

IFA Congress 2015 Basel

Subject 2: Practical protection of taxpayers' rights

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FINAL DIRECTIVES FOR BRANCH REPORTERS

Welcome and thank you

The General Reporters would like to thank all of the Branch Reporters for agreeing to prepare reports on this topic. We believe that it should be an interesting and exciting experience, and one which all of us should enjoy. It involves gathering together information that has not previously been gathered together, and developing principles which have not previously been developed. We are delighted that the Branch Reporters share the General Reporters' enthusiasm for the subject, and hope that this will come out in our reports.

Important: Read This! The Scope of the Topic

It is particularly important that every Branch Reporter reads this guidance on the Scope of the Topic. If you don't read this, and follow it, then it is likely that your report will not meet the objectives of this topic and, in extreme cases, may even have to be excluded from publication. If after having read this you have any doubts or uncertainties, please contact the General Reporters.

The focus of this topic is on the practical protection of taxpayers' rights. We are seeking to start the process of identifying:-

- (a) international best practice in the protection of taxpayers' rights; and
- (b) international minimum standards of protection for taxpayers' rights.

We are absolutely not looking for a theoretical discussion of what rights a taxpayer may or may not have: we take it for granted that taxpayers have rights; the question is how in practice can these be most effectively protected.

We are absolutely not looking for lengthy criticisms of the absence of protection for taxpayers' rights in particular countries. If you have volunteered to become a Branch Reporter because you have a bee in your bonnet about a particular case or a particular failure in your country to protect taxpayers' rights and you want to write all about that particular failure, then, with respect, you are probably not the right person to be the Branch Reporter.

We are absolutely not looking for a description of the legal texts in your country that protect taxpayers' rights, nor of a summary of the general principles that govern taxation and the relationship with the taxpayer in a particular country. Virtually every country will have some provisions in its tax law, or in the constitution, or in international treaties which protect taxpayers' rights. Most of those have been written about already in the past, and we do not think that this work needs to be repeated. You will only need to refer to the legal sources for protection of taxpayers' rights in your country to show the legal basis on which practical protections have been developed. You may, for example, refer to leading cases from your country if, for example, they illustrate good practice in protecting taxpayers' rights.

To take an example: the taxpayer's right to a fair trial if he disputes his tax liability. There is a theoretical issue for discussion whether a taxpayer has a right to a fair trial in connection with tax cases, and, if so, what does that right to a fair trial mean? We are not interested in this discussion. We take it as given that a taxpayer has a right to a fair trial – the question is how that right is guaranteed in practice. For example, the right to a fair trial may involve the right to a determination *within a reasonable time*. Tax disputes are notorious in many countries for going on for years and years and years. What we want to learn is whether your country has found an effective way of speeding up this process so that the right to a determination within a reasonable time is given practical protection. If, for example, there used to be lengthy delays in the hearing of tax disputes in your country, and then changes were made in practice or the law which resulted in the delay being shortened or disappearing, we would like to know about that. If there were long delays in your country and the law or practice was changed to reduce those delays, and it didn't work – we would also like to know about that. What we don't need to know is that there are problems of delays in hearing tax cases in your country (without any discussion of solutions):

the focus is on effective means in practice of protecting taxpayers' rights, and the guarantees of minimum standards.

We suspect that in virtually every country there must be something that the tax administration is doing well to protect taxpayers' rights. This is what we want to hear about. We want to focus on these examples as a way of identifying best practice.

This means that, perhaps more so than for most reports for IFA congresses, it will be necessary for Branch Reporters to think a lot before they start writing their Branch reports. Ask yourself the questions: "What do we do well in our country to protect taxpayers' rights? Could what we do become an international standard?" If a Branch Reporter comes to the conclusion that there is nothing that is done well in their country, then it is going to be a bit of a problem for that Branch Report, and the Reporter might wish to contact the General Reporters. However, if a Branch Reporter believes that the effective protection of some specific rights is below the standards that he/she considers as minimal, the Branch Report should point out what the specific problems are and how they could be solved with a view to reaching some degree of consistency with international minimum standards.

It also means that, perhaps more than for most reports for the IFA Congress, it may be necessary for the Branch Reporters to go out and actually investigate how and why a particular practice has developed and why it operates so effectively. This may identify the minimum standards for taxpayer protection that are applied in the territory of that branch. What are particularly interesting are instances where there was clearly a problem (e.g. breaches of taxpayer confidentiality), and a remedy was introduced (e.g. an independent audit of the maintenance of

taxpayers' records) which was/was not effective in dealing with this breach of taxpayers' rights. Again, this may illustrate minimum standards of protection. This is partly why we suggested that it would be helpful if each branch had two reporters, one of whom worked within the revenue authority (to give the authority's views of how a change was made to protect rights, why it was made, and how effective it was). If you are a Branch Reporter and you don't work within the revenue authority, you may find it helpful to establish communications with someone in the authority so you can check the background and accuracy and implications of what you are discussing in your report.

We hope that this clarifies the focus of the Branch Report. If any queries remain, please do not hesitate to contact the General Reporters.

What Needs to be Done?

The primary responsibility of each Branch Reporter is to write a report on the situation in their country in respect of the subject matter of this topic. The details of the format of the report are set out in Appendix 1 attached. Please note that the maximum length is 10,000 words and please note the dates for delivery of the report. If the length is exceeded, we will require that it is edited down to the maximum length.

The focus of the report is on the practical protection of taxpayers' rights with regard to direct taxes (e.g. income tax). If there is anything particularly interesting in your country about the protection of taxpayers' rights with respect to VAT/GST or other indirect taxes, then could you

please put those comments into an appendix to your report? The report and the appendix must, however, still remain within the overall 10,000 word limit.

Because we are looking for examples of good protection of taxpayers' rights, the writing of the Branch Reports for this year is likely to be far less structured than in previous years (if any of you have already been Branch Reporters, the experience this year will be very different from previous years). There is no set questionnaire that we are asking you to answer. Nor are we asking you to cover each and every aspect of taxpayer protection in your country. We are asking you to be highly selective and tell us about good practice or minimum standards for taxpayer protection. Our goal is to build up global best practices and minimal standards for protection of taxpayers' rights.

Under the next heading – “Contents of the Branch Reports” – we set out below a general structure for analysing the different issues to which the protection of taxpayers' rights is relevant. However, this is only an analytical structure: we absolutely do not expect you to go through writing something under every single heading of that structure. In respect of certain items in the analytical structure there may be absolutely nothing that is relevant from your jurisdiction to say. It may even be that for some Branch Reports you only wish to focus on just a few items in the analytical structure and to devote much of the 10,000 words on describing exactly how this works so well to protect taxpayers' rights in your jurisdiction. We expect you to be selective and not to provide information which is realistically of relatively little interest for an international audience. The General Reporters are looking forward to reading the draft Branch Reports and saying again and again “That's really interesting – I wonder if that practice could apply in other

countries and could become an international standard?!” “I wonder if this could be taken as evidence of an international minimum standard of protection.”

Because this is a somewhat different approach from the normal approach taken each year for Branch Reports, the General Reporters are very willing indeed to receive outlines from the Branch Reporters indicating the topics which the Branch Reporters propose to cover. If these outlines are sent by email to the General Reporters by **15th May 2014** the General Reporters will be able to comment and respond and give guidance on these outlines.

The analytical structure set out in the next section of these directives is not intended to be a straightjacket. It is intended simply to help to guide Branch Reporters to think about what would be most interesting to cover in their report. It may be that there is an issue relating to the protection of taxpayers’ rights that is not covered in this indicative structure at all. In those circumstances, the Branch Reporter is invited to contact the General Reporters to raise with them the discussion of this particular topic. It may be that the issue which is missing from the indicative structure is one that should be raised with other Branch Reporters (or it may be that it is one that is not, in the final analysis, appropriate for discussion in the IFA Report).

The General Reporters and the IFA Secretariat are in the process of establishing an innovative system for communication between Branch and General Reporters, a form of closed blog for Branch Reporters and the General Reporters to post comments. At present, we are working on the details of this system, and will send out those details as soon as possible. Once it is established, we will expect Branch Reporters to use it to exchange views. We hope that this will be a very helpful tool, and will make this task more enjoyable.

Branch reporters are likely to be aware of a certain amount that has already been written about the protection of taxpayers' rights. One document Branch Reporters might wish to consult is: *Towards greater fairness in taxation: A Model Taxpayer Charter* by Michael Cadesky, Ian Hayes and David Russell (2013). The authors of this recent book have very kindly agreed that they will make a copy available to every Branch Reporter, so once we have mailing addresses for all Reporters we will ask for copies to be distributed – this provides a good summary of taxpayers' rights, and a helpful structure for the analysis of taxpayers' rights. If Branch Reporters consider there are other general texts that may be helpful, they are welcome to use them and also to draw them to the attention of all Reporters.

The Contents of the Branch Reports

This section sets out an analytical framework for identifying those areas in practice where issues of the protection of taxpayers' rights may arise. It is only an indicative structure, and it is intended to prompt Branch Reporters to identify those areas which are of interest from their jurisdiction and on which their Branch Report will focus. It is absolutely not intended that each Branch Reporter covers every single heading below: this is not a questionnaire, but simply an analytical framework.

That being said, it would help the General Reporters immensely if each Branch Reporter explained concisely at the beginning of their report which of the headings in the analytical framework they were proposing to tackle, and then structure their report with sub headings

relating to those particular topics. This will make it far easier for the General Reporters to use the material to construct the General Report.

This analytical framework identifies what the General Reporters think are the main stages of the process of assessment and collection of tax, and some of the issues of taxpayers' rights that arise in relation to each of these stages in the tax assessment process.

1. Identifying taxpayers and issuing tax returns

Are there any issues of protection of taxpayers' rights in the identification of taxpayers or the issue of tax returns? For example, many taxpayers only pay tax through deduction at source, with information being supplied to their employers. Are there ways in which taxpayer confidentiality is maintained in this process? Please also consider the obligations to withhold tax imposed on persons making payments. Are there any highly effective practices to ensure that someone is not wrongly made liable to withhold tax, or made liable for not having withheld tax? Are there special treatments available for taxpayers who opt for compliance?

In many countries, a system of cooperative compliance applies to some taxpayers, who are risk-assessed as low risks. Does this create any problems in terms of the protection of the rights of other taxpayers (e.g. those who are not eligible) in terms of equality of treatment, or other protections? What practical measures exist to protect taxpayers from being wrongly categorised as high risk or prone to avoidance activities? Does the system of risk-assessment based on cooperative compliance entitle the taxpayers concerned to less intrusive interventions by the revenue authority (in audits, for example), and is it a way of achieving minimum standards?

While many countries still use a system of annual tax returns and assessments, some countries are moving towards a system of continuous information exchange between certain taxpayers and the revenue authorities (e.g. enhanced cooperation or real time working and information supply). Are there any issues of taxpayer protection raised by these systems, and how is the taxpayer protected?

2. The issue of tax assessments

Taxpayers should only be subject to the correct assessment to tax issued to the correct taxpayer. Are there any particularly good systems in operation in your country to check the validity of assessments and to ensure that excessive or potentially oppressive assessments are not issued?

3. Confidentiality

Taxpayers supply a great deal of highly confidential information to the revenue authorities: are there particularly effective ways of timely protecting this confidential information from leaking or from unauthorised use? Does the timely protection ensure no unauthorised disclosure in advance, or merely compensate afterwards for unauthorised disclosure? Do taxpayers have an opportunity to access the confidential information held about them and to timely correct any errors in that information? Are there particular protections for particular categories of information, such as legal advice or sensitive personal information?

4. Normal audits

Tax systems usually provide that taxpayers' returns may be subject to audits. That process has the potential for interfering with taxpayers' rights. Are there any particularly effective methods operated in your jurisdiction to ensure that audits are only opened when there are good reasons to do so, and they are brought to a conclusion as swiftly as possible? Does risk-assessment based on cooperative compliance assist in protecting taxpayers here? Do taxpayers have access to an effective remedy or method to bring an audit to a close? Are time limits applicable to the conduct of the audit? During the audit, if there are meetings between the taxpayer and the revenue official, or the taxpayers' representative, what safeguards are in place in respect of those meetings?

Tax authorities will often target their resources at those taxpayers who are most likely to have misstated their liability, or at the wealthiest taxpayers. How does this square in practice with the duty to treat all taxpayers fairly? Are there any practical ways to ensure no unfair discrimination against particular taxpayers in the exercise of the authorities' discretions?

Does the taxpayer have the right to be represented in the process of audit, and if so are there any restrictions on that representation? What methods are introduced to ensure that the taxpayer is best represented by a person of his choice?

If the taxpayer fails to cooperate in the audit process, does this have an impact on the audit methodology or the burden of proof? Are there ways in which the taxpayer's rights are still protected, even if he is not fully cooperative (e.g. by relying on his right to silence, or to not incriminate himself)? The point here is that human rights are to be protected both for the vast

majority of taxpayers who are cooperative, but also for the small percentage who are uncooperative or down-right awkward.

5. “More intensive” audits

There may be cases where the tax authorities go beyond a regular audit and carry out more intensive investigations which may include, for example, entering premises occupied by the taxpayer or the taxpayers’ advisers, or carrying out covert surveillance. These intensive powers have a far greater potential to infringe taxpayers’ rights. What safeguards have been introduced and are effective to limit the use of these powers or to ensure that the powers are not exercised oppressively or inappropriately? How is the balance maintained between the taxpayer’s rights and the interest of the state in collecting the tax or preventing evasion, so that the reaction does not exceed what is proportionate to the goal?

6. Review and Appeals

If a taxpayer disagrees with the determination of the revenue authority, are there effective rights for an internal review to be requested by the taxpayer, and/or does the taxpayer have rights of appeal? If such right of appeal exists, is it subject to conditions that make its exercise either too burdensome or deprive it of the features of an effective legal remedy? In the context of both review and appeal, how does this operate in a way to ensure that the taxpayer obtains a fair hearing and a determination within a reasonable time? Are there steps that have been taken to allow the taxpayer to have his point of view taken into account? Are there steps that have been taken to ensure the independence of the review and appeal process? If the tax is due before the

review or appeal takes place, what safeguards are there to ensure that the review / appeal is still an effective way to allow the taxpayer to challenge the assessment? How is the principle “*audita altera parte*” (or *audi alteram partem*) applied in tax audits and hearings?

Are there remedies (such as judicial review) to challenge exercise of discretion by tax officials?

Are these effective? Have any changes made them more effective?

7. Criminal and administrative sanctions

There is always the possibility that in connection with tax assessment an allegation of an offence may arise which would lead to the imposition of criminal or administrative sanctions. The criminal process is not particularly a focus of this topic: there is a great deal said elsewhere about the protection of those in that process. However, anything significant about the protection of taxpayers in the process of imposing such sanctions in your country is important; please tell us about it. For example, is there any helpful practice in your jurisdiction about the proportionality of sanctions to the conduct of the taxpayer?

It would be helpful if Branch Reporters considered the practice of double jeopardy (i.e. being liable to more than one sanction – such as a fine plus a criminal sanction) in their jurisdiction.

8. Enforcement of taxes

It is when taxes come to be enforced that there is a further potential for breaches of taxpayers’ rights. For example, disproportionate measures may be taken to enforce taxes, or assets

belonging to third parties might be seized in error. Are there any particular protections that have been operated in your country in respect of the enforcement of taxes?

9. Cross-border procedures

Given the international focus of IFA, the General Reporters are particularly interested to hear about the protection of taxpayers' rights in connection with cross-border tax matters. These may include, but are not limited, to the following topics.

First, in respect of cross border exchange of information, there are issues of procedure and confidentiality. So far as procedure is concerned, is the taxpayer informed that information relating to him is the subject of a cross border request for exchange of information (if, for example, the information is being sought from a third party, is the taxpayer entitled to be informed and to challenge the supply of information)? What rights does the taxpayer have to prevent cross border exchange of information? What rights does the taxpayer have in the process of exchanging information (e.g. is it treated as a mere administrative procedure between tax authorities, or is the impact on the taxpayer recognised and protected)? How is the balance maintained between effective tax administration (including access to information held abroad) and the taxpayer's right to confidentiality? What steps, if any, are taken to ensure that the information will be held as confidential in the state to which the information is sent?

Secondly, does the taxpayer have the right to ask for cross border exchange of information to be initiated if information might be useful from another country to show that the taxpayers' liability is excessive?

Thirdly, disputes under tax treaties may be subject to the mutual agreement procedure (“MAP”).

What rights does the taxpayer have to participate in the MAP procedure? Does the taxpayer have the right to accept or reject the outcome of the procedure?

Fourthly, if there are any provisions for cross border assistance in collection of taxes, what safeguards have been effectively put in place to protect the taxpayer who is the subject of a request for cross border assistance and collection?

10. Legislation

While the focus of this topic is on taxpayers’ procedural rights, the General Reporters are also interested to know of any particularly good practice to allow taxpayers to participate in the development of tax policy and the formulation of tax legislation. With respect to retrospective tax legislation, for example, are there effective restrictions on this? Are there effective ways of preventing any form of discriminatory or disproportionate legislation?

11. Revenue practice and guidance

Given the complexity of tax laws in most jurisdictions, revenue practice or published guidance is particularly important. Do taxpayers have a right to see this practice or guidance? Do they have a right to challenge it? And if there is a change in practice or guidance, how is that notified to taxpayers? How is the effect on taxpayers’ rights (for example, legitimate expectations of the taxpayers) taken into account?

12. Institutional framework for protecting taxpayers' rights

In your country is there an effective institutional framework for the protection of taxpayers' rights? Is there a taxpayers' charter or a taxpayers' bill of rights or some other legislation that sets out the taxpayers' rights? Is this effectively operated?

On the institutional side, are there any particular offices or individuals appointed to protect taxpayers' rights? Is there a taxpayers' ombudsman or a taxpayers' advocate? Is this an effective way in which taxpayers are given rights and remedies?

We hope that this indicative structure is helpful in sparking off the thinking of each Branch Reporter. Again, the General Reporters would emphasise that Branch Reporters are not expected to cover every one of these topics. Instead, Branch Reporters are invited to be selective and to identify only those subjects on which there is something interesting to contribute in the context of their territory and by way of discussion of effective protection of taxpayers' rights or of minimum standards for taxpayers' protection.