties and General Anti-Avoidance Rules (GAAR)", which was moderated by Prof. Erich Kirchler (University of Vienna, Austria). The panellists were Prof. Christoph Kogler (Tilburg University, The Netherlands), Prof. Luigi Mittone (University of Trento, Italy), Prof. Rupert Sausgruber (WU, Vienna, Austria) and Christophe Waerzeggers (Senior Counsel, International Monetary Fund).

Introducing the discussion, Erich Kirchler outlined the importance of issues related to fairness in tax compliance. In the traditional models, tax evasion is identical to a risky activity and the tools are audits and punishment. Audits can, however, backfire. Lab experiments have been conducted to test for the presence of the bomb-crater effect or the echo effect (i.e. the probability of a future audit as perceived by an evader falling or increasing after a successful audit). In a study based on data from 34 countries, the relationship between audit frequency and tax compliance had an inverted-U shape. The data from the IRS shows that audits with substantial adjustments lead to higher compliance and, conversely, audits with small adjustments lead to lower compliance. This suggests that audit and punishment policies will not necessarily induce compliance.

Christoph Kogler presented the results of an empirical study of the effect of delaying tax audit feedback on compliance and perception of fairness. The compliance responses to the delayed and the immediate feedback were different. Study participants who received delayed feedback showed higher compliance, higher perceived probability of audit and more severe perceived punishment than those who received immediate feedback. This may suggest that the longer the period of uncertainty experienced by a taxpayer, the greater his or her honesty will be in the short run. However, in the long run, compliance may still deteriorate.

Luigi Mittone presented the results of an experiment on the role of principal witness regulations in the study of tax evasion and institutions, namely, in the presence of corruption. The study

focussed on the difference in tax compliance under two regimes – with and without regulation – and on the changes in compliance following the transition between the two regimes. The main finding was that compliance was higher under the regime with regulation when the regime was fixed. However, the transition from the regime without regulation to the regime with regulation led to a drop in compliance. These findings imply that the time path of institutional changes is important and that, for a particular political measure to work, the required institutions must be in place before that measure is introduced.

In his talk, Rupert Sausgruber argued that the optimal tax gap is positive because of the compliance costs. Non-compliance leads to an unfair distribution of tax burden and tax-minimisation activities lead to deadweight loss, for example, from rent-seeking. Increasing the probability of detection is costly; it is easier to increase the penalty and reduce the probability of detection. However, there is evidence that the penalty has a weak effect on compliance. Corporate tax morale is important: in a competitive environment, ethics tend to fall. At the same time, stronger enforcement is likely to increase tax avoidance. He also argued that the introduction of GAAR has led to an increase in tax planning.

The discussion of avoidance and anti-avoidance rules continued with a presentation by Christophe Waerzeggers. The emphasis of his talk was on the tension between preserving the rule of law and the integrity of the tax system. The main points of his argument are developed in the technical note on "Introducing a GAAR" published by the International Monetary Fund (IMF), that he co-authored with Cory Hillier.²

The second panel, moderated by Prof. Michael Lang (WU, Vienna, Austria), was on "The Role of Intergovernmental Actors in Furthering and Protecting Taxpayer Rights: A Conversation." The panellists were Dr. Anette Kugelmüeller-Pugh (Federal Fiscal Court, Munich, Germany), John Peterson (OECD), Prof. Piergiorgio Valente (Link Campus University, Rome, Italy and President, Confédération Fiscale Européenne), Melchior Wathelet (Advocate-General, European Court of Justice, Luxembourg) and Héléne Michard (European Commission).

Piergiorgio Valente talked about the importance of transparency. Increasing globalisation has undermined the territorial rules of taxation. The OECD's BEPS Action Plan aims to contravene this trend. The main message is that the law must be changed as the world has changed. John Peterson argued that BEPS may have led to more uncertainty between taxpayers and tax authorities, as well as between the tax authorities.

Héléne Michard talked about cross-border ruling and the growing need for legal certainty. Currently, businesses can obtain information from their own tax authorities on how their transactions will be treated in a participating country, but only in respect of VAT.

Melchior Wathelet talked about the role of the courts and put forward the following arguments. First, when tax is imposed in breach of European Union (EU) law, it must be refunded with interest from the date on which the tax was paid, with full compensation, and the administrative costs must not be deducted. Second, if there is abuse of the law, the tax authority must respect the rights of the taxpayer to defence and any evidence must be obtained under criminal procedure according to

² <http://www.imf.org/external/pubs/ft/tltn/2016/tltn1601.pdf>

the EU fundamental rights. He mentioned the 2011/16 directive against evasion and the Berlioz case in relation to the information exchange between France and Luxembourg. Finally, he spoke about a case of an Italian firm which committed tax fraud during 2005-2009. Under Italian law, the seven-year limitation period would apply. The case was brought to trial in 2014, overriding the limitation against Italian constitutional rights. This was an example of the EU's rules going against a sovereign constitution.

Anette Kügelmüller-Pugh argued that a taxpayer should be able to appeal in an independent court, with access independent of claim and taxpayer's wealth or the need for legal aid or representation. The right to a fair trial and the court of appeal should also apply in all cases.

The conference continued with a panel on "Building Trust", which was conducted in two parts. The first part, "Transforming Cultures of Tax Agencies and Taxpayers", was moderated by Nina Olson (National Taxpayer Advocate, Washington, D.C.). The panellists were Prof. Henk Elffers (Netherlands Institute for the Study of Crime and Law Enforcement, Amsterdam), Lotta Björklund Larsen (Linköping University, Sweden), John Njiraini (Kenya Revenue Authority) and Dr. Attiya Waris (University of Nairobi, Kenya).

Henk Elffers talked about the rules of rule compliance and the Willing – Be Able – Daring to transgress (WBAD) rules model as a diagnostic instrument for fighting tax non-compliance. Why do people transgress tax rules? Answers would typically include low morale, opportunistic behaviour and punishment. It is well known that a lack of punishment does not always lead to crime while punishment does not always prevent crime – take, for example, speeding on the roads. It is also known that some good people sometimes transgress rules and that opportunities to do so are not always seized. The WBAD model takes an integrated approach to criminal behaviour, including tax non-compliance. It also offers a series of measure for each step, which should be implemented depending on the "height" of the steps. Thus, "willingness" can be controlled by education, "being able" by closing opportunities and "daring" should be addressed by punishment.

Lotta Björklund Larsen talked about the approach taken by Swedish Tax Agency with regard to shaping taxpayers, which involved the balance of controllability and communicability. It can be difficult to follow the letter of the law, because the law can be inconsistent and impractical. For example, employed and self-employed people face different treatments for the same activity. She argued that Swedes have confidence in their national tax agency and presented the results of ethnographic fieldwork which provided insights into the work of the Swedish Tax Agency and, in particular, into how its managers decide which types of taxable activities can be controlled and what can be communicated. The ultimate goal is to make all citizens pay their fair share.

Attiya Waris talked about developing fiscal legitimacy in order to build trust between the state and the society in Africa. The main obstacles to the creation of a society of compliant taxpayers in a developing country include various state inefficiencies, corruption and inequalities, and a lack of transparency, accountability and responsibility on behalf of state institutions. She argued that policies aimed at widening the tax base and increasing revenues in a developing country should be contingent on taxpayers' current situations. Using African countries as examples, she analysed the ways in which a state can go about changing taxpayer culture.

The second part of the panel on "Building Trust" focussed on "Safeguards on Tax Agency Power". The panellists were Diana Bernal (Prodecon, Mexico), Prof. Kristin Hickman (University of Minnesota, U.S.), and the Honorable Peter Panuthos (U.S. Tax Court, Washington, D.C.). The moderator, Prof. André Lareau (Laval University, Canada), opened the discussion by noting that a judge can, in fact, "help" a taxpayer who is not represented in court or who is represented by someone without adequate skill. Peter Panuthos pointed out that the majority of tax court cases in the United States are about the amounts below 50,000 U.S. dollars. Moreover, taxpayers are underrepresented by lawyers: more than 70 percent of them come to court without legal representation. As the unrepresented litigant may not understand the court procedures, he or she may find it difficult to argue in support of his or her position. This undermines the standard paradigm of all parties understanding the substantial procedural and substantive law, and makes active, affirmative judging important. Kristin Hickman talked about the growing influence of administrative law on the U.S. tax administration. She argued that, in many cases, the IRS appeared to be exempt from procedural requirements – the situation termed "tax exceptionalism". It is important that the IRS comply with the Administrative Procedure Act (APA), unless the Congress or the IRS Code exempt the IRS from complying with a particular requirement. The comment, in the subsequent discussion, on the compliance with administrative procedures was that the IRS has focussed on the implementation of the substance of the law and has lost expertise in procedures because of its organisation.

Diana Bernal talked about the procedures ensuring the tax authority's accountability in tax court cases. She presented the Mexican experience with regard to the establishment and development of the Tax Ombudsman and focussed on its two most relevant facilities: the Complaint Procedure Against Tax Authorities' Actions and the Conclusive Agreements Procedure. She argued that the accessibility, flexibility and low cost of these procedures make them exceptional when compared to those offered in several other jurisdictions and that they form a fertile ground for achieving the desired transparency and accountability of the tax administration.

The panellists' presentations were followed by a discussion about several issues. Can the right to equal treatment be exercised if the third party does not agree to the release of its information? While the court will not act, the ombudsman may act if it has its own access to the tax authority's records. Can the final decision by the court be a threat to tax law? Ultimately, it is important to maintain consistency in regulation, and, in fact, the effect of a court's decision can be positive if the tax agency learns from that decision.

The conference closed with remarks from Nina Olson and Prof. Michael Lang, who thanked the participants for their input and invited them to the future conferences on taxpayer rights.