

**International Conference on Taxpayer Rights  
Access to Justice: Judicial Review & Alternative Dispute Resolution**

**May 25, 2023**

**Panel 1:**

**A Rights Based Foundation for Access to judicial Review**

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This panel will explore the principles underlying access to judicial review, including the balance between the collective interest in promptly obtaining revenue necessary for public goods and the individual's right not to be deprived of property in violation of the rule of law coupled with the right to a fair trial. Topics will include exhaustion of administrative remedies and the requirement to pay-first-and-claim-later (solve et repete); transparency and access to court records; the role of the judge in the courtroom, especially when taxpayers are un- or under-represented; in camera or private hearings; and the ability of courts to address a violation of taxpayer rights during the administrative process preceding judicial review.

Panelists:

- Christian Allen, Judge, Tax Court Chile
- Thomas Andrieu, Conseil d'Etat, France
- Anthony D. Gafoor, Chair/Chief Judge, Tax Appeal Court of Trinidad and Tobago
- Professor Clara Gomes Moreira, Brazil

Moderator: Diana Leyden, Special Trial Judge, US Tax Court, US

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**1. How do time and other barriers to accessing judicial review impact trust in the independence of the judiciary?**

Tax cases in France are dealt with by the 42 administrative courts and represent about 10% of their caseload.

**1.1 Access to judicial review of a tax assessment in France is easy:**

- The time limit for lodging a claim with the tax administration extends until December 31<sup>st</sup> of the second year following the tax assessment
- However, before bringing a case to the tax judge and on the risk of inadmissibility of his appeal, the taxpayer is bound to first submit a claim to the tax administration, which aims to

obtain either the discharge of the contested tax, or its reduction (Article L. 190 of the Livre des procédures fiscales, hereafter LPF).

- And the lodging of a claim by the taxpayer does not suspend his obligation to pay the tax when the amount is above 4500 euros (R277 LPF). The deferment of payment of the tax is granted subject to the provision of financial guarantees (Article L. 277 of the LPF).
- The tax administration has a period of six months to investigate and decide on the complaint. It is also obliged to give reasons for any decision to reject a claim, whether in whole or in part. A decision that is insufficiently motivated or the absence of any formal answer from the tax administration will guarantee the taxpayer will face no deadline to appeal (Conseil d'Etat, Section, 9 Feb. 1979, Beudet, n° 5060, Rec.).
- Once a claim has been made :
  - There are no court fees
  - It is not required to have a lawyer and low income taxpayers will be provided one if they ask for it.

### **1.2 Access to higher courts in France is relatively easy :**

- The 9 administrative courts of appeal have jurisdiction to hear appeals against judgments handed down by the 42 administrative courts : the only difference is the taxpayer now needs a lawyer. Still no court fee.
- *Conseil d'Etat* is the French supreme court for administrative law and thus for tax cases:
  - Neither new facts nor new points of law can be raised or discussed
  - *Conseil d'Etat* will look at points of law, and will discuss the legal qualification of facts (*qualification juridique des faits*) only if it impacts the applicable legal regime
  - The taxpayer has to hire a specialized *Avocat au Conseil d'Etat et à la Cour de cassation* (not cheap)

### **1.3 The burden of proof does not weigh too heavily on the taxpayer**

The administrative judge forms his opinion not only on the basis of the documents produced by the parties, but also by requesting any document "likely to establish his conviction and of a nature to allow the verification of the applicant's allegations" (CE, Section, 1 May 1936, Couespel du Mesnil, Rec.). The inquisitorial nature of the procedure before the administrative judge, who directs the investigation, aims to remedy the inequality between the parties.

The principles of devolution of proof are as follows (see Conseil d'Etat, Section, 20 June 2003, Société Etablissements Lebreton - Comptoirs général de peintures et annexes, n° 232832, Rec.):

- Firstly, if the contested tax was established in accordance with the taxpayer's declaration, it is up to the taxpayer to prove that his or her own declaration was not accurate; conversely, when the administration rectifies the tax bases, it is up to the administration to establish the merits of the rectification;
- Secondly, when certain documents are in the hands of only one party, the burden of producing them falls on that party, regardless of the taxation procedure followed (e.g. proof

of the accuracy of accounting entries, which can only be produced by the taxpayer: Conseil d'Etat, 27 July 1984, SA Renfort Service, no. 34588, Rec.);

- Finally, certain specific rules regarding proof have been provided for by the legislator: thus, the burden of proof always rests on the taxpayer when he or she is subject to an ex officio tax assessment (Art. L. 193 of the Book of Tax Procedures) or when his or her accounts contain serious irregularities and the tax assessment is established in accordance with the opinion of the independent departmental tax commission (Art. L. 192 of the LPF). On the other hand, the burden of proof always lies with the administration when it intends to impose a penalty (Art. L. 195 LPF... and article 6 ECHR).

## **1.4 The taxpayer can ask the judge NOT to apply the law that is... illegal**

### *1.4.1 When the law is not compatible with the French Constitution :*

The priority question of constitutionality (QPC) procedure makes it possible to raise, by way of exception, i.e. on the occasion of a dispute submitted to an administrative or judicial court, a plea based on the unconstitutionality of a law. Tax litigation is the first source of QPC before the administrative courts. When it is of a serious nature, the question is referred by the court to the Constitutional Council, which rules on the respect of constitutionally guaranteed rights and freedoms which the legislator may have infringed<sup>1</sup>.

### *1.4.2 When the law is not compatible with EU law :*

The tax judge is often called upon to refer questions to the Court of Justice of the European Union for a preliminary ruling on the interpretation or assessment of the validity of acts of European Union law (Article 267 of the Treaty on the Functioning of the European Union). As of 1 January 2023, the Court of Justice of the European Union has received 17 references from Conseil d'Etat for preliminary rulings, four of which relate to tax matters.

### *1.4.3 When the law is not compatible with the European convention on human rights :*

- Article 1 of the first protocol to ECHR: property rights can be invoked against excessive taxation
- Tax penalties must abide by the principles stated in article 6 ECHR for criminal law

## **1.5 Protecting taxpayer's rights in court does not always require any tax assessment to start with:**

### *1.5.1 The taxpayer can litigate against:*

General and impersonal acts such as:

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<sup>1</sup> For example:

- The right to an effective remedy, guaranteed by Article 16 of the Declaration of the Human Rights and of the Citizen (DDHC), (CC, 28 March 2013, SARL Majestic Champagne, n° 2012-298 QPC);
- The principle of non-retroactivity of penalties and sanctions and the principle of proportionality of offences and penalties consecrated by Article 8 of the DDHC (CC, 7 March 2014, n° 2013-371 QPC)
- The principle of equality before public charges, enshrined in Article 13 of the DDHC (CC, 21 January 2011, Mrs B., No. 2010-88 QPC; CC, 20 January 2015, Afep, No. 2014-437 QPC), which is opposed to the confiscatory nature of the tax;
- The principle of equality before the law protected by Article 6 of the DDHC (CC, 6 June 2014, Société Orange SA, No. 2014-400 QPC; CC, 20 June 2014, M. and Mme M., No. 2014-404 QPC);
- Or the right to property protected by Article 2 of the DDHC and the fundamental guarantees attached to its exercise (CC, 18 June 2010, n°2010-5 QPC).

- Government regulations dealing with administrative or court procedures in tax matters
- A tax instruction by the tax authorities, even if it is limited to summarising the changes made by the legislator to the tax system, can be referred to the judge when it is likely to have significant effects on the rights or situation of persons other than the agents responsible for implementing it (cf. Section, 12 June 2020, No. 418142, GISTI, in the Recueil p. 192). The judge may on this occasion review the conventionality of a law that the circular reproduces identically (for a breach of the freedom of establishment protected by European Union law: CE, 2 June 2006, Miss C., No. 275416, Rec.), or its constitutionality, in which case the QPC is referred to the Constitutional Council (CE, 9 July 2010, M. and Mrs M., No. 339081, T.).
- The appeal against a tax instruction is a fast track for the taxpayer who can obtain in less than a year a final decision on a point of law from the French supreme court for administrative law (Conseil d'Etat), instead of waiting for a tax assessment and then fight it in three different courts, which can take from 6 to 10 years.

1.5.2 The courts can also hear appeals against individual acts that are separable from the taxation procedure:

- the refusal to be recognised as a taxable person for VAT purposes;
- certain positions taken by the tax administration on a factual situation ("rescripts" which, in the interests of legal certainty, make it possible to obtain a position from the administration that will be enforceable by the taxpayer, when these positions are likely to have significant non-tax effects).
- A taxpayer may hold the state liable if he or she has suffered damage other than the payment of tax. It is thus possible to obtain compensation for damage, including disturbances in living conditions, when they are directly and definitely caused by the administration's decisions.
- The faults allowing the administration to be held liable are diverse: for instance, the administration's failure to inform the accountant of a request for deferment of payment, an abnormal delay in the release of a security interest on assets after tax relief, "administrative obstinacy" during the audit procedure, or the disregard of an international convention by a tax law (CE, Assemblée, 8 February 2007, G., n° 279522, Rec.).
- Local authorities such as municipalities can also ask for compensation for the failure of the tax administration to properly collect taxes normally due to those local authorities.

**2. Transparency: (...)**

(...)

**3. Why is the ability of the judiciary to raise new issues (issues not considered at the administrative level) or to consider administrative violations of taxpayer rights important?**

**3.1 The tax judge does not have to stick to any of the parties' line of argument**

In all circumstances, the judge has to verify which law is applicable (*ratione materiae & ratione temporis*) and apply it, regardless of what the parties think of the matter.

Moreover, the tax court will raise *ex officio* the issue that a tax treaty prevents the French tax administration from taxing because France loses tax jurisdiction under the applicable treaty provision<sup>2</sup>.

Besides, both the tax administration and the taxpayer may put forward any new element (new points of law as well as new facts), both before the administrative court and before the administrative court of appeal, until the contradictory phase is closed (article L 199 C LPF).

This can sometimes lead to quashing the tax assessment but it can also lead to find a new legal basis for an otherwise illegal assessment.

The judge can thus decide to operate a substitution of legal basis, at any time of the procedure, including for the first time before the appeals judge (CE, 20 June 2007, SA Ferette, n° 290554, T.: same facts and same tax assessment but a different article of the tax code) or a substitution of reasoning (same applicable law but other facts or interpretation: CE, 1 December 2004, Minister of Economy, Finance and Industry v. Sté Vecteur, n° 259104, unpublished in the Recueil).

The substitution of legal basis is only possible on the express request of the tax administration and if the taxpayer has been able to benefit from all the procedural guarantees attached to the new legal basis invoked by the administration (SA Ferette, cited above), such as, for example, the consultation of the independent departmental tax commission (CE, 30 December 2009, Soc. Bonduelle Conserve International, no. 304516, T.), and after having been debated before the court.

### **3.2 Violations of administrative procedural rules by the tax administration do not always lead to the quashing of the tax assessment**

- French tax law provides for various rights in favour of taxpayers during tax procedures followed with the tax administration : protection during tax audits, rights during the assessment procedure, access to conciliation with the administration.
- One major issue in court is to find the appropriate judicial solution when the tax administration has not correctly followed the procedures established by law. In France, the solution comes from case law, because various attempts by the government to legislate on the matter have failed.
- As a general rule, when there has been a direct violation of a legal provision providing for some protection for taxpayers, the assessment will be judged invalid and will be quashed. The exceptions are mainly cases where the taxpayer's situation has not really been affected by the violation or when the tax administration has committed a minor mistake that does not affect the substance of the legal guarantee.
- When the violation is regarded as affecting the right of defense, the invalidity of the assessment is certain. For example, in the group taxation regime, the group parent company, which is the ultimate taxpayer for the group, must receive notification of the methods followed by the tax administration for adjusting the result of a subsidiary. Failure to notify or insufficient notification will bring down the assessment in tax court. Even though the legal provision was not entirely clear, the Conseil d'Etat has decided that notification to the group parent company must include, not only the amount, but also the calculation method for tax penalties resulting from the adjustment applied to a subsidiary<sup>3</sup>. Consequently, the tax penalty was struck down in court for failure to notify properly during the administrative part of the procedure.

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<sup>2</sup> Conseil d'Etat, 28 June 2002, Minister of finance vs. Schneider Electric, Case Nr 232276, RJF 10/02 n° 1080

<sup>3</sup> Conseil d'Etat, 25 June 2020, Minister of finance vs. BNP Paribas, Case Nr 421096, RJF 10/20 n° 770

- Another example of a legal guarantee not to be violated is when adjustments were notified at the end of an audit by a tax agent who was not qualified to do so. This circumstance taints these adjustments with an irregularity leading to their discharge (*Conseil d'Etat: Société Médipar*, 12 mars 2014, n° 354812, T. p. 600, RJF 6/14 n° 591).
- This jurisprudence has sometimes been criticized for helping devious taxpayers get away from their tax obligation. Clearly, some taxpayers put forward many procedural arguments when their tax case is very weak in substance, and they are then totally freed from any taxation, due to time limits, if the tax court quashes the assessment. The *Conseil d'Etat* has held the view that when taxpayers are entitled to a procedural guarantee, a violation of this guarantee must bring full judicial remedy.
- After the rewriting of case law in 2012 (*Meyer* case below), the tax administration has stopped trying to promote legislation that would restrict the power of tax courts to quash tax assessments on procedural grounds.
- Case law has been rewritten by a *Meyer* decision rendered by *Conseil d'Etat* in 2012<sup>4</sup>. The judicial solution is as follows : a procedural mistake by the tax administration will affect the validity of the tax assessment if this mistake has deprived the taxpayer of a legal guarantee. If so, the tax assessment will be quashed by the tax court, which means that the taxpayer will not be taxed in the end because of time limits for taxation. If the mistake does not affect a legal guarantee, then the procedural argument submitted by the taxpayer will be dismissed and the assessment will be examined by the tax court in the light of substantial tax rules.
- For example, in the *Meyer* case, the tax administration had sent the taxpayer a « request for justifications » under French law, which is a procedure carrying heavy penalties in case of a refusal to answer. But this procedure was not applicable in this case. The taxpayer had answered and had been assessed under a standard procedure, though he had been misled in the initial investigation phase. There was a procedural violation. But the request dealt with a kind of expense that the taxpayer had to justify anyway under tax law (burden of proof always on the taxpayer regarding that type of expense), therefore the request for justification had not deprived the taxpayer of a guarantee, and the assessment was upheld by the *Conseil d'Etat*.
- Another example of a procedural mistake that did not affect the tax assessment is given by a *Monsterleet* case in 2016<sup>5</sup>. The tax administration, in violation of tax law, had failed to inform the taxpayer that the information used against him had been obtained from third parties. The legal provision which had been violated was a guarantee in favour of taxpayers. But in this case, the information obtained from a third party was already known by the taxpayer. Therefore he had not been deprived of the legal guarantee and the assessment was not quashed on procedural grounds<sup>6</sup>.

### **3.3 There is no secrecy in court's proceedings : going to court thus allows the taxpayer to get full access to the information used by the tax authorities for the tax assessment**

The tax adjustment cannot be based on information which is not submitted to the taxpayer.

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<sup>4</sup> *Conseil d'Etat*, 16 April 2012, *Meyer*, Case Nr 320912, *Revue de jurisprudence fiscale* 7/12 n° 679

<sup>5</sup> *Conseil d'Etat*, 17 March 2016, *Minister of finance vs. Monsterleet*, Case Nr 381908, RJF 6/16 n° 545

<sup>6</sup> See also For example, if the tax administration has not responded to the taxpayer's observations, which is likely to deprive the taxpayer of the guarantee of the possibility of referring the matter to the independent departmental commission on direct taxes and turnover taxes, it is still necessary, in order for this failure to respond to have an impact, for the adjustment in question to fall within the jurisdiction of this commission; failing this, the taxpayer is not deprived of any guarantee (CE, 11 April 2014, M. H., No. 349719, Rec.)

This rule remains true and enforceable even when a international bilateral convention says otherwise.

The court must show the taxpayer the exchange of information information on which the adjustment is based, no matter what the bilateral convention says on the matter. To put it bluntly : the tax administration is bound by the secrecy clauses that feature in the bilateral convention... until the information has to be shown and discussed before the court if the adjustment is based on it.

If the administration decides to include such information in the file submitted to the judge, the principle of the adversarial nature of the judicial procedure implies that the taxpayer will have access to it. The judge is obliged to communicate them to the taxpayer, despite the stipulations of the tax treaty which are binding on the administration but not on the judge. It is so even when the courts are not mentioned by the convention as lawful recipients of the information<sup>7</sup>. If the administration refuses to provide the information on which the tax assessment is based, the assessment will be quashed.

**Secrecy ends when litigation starts.**

#### **4. Special concerns and issues of self-represented taxpayers : (...)**

(...)

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<sup>7</sup> See for the Franco-US convention : Cf. CE 13 octobre 1999 n° 191191, min. c/ SA Diebold Courtage : RJF 12/99 n° 1492 avec chronique Mme E. Mignon p. 931, concl. G. Bachelier BDCF 12/99 n° 125 ; CE 4-6-2008 n° 301776, 8e et 3e s.-s., Sté Sparflex : RJF 10/08 n° 1055, concl. N. Escaut BDCF 10/08 n° 119. (cf. Cass. com. 96-30.134 20 octobre 1998, n° 1584 P, Lynch.: RJF 1/99 n° 45). See also for the Franco-British and the Franco-Danish conventions : CE 26-1-2011 n° 311808, 8e et 3e s.-s., Weissenburger : RJF 4/11 n° 489.