6th anniversary of the IBFD Observatory on the Protection of Taxpayers Rights

In 2020 → 50 reports from 78 national reporters from 42 countries

In 2021 → 56 reports from 87 national reporters from 47 countries

Neutral, balanced report: groups of experts are formed by

- practitioners/taxpayers,
- tax authorities,
- academics,
- tax ombudspersons and
- the judiciary of each surveyed country

https://www.ibfd.org/Academic/Observatory-Protection-Taxpayers-Rights (open access)
Covers 12 areas:

1. Identifying taxpayers, issuing tax returns and communicating with taxpayers
2. The issue of tax assessment
3. Confidentiality
4. Normal audits
5. More intensive audits
6. Reviews and appeals
7. Criminal and administrative sanctions
8. Enforcement of taxes
9. Cross-border procedures
10. Legislation
11. Revenue practice and guidance
12. Institutional framework for the protection of taxpayers’ rights
2021 OPTR Report - Highlights

1. COVID-related developments and collection issues
2. Challenges to confidentiality and cross-border issues
3. Penalties and sanctions
4. Tax Legislation: non-retroactivity; enhanced participation
5. Adoption of Taxpayers’ Charters
1. COVID-related developments
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- 2021 → coming out of the COVID pandemic

- A number of measures that had been introduced during the pandemic which had an impact on taxpayers’ rights were either continued or had consequences
  - New systems introduced for remote meetings, remote filing of tax documentation (see §§1.5 and 1.7)
  - Relaxation of deadlines **BUT** backlog of activities that turned to burden (see §8)

- In summary: challenges turned to opportunities
1. COVID-related developments

- Collection of taxes: costly measures, wider protection (§8)
  - Variety of measures: postponements on collecting taxes; reduced interest rates for late payment of taxes; extension to due dates for compliance; reduced VAT rates; reduced income tax rates; higher tax-free brackets; forgivable loans; payment in instalments
  - Some interim measures → new normal? Colombian legislation regulating the rescue and recovery mechanism for companies in insolvency proceedings and the Danish tax deferral scheme for small and medium-sized enterprises
  - Costly; increased the tax debt; BUT protection of minimum necessary for living
2. Challenges to Confidentiality
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- 2021 – enhancement of transparency in tax matters in the EU but also emergence of modern threats (see §3)
  - Public CbCR EU Directive has been approved BUT implementation is facing challenges and is not completed yet
  - Since 2015 General Report: concerns over data being publicly disclosed without the authorization of the interested person - Access to data by tax authorities does not mean making the data public
  - Public CbCR: disproportionate; form of “naming and shaming”
  - Excessive reporting obligations, e.g. DAC6, Mexico (§3.14)
2. Challenges to confidentiality

- 2021 – Positive developments on confidentiality
- Whistle-blower protection (§3.9)
  - Danger: public disclosure of taxpayer confidential information
  - **BUT** a true whistle-blower is acting in public interest
  - EU Whistleblowing directive offers protection (**but:** delayed transposition by MSs)
  - ECtHR – *Halet v. Luxembourg (21884/18)*; “Luxleaks case”; concerns the balancing of rights; referred to the Grand Chamber; hearing on 2nd February 2022 (§9.1)
2. Challenges to confidentiality

- Challenges to confidentiality in cross-border cases
  - continuous and general trend extended into 2021: increase in cross-border procedures and accompanying weakening of taxpayers’ rights in the process.
  - **China**: prohibition of the exchange of illegally obtained information (moved towards the best practice)
  - **EU**: DAC7 (31-12-2022) introduces reporting obligations for digital online platforms; lower standard of foreseeable relevance; joint audits; restriction of data protection (EoI takes precedence)
3. Penalties and sanctions
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- 2021 – problems connected with the levying of penalties and sanctions
  
- Positive: Balance secured by the intervention of the judiciary
  
  - **Slovenia Constitutional Court:** surcharge tax of 70% on undeclared income, fully applicable just by the commencement of an ex-officio assessment is unconstitutional (§4.1)

- **BUT** this positive note is not a general trend in the use of penalties
A number of the reports noted both the increased use of criminal penalties and increased severity of the sanctions (§7)

- Negative effect: taxpayers risk higher sanctions; greater possibility of criminal penalty
- Positive effect: In principle greater safeguards should apply in the case of a more intensive audit
- Trend in increase of criminal penalties NOT MATCHED by greater safeguards
- An area to watch
4. Retroactive tax legislation
4. Retroactive Legislation

- Only positive developments
  - Introducing retroactive tax legislation poses threats to legal certainty and respect of legitimate expectations
  - Hidden forms of retroactivity in EU directives, **BUT** important message from Courts
  - **Constitutional Court of Luxembourg (§10.2):** the economic retroactivity of the 2016 law transposing the EU Savings directive is unconstitutional
  - Not an isolated case but a positive trend is recorded in the reports
The case of India – 3 positive elements (§10.2)

- The **Indian Government** has indicated that they do not intend to use too much retroactive legislation.
- **Indian Supreme Court** rejected argument that a change with regard to the taxation of royalties could have retroactive effect.
- **Arbitral bodies** in VODAFONE and CAIRN cases came down in favor of the rule of law.
  - CAIRN decision: identified only a small number of limited circumstances where retroactive tax legislation might be justified; otherwise it is a breach of the rule of law.
4. Retroactive Legislation

- Rule of law - Participation in law making (§10.3)
  - Concerns: “hardening” of soft law; progressive intervention of multilateral bodies in the legislative processes in tax matters; doubts about the democratic legitimacy of the rule-making processes carried out by such bodies
  - Positive development in 2021: a growing trend towards public consultation by the OECD and by the EU
  - EU: public consultation on taxpayer rights; IBFD contribution highlighting the current lack of harmonization and coordination and requiring action from the EC by some form of “codification”
5. Adoption of Taxpayer Charters
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- Growth in the adoption of Taxpayers’ Charters or Taxpayers’ Bills of Rights - significant majority of countries have them now (§12.2)
  - Currently: proposal from the EU to adopt at the EU level a European Taxpayers’ Charter
  - Established body of case law from the CJEU on the application of the EU Charter of Fundamental Rights to tax cases
  - CJEU case law forms the basis for the development of an EU Charter of Taxpayers’ Rights
Thank you!