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Separation of Powers in Tax Law

Ana Paula Dourado
editor

Main contributors: William B. Barker
Emmanuel de Crouy-Chanel
Ana Paula Dourado
M. Luisa Esteve Pardo
Lorenzo del Federico
Hans Gribnau
Johannes Heinrich
Gordana Ilić-Popov
Konosuke Kimura
Krzysztof Lasiński-Sulecki
Alexandre Maitrot de la Motte
Wojciech Morawski
Jacob Graff Nielsen
Martha O'Brien
Bruno Peeters
Heinz-Juergen Pezzer
Irina Prinz
Karasseva Sentsova
Eleni Theocharopoulou
Elly van de Velde
Danil V. Vinnitskiy

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Preface

This volume is the seventh in the series of reports on the annual congresses of the European Association of Tax Law Professors (EATLP). The topic on Separation of Powers in Tax Law was discussed in a workshop in the 2009 Congress held in Santiago de Compostela. I prepared the questionnaire and the workshop together with Heinz-Jürgen Pezzer, judge of the German Federal Fiscal Supreme Court and currently its President (Bundesfinanzhof), and we had an overwhelming reply from 22 countries, published at the website of the EATLP. To some extent, this positive reaction was not a surprise, since separation of powers is a universal topic raising issues and difficulties in all places and times.

Taking into account the complexity of the subject and the relative short time for discussion, we organized the workshop based on the main issues raised in the questionnaire and corresponding answers by the national reporters, with spontaneous input statements from the latter, so that all EATLP Members and participants in the workshop caught some glimpse of the problems in debate and were curious to reading the book now published.

Since the enthusiasm and efforts put in the first drafts of the national reports were enormous, I decided to publish this volume as soon as possible and managed to have 19 national contributions. I therefore have to thank the authors for having adhered to my challenge in such short time and with such outstanding quality.

The book is organized as follows: a general report, countries reports by alphabetical order, and a table containing the information provided by the national reporters on the functions and relationship among the parliament, the government and the tax administration and the courts. My task as general reporter was based on the following premises confirmed by my reading of the national reports: I contend that constitutional regimes, including tax constitutional principles, are subject to reciprocal influences, and reflect approximation of different families of law and different legal systems occurring since many decades and currently in greater degree. Thus, comparison of different legal systems is possible (and in this sense, this book can be the basis for future comparison of law work). Legal theory problems, such as the ones connected with the meaning of legal determinacy and indeterminacy and language constraints, are universal legal problems that are to be answered in similar ways in every rule-of-law State. The same is valid to philosophy of law issues regarding validity of law and the difference between creation and interpretation and the competent powers to carry on those functions. Let me clarify that I am not carrying a job of comparison of legal systems in my general report (it is not a report based on a comparative of law methodology). In fact, I did not aim at handling the details of any reported legal system in the book, but to simply take the main aspects of these regimes as examples to fundament my

own position, on the following issues, aimed at rule-of-law States and with universal vocation: competence to create tax law and validity of tax law; the meaning of determinacy and indeterminacy, constraints to achieving legal determinacy and consequences of legal indeterminacy; the role of the tax administration and the courts facing vague laws leading to indeterminacy (administrative and judicial discretion), judicial control of administrative application of vague laws; and finally, the best ways to achieve determinacy and the associated legal certainty and predictability of tax law, in the current legal systems. I am aware that my position on these issues does not solve the problem of complexity of tax law, and may be this could be the pretext for a Congress EATLP subject. Since my contribution to the book is not aimed at describing and analysing in detail the legal systems described by the national reporters, it is not a summary of them, and therefore does by no means replace their reading.

I owe many thanks: to Ms. Sabine Heidenbauer and Ms. Karin Simader, who helped me in collecting the texts for the EATLP Congress; to Ms. Margaret Nettinga who revised and edited the book, with whom I shared many decisions on the systematization of the book and whom I find irreplaceable; to Heinz-Jürgen Pezzer for having co-drafted the questionnaire and joined me in the organization of the workshop; to my colleagues in the Academic Committee and its Chairman (Michael Lang) for having accepted to include this subject in the Santiago de Compostela EATLP Congress in a different format, and especially to the Executive Board (Kees van Raad, Frans Vanistendael, Daniel Gutmann) and Michael Lang for having immediately agreed on the publication of the book. My final greatfull acknowledgement goes to Kees van Raad who had a decisive voice in the shape and style of this volume.

Ana Paula Dourado

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Abbreviations

DTC	Double tax convention
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights
ECJ	European Court of Justice
GAAR	General anti-avoidance rule
ICCPR	International Covenant on Civil and Political Rights
PE	permanent establishment
VAT	Value added tax

Austria

BAO	Fiscal Code (Bundesabgabenordnung)
B-FV	Federal Constitutional Law
B-VG	Federal Constitutional Law (Bundes-Verfassungsgesetz)
VfGH	Constitutional Court (Verfassungsgerichtshof)

Canada

CRA	Canada Revenue Agency
IWTA	Income War Tax Act
TCA	Tax rental agreements
SCF	Standing Committee on Finance
TCC	Tax Court of Canada
FCA	Federal Court of Appeal
SCC	Supreme Court of Canada
ITCIA	Income Tax Conventions Interpretation Act

Greece

CoS	Council of State or judgment of the Council of State
CPAC	Code of Procedure before the Administrative Courts
CTP	Code of Tax Procedure

Spain

CE	Constitution
LGT	Act 58/2003, 27 December, on General Taxation

Turkey

CITL	Corporate Income Tax Law
E.	Esas
ITL	Income Tax Law
K.	Karar
rep.	repeated
TC	Turkish Constitution
TCC	Turkish Constitutional Court
TPL	Tax Procedure Law

Russia

RF	Russian Federation

Sweden

JO	Justitieombudsmannen
NJA	Nytt Juridiskt Arkiv (Cases from the Swedish Supreme Court)

SOU	Statens Offentliga Utredningar (Swedish Government Official Report)
RF	Regeringsformen (the Swedish constitution)
RÅ	Regeringsrättens Årsbok (Cases from the Swedish Supreme Administrative Court)

United Kingdom

HMRC	Her Majesty's Revenue and Customs

Part I – Separation of Powers in Tax Law: General Report, Remarks and Country Reports

In Search of Validity in Tax Law: The Boundaries between Creation and Application in a Rule-of-Law State. General Report (Ana Paula Dourado)

Introduction: Identifying the problem using a two-fold approach

Separation of powers in a rule of law State can be described in the following way: law is the result of a pluralistic political programme characterized by the Habermasian "discourse principle", courts solve conflicts based on legislation and try to achieve legal certainty and justice as an impartial party on the basis of legal argumentation and democratically enacted and accepted fair procedures, and the administration implements legislation that is not self-executing[1].

Determining the meaning of separation of powers in current tax regimes raises several interrelated issues consisting in the legitimacy of legal competence granted by constitutions and international treaties to the governments, and also by the Treaty on the Functioning of the European Union (TFEU) in the case of its Member States, in the meaning and limits of legal determinacy and indeterminacy, on the one hand, and in the meaning and scope of administrative discretion, on the other hand, as well as in the meaning and scope of judicial discretion and judicial activism.

These issues are not a specific feature of tax law, but are common to every legal field where the legislative competence belongs to the parliament according to the constitution and is often shifted to the governments and courts, either by an express delegation to the government, where the constitution provides for such a tool, or by the use of vague concepts leading to indeterminate results. However, in tax law, the fact that the tax administration has to interpret and apply vague concepts and vague laws introduces more complexity, since it has to be determined whether they constitute an authorization of administrative discretion or whether vagueness is only an issue of legal indeterminacy and corresponding interpretation and whether as such the final word always belongs to the courts – as happens in the fields of law where the administration plays no role in applying the law (such as in penal law)[2].

[1] Jürgen Habermas, *Faktizität und Geltung, Beiträge zur Diskurstheorie des Rechts und des demokratischen Rechtsstaats*, Frankfurt-am-Main, 1992, 2. Auflage, p. 229 et seq.

[2] See Ana Paula Dourado, *O Princípio da Legalidade Fiscal, Tipicidade, conceitos jurídicos indeterminados e margem de livre apreciação*, Coimbra, 2007, e.g., chapter V.

This topic thus raises questions on explaining and justifying the prominent role played by the tax administration and the courts, and the boundaries between creating and applying the law, not only because this is a legal theory and legal philosophy problem, but in the case of tax law also because tax systems have become very complex and require regulations and rulings enacted by the tax administration that in principle deal only with technical details, but which sometimes go beyond them and contain policy options. Vagueness in tax law and the resulting indeterminacy has also led to regulations, rulings and case law, the main role of which is to reduce that vagueness.

Moreover, the principles of the rule of law and legal certainty are in permanent tension with the principle of equality and the principle of abuse, and whereas the two former ones require determinacy and interpretation according to the average typical case, the two latter ones require flexibility and therefore, to some extent, indeterminacy, so that the law can be correctly applied to each individual case[3]. The principle of abuse will then operate as an interpretative principle[4].

Having these premises in mind, the discussion that follows is oriented toward a two-fold and inter-related approach:
In one approach, I am confronting the rule of law as the aim to be pursued by the separation of powers or by a democratic State as opposed to arbitrary government or a dictatorial regime. Thus, I will discuss the role of parliaments in enacting tax laws, the issue of the validity of law, the democratic legitimacy of the governments that are granted legislative delegated competence on tax matters; the absence of that legitimacy in the tax administrations; the interpretation by the courts, and the fact that both the tax administration and the courts sometimes go beyond the mere application of the law enacted by parliaments and governments, leading to the exercise of administrative policy making and judicial activism, i.e. the creation of law. This is simultaneously a philosophical and constitutional approach.

In the other approach, I will centre the discussion on the rule of law as an ideal that implies predictability of the results, and this requires that laws enacted by parliaments are sufficiently precise. However, legal language as natural language is often imprecise, and I will discuss whether vagueness in tax law and legal indeterminacy bring some advantages to the rule of law State or whether it inevitably

[3] See Paul Kirchhof, «Der verfassungsrechtliche Auftrag zur Steuervereinfachung", *Steuervereinfachung, FS für Dietrich Meyding zum 65. Geburtstag,* Hrsg. Wilhelm Bühler, Paul Kirchhof and Franz Klein, Heidelberg, 1994, p.13.
[4] For the discussion of the principle of abuse as an interpretative principle, see Ana Paula Dourado, «A Single Principle of Abuse in EC Law: a methodological approach to rejecting a different concept of abuse in personal taxation», *The Principle of Abuse in EC Law*, Oxford, 2010, to be published.

leads to arbitrary decisions and therefore to unpredictability. And this is in turn basically a philosophical and legal theory approach.

From the constitutional perspective, as the one that is predominantly handled in the national reports published below, the separation-of-powers issue and consequently the rule of law and the principle of legality of taxes constitute a domestic issue to be analysed under each constitutional system and every comparative of law perspective has to be carefully tackled. Although as valuable as this remark may be, this topic does merit attention from the perspective of comparative law. When I decided to handle it in a broad comparative law perspective, I departed from the assumption that classical assertions such as the one argued by Jesch in 1968, according to whom the principle of legality has to be researched in each domestic system and in each constitution's specific rules[5], are no longer valid in an absolute way, but instead that constitutional pluralism, deriving from worldwide reciprocal influences both at the level of written principles and rules and at the level of interpretation of the constitutional principles characterizing contemporary constitutional law, is recommendable both at the stage of the creation and application of law, and is as strong as legal pluralism in other fields of law [6] such as in tax law.

The EU decision-making process is one strong example of this legal pluralism – internal legal pluralism – since the European Court of Justice (hereinafter: ECJ) recognizes many constitutional and administrative principles as EU principles[7]. Soft law is also currently playing a prominent role in the EU, including in tax matters, and is contributing to the transaction of legal solutions and legal arguments among different jurisdictions. But legal pluralism also occurs at the OECD level, the OECD proposals therefore being influenced by and influencing OECD Member States: the recently introduced arbitration procedure is one example.

1. Relationship between the parliament and the tax authorities: The influence of the tax authorities on tax legislation

[5] Dietrich Jesch, *Gesetz und Verwaltung,* 2. Auflage, Tübingen, 1968, p. 4.

[6] For a critical view of legal pluralism in the USA, arguing that the ultimate argument for consulting the law of other countries is a "many minds argument", and "that it is most plausible in new democracies, attempting to produce constitutional doctrine without much in the way of established precedents", Cass Sunstein, *A Constitution of Many Minds*, *Why the Founding Document Doesn't Mean What it Meant Before,* Princeton, 2009, p. 12, 187 et seq.

[7] ECJ Case11/70, Internationale Handelgesellschaft [1970], ECR 1125; ECJ Case 5/88 Wachauf [1989] ECR 2609; ECJ Case C-260/89 ERT [1991] ECR I-2925; Opinion of the Advocate General Case C-168/91 Konstantinidis [1993] ECR I-1191; ECJ Case C-168/91, Konstantinidis [1991] ECR-I 1191; Opinion of the Advocate General M. Poiares Maduro Case C-402/05 P, Kadi [2008] ECR 00000; Paul Craig/Gráinne de Búrca, *EU Law, Text, Cases, and Materials,* 4th ed., Oxford, 2008, pp. 539 et seq.; Armin von Bogdandy, "The European Union as a Human Rights Organization? Human Rights and the Core of the European Union", *Common Market Law Review 3*7, 2000, pp. 1307 et seq.

1.1. Validity of law and legislative competence in tax matters

In legal systems governed by the rule of law, separation of powers in tax law is commonly linked to the "no taxation without representation" aphorism or to the principle of people's sovereignty. The latter requires that law is enacted by a parliament, and that the principles of juridical protection of individual rights by independent courts, of administrative legality and of separation between State and society are ensured. The principle of people's sovereignty is an integral part of all national constitutions reported in this book, and can be handled by the principles of the rule of law and legal certainty. My starting point lies in the normative assumption that tax law, like any other law enacted by a parliament, results and receives its legitimacy from democratic procedures, characterized by public discussion and argumentation and from disagreement in a context of free communication, since legislatures operate in the framework of political plurality and hence of disagreement which is incorporated by them.
This normative assumption corresponds to the Habermasian perspective on the validity and legitimacy of law, to his Diskursprinzip[8], and is also central to Jeremy Waldron's "Law and Disagreement"[9]: the statutes enacted "represent the short- or medium-term ascendancy of one view over the others" and "they are essentially the product of large and polyphonous assemblies"[10]. In other words, laws and decisions by the majority underlying them are valid and legitimate because they result from pluralism and a compromise within the democratic process and because they are accepted by the targeted persons and community participants in the political process.

Let me stress that validity of laws lies not only in its source and procedure leading to the recognition of the authority of the law by norm-applying institutions such as the tax administration, tax courts and the ECJ, but also because any potential addressee recognizes those norms in virtue of the source and pluralistic procedure criteria. Valid are the rules of procedure with which all targeted persons would have agreed as participants in rational discourse [11].

From a legal positivist viewpoint, such as the one advocated by Hart or by Raz, it is sufficient that courts and administrative instances accept the norm and declare its acceptance - because the law is in force and there is a rule of recognition, or because it is granted authority [12]. But, following the Habermasian perspective, and the analytical theorists jurisprudence, I hereby contend that validity and

[8] Jürgen Habermas, *Faktizität und Geltung…,* cit., e.g. p. 15 et seq. and 151 et seq.
[9] Jeremy Waldron*, Law and Disagreement*, Oxford, 1999.
[10] Jeremy Waldron, *Law and Disagreement*, cit., p. 10.
[11] Jürgen Habermas, *Faktizität und Geltung… ,* cit., p. 138.
[12] H.L.A. Hart, *The Concept of Law,* Oxford, Clarendon Law Series, 1961, chapter VI, pp. 97 et seq., 110 et seq.; Joseph Raz, *The Concept of a Legal system, An Introduction to the Theory of Legal System,* 2nd ed., Oxford, 1980, pp. 197-200; *The Authority of Law: Essays on Law and Morality,* Oxford, 1980*,* Chapters 1-2.

legitimacy require social validity or social acceptance, i.e., rules are legitimate because they express an authentic understanding of the juridical community, its shared values and interests and a rational choice of strategies and means[13]. Validity is therefore equivalent to legitimacy and that is the meaning attributed to the former whenever I refer to it in this essay.

Validity is not however equivalent to material justice, since the latter requires the rational choice of instruments and equilibrium of interests that do not allow generalization but require compromise. Only when a law solves these problems, does it reach material justice[14]. Discussion on the separation of powers in tax law deals with validity and legitimacy issues of tax law, the competence of the tax administration and the courts, with the meaning and consequences of legal indeterminacy – all of those can be summarized in the rule-of-law principle - and not with material justice issues or the principle of equality. However, the principle of equality can be in tension with the rule of law principle, such as in the case of transfer pricing issues, deductibility of the expenses related to the core activity of a company or of abuse of law[15], and either of them can in the concrete case limit the application of the other.

Claiming validity of law is essential to my essay and general report, not only for the sake of clarification of my point of departure, but also because the context is adverse, since the tax authorities, directly or indirectly through their governments have been playing a prominent role both at national and supra-national (e.g. EU) level in the last decades of the twentieth century and in the beginning of the twenty-first century. Moreover, legislation is normally prepared by technical and experts' committees, often constituted by tax administration officials appointed by the governments and soft law in tax matters plays a relevant role, for example at the EU level. However, the observation of this situation corresponds to the descriptive methodology adopted by political science, and highlighting such alleged supremacy of technical and experts' committees leads to discrediting legislation and is insufficient to explain and justify that taxes are enacted by law and by parliamentary legislation and are accepted as such.

Many legal theorists and philosophers have argued in favour of committees, especially small ones, drafting legislation, because they hold the necessary technical skills in order to achieve high quality[16]. And in fact, the drafting of legislation, including tax legislation, has been done by those specialized committees, but it must be duly stressed that that is different from parliamentary final consent. In other words, a description of the current situation, according to which tax legislation is prepared by technical

[13] Jürgen Habermas, *Faktizität und Geltung*…, cit., pp. 192, 194. Jeremy Waldron, *Law and Disagreement,* cit., ch. 2.; Ronald Dworkin, *The Law's Empire*, Cambridge, 1986, pp. 165 et seq. (on the principle of fairness) and pp. 313-354.
[14] Jürgen Habermas, *Faktizität und Geltung*…, cit., p. 192.
[15] Ana Paula Dourado, *O Princípio da Legalidade Fiscal…,* cit., pp. 339 et seq.
[16] See Jeremy Waldron, *Law and Disagreement,* cit., pp. 42 et seq.

committees and moreover complemented by governmental regulations and courts decisions does not explain why the "no taxation without representation principle" is still valid or why the legitimacy of taxes is bound to a vote by parliament. The answer to this lies in the idea that the aforementioned validity of parliamentary legislation, based on the democratic enactment procedure and underlying pluralistic discussion is essential to justify the fact that taxes are enacted by law – parliamentary law – and to its authority (validity), even if they are prepared by public officials and other experts in specialized committees and complemented by other legal instruments and soft law and case law.

The validity of law and taxes enacted by parliaments is constitutionally ensured in every reported tax system, even if it is fulfilled in a different manner and more or less satisfactorily. In other words, it is common to the national reports in this book that taxes have to be enacted by law because the constitutions so require and this means that the principles of "people's sovereignty" and "no taxation without representation" are constitutionally expressed in a competence rule and the validity issue is then presumed and becomes a formal problem of compatibility of the tax regime with the constitution (except for the UK).

It is further reported in the contributions published in this book, that even if the interpretation followed by the tax administration is not confirmed by the courts, the tax administration will influence the government and both of them the parliament, in order to change the law, accordingly[17]. I can ask whether this influence of the tax administration and government on the parliament is inconsistent with the separation of powers (legislative competence belonging to the parliament) or whether legislative competence in tax law has to include the government's policy in respect of the tax regime. My answer to this question is that the fact that the tax administration will pressure the government and the parliament to change the law only means that governments are able to convince their parliaments of their interpretative paths and solutions – either because there are budgetary needs, equity problems, abuse of law problems or some other motivation. But again I want to stress that it is up to the parliament to accept amending the legislation or not, and in that final decision and in the pluralistic discussion of the solution lies the core aspect of validity of (tax) law. Having claimed this, I want to add that the descriptive methodology allows me to recognize that pluralistic discussion within the parliament varies in the various reported countries and if it is lacking, it weakens validity of tax law and can ultimately have a negative repercussion on the separation of powers.

Notwithstanding the specificities of each financial constitutional system and namely of the Federal States, such as Austria, Belgium, Canada, Germany and the USA, and of the Regional States such as

[17] See Part II, 3.5. c).

Spain, in comparison to the Unitary States, the national reports below published illustrate that in some constitutional tax systems, the competence to enact tax laws belongs exclusively to the parliament (e.g. Austria[18], Belgium[19], Canada[20], Denmark[21], Germany[22], Israel[23], Japan[24], the Netherlands[25], Poland[26], Russia[27], Serbia[28], the UK[29]). In other reported systems, the competence to enact tax legislation belongs not only to the parliament, but also to the government, which either has delegated legislative competence (Finland[30], France[31], Greece (exceptionally, in respect of non-essential elements)[32], Italy[33], Portugal[34], Sweden (exceptionally, in respect of non-essential elements)[35], Turkey (exceptionally, in respect of tax rates or tax exemptions)[36], or may adopt exceptional provisory measures (Brazil[37], Italy[38], Spain (in principle, exceptionally and in respect of non-essential elements, but in practice, not as exceptional as the constitution seems to require)[39]. Where the exclusive competence to enact tax laws belongs to the parliament, pluralistic discussion is more effective and the parliament seems in most cases to have more decision-making power on the tax legislation than in systems where the government also has, and exercises, legislative competence. It is also common to many systems reported in this book that in respect of the first type of system, specialized commissions within the parliament handle the drafting and the technical aspects of the tax legislation. All governments are competent to draft tax bills proposals and these are in most cases prepared by the tax administration and the minister of finance. And in all reported countries except Belgium and the United States, the governments do draft tax bill proposals with frequency: see Austria[40], Brazil[41], Canada (the Tax Revenue Agency)[42],

[18] Johannes Heinrich/ Irina Prinz, "Austria: Separation of Powers in Tax Law", 1.1. and 1.2.
[19] Bruno Peeters/Elly van de Velde, "Belgium: Separation of Powers in Tax Law", 1.1. and 1.2.
[20] Martha O'Brien, "Canada: Separation of Powers in Tax Law", 3.
[21] Jacob Graff Nielsen, "Denmark: Separation of Powers in Tax Law", 1.1.
[22] Heike Jochum, http://www.eatlp.org/uploads/public/santiago/sop/Germany%20-%20Heike%20Jochum.pdf, 1.
[23] Yoseph M. Edrey, http://www.eatlp.org/uploads/public/santiago/sop/Israel%20-%20Yoseph%20M%20Edrey.pdf, 1.
[24] Konosuke Kimura, "Japan: Separation of Powers in Tax Law", 1.1.
[25] Hans Gribnau, "The Netherlands: Separation of Powers in Tax Law", 4.1.
[26] Krzysztof Lasínski-Sulecki/Wojciech Morawski, "Poland: Separation of Powers in Tax Law", 1.1. and 1.2.
[27] M. Sentsova/Danil V. Vinnitskiy, "Russia: Separation of Powers in Tax Law", 1.
[28] Dejan Popović/Gordana Ilić-Popov, Serbia: Separation of Powers in Tax Law: 1.1.
[29] Sandra Eden, "United Kingdom: Separation of Powers", 1.
[30] http://www.eatlp.org/uploads/public/santiago/sop/Finland%20-%20Marjaana%20Helminen.pdf, 1.
[31] Emmanuel de Crouy-Chanel and Alexandre Maitrot de la Motte, "France: Separation of Powers in Tax Law", 1.1.
[32] Eleni Theocharopoulou, "Greece: Separation of Powers in Tax Law", 1.1.
[33] Lorenzo del Federico, "Italy: Separation of Powers in Tax Law", 1.
[34] António Carlos dos Santos/Paulo Nogueira da Costa, "Portugal: Separation of Powers in Taxation".1.1.
[35] Stefan Olsson, "Sweden: Separation of Powers in Tax Law", 1.
[36] Billur Yalti, "Turkey: Separation of Powers in Tax Law", 1.1.2.1.
[37] Marco António del Greco, http://www.eatlp.org/uploads/public/santiago/sop/Brazil%20-%20Marco%20Aurelio%20Greco.pdf, 1.1.
[38] Lorenzo del Federico, "Italy: Separation of Powers in Tax Law", 1.
[39] M. Luisa Esteve Pardo,"Spain: Separation of Powers in Tax Law", 1.
[40] Johannes Heinrich/Irina Prinz, cit., 1.
[41] See Marco António del Greco, http://www.eatlp.org/uploads/public/santiago/sop/Brazil%20-%20Marco%20Aurelio%20Greco.pdf, 1.1., 1.2., 1.3.
[42] Martha O´Brien, cit., 1 and 3.

Denmark[43], Finland[44], France[45], Germany[46], Greece (exclusive competence)[47], Israel[48], Italy[49], Japan[50], the Netherlands[51], Poland[52], Portugal[53], Russia[54], Serbia[55], Spain[56], Sweden[57], Turkey[58], the UK[59]. In Belgium[60], even though the government drafts tax bills, it does so, on a less regular basis than the members of parliament[61]. Contrary to the other systems reported in this book, in the United States the Executive Branch (the President and its administrative agencies, namely the Internal Revenue Service) does not normally present draft laws to the parliament, but rather policy proposals, the drafting work being done by the House Legislative Counsel and the Senate Legislative Counsel[62], which demonstrates a strong control of the legislative power by the Congress. At least in one reported country, the parliament does not seem to really handle tax legislation, and it seems to passively accept the draft bills provided by the tax authorities with frequency, without discussing them in detail and scarcely introducing any changes to them[63]. In many reported countries, the parliament has an active role, discussing the draft bills and introducing changes to them, in a way that better ensures the idea that creation of law belongs to it (e.g. Belgium[64], Denmark[65], Israel[66], Turkey[67], the UK[68], the United States[69]).

Although it is obvious that there are no perfect systems, comparison of legal systems reported in this book allows me to conclude that in those systems where the parliament is actively involved in

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43 Jacob Graff Nielsen, cit., 1.
44 Marjaana Helminen, cit., 1.2., 1.3.
45 Emmanuel de Crouy-Chanel and Alexandre Maitrot de la Motte, cit., 1.2.
46 Heike Jochum, cit., 1.2., 1.3.1.
47 Eleni Theocharopoulou, cit., 1.2.
48 Yoseph M. Edrey, cit. 1.1.,1.2.,1.3.1.
49 Federico del Lorenzo, cit., 1.
50 Konosuke Kimura, cit., 1.
51 Hans Gribnau, cit., 4.1.1., 4.2.
52 Krzysztof Lasiński-Sulecki, Wojciech Morawski, cit., 1.
53 António Carlos dos Santos/Paulo Nogueira da Costa, cit., 1.2., 1.3.
54 M. Sentsova/Danil V. Vinnitskiy, cit., 1.
55 Dejan Popović/Gordana Ilić-Popov, cit., 1.
56 M. Luisa Esteve Pardo, cit., 1.
57 Stefan Olsson, cit., 1.
58 Billur Yalti, cit., 1.2.
59 Sandra Eden, 1.
60 Bruno Peeters/Elly van de Velde, "Belgium: Separation of Powers in Tax Law", 1.2., 1.3.1.
61 Bruno Peeters/Elly van de Velde, cit., 1.3.1. and 1.3.2.
62 William Barker, cit., 1.2.
63 I am referring to France: Emmanuel de Crouy-Chanel/Alexandre Maitrot de la Motte, cit., 1.3.2. But also in the case of Japan, it seems that the Standing Financial Committee of the Parliament does not guarantee active participation of the Parliament in the discussion of the tax legislation (Kimura, 1). The same is happening in the Netherlands (Hans Gribnau, cit. 4.1.2, 4.2.), and probably in other reported countries.
64 Bruno Peeters /Elly van de Velde, cit., 1.3.2.
65 Jacob Graf Nielsen, cit., 1.
66 http://www.eatlp.org/uploads/public/santiago/sop/Israel%20-%20Yoseph%20M%20Edrey.pdf
67 Billur Yalti, cit., 1.2.
68 Sandra Eden, cit., 1.
69 William Barker, cit., 2.1.

discussing the legislative proposals, either in plenary sessions or in specialized commissions, the validity of law is better achieved. In fact, if not doing so in plenary sessions, in most of the reported countries, specialized parliamentary commissions discuss the draft bills in detail and that seems to be an efficient procedure that does not preclude that laws are effectively passed by the parliament - although it must be recognized that tax law bills are often so complicated and extensive that the parliament cannot in reality take all aspects into consideration[70].

Moreover, in the reported systems where the checks and balances among the three branches – legislative, executive and judicial – function in a good and efficient manner, predictability and certainty seem to be satisfactorily achieved (see the example of Canada and the United States[71]).

Taking the aforementioned context into account, the national reports published in this book confirm that governments are a very significant player influencing tax regimes, either presenting bills, or even passing them or demanding their amendment according to their own idea of equality, ability-to-pay and ultimately, budget needs. Another fundamental aspect must still be added to the discussion: although governments, on behalf of the ministers of finance, publicly take many of the policy initiatives and decisions on tax regimes (tax reforms, amendments to the legislation in force, new regimes), tax policy is currently often decided by the tax administration and international players with no democratic legitimacy, such as the OECD and the European Commission, and this influence can be understood in the context of external legal pluralism and the relevant role it plays.

1.2. Legislative competence exercised by the government and regulations from a validity perspective

The influence exercised by the tax administration on the legislation has to be distinguished from the aforementioned delegated legislative competence granted by some constitutions to the governments and these have to be distinguished from administrative regulations on the essential elements of taxes, where the contents of the latter are not previously authorized by the parliament. Contrary to the constitutional monarchies of the nineteenth century, where governments were granted primary legislative competence or competence to enact regulations, in the post-Second World War constitutions legislative competence exercised by governments as well as their competence to enact regulations has to be authorized by parliamentary law or be based on previous law[72]. The fact that the political function is

[70] See, in this sense, e.g. Jacob Graf Nielsen, cit., 1.
[71] Martha O´Brien, cit.; William B. Barker, cit., 2.1.
[72] See Ana Paula Dourado, *O Princípio da Legalidade…,* cit., pp. 359 et seq.

not only exercised by parliaments but also by governments and the fact that these emerge from parliamentary majorities has led to a constitutional analysis of the relation between legal sources and not between powers. It is in this context recognized that, where policy decisions on what I call the legal type of tax and which I will define below (the *an* and the *quantum* of the taxes) are, in most of the legal systems reported in this book, jointly taken by the parliament and the government, even if it is up to the parliament to discuss and consent on them. For the sake of clarity, I contend that the relationship between legal sources is not a free relationship among them, but organized instead according to the principle of competence and the different operational spheres granted by the constitution[73].

The indirect democratic legitimacy of the government and its legal sources, the welfare State and the regulatory State, governmental responsibility over the state budget and political responsibility concerning public choice on public expenses also contribute to the legitimacy of governmental normative competence, not forgetting that this legitimacy has to be granted by the parliament and it is under the latter's competence to take the essential policy options on the legal type of the tax, even if the government may further complement those options and decide on more technical and detailed aspects regarding that legal type. The latter aspects of the tax regimes should not be handled by parliaments so that these are not overburdened, but simultaneously, constitutional courts should be competent to judge the compatibility of each normative act (e.g. regulations) with the constitution and not only of laws.

The same legitimacy-type of argument can be used in respect of the EU tax directives, since the Council is constituted by governmental representatives and therefore the Council has indirect democratic legitimacy[74]. Moreover, unanimity and the fact that directives have to be transposed into domestic law ensure validity of (tax) law. Again, even if indirectly, EU directives are also valid in the above mentioned sense according to the principle of sovereignty, and internal legal pluralism – mutual acceptance of fundamental principles by the domestic courts and the ECJ - will solve any conflicts between the domestic and the EU systems, since EU law as well as domestic constitutions have to be observed by the parliaments.

However, it is difficult to state whether delegated competence to enact regulations granted by the parliament to the government (e.g. in Germany) is comparable to delegated legislative competence to the government (e.g. Italy, Portugal, Spain) and whether it has different implications on the validity issue. I would contend in this respect that if the legal type of a tax (again the *an* and the *quantum*) is

[73] Ana Paula Dourado, *O Princípio da Legalidade Fiscal…,* cit., pp. 218 et seq.
[74] Paul Craíg/Gráinne de Búrca, *EU Law, Text, Cases and Materials,* cit., p. 137 (pp. 133 et seq.).

defined by parliamentary law and the latter authorizes a regulation to complement it, the situation is not different from an authorization by parliamentary law to a decree-law or legislative decree passed by the government, as long as both types of rules are published in the official journals.

The validity issue seems to be different, however, if regulations decide on the legal type of tax by delegation, without any previous political decision taken by a parliamentary law on those elements. This seems to be the situation in Italy, a situation which has been very much criticized by the literature[75].

Following the above reasoning, the separation of powers and the rule of law will not be achieved whenever the essential decision on what I have been calling the legal type of tax is not taken by parliamentary law, but instead by delegated governmental law or by regulation, the latter situation being more critical as long as there is no legal parliamentary authorization containing the main policy decision on the legal type of tax. Even worse is the case where the regulation can be enacted by the minister of finance alone and not by the government.

1.3. Competence to enact regulations and rulings

In all reported systems, the governments have competence to enact regulations and the tax administrations have competence to enact rulings [76]. In the cases where regulations and rulings are frequent tools, laws are normally less detailed and technical details are left to the latter, and the advantage lies in the greater flexibility to adopt the rules[77]. In any case, in all reported systems the government and the tax administration either directly or indirectly have a big influence on the final result of the tax regime.

In respect of some of their application functions, the government and the tax administration can be described as one entity (e.g., preparation of draft legislation at the technical level by the tax administration according to domestic government policy guidelines; tax administration delegates at the EU and OECD technical level following domestic government policy guidelines, tax administration legal reasoning and legal advice as the basis of the decision on hierarchic claims against tax assessments addressed to the Minister of Finance, the legality of which is claimed by the taxpayer).

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[75] Federico del Lorenzo, cit., 1.; Elena Malfatti, *Rapporti tra deleghe legislative e delegificazioni,* Torino, 1999, pp. 155 et seq.; Adriano di Pietro, "I regolamenti, le circolari e le altere norme amministrative per l'applicazione della legge tributaria", *Trattato di DirittoTributario,* Annuario, Padova, 2001, pp. 335 et seq.

[76] See a slightly different situation in Serbia, concerning rulings: Dejan Popović/Gordana Ilić-Popov, cit., 3.

[77] The volume of rulings is, however, very much critized in Japan: see Kimura, cit. 3.

But a distinction between the government and the tax administration is to be drawn in respect of the legislative competence that is granted to the government by some constitutions, and effectively exercised by them, in respect of regulations enacted by the government and not by the minister of finance alone, and also in respect of rulings that are enacted by the tax administration and the role of which is disputable and varies according to the different jurisdictions. Nevertheless, an interaction between the government and the tax administration still exists in the latter cases, and it is common to find an influence of the tax administration or the high bureaucrats in the government that again poses issues of democratic legitimacy.

1.4. The domain of parliamentary law vs. legal sources in cascade: creation vs. application

A star-like system seems to characterize the types of systems where the parliament is in the centre enacting laws, and each power has its competence, regulating those laws and applying them to the concrete case; legal sources in cascade, in contrast, characterizes the types of systems where each power simultaneously interprets and complements the gaps of the other legal source, creating rules. Vagueness is in the latter systems progressively fulfilled by the normative acts that complement and observe the ones that are on the higher levels of the cascade. I tend to claim that even in legal systems where tax laws are exclusively enacted by parliamentary law, like the federal ones reported in this book (e.g. Austria, Canada, Germany, United States), and which would in principle be described as a star-like system, legal sources of taxes are also organized in cascade and the difference between the two systems is in this respect blurred.

Since, as I will claim below, legal indeterminacy resulting from vagueness in law only occurs in important and hard cases, the complementary role of a rule or court decision does not necessarily imply exercise of discretion by the power exercising its competence and therefore this pyramid is not identical to the Kelsenian pyramid according to which there is no difference between creation and application of the law, because the "authority" applying the norm also creates norms. In other words, still according to Kelsen[78], the executive and judicial branches have inevitable discretion when applying the law, because application would always imply the fulfilment of gaps according to extra-legal arguments, since legal arguments would not be sufficient to justify one and only one correct answer. Differently, by stating that the government, the tax administration and the courts complement the parliamentary law and its vagueness, I do not mean that they are systematically going beyond application, and therefore

[78] Hans Kelsen, "Science and Politics", *What is Justice?, Justice, Law and Politics in the Mirror of Science, Collected Essays,* Berkeley, Los Angeles, 1957, pp. 365, 366, 369 et seq.; *Théorie Génerale du Droit et de l'État, suivi de La Doctrine du Droit Naturel et le Positivisme Juridique,* translated by Béatrice Laroche and Valérie Faure, Paris, 1997 (1945, 1928), p. 187; *Teoria Pura do Direito*, 6.ª ed. Coimbra, 1984 (1960), translated by Baptista Machado, pp. 464 et seq.

acting with discretion and making use of extra-legal arguments. Taking into account that the parliament has a reserved competence to enact legislation in tax matters, as a rule, application of parliamentary law is a bound activity, in respect of the legal type of the tax. However, when the vagueness of parliamentary law is high and a regulation fills the existing gap according to extra-legal arguments (taking policy options that cannot be justified by the legal type of tax or exclusively by legal arguments) creation occurs if the rule aims at being universal.

I therefore contend that, taking into account the current constitutional reality in various reported countries, legal sources are coordinated and are complementary in cascade, being guided by the underlying legal type and trying to add more concrete elements to the legal type, in most cases according to hermeneutical methods: parliamentary law, government legislation and regulations, administrative self-binding rulings, coherent and consistent case law leading to settled case law[79]. In important and hard cases, legal indeterminacy will lead to the creation of rules by the government, administration and courts[80].

This is related to another main idea underlying my essay, regarding the distinction between validity of the law and adequate application of the law[81]. Let me recall with Klaus Günther that the validity claim of a rule is extended to everyone and that it is also connected with the increasing volume and density of a society[82]. To a certain extent, validity therefore implies vagueness, since vague laws take into account the typical situation and devalue the particularities of a case[83], and in this way it can be applicable to a large number of situations. In turn, the taking into account of the particularities of a case belongs to the application moment of the rule, because only then are the relevant features of a particular situation to be selected and their appropriateness to the norm verified. Application involves the checking of whether the relevant features of the individual case belong to the semantic extension of the norm and is also institutionalized in procedures that make the assessment of the particular features of the case possible. Using Klaus Günther's words, application of law is a "free space of appropriateness

79 Ana Paula Dourado, *O Princípio da Legalidade Fiscal…,* cit., pp. 215-232.
80 On the meaning of hard cases, see: H.L.A. Hart, *The Concept of Law,* cit., pp. 124 et seq.; Ronald Dworkin, *Taking Rights Seriously,* cit., pp 81 et seq.; Jules L. Coleman/Brian Leiter, "Determinacy, Objectivity, and Authority", cit., p. 215; Manuel Atienza, *Tras la Justicia, Una Introducción al Derecho y al Razonamiento Jurídico,* Barcelona, 1993, pp. 174-176; Juan B. Etcheverry, *Objectividad y Determinación del Derecho, Un Diálogo con losherederos de Hart,* Granada, 2009, 147 et seq.
81 See Jürgen Habermas, *Faktizität…,* cit., 266 et seq.; Klaus Günther, *The Sense of Appropriateness, Application Discourses in Morality and Law,* New York, 1989, translated by John Farrell, p. 168.
82 Klaus Günther, *The Sense of Appropriateness…,* cit., pp. 270-271.
83 Karl Larenz/Claus-Wilhelm Canaris, *Methodenlehre der Rechtswissenschaft,* Berlin, Heidelberg, 1995, 3. Auflage, pp. 290 et seq.; Franz Bydlinski, *Juristische Methodenlehre und Rechtsbegriff,* 2. Auflage, Wien, New York, 1991, pp. 544-555; Hans J. Wolff/Otto Bachof, *Verwaltungsrecht I,* 9. Auflage, München, 1974, pp. 18-190.

argumentation based on the law itself, and political and moral principles accepted by a specific community"[84].

It may sometimes be difficult to distinguish when the tax administration, the government and the courts are creating law or applying the law, whenever they complement the essential policy choices consented to by the parliament (since vagueness can be overcome, if integrity, in Dworkin's sense, guides interpretation [85]). In the above described context, regulations and rulings can simultaneously belong to the creation and the application of law or to either of them, depending on whether the universal characteristics of the norm are present and are not exclusively based on the hermeneutical elements or whether they are exclusively based on these elements. In other words, I contend that whenever there is legal vagueness and indeterminacy and the government or the tax administration rule has a universal claim and goes beyond appropriateness, that rule belongs to the field of creation. This is so, even if that rule is less universal than the parliamentary law and is not valid in the way parliamentary law is (by pluralistic discourse), but the fact that it is procedurally legitimized and that appropriateness cannot explain its features, exclude it from the field of mere application.

The issue is then an issue of validity (and constitutionality) of those regulations and rulings.

2. The meaning of legal indeterminacy in tax matters

2.1. The rule of law

As previously mentioned, taxes are to be enacted by parliamentary law and in some systems by the government's decree-laws or legislative decrees following an authorization of the parliament according to the procedural rules foreseen in each constitution. In order to fulfill the requirements of the rule of law and avoid arbitrary (unpredictable) decisions by a power that is supposed to apply the law instead of creating it, legal rules are expected to be clear, coherent, prospective and stable and therefore capable of orienting the behaviour of their addressees and constrain the will of the judge who is expected to treat like cases alike [86]. In other words, in order to fulfil their function – both from the perspective of

[84] *The Sense of Appropriateness*…, cit., pp.169-173.
[85] Ronald Dworkin, *Law's Empire*, Cambridge, 1986, chapters V and VI; Klaus Günther, *The Sense of Appropriateness…,* cit., pp. 269 et seq.
[86] Jules L. Coleman/Brian Leiter, "Determinacy, Objectivity, and Authority", *Law and Interpretation, Essays in Legal Philosophy,* Ed. by Andrei Marmor, Oxford, 1995, cit., p.229; Andrei Marmor, "The Rule of Law and its Limits", *Law and Philosophy,* 2004, pp. 38-43; Timothy Endicott, *Vagueness in Law*, New York, 2003 (2000), pp. 185, 188; H.L.A. Hart, *The Concept of Law,* cit., pp. 138-150; Ronald Dworkin, *Law's Empire,* cit., pp. 93 et seq.; Stephen Guest, *Ronald Dworkin,* 2nd Ed. Edinburgh, 1997, pp. 171 et seq.

validity and of constitutional conformity – legal rules on taxes have to be determinate. Equal treatment and predictability of the tax are only achieved if the law is determined enough.
Although the crisis of the law as an instrument to achieve equality, and in this way justice, is often highlighted[87], the role played by laws enacted by the parliament in the democratic decision process must not be underestimated, as I recalled above. In fact, decisions on the fundamental issues regarding taxation (as well as in other legal fields) by the parliament distinguish democratic from dictatorial regimes and arbitrary results, and the law is still seen as the best instrument to achieve equality[88]. This fundamental feature characterizes both common law and civil law systems.

Legal determinacy is therefore required in tax law on the basis of the idea that justification of judicial decisions presupposes that they are exclusively grounded on legal arguments so that the taxpayer can conform its behaviour to the law. Judicial decisions are justified – their coerciveness is justified - if they only use legal arguments, so that the taxpayer may adapt his behaviour to the law[89]. Thus, as I will claim below, the typical (foreseen) cases regarding the legal type of tax have to be discussed and passed by the parliament (parliamentary law).

By the use of vague rules leading to indeterminacy, the parliament circumvents its constitutional duties to enact legislation and decide on the *an* and *quantum* of taxes. Thus, legal indeterminacy will shift the power of decision-making from the parliament to the executive and judicial organs. In broad terms, legal indeterminacy leads to judicial discretion, judicial activism and also to legislative (by the government) and administrative discretion and, if frequent, ultimately to the lack of authority of the law and to arbitrary governance. I.e., a vague law leads to unpredictable decisions by the tax administration and the courts and the rule of law and separation of powers seems to be unattainable. In other words, legal indeterminacy becomes a problem in a rule of law State when it suggests that the exercise of a rational assessment on the basis of exclusive legal arguments cannot be claimed against a different exercise[90].

2.2. National constitutions and the essential elements of a tax: the legal type of a tax

[87] David Lyons, *Ethics and the Rule of Law,* Cambridge, London, New York, New Rochelle, Melbourne and Sydney, 1984; pp. 194 et seq.; Andrei Marmor, "The Rule of Law and its Limits", cit., pp. 5 et seq.; *Clotilde* Nyssens, "Comment s´Établit la Règle de Droit Aujourd' hui? Le Point de Vue d' une Assistante Parlamentaire", *Élaborer la Loi Aujourd´hui, Mission Impossible?,* dir. Benoît Jadot/François Ost, Bruxelles, 1999, pp. 107 et seq..
[88] Jeremy Waldron, *Law and Disagreement*, cit., ch. 5; Timothy Endicott, *Vagueness in Law,* cit., pp. 186-187; John Rawls, *A Theory of Justice,* Cambridge , Massachussets, 1971, p. 237; Ronald Dworkin, *Law's Empire,* cit., pp. 95-96.
[89] Jules L. Coleman/Brian Leiter, "Determinacy, Objectivity, and Authority", cit., pp. 235-237.
[90] Idem, cit., p. 227-229; Andrei Marmor, "The Rule of Law and its Limits", cit., pp. 38 et seq.; Timothy Endicott, *Vagueness in Law,* cit., pp. 185 et seq.; H.L.A. Hart, *The Concept of Law,* cit., pp. 138 et seq.; Ronald Dworkin*, Law's Empire,* cit., pp. 93 et seq.

I have claimed that even if tax rules are to be enacted by law – in principle, by parliamentary law – it is currently recognized that only the essential elements of a tax – the legal type of a tax - are to be so enacted. The same is true in respect of tax process and procedural rules and rules on tax offences; however, these are not genuine tax rules, but instead judicial, administrative and criminal rules subject to the constitutional requirements of the corresponding field of law. Thus, not every detail of the tax regime has to be decided by law, and the issue on determinacy implies both the identification of those elements as well as the degree of detail - the minimum level of legal determinacy - that has to be decided by law.

The elements constituting the legal type of a tax, broadly referred to above as the *an* and the *quantum* of a tax, have been identified by Albert Hensel [91], in the second edition of his tax book, published after the first German General Tax Code drafted by Enno Becker (1919)[92] and since then influenced many of the continental tax legal systems. Those elements are the tax object, the taxpayer, the taxable base and the tax rates and I call them the legal type of a tax, trying to accommodate the German expression *Tatbestand*, corresponding to the Italian *fattispecie*: the legal type of a tax is a legal abstraction of the facts chosen by the legislator as paradigm, as pattern, as the typical ones and invariably should include object (*an*) and assessment (*quantum*) as the essence of the principles of people's sovereignty and rule of law in tax law. Both the German and the Italian literature have worked on the *Tatbestand* or *fattispecie* concept, based on Feuerbach's and Beling's research in penal law[93], and Hensel introduced it in tax law. The fact that the legal type of a tax has to be determined by law is a requirement of the rule of law and of the competence belonging to the parliament in deciding and enacting taxes (or crimes, or fundamental rights). In this sense, the legal type of taxes as the object of the exclusive competence granted to the parliament fulfils the constitutional requirement for precise laws (or legal determinacy) as opposed to vague laws (possibly leading to legal indeterminacy).

It is common to every reported country in this book that the aforementioned legal type of tax is determined by law as part of the constitutional principles on separation of powers and "no taxation without representation", although most constitutions do not explicitly include it under the competence of the parliament (but for example, the French[94], the Greek[95] and the Portuguese[96] constitutions do). I

[91]Albert Hensel, S*teuerrecht,* Berlin, 1927, 2. Auflage, p. 39; E. Reimer/C. Waldhoff, "Steuerrechtliche Systembildung und Steuerverfassungsrecht in der Entstehungszeit des modernen Steuerrechts in Deutschland – Zu Leben und Werk Albert Hensels (1895-1933), *Albert Hensel, System des Familiensteuerrechts und andere Schriften,* Hrsg. Reimer/Waldhoff, Köln, 2000, pp. 36-43.

[92] See also Enno Becker, "Grundfragen aus der neuen Steuergesetzen", *Steuer und Wirtschaft,* 1926, pp. 241 et seq.

[93] Paul Joh. Anselm Feuerbach, *Lehrbuch des gemeinen in Deutschland gültigen Peinlichen Rechts,* Giessen, 1801, 1. Ed., §§ 68, 89; Ernst Beling, *Die Lehre vom Verbrechen,* Tübingen, 1906, ch. V; Alberto Gargani, *Dal Corpus Delicti al Tatbestand – Le Origini della Tipicità Penale,* Milano, 1997, pp. 465 et seq.

[94] Emmanuel de Crouy-Chanel and Alexandre Maitrot de la Motte, cit., 1.1.

can also add that the legal type of tax, being a dogmatic concept, although characteristic to the civil law countries methodology, is valid in common law countries and in any tax system belonging to any other family of law. Thus, the legal type of tax is universal and common to every country herein reported and to every rule-of-law State. What varies in the legal systems under analysis is the constitutional reality or the way the parliament, the government, the tax administration and the courts interpret and comply with that requirement.

I have now clarified that the issue on who has the final decision on the legal type of tax as long as there is relevant pluralistic discussion, is central to my view on the rule of law and separation of powers. I have also identified the relevant object of that discussion and decision: the legal type of tax. Thus, separation of powers, taxation according to the rule of law and legal determinacy regarding the legal type of tax are intrinsically connected and aim to achieve predictability of taxes and the principle of legal certainty. Delegation of the main policy decisions regarding that legal type or too much vagueness will weaken the rule of law and may ultimately lead to arbitrary decisions.

As I will discuss below, legal determinacy and indeterminacy are quantitative matters and as long as the main policy options on the legal type of tax are taken by parliamentary law, then decree-laws, legislative decrees, regulations, rulings and case law can contribute to the achievement of that certainty in respect of quantification issues.

2.3. The meaning of determinacy and indeterminacy

I have been claiming that the topic of separation of powers in tax law relates to the democratic legitimacy of the powers that ultimately decide on what is the legal type of a tax. If the aforementioned issues are to be answered by philosophy of law and by the constitutions, creation and application of tax legislation faces the common difficulties and constraints of legal drafting and interpretation, because legal language is imprecise. Thus, separation of powers is not only to be solved by the constitutional principles and rules, in their written form (whenever there is a written constitution) and in their application (constitutional reality), but also by a methodological or legal theory approach (what is legal indeterminacy and how it can affect democratic tax systems). The latter analyses the intrinsic constraints to legal language and drafting: legal language as human language is inevitably imprecise, only

[95] Eleni Theocharopoulou, cit., 1.1.
[96] António Carlos dos Santos/ Paulo Nogueira da Costa, cit., 1.1.

quantitative concepts are determined and to a certain context even these can lead to indeterminate results[97].

Taking into account these premises, the legal type of tax not only implies identification of its elements, but also that it is sufficiently determined by parliamentary law. I claim in this respect that the main policy options on that legal type have to be discussed and decided by parliamentary law. Legal authorizations to the government, when they are constitutionally authorized must be determined enough and orient the government on its task, so that predictability on further solutions is granted. When the law is vague and still needs to be complemented by the government, it cannot be so vague as to empty the legal type of tax: determinacy in respect of the legal type of tax is required.

How precise or detailed the law needs to be in respect of the legal type of tax is thus to be analysed and even though it is a constitutional requirement, since otherwise separation of powers and validity of law would not be achieved, it ultimately is an issue of philosophy of law and legal theory. My assumption in this respect is that vagueness is quantitative[98]. Laws can be more or less vague, and with the exception of rules only containing figures (tax rates, for example as long as there is not a range of tax rates to be chosen by the tax administration or the court), a rule is hardly always precise and indeterminacy can occur, in the sense that a situation will arise that has not been foreseen by the legislator and also often one result from interpretation will not exclude other possible results. Awareness of the open texture of the law and the rule-scepticism due to the impossibility of anticipating all circumstances targeted by the law by the legislator was pointed out by Hart, Raz and the analytical theory of law[99], and they have contributed to the recognition of methodological constraints which are present even when the constitutions grant exclusive competence to parliamentary law on a certain matter.

My next assumption is that legal determinacy occurs when the whole amount of legal arguments is enough to justify a judicial decision (or an administrative decision)[100]. Legal determinacy is neither to be assessed in respect of each word or words used in a paragraph of a provision, nor in respect of one isolated legal concept, and sometimes nor even in respect of an isolated rule but it is the result of interpretation of the rule. A concept can be vague, but interpretation of the rule can be determinate, in

[97] See e.g., Arthur Kaufmann, *Rechtsphilosophie*, München, 1997, pp. 124-125; *Grundprobleme des Rechtsphilosophie*, München, 1994, pp. 101-102, 106.
[98] Matthias Klatt, "Semantic Normativity and the Objectivity Claim of Legal Argumentation", *Associations Journal for Legal and Social Theory, 2*003, pp. 121-122; Timothy Endicott, *Vagueness in Law*, cit., pp. 31 et seq., 188 et seq..,(191), Dietrich Jesch, Unbestimmter Rechtsbegriff und Ermessen" *Archiv des öffentlichen Rechts*, 1957, pp. 167-168, 177-178.
[99] H.L.A. Hart, *The Concept of Law,* cit., pp. 121 et seq.; Joseph Raz, *The Authority of Law…,* cit., pp. 72-74; Timothy Endicott, *Vagueness in Law,* cit., pp. 57 et seq., 63-75; Jules L. Coleman/Brian Leiter, "Determinacy, Objectivity and Authority", p. 215.
[100] On the meaning of indeterminacy: Jules L. Coleman/Brian Leiter, "Determinacy, Objectivity and Authority", idem.

the aforementioned sense that the whole amount of legal arguments is enough to justify a decision. Determinacy is not a synonym for too detailed laws and for predictability as to the exact amount of tax to be paid, since the former can lead to indeterminacy, in the sense that it can lead to legal gaps or to too complex solutions causing interpretation difficulties[101]. In the UK report published below, it is recalled that the judiciary has not applied legislation on the basis that it is incomprehensible (in the words of Lord Simonds in the House of Lords in 1946), even though the reporter does not relate this issue with legal indeterminacy (or hesitates to do so)[102] [103].

Thus, some vagueness (and vagueness is to some extent unavoidable) and open legal types are neither unconstitutional nor do they lead to invalid, illegitimate or arbitrary regimes. The same is true in respect of express remittance to decree-laws and regulations, so that these rule the technical aspects of a tax regime – these can also be passed by domestic rulings, comitology and soft law procedures within the EU.

For example, if the tax legislator opted in the personal income tax code to enumerate the types of capital income without allowing for any other types to be included in the rule, many types of capital would either be outside of the scope of the rule and that would mean that the precise rule led to treatment of like situations differently – taxation of some capital income vs. non-taxation of some other capital income – or the judge would try to treat the income as capital income, either with recourse to a General Anti-Avoidance Rule or without recourse to exclusive legal arguments and that would lead to higher unpredictability of the results. The same applies to the enumeration of tax subjects.

In this sense, some rules on taxes such as the definition of the tax object and subject and deductibility of costs are often open legal types, so that like situations are treated alike. The rule of law is then achieved if legal rules on the legal type of taxes are determined in the easy cases, allowing other principles to be taken into account, and when the final results aimed at the law are more predictable because of some vagueness than by detailed and supposedly precise rules.

Legal determinacy is desirable in order to (democratically) justify coercive judicial decisions. The latter decisions should not be based on extra-legal arguments, such as cultural rules and shared practices that go beyond the semantic extension of the legal norm, even if these are used by the courts and in that way to a certain extent internalized in the institutionalized procedure (appropriateness of application).

[101] Timothy Endicott, *Vagueness in Law,* cit., pp. 29 et seq., 188-190 et seq.
[102] Sandra Eden, cit., 2.
[103] See the Danish report and the reference to indeterminacy caused by too detailed rules: Jacob Graff Nielsen, cit., 2.

Legal determinacy is required in order that the individual, including the taxpayer, is given the opportunity to behave according to the law in respect of the legal type of tax.

In turn, legal indeterminacy is an indeterminacy of legal arguments and it normally occurs when the available amount of legal arguments is insufficient to explain one and only one result achieved by the courts (Coleman/Leiter formulation)[104]. Indeterminacy in this sense may occur when the available amount of legal arguments is not able to assure and justify one and only one result in important or difficult cases and it will normally only occur in important and hard cases[105]. A decision on the latter will be a result not only of legal arguments and principles (as happens in respect of easy cases) but also implying harmonization of contradictory principles and values, with several solutions being possible. In the latter case, a discretionary decision will occur, but it will still imply formal rationality: Consistency has to be observed, binding legal rules have to be respected, any evidence produced cannot be disregarded, the fundamental arguments will still have to be legal arguments (based on rules and principles) and not extra-legal ones (such as shared cultural rules and shared social practices)[106].

The second meaning of indeterminacy that is relevant to this essay can also take place when legal arguments are not adequate to guarantee any result. This situation occurs in the case of legal gaps[107], and although in a mature legal system genuine legal gaps seldom occur, because they can be overcome by all legal players (by all powers) [108], in fields such as in tax law, where the exclusive legislative competence belongs to the parliament even if it can be delegated, legal gaps both in parliamentary law and government-delegated decree-laws occur and they imply that in that situation no taxes may be levied.

Thus, legal indeterminacy cannot be eliminated, and tax law will intentionally or unintentionally sometimes be indeterminate. Discretion is related to the first meaning of indeterminacy as described above, whereas filling legal gaps by analogy relates to its second meaning. In the following paragraphs and pages, unless I expressly mention that I am taking into account the latter meaning of indeterminacy, I will be referring to its first meaning.

The relevant issue in tax law is then whether discretion is granted to the tax administration so that it decides each case according to its own circumstances, whether there is in principle an obligation to

[104] Jules L. Coleman/Brian Leiter, "Determinacy, Objectivity and Authority", cit., p. 215.
[105] Jules L. Coleman/Brian Leiter, "Determinacy, Objectivity and Authority", cit., pp. 226-227.
[106] Ronald Dworkin, *Taking Rights Seriously*, Revised ed., London, Duckworth, 1977, pp. 105-107; Manuel Atienza, Tras la justicia, Una introducción al derecho y al Razonamiento jurídico, Barcelona, 1993.
[107] In the Sense of Joseph Raz, *The Authority of Law...,* cit., pp. 70-74.
[108] See Jules L. Coleman/Brian Leiter, "Determinacy, Objectivity, and Authority", cit., pp. 226-227.

contribute to determinacy, by way of enacting general rules, and/or whether the last word always belongs to the courts. The role of the tax courts and of the ECJ within this framework also has to be discussed.

My assumption is that vague laws leading to indeterminacy are not synonymous with administrative discretion, although vague laws may grant administrative discretion. In other words, administrative discretion is granted by law, it may be granted by expressions such as "the Minister of Finance can grant an exemption to….", or it may be conceded by vague laws, it aims at fulfilling public aims and its limits are defined by law, but beyond those aims and limits it always requires a subjective assessment by the tax administration according to the circumstances of the concrete single case[109].

2.4. Techniques of legal drafting

Aware of the constraints, and taking them into account, legal theory has identified two main techniques of legal drafting and the aims they achieve in respect of interpretation and relationship among the powers. One corresponds to the adoption of general rules, standards and principles aimed at a general group of persons and/or objects. As Hart explained, in any field of law as well as in any large group, general rules, standards and principles understood by a multitude of individuals and requiring of them a certain conduct, must be the main instrument of social control[110]. Identification of classes and general classifications are a condition for a successful operation of the law over a multitude of individuals and areas of social life[111].

I can call this technique typifying and it implies the finding of common characteristics of a group that will be the object of the regime[112]. In this way, equality and predictability are assured and in tax law this is the prevailing technique, since tax law aims at reaching general, global and typical cases of the manifestation of wealth, and at simplifying the underlying reality[113]: aiming at the typical case, the legislator also aims at predictability of the regime. However, and on the contrary, if the typifying is targeted at non typical-cases or exceptional cases, it is no longer connected to the principle of predictability. Typifying can either be done by illustrative conditions or detailed rules.

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[109] Karl Engisch, "Die normativen Tatbestandselemente im Strafrecht", *Festschrift für Edmund Mezger zum 70. Geburtstag*, Hrsg. Karl Engish and Reinhart Maurach, München, Berlin, 1954.
[110] H.L.A. Hart, *The Concept of Law*, cit., p. 121.
[111] See Klaus Günther, *The Sense of Appropriateness…,* cit., pp. 270-271.
[112] See Heinrich Henkel, *Introducción a la Filosofia del Derecho- Fundamentos del Derecho,* Madrid, 1968 (1964) transl. by Enrique Gimbenart Ordeig, pp. 575 et seq.
[113] Heinrich Henkel, *Introducción*…, cit., p. 588; Paul Kirchhof, "Der verfassungsrechtliche Auftrag zur Steuervereinfachung" *Steuervereinfachung, Festschrift für Dietrich Meyding zum 65. Geburtstag*, Hrsg. Wilhelm Bühler, Paul Kirchhof and Franz Klein, Heidelberg, 1994, pp. 6 et seq.

In the case of detailed rules based on the type, the conditions of which are drafted as exclusive rather than as illustrative, the parliament in principle leaves less room for interpretation and discretion. German authors have identified the latter technique as "closed typifying" (*Tatbestandsmässigkeit*), supposedly required in fields such as penal law and tax law, and there are two related reasons justifying its adoption.

One is connected with the rule-of-law requirements: it concerns the fact that in civil law countries, the legislator is normally required by the written constitution to decide on the aforementioned regimes, following principles such as the *nulla poena sine lege* from Feuerbach, and the "no taxation without representation" principle, and in order to be effective, the legislator has to target at the average pattern or average type among a multitude of individuals. But the decision will only be effectively taken by the parliament if it leaves no discretion to the application organs, and therefore if it typifies the circumstances in such a way that they become the exclusive circumstances to be taken into account, avoiding or at least reducing legal uncertainty.

The other reason is related to legal certainty and foreseeable taxation, since these in principle are achieved by detailed legal provisions. However, this typifying technique will lead to a progressive departure from underlying typical cases and therefore to tax regimes contrary to the principle of equality and ultimately to tax avoidance[114].

On the contrary, the precedent method in common law countries, normally based on an individual assessment of cases, as well as the methodology according to which legislation is to be based on the average or frequent type and the open, illustrative typifying of the main characteristics of that type, can in theory lead to greater uncertainty (however, both techniques are now common to both legal traditions). As opposed to the general rules typifying all or most of the circumstances, the use of vague concepts by the law favours its application on a case-by-case basis. This technique aims at more equitable solutions, since it permits each case to be handled in its specificities, although it leads at the same time and as a rule (or more frequently) to indeterminate results and to larger discretion by the tax administration and the courts. In this circumstance, the rule of law (determinacy of law) and its aims are in tension with other purposes followed by tax law, namely taxation according to the principle of equality or the ability-to-pay principle.

[114] See on the subject, Ana Paula Dourado, *O Princípio da Legalidade Fiscal…,* ch. VII.

The use of vague concepts in the law, instead of closed-typified solutions, is also legitimate in tax law, since, taking into account that the legislator cannot anticipate every circumstance, if the law is too determined, it will encourage tax planning and abusive behaviour. Leaving to the tax administration and the courts the assessment on whether the individual circumstances either correspond to the general circumstances of the law or to an abusive behaviour, will allow a result closer to the idea of justice and distribution of tax burdens based on the ability-to-pay principle underlying that specific law. In this respect, some national reporters mention the anti-abuse purposes followed by some vague rules, and which in this way justify indeterminacy of tax legislation[115]. Moreover, as previously argued, vague concepts do not necessarily lead to indeterminate results and are therefore in certain cases adequate for achieving legal certainty.

In all countries, both techniques are used, although in most countries detailed tax rules seem to prevail over vague ones. In Canada, for example, tax acts are very detailed but are accompanied by indeterminate clauses, e.g., relating to amounts of deduction (test of reasonableness) and a General Anti-Abuse Clause (GAAR)[116]. And for example, whereas in Greece and Italy the tax legislation is normally detailed[117], in Poland the situation varies[118], in Russia the literature seems to require more determinacy in respect of the taxable base[119], and in France it is normally not very detailed[120]. In Spain, a distinction is made between state taxes and regional and local taxes, in the latter case, discretion being granted to local authorities[121]. Moreover, in Canada, the UK, the US and Sweden, the courts have an important contribution to make vague concepts more determined and developing tax principles[122].

Thus, most of the national reports published in this book, although confirming that the use of general and detailed legal rules typifying the circumstances is the technique normally followed by the legislator in tax matters, also illustrate the fact that vague concepts are used in tax legislation, namely in respect of rules on the taxable base and especially in respect of admissible deductions. Vague concepts such as "costs related to the activity" or "costs intrinsically related to the activity" are common to some reported systems.

115 See e.g. the Belgian report: Bruno Peeters/Elly van de Velde, cit., 2.1., 2.2., 2.4.; see also the reference to several anti-avoidance rules in the Canadian report: Martha O'Brien, cit., 3.
116 Martha O'Brien, cit., 3.
117 Eleni Theocharopoulou, cit., 2.1.; Federico del Lorenzo, cit., 2.
118 Krzysztof Lasiński-Sulecki/Wojciech Morawski, 2.
119 M. Sentsova/Danil V. Vinnitskiy, 2.
120 Emmanuel de Crouy-Chanel/Alexandre Maitrot de la Motte, cit., 2.1.
121 M. Luisa Esteve Pardo, cit., 2.
122 Martha O'Brien, cit., 3.; William B. Barker, cit., Preliminary remarks; Sandra Eden, cit., 2;

All in all, legal certainty and separation of powers formally understood favour detailed and typified legislation, whereas the ability-to-pay principle which in turn requires in some cases an anti-abusive interpretation (the principle of abuse used as an interpretation principle) and anti-abuse provisions, favour the adoption of vague concepts and application of the law on a case-by-case basis. Thus, both techniques can be combined by the tax legislator, as long as the adoption of general, typified and detailed rules prevail over vague rules. Reading the contributions to this book, I can conclude that the use of vague legislation is not a problem, although in many systems parliaments implicitly or explicitly delegate too much power to the government.

2.5. Vague laws and administrative discretion

Administrative discretion and its meaning and relationship with vague laws and legal indeterminacy have been widely discussed in the European civil law countries (Germany and Austria, France and the legal systems influenced by the latter, such as Italy, Portugal and Spain) in the twentieth century, but the debate goes back to the constitutional monarchies in the nineteenth century, which have played an important role in the development of the discussion. At that time, administrative discretion corresponded to a free administrative space granted by vague laws, it was identified with the administrative activity outside the scope of law, it was a reality strange to law, not ruled by law, and therefore identified with a right to administrative choice of legal creation (so-called Jellinek line of reasoning)[123]. In contrast to this position granted to the administration, and in apparent contradiction to it, still according to Jellinek's doctrine, courts were strictly bound by law, and their activity was limited to a logical-automatic application of the law[124]. Thus, vagueness and indeterminacy implied freedom of the administrative activity, administrative creation of law uncontrolled by the courts, and the constitution and legislation constituted a limit and not the fundament of the administrative activity.

The twentieth century was characterized by bringing vague laws, and the legal indeterminacy and administrative activity related to them, within the scope of interpretation and application of law. The law now appears as the fundament of the administrative decision, and no longer as a negative limit to the administrative activity[125]. Facing administrative discretion as a way of applying the law and achieving its aims and not as an extra-constitutional prerogative inherited from the constitutional monarchies'

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123 Walter Jellinek, *Gesetz, Gesetzanwendung und Zweckmässigkeitserwägung, zugleich ein System der Ungültigkeitsgründe von Polizeiverordnungen und –Verfügungen, Eine Staats- und Verwaltungsrechtliche Untersuchung,* Tübingen, 1913, pp. 30 et seq., 36-40, 132 and 188-189; *Verwaltungsrecht,* 3. Auflage, Berlin, 1931, pp. 28 et seq.; Hans Heinrich Rupp, " 'Ermessen', 'unbestimmter Rechtsbegriff' und kein Ende", *Festschrift für Wolfgang Zeidler,* Hrsg. Walter Fürst, Roman Herzog, Dieter C. Umbach, Bd. 1, Berlin, New York, 1987, pp. 460-461.

124 Hans Heinrich Rupp, " 'Ermessen'…, cit., pp. 457-459.

125 See David Duarte, *Procedimentalização, participação e fundamentação: para uma concretização do princípio da imparcialidade administrativa como parâmetro decisório*, Coimbra, 1996, p. 339 (pp. 337 et seq.).

framework is also a way to refrain the judicial attack to the former[126]. Some German authors have however contributed to deepening the traditional perspective opposing discretion to interpretation[127]. Whereas discretion would mean the creation of law and would grant a choice between or among legally authorized alternatives, vague concepts situated in the if-conditions of the legal norm would imply application of law, which in turn either meant application bound to law or legal indeterminacy granting some free space to extra-legal arguments uncontrolled by the courts[128]. That absence of control is based on the argument that there would be no advantage in replacing a subjective administrative assessment (by the administration) by another subjective assessment (by the courts).

This distinction between administrative discretion and margin of free assessment is somehow puzzling, taking into account the aforementioned movement of subjecting administrative activity to law. If the administration is bound by law, even when it has to apply vague laws, the fact that they have to be interpreted like any other laws would imply judicial control as happens in every other field of law, including those where legal determinacy is specially required, such as criminal law and fundamental rights law. In any case, the discussion on pure discretionary concepts and vague laws leading to indeterminacy but subject to judicial control has its origin in the end of the nineteenth century and bringing administrative activity to law has been a process, the evolution of which is more or less linear. It has been a process parallel to the one that abandoned identification of law and reason, to the substitution of the interpretation theory of "jurisprudence of concepts" by the trends in favour of teleological interpretation, to the approximation of administrative discretion and judicial discretion[129].

3. The consequences of legal indeterminacy in tax matters

3.1. Administrative discretion and judicial discretion

I have contended above that discretion is granted by law to the administration; I also contended that legal indeterminacy has to be identified by legal theory; it has been recognized that both the administration and the courts sometimes have to interpret vague laws according to some extra-legal arguments which means that the law is binding according to different degrees or intensity, and the two

[126] Ana Paula Dourado, *O Princípio da Legalidade Fiscal…,* cit., pp. 380 et seq.; Fritz Ossenbühl, Tendenzen und Gefahren der neueren Ermessenslehre", *Die öffentliche Verwaltung,* 1968, p. 626.

[127]See e.g. Otto Bachof, "Beurteilungsspielraum, Ermessen und unbestimmter Rechtsbegriff im Verwaltungsrecht", *Juristische Zeitung,* 1955, n. 4, pp. 98 et seq.; Carl Hermann Ule, "Zur Anwendung unbestimmter Rechtsbegriffe im Verwaltungsrecht", *Forschungen und Berischte aus dem öffntlichen Recht, Gedächtnisschrift für Walter Jellinek,* Hrg. Otto Bachof, Martin Drath, Otto Gönnenwein, Ernst Walz, Bd. 6, München, pp. 309 et seq.

[128] Fritz Ossenbühl, "Tendenzen und Gefahren…"., cit., p. 619.

[129] Hans Heinrich Rupp, *Grundfragen der heutigen Verwaltungsrechtslehre, Verwaltungsnormen und Verwaltungsrechtsverhältnis,* 2. Auflage, Tübingen, 1991, pp. 169-191; Dietrich Jesch, *Gesetz und Verwaltung*, cit., pp. 9-29.

extremes are not acceptable: neither an automatic application of law nor unlimited discretion is acceptable; the more vague the law is, the broadest the margin of discretion/free assessment by the organs applying the law. Interpretation and application of law implies identification of the type foreseen and covered by the law, so that the individual case can be subsumed in the legal type (assessment on appropriateness). Both in the case of administrative and of judicial discretion, the boundaries of interpretation of law have to be defined.

Although the meaning of administrative discretion is still debatable and debated, my claim is that, even if it belongs to the application of law – it has to be granted by law and exercised within its limits -, the core of administrative discretion lies in the extra-legal justifying arguments and in the subjective assessment of the individual case. In other words, administrative discretion implies the choice and selection of essential policy-decision criteria determined and limited by law [130].

Taking into account the aforementioned premises, the issue is whether they are sufficient to equalize administrative discretion/margin of free assessment and judicial discretion and to make it indifferent that in face of legal indeterminacy in tax law the final decision either belongs to the tax administration or the courts. In order to answer this question, the legal theory and philosophy of law arguments are not sufficient to justify any administrative discretion and free space recognized by the courts for judicially uncontrolled extra-legal assessments put forward by the administration, since legal theory and philosophy of law only allow us to identify legal indeterminacy and to discuss validity of law and the limits of interpretation (by the courts), but the boundaries of the competence of the administration and the courts are not discussed.

That free space has to be justified by arguments on the type of subject that has to be ruled on, connected with the different functions, competences and types of responsibility belonging to different powers. Subject matters such as administrative planning, administrative evaluation of people, situations and social processes are to be decided by the administration because the administration is not only led by interpretation principles and rules but also by political arguments; the government can ultimately be politically responsible for it[131]. On the contrary, courts are exclusively led by law and any extra-legal arguments have to be framed by legal principles[132] – although I recognize that legal indeterminacy will only occur in important and hard cases (the amount of legal arguments will never ensure or justify one

[130] Fritz Ossenbühl, "'Ermessen' und 'unbestimmter Rechtsbegriff' im Verwaltungsrecht", *Recht und Staat in Geschichte und Gegenwart,* n. 230-231, Tübingen, 1960, p. 87; "Tendenzen und Gefahren…", cit., p. 619.
[131] See Ana Paula Dourado, *O Princípio da Legalidade Fiscal…,* cit., pp. 468 et seq. and the literature cited therein.
[132] Idem.

and only one result in important and hard cases), it will often occur and extra-legal arguments will imply judicial discretion.

Most arguments used in respect of subject-matters other than taxes are not applicable to the latter, being the case of the practicability arguments connected with the impossibility to have access to certain evidence because it cannot be repeated and to the technical-scientific character of the matter (practical difficulties with regard to the judicial control of oral examinations at universities, for example) and the technical-scientific characterization of some independent commissions.

In tax law, legal vagueness and indeterminacy do not as a rule imply the granting of administrative discretion, since it does not require a subjective assessment in each concrete case. Taking into account that the legal type of tax, as previously discussed, has to be determined by parliamentary law, and that legal determinacy is required in respect of the policy decisions on the legal type, administrative discretion as above defined has to be exceptional and justified by constitutional principles that in a concrete case are to prevail over the exclusive competence granted to parliamentary law. In tax law, any discretion granted to the government (to the minister of finance) will most frequently occur in respect of tax benefits rules, which are not strictly tax rules since they have extra-fiscal aims, constitute an exception to the tax incidence rules and to the ability-to-pay principle, and are therefore simultaneously led by the principles belonging to the economic constitution and to the tax constitution. As a general rule, interpretation of the law will be decisive for determining whether it requires such single assessment.

This means that if the law is not unconstitutional because the legal type of tax has been satisfactorily determined by parliamentary law, vagueness and application of vague laws by the tax administration will imply judicial control, unless the principles of legal certainty and predictability together with the principles of practicability and second-best equity, recommend reduction of vagueness and indeterminacy by a general and abstract rule, either by regulations, rulings or soft law instruments.

3.2. Judicial control of vague laws

Reporting the situation in the contributions published below, I verify that in some countries the requirement of detailed statutory regimes seems to be effectively controlled by the courts (e.g. Belgian, Brazil, Greece, Japan, Poland and Russia)[133] and that indeterminacy is associated by some national

[133] Bruno Peeters/Elly van de Velde, cit., 2.4.; Marco António del Greco, cit., 2.4.; Eleni Theocharopoulou, cit., 2.2. and 3; Kimura, cit., 2.; Krzysztof Lasiński-Sulecki/ Wojciech Morawski, 2; M. Sentsova/Danil V. Vinnitskiy, cit., 2.

courts with the necessity of fighting tax abuse (e.g. Belgium, Denmark)[134], but except for the Danish report and its author's view[135], simplicity of tax law was not mentioned as a reason for indeterminate laws. Nevertheless, complexity as a problem that can lead to non application of a law by the judiciary is mentioned in the UK report[136] and complexity arising from a huge amount of regulations and rulings was mentioned (e.g. Japan[137]). In countries such as Canada, the UK and US legal indeterminacy is not seen as a problem, since it belongs to the courts to find the ultimate meaning of a statute (using all interpretation methods, regulations, administrative rulings, judicial decisions and general principles)[138]. In Canada, statutory indeterminacy will be unconstitutional if it infringes the "right to life, liberty and security" (if they lead to arbitrary results), and in the USA, if it is so unclear that will be arbitrary[139]. In Serbia, there are doubts on whether legal indeterminacy raises an issue of constitutionality[140], but most reporters highlight that in the case of indeterminacy, regulations and rulings will complete the regime (differently, Greece[141]).

Constitutional courts have in some reported countries (e.g., Belgium, Brazil and Poland) held vague tax rules unconstitutional once or twice[142]. In Japan the Supreme Court has declared tax rules unconstitutional due to indeterminacy in a few cases[143]. In Russia the Constitutional Court has held some vague tax rules unconstitutional, but the case law is increasingly filling in the legal indeterminacy[144]. It must be stressed that in most reported countries, the competent courts have never held a tax rule unconstitutional due to its indeterminacy. As a result, vague rules are considered to be compatible with the rule of law in most situations and when leading to indeterminacy their application either implies the supremacy of the tax administration or of the courts.

In some countries, the literature highlights the difference between discretion and indeterminacy (e.g. Austria, Germany, Greece, Portugal)[145]: discretion is often considered to be prohibited; in the case of

134 Bruno Peeters/Elly van de Velde, cit., 2.1., 2.2.; Jacob Graff Nielsen, cit., 2.3.
135 Jacob Graff Nielsen, cit., 2.
136 See also the reference to complexity as a problem that can lead to non application of a law by the judiciary, in the UK report: Sandra Eden, cit., 2.
137 Kimura, cit., 1.
138 Martha O'Brien, cit., 3; Sandra Eden, cit., 2; William B. Barker, cit.2.
139 Martha O'Brien, cit., 3; William B. Barker, cit., 2.
140 Dejan Popović/Gordana Ilić-Popov, cit., 2.
141 Eleni Theocharopoulou, cit., 3.
142 Bruno Peeters/Elly van de Velde, cit., 2.4.; Marco António del Greco; 2.4.; Krzysztof Lasiński-Sulecki/Wojciech Morawski, cit., 2.; tax rules have been challenged on the basis of indeterminacy in Canada, but no tax provision has ever been held to be invalid on that basis: Martha O'Brien, cit., 3.
143 Kimura, cit., 2.
144 M. Sentsova/Danil V. Vinnitskiy, cit., 2.
145 Johannes Heinrich/Irina Prinz, cit., 2; Eleni Theocharopoulou, cit., 2.1.; for the German and Portuguese literature and case law, Ana Paula Dourado, *O Princípio da Legalidade Fiscal*…, cit., chs. V and VI.

legal indeterminacy, the final word belongs to the courts. In Greece interpretation seems to be close to a literal interpretation (on the opposite side, see e.g. Canada, Sweden)[146].

Thus, the practice in various reported countries on the judicial control of legal indeterminacy applied by the tax administration varies. In the case of the administrative application to the concrete case, in some reported countries, like Germany, courts have or tend to have the last word on the interpretation of any vague laws (the protection of fundamental rights has led to judicial control by the German constitutional court whenever issues related to them were raised), unless in the case of German tax rulings, the control of which is discussed[147]. In other countries, such as Portugal, tax courts have until recently avoided control of indeterminacy, recognizing some margin of free assessment[148]. When the tax administration enacts regulations, it seems common to most reported countries that the courts recognize a broad margin of free assessment on the normative solution chosen by the administration: what I call a margin of free typifying[149].

All countries seem to have independent courts, and even if recognizing some margin of free assessment to the administration, they are in principle granted the last word on the indeterminacy of tax legislation.

I can also conclude that in common law systems the role of the courts' case law, in progressively determining legal concepts and rules is understood as part of their function (see the Canadian and the US reports), whereas in civil law systems (written) constitutions clearly provide for an exclusive or nearly exclusive legislative competence of the parliament in tax matters. As previously mentioned, in some cases, constitutions of civil law countries even expressly subject specific tax elements to that exclusive competence – normally, the aforementioned *an* and *quantum* of the tax – tax object, tax subject, taxable base, tax rates – even if requirements on determinacy vary, and in respect of the quantification elements, especially in respect of the taxable base and deductions allowed, some room is granted and recognized by the courts to free assessment or typifying. The constitutional rules on the allocation of legislative competence in tax matters and definition of which tax matters are subject to that competence creates the grounds for judicial control of legal indeterminacy in civil law countries.

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146 Eleni Theocharopoulou, cit., 3; Martha O'Brien, cit., 1.; Stefan Olsson, cit., p. 3;

147 See Ana Paula Dourado, *O Princípio da Legalidade Fiscal*…, cit., pp. 650 et seq. ; - Ana Paula Dourado/Rainer Prokisch - «Das steuerrechtliche Legalitätsprinzip im portugiesischen und deutschen Verfassungsrecht», *Jahrbuch des Öffentlichen Rechts*, 1999, vol. 47, pp. 35-77.

148 Ana Paula Dourado, *O Princípio da Legalidade Fiscal*…, cit., pp. 9 et seq., 143 et seq., 516 et seq.

149 Following to some extent Lerke Osterloh's, *Gesetzesbindung und Typisierungsspielräume bei der Anwendung der Steuergestze,* Baden-Baden, 1992.

However, in practice, the judicial control on the constitutionality of vagueness in tax law leading to indeterminate results does not differ much in civil law and common law countries. The trend, already pointed out by Hart in 1961, shows that the legal families belonging to one or the other of them have become closer regarding the way they face legal determinacy and indeterminacy.

"Two principal devices, at first sight very different from each other, have been used for the communication of such general standards of conduct in advance of the several occasions on which they are to be applied. One of them makes a maximal and the other a minimal use of general classifying words. The first is typified by what we call legislation and the second by precedent. We can see the distinguishing features of these in the following simple example. One father before going to church says to his son, 'Every man and boy must take off his hat on entering a church'. Another baring his head as he enters the church says, "Look: this is the right way to behave on such occasions"[150]. Still according to Hart, "Much of the jurisprudence of this century has consisted of the progressive realization (and sometimes exaggeration) of the important fact that the distinction between the uncertainties of communication by authoritative example (precedent), and the certainties of communication by authoritative general language (legislation) is far less firm than this naïve contrast suggests"[151].

The European Union and its legal system and institutional players, the economic regional integrations spread throughout the continents, the globalization phenomena, the legal players at the international playing field both at an institutional level (such as the IMF, OECD, EU) or acting as discussion *fora* (such as the IFA and the EATLP) and the pluralism of legal sources and competences resulting from them, all have contributed to intensifying the aforementioned trend of approximation of common law and civil law legal systems.

Although it is clear in most systems that the final word on the interpretation of vague rules belongs to the courts, and that legal indeterminacy is not a synonym for granting administrative discretion, the truth is that the answer on who is competent to determine the meaning of vague rules depends very much on the interaction between the tax administration and the courts, the role played by the former and the latter in the legal system as a whole and in tax matters specifically, ultimately on how courts interpret and apply the law.

[150] H.L.A. Hart, *The Concept of law*, cit., p. 121.
[151] Idem, p. 123.

3.3. Administrative functions and margin of free typifying through regulations and rulings

I have claimed so far that the theoretical-analytical arguments on indeterminacy are not enough to justify the margin of free typifying granted to the tax administration in enacting regulations and rulings. It is true that in the case of regulations the normative competence is at stake and it can and must be distinguished from the application of vague laws to the concrete case. However, in respect of administrative rulings and soft law instruments it is not clear whether and to what extent I can distinguish them from the interpretation/application to the concrete case, since they result from the application of vague laws (decree-laws and regulations, if that is the case), to the concrete situation. Application of law as an analogy circle between the individual case and the rule, as it happens with case law, is very clear when one wants to explain the origin of administrative rulings. But in all of the aforementioned cases of administrative activity – either exercised by regulations, rulings or (other) soft law instruments - the law is vague and its vagueness is reduced by the administration and not by the courts.

Thus, I have to ask whether the tax administration, according to its competence, efficacy, legitimacy and procedure can decide on how to interpret and apply the vague tax legislation to a series of identical cases[152] and possibly create rules. My premise is that this activity occurs in respect of more or less vague laws and that implies a margin of free assessment by the tax administration, lying beyond the core of the legal type of tax.

Even if I distinguish between discretion and a free administrative assessment/typifying granted by legal indeterminacy, I am taking into account the different functions and competences: the legislative power and the degree of determinacy that parliamentary law has to comply with, the government and the executive power and the extent to which they are bound to the (parliamentary) law, the jurisdictional and the control it is expected to implement.

More than any specificity of the tax administrative activity and the purposes it follows or the political responsibility that has to be assumed by governments in respect of tax decisions, the aforementioned margin of free assessment uncontrolled by the courts is justified due to the requirements of determinacy and predictability. Thus, as a rule, vagueness and indeterminacy will either lead to judicial control of the tax administrative act or to control of the legality of the rule complementing the vague law: that is the case of tax abuse accepted in many civil law countries as an interpretative principle and

[152] Mutatis mutandis, Fritz Ossenbühl, "Rechtsquellen und Rechtsbindung der Verwaltung", *Allgemeines Verwaltungsrecht,* Hrsg. Hans-Uwe Erichsen/Dirk Ehlers, 12. Ed., Berlin, 2002, p. 219. Ana Paula Dourado, *O Princípio da Legalidade Fiscal…,* cit., p. 469.

arguably by the ECJ as well - together with the principle of equality tax abuse justifies a certain legal vagueness implying a casuistic analysis on whether a "wholly artificial arrangement" exists, and that assessment by the tax administration is to be controlled by the courts. At the same time, principles of the second and third level can make the abuse principle more concrete and ultimately settled case law will contribute to progressive determinacy.

I conclude that the interpretation granted to the law by the tax administration in its normative regulatory activity either by legally binding instruments or by soft law instruments is to be accepted by the courts as long as the interpretation is defensible, since indeterminacy implies that more than one answer is legally correct, and replacing it would increase uncertainty. Courts must control the legality of the procedure, any contradictory regimes, control and balance the different applicable international law principles and in the case of EU Member States the European law principles, as well as constitutional and legal principles. However, if the government and the tax administration do not reduce legal indeterminacy in the aforementioned manner, the courts must control the administrative application of vague rules and reduce its indeterminacy by way of settled case law.

3.4. Judicial control of rulings in tax law

In principle, rulings enacted by the tax administration only bind the tax administration itself (in the US, if the interpretative regulations present a reasonable interpretation of legislative provisions, they are followed by the courts – they are deemed to have received congressional approval and have the effect of law."[153]). However, rulings enacted by the tax administration are in some countries followed by the courts, as long as these rulings are not considered to be illegal (see, e.g. Canada, Italy, Japan, Poland)[154]. In other countries they are examined along with the evidence and facts of the case (Russia)[155] or as relevant arguments (Spain)[156]. Thus, in most countries courts are not bound by the rulings, but in Poland the courts cannot deprive taxpayers of protection deriving from rulings even if these are illegal[157]. In Serbia the Minister of Finance has competence to answer interpretation issues, but his opinions are not binding[158]. All this implies that the interpretation by the tax administration of indeterminate laws helps the courts to reach a possible meaning (see, e.g. Denmark, Spain)[159].

153 William B. Barker, cit., 2.5., United States v. Cleveland Indians Baseball Co., 532 U.S. 200, 212 (2001).
154 Martha O'Brien, 4.; Federico del Lorenzo, cit., 3.; Kimura, cit., 3.; Krzysztof Lasiński-Sulecki/ Wojciech Morawski, 3.
155 M. Sentsova and Prof. Danil V. Vinnitskiy, 3.
156 M. Luisa Esteve Pardo, cit., 4.
157 Krzysztof Lasiński-Sulecki/ Wojciech Morawski, cit., 3.
158 Dejan Popović/Gordana Ilić-Popov, cit., 3.
159 Jacob Graff Nielsen, cit., 3.; M. Luisa Esteve Pardo, cit., 3., 4..

3.5. Conclusions: Determinacy of the legal type of tax

Comparing different constitutional and legal systems and taking into account the premises and arguments above, I contend that the core of the parliamentary law and delegated decree-laws or legislative decrees has to cover the typical cases aimed at the legal type of tax and that the core has to be broader than the margin left to covering untypical ones.

Regarding the object of tax, parliamentary law has to directly define the typical manifestations of wealth that each tax aims to reach (the paradigm cases), and it also has to enumerate them, unless the political option and definition is clear and it delegates to the government decree-law or legislative decree the concrete enumeration of those manifestations. The best technique in this respect seems to be the definition and enumeration of the typical cases, but an open enumeration with a residual clause that allows taxation of any manifestation of wealth that can correspond to the definition.

However, in a rule-of-law State there can be no legal irrebuttable presumption of wealth, consumption or income, since even though irrebuttable presumptions constitute a legal technique aimed at achieving legal determinacy, in the sense that they avoid proof of facts, irrebuttable presumptions on any manifestation of wealth is incompatible with the ability-to-pay principle. But, if an irrebuttable presumption on the tax object itself is prohibited, rebuttable presumptions are not, namely in the case of wealth the origin of which has not been declared to the tax authorities and whenever there is non-compliance of cooperation duties (when accounting does not reflect, inform or clarify about an accrual of income that justifies the acquisition of certain assets). Moreover, within the European Union, irrebuttable presumptions on accrual of income and assessment of the taxable base are prohibited if discriminatory, even if led by anti-abuse purposes, which means that in the case of discrimination, the tax administration and the domestic courts have to consider the individual circumstances of the case: the ECJ has recognised application of domestic anti-abuse concepts as long as that does not prejudice the "full effect and uniform application of the Community law provisions allegedly relied in an abusive manner"[160]. Regarding the taxpayer, it seems that an illustrative enumeration of taxpayers is the best technique to adopt, so that some entities are not outside the scope of the tax by adopting a legal form that is not foreseen in the law.

As previously mentioned, quantification of tax has also to be determined by parliamentary law, so that predictability as to the amount to tax to be paid is assured. But, since quantification often implies assessments based on the typical cases, due to the practical impossibility of considering the particularities of each case (second best equality), the details of the legal tax regime can be determined

[160] Opinion of Advocate General Poiares Maduro, *Halifax*, cit., point 65; ECJ Case C-206, *Palletta* [1996] ECR I-2357, para. 25; *Kefalas*, cit., paras. 21-22; ECJ C-373/97, *Dionisios Diamantis and Elliniko Dimosio (Greek State),* [2000] I-1705, paras. 34-35; *Centros*, cit., paras. 24-25.

by decree-law or legislative decree and the more technical aspects by regulations or even rulings in a way that, globally considered, the tax regime progressively becomes more concrete. In respect of the quantification rules, namely in respect of deductible costs, tax legislation is frequently vague as is exemplified by the reported countries in respect of the incurred costs necessary to obtain the gross income. Taking into account that vagueness in tax law and legal indeterminacy will reduce the validity of law and the predictability of the amount of tax to be paid, progressive reduction of that indeterminacy by enactment of decree-laws, regulations and rulings will contribute to predictable results and also to achieving validity of law, since the parliament will be able to amend the law if it does not agree with the way in which determinacy was achieved by other legal and soft law instruments.

4. Relationship between the tax administration and the tax courts

4.1. The situation in the reported countries

The tax administration is in all countries bound by the court's decision on the case, but in most countries not bound in respect of similar cases (e.g. in some reported countries the tax administration has tried to circumvent domestic courts decisions[161]) – unless they are common law systems. In some countries the tax administration follows the case law in similar cases (e.g. Austria, Belgium, Japan[162]), and in some others even pays special attention to it, and is even organized by the tax administration itself in order to be available and distributed to the competent departments and officials (e.g. France, Poland, Serbia)[163].

I can highlight two aspects that have been mentioned before in this essay and that show the big influence of the tax administration in the tax legislation:
Legal indeterminacy is normally filled in by regulations and rulings and if the vagueness of the legislation is high, the solution found by the tax administration expresses a relevant margin of free assessment or typifying (relation parliament/government/bureaucrats);
Even if the courts control the above mentioned free assessment, through the control of the legality of the regulations and rulings, if the vagueness is high, they will normally accept the tax administration's

[161] See Part II, 3.5. d), e) .
[162]Johannes Heinrich/Irina Prinz, cit., 4.; Bruno Peeters/Elly van de Velde, 4.5.; Kimura, 4.
[163] Emmanuel de Crouy-Chanel and Alexandre Maitrot de la Motte, cit., 4.3.; Krzysztof Lasiński-Sulecki/Wojciech Morawski, 4.; Dejan Popović/Gordana Ilić-Popov.

solution, as long as it is defensible, due to the principle of practicability, and unconstitutionality of indeterminate legal rules seldom occurs;
And in all, or almost all, countries, when the courts declare the illegality of the tax administration interpretation of the law, and support the taxpayers' viewpoint, the tax administration will try to have the law amended and will often achieve this, in order to reach the meaning proposed.

4.2. Conclusions: The consequences of legal indeterminacy in tax matters concerning the tax object, the tax subject, and the quantification elements

I have contended in the previous pages that vagueness of tax laws, when leading to indeterminacy, implies a margin of free assessment granted either to the tax administration in enacting more detailed regimes by regulations, rulings or soft law instruments or to the courts, the broadness of which depends on the degree of indeterminacy. I also contended that separation of powers in tax law and the rule of law require that vague rules in respect of the taxable base and quantification items are progressively determined by a joint activity of the tax administration and the courts.

The country reports published in this book illustrate that the fact that the courts control of the application of vague rules by the tax administration creates a balanced solution – any transfer of power conferred by the parliament to the tax administration by the use of legal vagueness leading to indeterminacy is compensated by the judicial control of a correct interpretation.

Due to the fact that tax law has to be enacted and passed by the parliament, vagueness in tax law and legal indeterminacy will again not as a rule lead to discretion but either to judicial control or, in the case of the taxable base (quantification items), to a subsequent concretization work by the government, administration and courts, possibly implying a creation of rules. Notwithstanding the distinction I mentioned in 3.5. and reintroduced below, all of them must look for the typical situations and foresee them. In the case of the government and tax administration, they are supposed to act by issuing a general and abstract rule – decree-law, regulation, ruling– and in the case of the courts, case law should be consistent and progressively settled. The main and real disadvantage with this methodology is that it greatly contributes to complexity of tax law[164].

[164] Christian Waldhoff, "Vertrauenschutz im Steuerrecht", *Vertrauenschutz im Steuerrecht,* Hrsg. Heinz-Jürgen Pezzer, *DStJG,* Bd. 27, Köln, 2004, pp. 129 et seq.; Klaus Vogel/Christian Waldhoff, *Grundlagen des Finanzverfassungsrechts, Sonderausgabe des Bonner Kommentars zum Grundgesetz, (Vorbemerkungen zu Art. 104 a bis 115 GG*) Heidelberg, 1999, pp. 316 et seq.

It seems, however, that as long as taxes remain high in OECD countries, complexity of tax law is unavoidable. Although all tax systems reported in this book are presumably too complex, the legal sources leading to this complexity vary and it seems that in countries where the legislative competence belongs exclusively to the parliament the law itself is very (perhaps too) detailed (e.g. Germany), whereas in those reported systems where the legislative competence can be and is delegated to the government the complexity derives from multiple sources: laws enacted by parliament, decree-laws enacted by the government, regulations enacted by the government or the minister of finance, rulings enacted by the tax administration (e.g. the Netherlands and Japan) and detailed case law (cf. Austria).

Taking into account the previous premises, my conclusions in respect of the legal type of tax are the following ones:

legal indeterminacy of the tax object and or the tax subject implies an option between yes and no: it is taxable /it is not taxable; it is a taxpayer/it is not a taxpayer. By legal indeterminacy, I mean in this context the two forms I mentioned above and that I now recall: one form of indeterminacy occurs when the law does not give an answer in important or difficult cases because the amount of legal arguments is never adequate to lead to any result (so-called legal gap)[165]; and the other occurs when legal arguments can justify several answers and not only one, and it implies that some situations (tax object or tax subject) can be neutral or negative. In these cases, where a yes or no answer is required, vagueness and indeterminacy lead to an issue of boundaries of permitted interpretation vs. prohibited interpretation, since either there is a legal gap or candidates for the rule can be neutral or negative. I contend the decision on whether the tax object or the tax subject is foreseen or not in the law requires an assessment on a case-by-case basis, and accordingly the answer always belongs to the courts. Moreover, there are no reasons of practicability or equality that justify enactment of more detailed rules by the tax administration, and any legal gaps (implying a no answer from the interpreter) have to be fulfilled by the legislator.

In respect of quantification rules, the inclusion in or the deduction of certain amounts (e.g. transfer pricing issues, deduction of necessary, indispensable or reasonable costs, representation costs, deduction of health care costs, etc.) from the taxable base is a matter of massive administration, and the principles of equality (a second-best equality or the achievable equality) justify the fact that the tax administration is guided by the typical taxpayer or the typical case when vague laws and resulting legal indeterminacy allow for more than one correct legally justified decision. As previously mentioned, enactment of rules on the basis of vague laws must be considered legal by the courts as long as the interpretation granted to them by the tax administration and any typifying implying creation of rules is

[165] This can also occur when there is conflict among several rules and principles, because the legal system is very rich: Coleman/Leiter, cit., pp. 226-227 et seq.

defensible. If in the process of controlling legality of the government/administrative norm within the margin of free assessment/typifying, the court itself suggests a solution replacing the one given by the tax administration, it will increase legal uncertainty. This margin of free assessment/typifying within the scope of normative process must be especially recognized in respect of the tax matters identified by the tax courts and the literature, according to criteria regarding sharing of specific competences, namely the principle of practicability and the political responsibility of the government in respect of certain politically oriented decisions: granting of deductions, definition of tax havens, granting of tax benefits (state aids).

Due to the principle of people's sovereignty (or the "no taxation without representation" aphorism), validity of law, predictability and legal certainty of amount of taxes to be paid, administrative discretion is only exceptionally acceptable.

Taking into account the previous conclusions, if I next admit that the tax administration grants a certain meaning to a vague legal rule taking into account the circumstances of the individual case, the court has to control the administrative application of the rule and in respect of quantification issues, it may even consider that typical cases should have been taken into account (for example, on the ground that there is no certainty on the underlying individual elements such as documentation on costs and its characterization, the value of the immovable asset) and accordingly substitute the interpretation granted by the tax administration for it. Such a decision based on the frequent or average typical case will hopefully create the basis for settled jurisprudence in the future. Subjects such as administrative corrections to the taxable base, application of indirect assessment methods in case cooperation duties are not fulfilled, valuation rules on immovable property, should be progressively defined on the basis of general administrative rules and coherent case law. However, judicial decisions based on the frequent or average taxpayer should be subsidiary to the administrative action by way of regulations and rulings since courts are by definition supposed to decide the individual case according to its particular circumstances.

5. Relationship between different legal sources (legal pluralism)

EU Member States tax systems reported in this book face a challenge concerning pluralism of legal sources emerging from each Member State's domestic system, from the EU legal order – EU primary (the Treaties) and secondary (directives, regulations) legislation and soft law instruments – and from international treaties to the extent that they are domestically applicable. In the case of EU Member States, the most complex issues arise in respect of EU and domestic legal orders, i.e. in respect of what

is known as internal legal pluralism, or, in other words, legal sources binding the EU institutions and the Member States. This challenge affects both the domestic legislator that has to comply with EU law, the tax administration and courts that have to comply with all valid legal sources (EU, international and domestic law). Conflicts may arise in respect of EU constitutional law and domestic constitutions since acceptance of the primacy of EU law over national constitutions has not been uncontroversial and unconditional which implies that plurality of constitutional sources are often to be solved in a non-hierarchical manner, by reciprocal influence and recognition of common principles and rules. Conflicts of the EC Treaty and national constitutions have not arisen so far in tax law, but can arise in the future in respect of principles such as the separation of powers, the sovereignty of the people, legal certainty, retroactivity, equality and abuse of law (and now in respect of the TFEU) . External legal pluralism can raise other sort of conflicts, namely, in respect of the interpretation of tax treaties and instruments of soft law (e.g. codes of conduct, OECD reports and commentaries), which often imply cross references to domestic law concepts and the competent judicial organs do not often promote coordination regarding the interpretation of different legal orders. But legal arguments and strategies circulate more than ever among different *fora* and legal jurisdictions.

In the reports published below, in most EU Member States, the tax administration acts as being bound to tax treaties and EC secondary law (in the latter case, EU Member States), but it does not consider itself bound to the ECJ case law. On the contrary, in the same EU Member States, courts are constitutionally bound to international and EU law (in the latter case, EU Member States), including the ECJ rulings, in principle even if the ruling refers to other Member State's legislation, as required by the CILFIT doctrine. I recall that according to CILFIT an ECJ decision can be so clear on the compatibility of a certain domestic rule or regime, that a similar rule or regime in force in another Member State can and should be decided by national courts without a referral to the ECJ. But in practice, interpretation of CILFIT by national courts of EU Member States varies considerably[166].

[166] See the General Report and Part I of Ana Paula Dourado/Ricardo Borges eds. *The Meaning and Scope of the Acte Clair Doctrine in Direct Taxation,* IBFD, Amsterdam, 2008, 515 pp.

Some remarks on the relationship between the tax administration and the domestic tax courts (Heinz-Juergen Pezzer)

In her General Report, Ana Paula Dourado has already emphasized the dominant role of the tax authorities (especially the Ministry of Finance) in the process of legislation.
Between the tax authorities and the domestic courts, which have the duty to control them, there are some further phenomena which lead to the question whether there is really a balance of power.

First, fortunately there seem to be independent courts in all countries which have been mentioned in this research project. The decisions that are not in favour of the tax authorities are in many cases accepted, and final judicial decisions on a single tax case are mostly followed by the tax administration in all other similar cases.

Nevertheless, the power of the tax authorities is dominant to the extent that after a final decision that is considered as not "acceptable" because, e.g., it is too expensive for the public, the Ministry of Finance in almost all countries often or very often influences the parliament to change (amend) the law. From democratic point of view, this cannot be criticized. If the parliament does not enough knowledge to resist the Ministry's initiative or does not want to follow the opinion of the High Court for fiscal reasons, it depends just on the responsibility of the parliament. But nevertheless this phenomenon shows how dominant the role of the Ministry of Finance is in reality.

Tax authorities undoubtedly (so I think) have the duty to interpret the laws by themselves. If they consider a decision by the High Court to be absolutely wrong, they are obliged to interfere. Therefore, it should not be criticized if they try to convince the court in another similar case, that it is necessary to change its opinion. That happens in almost all of the countries covered here.
But this raises the following unsolved questions: What happens meanwhile to all the other taxpayers? Can they trust the favourable decision of the High Court? Should the tax authorities take the decision that is favourable for the taxpayers as a provisional basis of all tax returns with the remark that there will be a correction of the tax return if the High Court changes its holding and follows the opinion of the tax authorities? At least, if the tax authorities take their own opinion as basis of the tax returns, are they obliged to point out to the taxpayers that there is a diverging decision of the High Court in favour of the taxpayer? If not, all taxpayers that do not have professional advice will be cheated.

Can it be justified that the tax administration (e.g. by order of the Ministry of Finance) makes sure that the tax authorities will not follow a decision of the High Court in similar cases? This never happens in Denmark, Finland, Israel, Japan, Turkey and the UK. But it sometimes happens in Austria, Belgium, Brazil, Germany (every tenth fundamental decision of the Bundesfinanzhof (Federal Finance High Court), Italy, Japan, Poland, Serbia, Spain, the United States, and Russia. This is in my opinion not according to the principles of separation of powers.

Currently, some special problems in Germany show how difficult a real separation of powers may be: According to a general order issued by the Ministry of Finance, the tax authorities only may follow those judgments that are published in a special journal edited by the Ministry of Finance (Federal Tax Journal, *Bundessteuerblatt*). Judgments that are chosen by the Ministry to be printed there are listed on the website of the Ministry (www.bundesfinanzministerium.de). If a taxpayer wants to base his case in his case on a special judgment that is not listed on the website of the Ministry or is not published in the Federal Tax Journal and that differs from the opinion of the tax administration he may encounter difficulties and will be probably not successful. The local tax office is not allowed to follow such a judgment. So the taxpayer is forced to bring an action to the court again, even though there has already been a final judgment delivered by the High Court.
Sometimes it takes even several years until the Ministry of Finance has decided whether a judgment will be published in the Federal Tax Journal or not. In the meantime taxpayers are not able to rely on this judgment for their personal tax cases.
For a few years another phenomenon occurs, almost a conjuring trick used by the tax authorities: According to German procedural law, tax courts can deliver a provisional decision in written form that becomes final if the taxpayer and the local tax office do not apply for a trial. If the court has delivered such a provisional decision in favour of the taxpayer, the local tax office sometimes applies for a trial so that the court proceedings go on. Then the local tax office changes the tax return according to the opinion of the taxpayer, so that the court procedure will be ended, because a judgment is no longer necessary. At first glance, this result might seem pleasing. But it is not pleasing indeed for all other taxpayers who have to raise the same issue in law, because in all other cases the tax authorities will again follow their own opinion, which is antipodal to the court's opinion (that has not been fixed in a judgment, as the procedure in the leading case was ended). The tax administration simply gave up and corrected the tax return in the leading case pending at the High Court in order to avoid a final judgment in favour of the taxpayer. In my opinion, this is a tricky way to avoid final decisions of the High Court that is not according to the principles of separation of powers. To conclude, the principles

of separation of powers are not effective in an optimal way. In reality, we have to realize, that the executive power plays a dominant role.

The Ministry of Finance in fact often takes the lead in tax legislation and also initiates an amendment of the tax law if the High Court has delivered a final decision that is – from the Ministry's point of view -- not acceptable. There do not seem to be methods to improve the situation effectively in a short time. The only chance might be to improve the knowledge of the members of parliament about taxes, so that they deal with taxes not only from a fiscal perspective, but recognize the duty to establish tax law as a coherent part of a fair and reasonable legal system that is ruled by the principles of justice and the constitution. This will require serious discussion for many years.

In all of the countries covered here there are independent courts that are obliged to control the tax authorities. On the whole, they seem to fulfil their mission. Nevertheless in many countries the tax authorities sometimes circumvent final decisions of the High Court, or the Ministry of Finance makes sure that the local tax offices do not follow the judgment in all similar cases. This might be acceptable for very special exceptions, for a genuine error of judgment, but normally this policy of the executive power is not in accordance with the rule of law in general and especially not with the principles of separation of powers.

What should we do in this situation? The first step could be to intensify the discussion about the problem. Most all officials will find the dominant role of the executive power quite normal. And they will consider the circumventing of High Court judgments as some sort of useful institutional self-defence, especially because it has been common practice in the past. Therefore, it is desirable to encourage the courts to insist upon their duty to control the executive power and to emphasize in the discussion that circumventing High Court judgments by the executive power means basically an ultra vires action and therefore has to be limited to very special exceptions, in other words to extreme cases only.

Austria: Separation of Powers in Tax Law (Johannes Heinrich and Irina Prinz)

1. Relationship between the parliament and the tax authorities: the influence of the tax authorities on tax legislation

In general, taxes may only be levied on basis of the law[1] and law is enacted by parliament (on a federal or State level). Additionally every administrative authority, and therefore also the tax authorities, may within its sphere of action enact legally binding executive orders (regulations) without any further authorization.[2] However, these orders are only allowed to specify the law passed by a parliament. Thus, the government represented by the Minister of Finance has no original legislative competence on tax matters.

According to the Austrian Constitution there are four different ways of submitting a draft bill:[3]
Usually a ministry (with respect to tax bills the Ministry of Finance) prepares a draft bill. The draft then undergoes an expertise procedure and is finally submitted to the parliament by the government ('government bill');

Any member of parliament (if supported by four more members of parliament) can submit a draft, [4]

as well as commissions formed by the parliament (in the case of tax law acts the Financial Committee).[5]

Furthermore, the Federal Assembly (*Bundesrat*) or one third of the members of the Federal Assembly, as well as

100,000 eligible voters by way of a petition (*Volksbegehren*) are entitled to submit drafts; however, these last two options do not occur very often.

Presentation of a government bill is the most common way to start the legislative procedure in the field of tax law. The Ministry of Finance prepares a draft bill, which is then presented to special interest groups with a request for their expert opinions. The consultation of the Chambers that represent

[1] § 5 Financial Constitutional Law *(Finanz-Verfassungsgesetz; F-VG).*
[2] Article 18 (2) Federal Constitutional Law *(Bundes-Verfassungsgesetz; B-VG).*
[3] Article 41 Federal Constitutional Law (*B-VG*).
[4] § 26 Rules of Procedure Law 1975 (*Geschäftsordnungsgesetz* 1975; *GeOG*).
[5] § 27 Rules of Procedure Law 1975 (*Geschäftsordnungsgesetz* 1975; *GeOG*).

workers and professionals (e.g. the Austrian Federal Economic Chamber, Austrian Bar Association, Austrian Medical Association) is even obligatory if the draft touches interests represented by a particular Chamber.[6] Beyond this statutory obligation it is common practise to invite various other bodies to comment on the draft. The expertise procedure should make sure that all politically relevant groups agree on the draft to avoid complaints and problems with applying the law afterwards and give everyone affected the possibility to make suggestions for modifications. Usually numerous changes are made in this stage of the legislative process. Afterwards the (in many cases modified) draft is discussed within the Council of Ministers, which finally submits the draft by unanimous decision to the parliament as a 'government bill'.

As mentioned above, government bills are the most common way for the legislative procedure in the field of tax law to be started. Sometimes tax bill drafts are submitted by five members of parliament or the Financial Committee of the parliament to the parliament. All other possibilities mentioned above to start the legislative process are used very infrequently.

In the literature statistical data on the use of the five different ways to start the legislative procedure can be found.[7] The data is collected on the basis of legislative initiatives in all fields of law, but the results also hold for bills in the field of tax law.

	20th Legislative Period (1996 – 1999)	21st Legislative Period (1999 – 2002)
Government bills	71 %	65.9 %
Bills submitted by 5 MP	19.5 %	21.4 %
Bills submitted by a commission of the parliament	9.1 %	11.7 %

In parliament, government bills are subject to a first reading in a plenary meeting. In the course of the first reading only general principles of the government bill are discussed. Afterwards government bills in tax matters are assigned to the Financial Committee of the parliament.[8] The Financial Committee discusses the draft in detail and submits a report to the parliament.[9] About 50 % of all government bills are modified during the discussion in commissions of the parliament. In 15 % of the cases,

[6] E.g. § 10 Federal Economic Chamber Law (*Wirtschaftskammergesetz 1998; WKG*).
[7] See Beck, E R A/Schaller, C, *Zur Qualität der britischen und österreichischen Demokratie* (Concerning the Quality of the British and Austrian Democracy), Vienna, Cologne, Graz, 2003, p 159 with references.
[8] § 69 Rules of Procedure Law 1975 (*Geschäftsordnungsgesetz 1975; GeOG*).
[9] § 42 Rules of Procedure Law 1975 (*Geschäftsordnungsgesetz 1975; GeOG*).

modifications of government bills are made during a plenary meeting of the parliament.[10] After the consultations with the Financial Committee the draft is subject to the second reading within the parliament. The second reading is split up into a general debate and a special debate. In the course of the special debate the parliament decides on the law or parts of a law.[11] The final decision on a new law is made during the third reading.[12]

The very strong position of the Austrian government in the law-making process in general is criticized by some authors.[13] In the field of tax law, the vast majority of legislation is based on tax bills drafted by the government and in most cases only marginal changes are made by the parliament in a plenary discussion and only small changes are usually made by the Financial Committee of the parliament. However, it must be kept in mind that the parliament itself does not have the required expertise to draft complex tax bills. Therefore, it makes sense to leave the drafting to experts of the Ministry of Finance and to discuss these drafts with other experts before they are presented to the parliament by the government.

Besides, in Austria it is very common that the government can fall back on a political majority in parliament. Since 1945, only once (for a period of 18 months) has there been a government which could not rely on a political majority in parliament. Since it is not necessary to seek a broad consensus in parliament for enacting new legislation, many laws are passed only with the votes of the political parties representing the government. Thus, during the parliamentary session 2006/07 it was agreed only upon 30% of all bills unanimously,[14] for the parliamentary session 2007/08 the percentage raised to 39%.[15] With respect to tax matters within the last legislative period (2006 – 2008) bills were passed usually with the votes of the two political parties representing the government and without the consent of the three opposition parties.

2. The meaning of legal indeterminacy in tax matters

The use of undefined/vague legal provisions is quite common in Austrian tax law. In general, one has to distinguish between undefined/indeterminate provisions, on the one hand and provisions, which give the tax administration discretion when applying such norm, on the other hand.

[10] See Beck/Schaller, Quality, p. 160.
[11] §§ 70, 72 Rules of Procedure Law 1975 (*Geschäftsordnungsgesetz 1975; GeOG*).
[12] § 74 Rules of Procedure Law 1975 (*Geschäftsordnungsgesetz 1975; GeOG*).
[13] Beck/Schaller, Quality, p. 159.
[14] NN, Nationalrat: Bilanz der Tagung 2006/07 (*National Council: Retrospect on the Session 2006/07*), www.parlament.gv.at/PG/PR/JAHR_2007/PK0588 (29.6.2009).
[15] NN, Nationalrat: Bilanz der Tagung 2007/08 (*National Council: Retrospect on the Session 2007/08*), www.parlament.gv.at/PG/PR/JAHR_2008/PK0678 (29.6.2009).

Basically, according to Article 18 (1) Federal Constitutional Law (*B-VG*) "the entire public administration shall be based on law." The rule of law obliges the legislator to make law which is determined up to such degree that the administration can act without being arbitrary. However, according to Article 130 (2) Federal Constitutional Law and § 20 Fiscal Code (*Bundesabgabenordnung; BAO*), the legislator may desist from such binding rules concerning administrative acts and leave it to the administrative authority to act in a certain way. Though administrative discretion allows several legitimate ways of administrative action, legal boundaries and the legislator's intention have to be taken into account. Within the range given by law the tax administration has to make its decisions taking equitableness, expediency and all circumstances of the case into account.[16]

Unlike administrative discretion, undefined provisions do not entitle the administrative authorities to act in different ways. Although the meanings of these provisions are very abstract and vague, they just allow one possible administrative decision. Strictly speaking these are binding provisions – but they give a certain leeway to the administrative authorities because of natural linguistic impreciseness and the necessity to formulate rather vague provisions.[17]

Niemann discusses the two alternative ways of formulating tax law provisions (vague versus detailed tax provisions) with regard to their effects on the costs of collecting taxes.[18] He cannot say whether vague concepts make the calculation of the tax base easier and therefore cheaper for the taxpayers. But, as a result of an analysis of 1734 decisions passed by the Austrian Administrative (High) Court from 2001 until May 2006, it seems to be clear that the use of vague tax concepts, such as for example "business expenses" leads to many disputes with the tax administration. These disputes, without doubt, increase the costs of collecting taxes. Thus, *Niemann* recommends the use of more detailed tax law provisions.

On the other hand, it is not possible for the legislator to take all potential situations into consideration. Therefore, it is necessary for the legislator to use tax concepts that describe a typical situation. But, when applied in a concrete situation it is not necessary that all elements of the tax concept are fulfilled in the same extent. Despite the indeterminacy of such vague tax concepts, such concepts do not give

[16] § 20 Fiscal Code (*BAO*).
[17] See section 1 above.
[18] Niemann, R, *Steuervereinfachung durch mehr Gesetzesbestimmungen?* (Tax Simplification through more legislation?), politicum 105, 2008, 35-38; Niemann, R/Kastner, C, *Wie streitanfällig ist das österreichische Steuerrecht* (How vulnerable is the Austrian Tax Law to disputes in front of the Courts), *Steuer und Wirtschaft 2009*, issue No. 2, p. 128 (p. 137).

the administration any discretion. The proper application of such concepts leads in each case to only one legitimate decision.[19]

The Constitutional Court (*Verfassungsgerichtshof; VfGH*) is obliged to test tax legislation for its constitutionality and has the competence to repeal the concerned tax legislation if otherwise.[20]

The constitutional principle of legality[21] (*Legalitätsprinzip*) commits the legislator to sufficiently determining legal provisions. Administrative acts should be bound to the law and predictable for all citizens. Whereas the necessity for clearly stating the essential substances and competences of administrative acts is undoubted, the degree of determination is a more complex question: On the one hand, administrative power has to be controlled. On the other hand, a certain flexibility is required. Vaguely formulated provisions therefore do not automatically infringe the constitutional principle of legality. The constitutionality of undetermined legal provisions does also depends on the affected field of law, for instance tax law and criminal law have to be much more detailed than economic law.[22] In the end, however, the particular case has to be considered and the constitutionality is stated by the Constitutional Court on an individual basis.

Undefined legal provisions conform with the principle of legality as far as the meaning is determinable to such a degree that administrative acts can be checked on their accordance with the law. However, if there are too many contradicting opinions concerning the meaning of one provision or – even after application of all means of interpretation – a meaning cannot be figured out,[23] then that is a violation of the principle of legality, which is part of the rule of law, and therefore part of the constitutionality principle.[24]

Additionally, a certain comprehensibility of legal norms is required. In order to be constitutional, legal provisions need not only to be accessible and readable in a formal understanding, but it is also necessary that the persons subject to the law are able to understand the meaning of the norm. On basis of the rule of law and the principle of announcement and publicity, the Austrian Constitutional Court has passed the following findings concerning the comprehensibility of legal norms:

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[19] See Stoll, G, *Bundesabgabenordnung-Kommentar* (Commentary on the Fiscal Code), Vienna 1994, pp. 203 et seq.
[20] Article 140 Federal Constitutional Law (*B-VG*).
[21] Article 18 Federal Constitutional Law (*B-VG*).
[22] VfGH 13.12.1988, G 169/88, V 120/88, VfSlg 11.938; VfGH 20.6.1994, B 473/92, VfSlg 13.785; VfGH 15.6.1998, B 2410/94, VfSlg 15.177.
[23] VfGH 13.10.1987, G 90/87 et al., VfSlg 11.499; VfGH 20.6.1994, B 473/92, VfSlg 13.785; VfGH 4.3.1999, G 470/97, VfSlg 15.447.
[24] Eg VfGH 27.6.1969, G 17/68, VfSlg 5993; VfGH 14.3.1997, G 392/96 et al, VfSlg 14.802.

Diligence of an archivist:[25] If the tenor of a norm can only be determined because of a subtle knowledge of the Constitution, a qualified legal qualification and experience and being almost as diligent as an archivist, this norm is not in line with the principle of announcement and publicity.

Brainteaser-ruling:[26] A norm is not in line with the principles of legal clarity and legal certainty – which are immanently part of the Constitution – if for the understanding the norm at all it is necessary to have varied experience, extraordinary methodical abilities or, to a certain degree, a penchant for answering brainteasers.

3. The consequences of legal indeterminacy in tax matters

In order to understand the following sections, it is important to illustrate the different sources of (tax) law in Austria:

Laws, acts (*Gesetz*): Constitutional acts stand above non-constitutional acts.

Regulations (binding; *Verordnung*): Every administrative (tax) authority can enact legally binding regulations without any further authorization.[27] However, administrative regulations are based on the law, and usually they only specify certain provisions of the law, but they may not alter the law. Regulations are subject to control by the Constitutional Court with respect to legality.[28] The number of regulations specifying tax law is rather small in comparison to the number of tax law questions answered by the administration by means of administrative decrees.

Administrative decrees (non-binding; *Erlass, Richtlinie*): The decrees released by the Ministry of Finance are of great importance for the consistent application of the tax law by the administration. There are comprehensive decrees with respect to almost every important tax act.

Administrative rulings (*Bescheid*): They set the law with respect to an individual case.

Case law.

Tax treaties: They are in line with the non-constitutional acts but usually eliminate these acts because of their speciality.

European law prevails over all other sources of law (including constitutional law).

As long as an undefined legal provision meets the requirements stated above, and therefore is constitutional, it gives the tax authorities a certain leeway to interpret the provision and to act accordingly. In the opinion of the majority of authors and of the Austrian Administrative (High) Court

[25] VfGH 14.12.1956, G 30/56, VfSlg 3130.
[26] VfGH 29.6.1990, G 81/90 et al, VfSlg 12.420.
[27] Article 18 (2) Federal Constitutional Law (*B-VG*).
[28] Article 139 Federal Constitutional Law (*B-VG*).

itself[29] the Administrative Court has the final word in this context regarding the interpretation of the particular undefined provision.

Various tax provisions allow administrative discretion and entitle the tax authorities to act in different ways in accordance with the law.[30] Within this scope the entitlement of Courts to control administrative acting is limited. The Administrative Court is only obliged to check whether administrative discretion was exercised correctly in terms of the law.[31]

Article 130 et seq. Federal Constitutional Law (*B-VG*) entitles the Administrative (High) Court to interpret undefined legal (tax) provisions. If the authorities, however, exercise their right to enact (binding) regulations, in which they fill in undefined provisions, the Administrative (High) Court is bound to this interpretation. In this case only the Constitutional Court is able to control the regulations on their legality and constitutionality.

In Austria there are only a few (binding) regulations which make indeterminate legal provisions concrete. Much more frequently administrative decrees and case law take this over this. Administrative decrees do not bind the courts. Judgments by (High) Courts are generally only applicable to the case in litigation, but such judgments can matter beyond the particular case if the facts of other cases are similar. If the Administrative (High) Court in a new judgment wants to deviate from a previous ruling it has to form an extended senate (nine instead of five members) to do so.[32]

Administrative rulings set law only in the case in litigation and can usually be tested in front of an appellate (administrative) court. The question of being legally binding in Austria arises with respect to administrative decrees and the question must be answered with a no. Administrative decrees are neither binding on taxpayers nor on the courts. But a taxpayer has to assume that the tax administration will act on basis of its own decrees. Additionally, to a certain degree § 236 Fiscal Code (*BAO*) protects the confidence of taxpayers in administrative acts. Tax debts due may be waived partly or completely if the tax levy would be unfair in the individual case. The Minister of Finance enacted a regulation[33] to specify § 236 Fiscal Code (*BAO*) in which he listed the circumstances causing such an inequity. According to that regulation, the levy would be unfair, for instance, if the tax duty is based on an interpretation of the law that is in conflict with the interpretation given by the Ministry of Finance in a decree which was

[29] E.g. VwGH 28.5.1991, 91/04/0110.
[30] Article 130 (2) Federal Constitutional Law (*B-VG*) and § 20 Fiscal Code (*BAO*).
[31] VwGH 26.4.2005, 2005/03/0031; VwGH 29.9.2005, 2004/11/0043.
[32] § 13 (1) Administrative Court Law (*Verwaltungsgerichtshofgesetz 1985*).
[33] BGBl II 2005/435 (Federal Law Gazette II 2005/435).

published in the Gazette of the Tax Administration, and the taxpayer has undertaken significant activities relying upon this decree.

4. Relationship between the tax administration and the domestic tax courts

The application of tax law by the tax administration is controlled by the Independent Financial Senate (*Unabhängiger Finanzsenat*), the Administrative (High) Court (*Verwaltungsgerichtshof*) and the Constitutional Court (*Verfassungsgerichtshof*).

The Independent Financial Senate adjudicates as second instance on tax law cases. This Senate is an administrative body but it is provided with the independency of a 'tribunal' within the meaning of Article 6 European Convention on Human Rights (ECHR). The decision of the Senate replaces the decision of the first instance.

Against a decision of the Independent Financial Senate the taxpayer may file an appeal with the Administrative (High) Court due to illegality of the decision or with the Constitutional Court due to the violation of rights guaranteed by the constitution or due to the application of unconstitutional law. The coexistence of these two high courts is a specific characteristic of the Austrian legal protection system. Additionally, the Constitutional Court is also called to adjudicate on the constitutionality and legality of regulations enacted by the tax administration. The Administrative (High) Court and the Constitutional Court do not decide in the case per se; they only abrogate or uphold the decision of the Independent Financial Senate. In the case of an abrogation the Independent Financial Senate has to decide the case once again. Basically the domestic courts are independent and do not have to consider any administrative decrees or individual administrative rulings. The Administrative (High) Court, however, has to take into account the (binding) regulations enacted by the tax administration, because it has no competence to control them. It is the duty of the Constitutional Court to check binding regulations on their conformity with the law.

The tax administration does take into consideration case law of the Austrian courts. The administration (first instance) usually does not take ECJ judgments into consideration except if they are told to do so by an administrative ruling from the Minister of Finance.

Basically the interpretation of the law is a one-way street – the tax administration observes the interpretation of tax law by courts, but not vice versa. An exception is the obligatory observation of (binding administrative) regulations by the Administrative (High) Court. For example, according to

Regulation, BGBl[34] II 2003/528, the term "domicile" does not include secondary residences which are used for less than 70 days a year by persons which have been or will be not an Austrian resident for more than five years. As mentioned above, only the Constitutional Court is permitted to check regulations on their conformity with the law.

With respect to the particular case in litigation, the tax administration is always bound to the supreme court's decision. At that point it must be remarked, that the Austrian supreme courts do not decide in the case but only abrogate the administrative ruling in litigation. Afterward it is up to the Independent Financial Senate to decide on the case once again having regard to the court's findings. Supreme court decisions therefore do not automatically affect other cases. In practice, the tax administration takes supreme courts' findings into account when deciding on other cases, provided that the facts are similar.

In the course of a preliminary ruling procedure according to Article 234 EC Treaty, the ECJ does not decide in the particular case, but decides on the compatibility of a provision of a national legal system with European law or on the interpretation of European law. The presenting courts (including the Independent Financial Senate) are legally bound to the ECJ's findings.

Sometimes, rather infrequently, the Austrian Ministry of Finance comments on a judgment by stating that it only has relevance for the case in litigation, but in general the administration accepts the courts' case law.

[34] *Bundesgesetzblatt* (Federal Law Gazette).

Belgium: Separation of Powers in Tax Law (Bruno Peeters and Elly van de Velde)

Preliminary observations

Belgium is a federal state, composed of two types of federated entities: communities and regions. Each entity has its own parliament and government with similar legislative competences.

The fiscal competence is a competitive competence. Article 170 of the Belgian Constitution attributes taxes to the federal authorities as well as to the federated entities. Article 170 §2, second indent of the Belgian Constitution, however, gives priority to the federal legislator in tax matters. The federal legislator can, if 'necessary', subtract tax matters from the fiscal competences of the federated entities.

In this report, we are looking at the federal tax legislation.

Nevertheless, it should be pointed out here that the federated entities have fiscal autonomy as well. The decrees and – for the Brussels Region – the ordinances which they ordain, are on the same level as laws (same hierarchy).

1. Relationship between the parliament and the tax authorities: the influence of the tax authorities on tax legislation

1.1. Governmental legislative competence on tax matters

Legislative competence is regulated by the Constitution. Article 170 §1 of the Constitution prescribes that taxes to the benefit of the States may only be introduced by a law. Furthermore, no exemption or reduction of taxes may be introduced except by a law (Article 172, second paragraph Constitution). Consequently, the legislator principally has to make the decision to introduce a tax. Any tax must have a firm basis in statutes approved by the parliament, the state organ where voters and – by consequence –

taxpayers are politically represented.[1] In other words, the Constitution explicitly formulates the principle of legality in tax matters, that is, the principle of 'no taxation without representation'.
On the one hand, Article 36 of the Constitution indicates that the federal legislative power is exercised jointly by the King, the House of Representatives and the Senate. As a consequence, the King, covered by the Federal Government, is part of the federal legislative power in Belgium. As a branch of the federal legislative power, the Government – as well as the House of Representatives and the Senate – has the right to propose legislation (Article 75, first indent Constitution), tax legislation included. These tax bills are mostly prepared by the policy cell of the Minister of Finance or by the tax administration. In addition, the King sanctions and promulgates (tax) laws (Article 109 Constitution).

On the other hand, the federal executive power also belongs to the King (Article 37 Constitution). In practice, it is exercised by the Federal Government. In this function, the King (i.e. the Federal Government) has no other powers than those formally attributed to him by the Constitution and by specific laws passed by virtue of the Constitution itself (Article 105 Constitution). One of those powers is that the King makes regulatory decrees and regulations that are required for the execution of laws, without ever having the power either to suspend the laws themselves or to grant dispensation from their execution (Article 108 Constitution). These are the so-called Royal or Ministerial Decrees.
Here, the question arises whether the Government only executes tax law by regulatory decree or if there is a delegation of legislative power. By virtue of the Constitution, only incidental and ancillary rules with respect to taxation may be delegated to the Government as executive power. The legislator has to establish the essential elements of taxation. These include, among other elements,, the identity of taxpayers, taxable events or objects of taxation, the tax base, tax rates and exemptions or reductions. Nevertheless, there can be exceptional circumstances that oblige the Government to determine an essential element of taxation. The legitimacy of such a delegation to the executive power depends essentially on four conditions, which are laid down by the Constitutional Court:

it is impossible for the legislator to establish all essential elements of the tax because of constraints of parliamentary procedure;

the content of the delegation is explicit and unequivocal;

the tax measure approved by the executive power must be submitted to the legislator within a short period of time and confirmed by it;

regulatory decrees which are not confirmed by the parliament become null and void.[2]

[1] M. BOURGEOIS, "Constitutional framework of the different types of income", in B. PEETERS (ed.), *The concept of tax*, 2005 EATLP Congress, Naples (Caserta), EATLP International Tax Series, Volume 3, 2005, 158; B. PEETERS, "Het fiscaal legaliteitsbeginsel in de Belgische Grondwet: verstrakking of erosie?", in B. PEETERS, J. VELAERS (eds.), *De Grondwet in groothoekperspectief. Liber amicorum disciplinorumque Karel Rimanque*, Antwerp-Oxford, Intersentia, 2007, 509-510; F. VANISTENDAEL, "Legal Framework for Taxation", in V. THURONYI (ed.), *Tax Law Design and Drafting*, Washington D.C., International Monetary Fund, 1996, 16-19.

1.2. The drafting of tax bill proposals by the Government

By virtue of Article 75, first indent of the Constitution, the King (i.e. the Federal Government) has – as a branch of the federal legislative power, as well as the House of Representatives and the Senate – the right to propose legislation, tax legislation included (see 1.1.).

1.3. Frequency of exercise of legislative competence

1.3.1. The Government usually exercises its legislative competence

As a branch of the federal legislative power, the Government regularly drafts tax bills, but less frequently than the members of the parliament. However, in the case of governmental initiative, draft bills will be rarely defeated in general (there are no data available for taxation in particular). Almost every governmental proposal passes and becomes legislation. This cannot be said of parliamentary draft bills. Consequently, it is fair to say that in Belgium, the Government has a factual supremacy over the parliament.

As a branch of the federal executive power, the Government often executes tax legislation, but mostly does not determine essential elements of tax, which is rather exceptional.

1.3.2. Role of the parliament with respect to draft tax bills

Draft bills on taxation by governmental initiative are tabled with the House of Representatives and are then sent to the Senate (Article 75, third alinea Constitution). A draft bill may be adopted by a House only after an article-by-article vote. The House of Representatives and the Senate have the right to amend and to split the articles and amendments proposed (Article 76 Constitution). Article 78 of the Constitution outlines the optional bi-chamber parliamentary procedure and the relations between the House of Representatives and the Senate. In this procedure, the Senate fulfills the role of reflection chamber. The Senate may evoke bills. If it does not intervene within fifteen days, the bill becomes law. The Senate may amend bills that have been introduced, but the House of Representatives always has

[2] Const. Court No. 18/98, 18 February 1998; Const. Court No. 105/99, 6 October 1999; Const. Court No. 195/2004, 1 December 2004; Const. Court 16 March 2005, No. 61/2005; Const. Court 28 July 2006, No. 124/2006; Const. Court. No. 83/2008, 27 May 2008, www.arbitrage.be. See also M. BOURGEOIS, "Constitutional framework of the different types of income", in B. PEETERS (ed.), *The concept of tax*, 2005 EATLP Congress, Naples (Caserta), EATLP International Tax Series, Volume 3, 2005, 165-167; B. PEETERS, "Het fiscaal legaliteitsbeginsel in de Belgische Grondwet: verstrakking of erosie?", in B. PEETERS, J. VELAERS (eds.), *De Grondwet in groothoekperspectief. Liber amicorum disciplinorumque Karel Rimanque*, Antwerp-Oxford, Intersentia, 2007, 537-540.

the final word. The latter can thus accept a law without taking into account the amendments proposed by the Senate. This means that both Houses have the opportunity to scrutinize carefully the many provisions of such laws in a parliamentary debate and to introduce changes.

Most federal laws, however, are discussed in the competent parliamentary Committee, where the main parliamentary work concerning legislation takes place. The Committees consist of a limited number of members of parliament on the basis of proportional representation. The purpose is that legislation is discussed by members of parliament who are more familiar with the matter or are gradually specializing in it. Committees can also request the assistance of external specialists and obtain advice for the preparation of the legislative work, organize seminars and hearings, and request the presence of the competent minister. Drafts and proposals of tax laws are discussed in the parliamentary Committee for Finance and Budget. In principle, the meetings of the Committees are public. Reports about their activities are made for the attention of the plenary meeting. The discussions in the Committee are decisive for the discussion in plenary meetings. The latter work on the basis of the text accepted by the Committee. The main problems have already been broached, the various arguments and viewpoints are known. Amendments or drafts which were rejected in the Committee can also be discussed during the plenary meeting.

In addition, in the case of a governmental initiative, there is a principal obligation to request judicial, linguistic and advice on the legal technique from the Legislative Section of the Council of State about a bill for a regulatory decree or a draft bill of law, decree or ordinance. The Council of State may propose changes to the draft bills, but this advice is not binding. However, this obligation can be circumvened: by invoking the highly urgent character. Reglementary decrees do not need to be submitted for advice. Preliminary bills of law, decrees or ordinances do, but the advice is limited to matters of competence. The Administrative Section of the Belgian Council of State may nullify a decree which has not been presented for advice to the Legislative Section, if the highly urgent character is not motivated strongly enough;

by submitting a bill of law, decree or ordinance under the guise of a parliamentary proposal;

by submitting a provision in a preliminary bill of law, decree or ordinance under the guise of an amendment;

by motivating the highly urgent character, so that the Council of State has to give its opinion within a period of five days.

Nevertheless, it has been common practice for Belgian legislators since the 1970s to regularly assemble a bulk of unrelated rules modifying numerous existing statutes for budgetary purposes in one massive

arrangement law.[3] This happens at least once a year: at the end of the year: the Government submits on the one hand a budget draft and on the other hand a draft of arrangement law, which both are to come into effect before 1 January of the next year. Additionally, it can happen that an arrangement law is approved in the middle of the year, within the framework of a budget control.
This kind of legislation undermines not only the quality of the law, but also the parliamentary debate. Arrangement laws may push the factual supremacy of the Governement over the parliament to the extreme. This legislation is introduced in parliament under a time limit, too limited for the members of parliament to carefully scrutinize the many provisions of such laws. There is no time for amendments, and only those initiated by the Government are accepted. Consequently, parliamentary debate is reduced. Moreover, advice from the Legislative Section of the Council of State is avoided, either through urgency procedures or through amendments, which do not have to be submitted to advisory bodies.

Recently, in July 2008, some members of the House of Representatives submitted a draft bill to establish a Committee 'F' (for Finance).[4] This new Committee should control the Government/Belgian Service for Federal Taxation when it prepares a draft tax bill. In particular, the compatibility of the tax draft bill with the constitutional principle of equality should be controlled in an early stage. The earlier, the better – as far as the initiators of the law proposal are concerned.

1.4.Reaction in Belgian literature and at the Belgian courts

In Belgium, the constitutional principle of legality in tax matters is controlled ex ante by the Legislative Section of the Council of State and ex post by the Constitutional Court. As a consequence, this principle seems to be sufficiently respected in the phase of the genesis of the tax legislation. Due to the practice of arrangement laws mentioned earlier and to the tight times schedule during which tax laws often have to be voted in parliament, a *de facto* democratic deficit is at risk of occurring.

Furthermore, the principle of legality in tax matters has to be respected in applying tax legislation. In that respect, the tax administration is not allowed, for instance, to add additional conditions which are not foreseen in the legislation at hand. In view of that principle, there is a tendency in the Belgian legal doctrine to criticize the practice developed by the so-called Belgian Service of advance decisions in tax matters (the 'Advance Ruling Commission') which sometimes couples the delivery of a positive ruling

[3] See P. POPELIER, "Mosaics of Legal Provisions", *European Journal of Law Reform*, 2005, 47-57 and J. VAN NIEUWENHOVE, "Verzamelwetgeving in België", *RegelMaat* 2006, 153-166.
[4] Law proposal for the regulation of the control of the Belgian Service of Federal Finance, 9 July 2008, *Parl. St.* Kamer 2007-2008, No. 51, No. 1341/001 and No. 1348/001.

with the requirement that the taxpayer respects additional conditions which are not explicitly foreseen by law. [5]

2. The meaning of legal indeterminacy in tax matters

2.1. Vagueness of Belgian tax legislation

Belgian tax legislation is detailed as well as vague. By virtue of the constitutional principle of legality for taxation (see 1.1.), most tax legislation is very detailed.

However, there is a trend in Belgium towards more vague tax legislation. Examples of vague concepts are 'legitimate financial or economic needs' of the Belgian anti-abuse provision in Article 344 §1 of the Income Tax Code and 'abnormal or benevolent advantages' in Article 26 of the Income Tax Code.

2.2. Evaluation in the Belgian literature

The evaluation is differentiated.[6]

Because today human and judicial relationships are becoming more and more complex and varied, it is often difficult, or even impossible, to apply the constitutional principle of legality very strictly. It is sometimes very difficult to introduce taxes by means of clear and precise tax legislation. In tax law, the necessity to react very quickly in order to neutralize tax avoidance implies that the principle of legality must be considered a dynamic principle. Nevertheless, in the beginning, the strict principle of legality was the taxpayer's pre-eminent constitutional source of legal certainty.

It may be observed that the legislator increasingly uses vague and indeterminate concepts in tax legislation. Although vague concepts do not serve the principle of legal certainty at first sight, they still have some advantages as well. They give a certain flexibility when applied in specific situations or in the future. They prevent the tax code from changing too much, which would also undermine legal certainty. Because of the use of indeterminate concepts in tax law, tax authorities and courts receive a

[5] B. PEETERS, "Het fiscaal legaliteitsbeginsel in de Belgische Grondwet: verstrakking of erosie?", in B. PEETERS, J. VELAERS (eds.), *De Grondwet in groothoekperspectief. Liber amicorum disciplinorumque Karel Rimanque*, Antwerp-Oxford, Intersentia, 2007,553-562, with more references in footnote 174; T. AFSCHRIFT, "Le respect du principe de la légalité de l'impôt par le service des décisions anticipées », Recueil Générale du Contentieux Fiscal, 2008/6, 437-457.
[6] B. PEETERS, T. WUSTENBERGHS, "De onverenigbaarheid van vage en onbepaalde normen met het fiscale legaliteits- en rechtszekerheidsbeginsel", *A.F.T.* 1999, 111-112.

greater discretionary power in the concrete application of the law. This evolution threats to affect the predictability of tax law, which is another aspect of legal certainty. Therefore, vague and indeterminate concepts should be used only exceptionally. A balance between the interests of the taxpayer and the interests of the tax authorities must be found. A (further) proliferation of vague and indeterminate concepts does not serve the interests or the legal certainty of the taxpayer. Furthermore, the principle of equality should not be overruled by a too arbitrary interpretation of the tax administration and the domestic courts.
To conclude, tax legislation has to be precise enough to be predictable and flexible enough to allow for application in specific or future situations.

2.3. Control on the constitutionality of Belgian tax legislation

On the one hand, Belgium has a Constitutional Court that is competent to control the tax law's compatibility with a series of constitutional fundamental rights as well as with other constitutional rules. In particular, the Constitutional Court controls the compatibility of tax laws, decrees and ordinances with the constitutional principle of legality for taxation set forth in Articles 170 and 172, second indent of the Constitution as well as the principle of equality (Article 172 Constitution). However, the Court is only obliged to control upon request. Taxpayers with a certain interest may request the Constitutional Court to declare a specific tax law null and void. Domestic courts are principally obliged to ask the Constitutional Court a preliminary question about the constitutionality of tax legislation, if such a question has been raised before the domestic court. The Constitutional Court is not part of the judicial power, but functions independently.

On the other hand, if with 'tax legislation' Royal or Ministerial Decrees are also meant (see 1.1, Articles 105 and 108 Constitution), two observations should be made.
Firstly, all independent domestic courts only apply such general (or provincial or local) tax decisions and regulations provided that they are in accordance with the law (Article 159 Constitution and Article 259, first indent, 32° Code of Civil Procedure). This article implies the independent judicial review of the legality of the executive power. The court is not only obliged to control the compatibility of regulatory decrees and regulations with the internal law, but it must control the compatibility with the Constitution and international treaties or EC law with direct effect as well.
Secondly, the Section Administrative Disputes (Bestuursgeschillen) of the Council of State makes decisions as an administrative court by means of judgments (Article 160, second indent Constitution). This Council can control, among other things, the constitutionality of general (or provincial or local)

(but not individual) tax decisions and regulations and nullify them. The Council of State is not part of the judicial power, but functions independently.

2.4. Unconstitutionality due to legal indeterminacy in Belgian tax law

Recently, the Constitutional Court decided that a specific tax rule violated the constitutional principle of legality as mentioned in Article 170, first paragraph of the Constitution for the reason that this rule did not contain criteria clear and detailed enough to determine the identity of the taxpayers and the amount of the tax[7]. In addition to this decision, in 2004 the Constitutional Court also examined the prejudicial question whether the Belgian anti-abuse provision (Article 344 §1 Income Tax Code) is so vague as to give too much freedom to the tax administration, implying a general delegation for the determination of essential elements for taxation to the tax authorities.[8] The Court answered, however, that the legislator gave enough indications and strict conditions for the tax authorities and, consequently, that there is no general delegation. Thus, in this case, the legal indeterminacy is not considered unconstitutional. Furthermore, the Section Administrative Disputes of the Belgian Council of State decided very recently that a tax decision of a local government was illegal for an imprecise and inaccurate determination of the taxable object[9].

3. Consequences of legal indeterminacy in tax matters

3.1. Final word regarding the interpretation of the rule

In principle, Article 84 of the Constitution prescribes that only the law can give an authentic (i.e. generally binding *erga omnes*) interpretation of a legislative instrument.[10] In fact, this article excludes the courts from taking part in the rule-making process. The author of the legislation is considered its best interpreter. The courts must act in accordance with an interpretative law.

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[7] Const. Court No.. 54/2008, 13 March 2008, www.arbitrage.be , considerations B.11-18. F. BOUHON, "Le juge constitutionnel et la fiscalité négociée: le maintien des effets d'une norme annulée, applicable une seule fois. Note sous l'arrêt n° 54/2008 de la Cour Constitutionnelle », to be published in : *Revue de la Faculté de Droit de Liège*, Decembre 2008, 32 p.

[8] Const. Court 24 November 2004, No. 188/2004, www.arbitrage.be.

[9] Council of State, Section Administrative Disputes, No. 185.386, 14 July 2008, NV Elia Asset v. City of Louvain.

[10] Article 133 Belgian Constitution prescribes the same for decrees of the federated states. See also M. ADAMS, "Precedent versus gravitational force of court decisions in Belgium: between theory, law and facts", in E. HONDIUS (ed.), *Precedent and the Law*, Brussels, Bruylant, 2007, 162.

Beside this constitutional provision (when there is no interpretative law), the Belgian Supreme Court ('Court of Cassation') has the final word about the interpretation of the law. In contrast to an authentic interpretation by a law, the interpretation of the Supreme Court is only binding *inter partes*.

3.2. Constitutional basis for the final word on interpretation

By virtue of Article 147 of the Constitution, there is one Supreme Court for all Belgium. This Court has no competence over the substance of the case. Consequently, the Constitution affirms indirectly that the Supreme Court's task consists of interpreting the law. Furthermore, the Articles 144 and 145 of the Constitution are considered the constitutional basis for the competence of the Supreme Court. Article 144 of the Constitution prescribes that disputes about civil rights belong exclusively to the competence of the courts. Disputes about political rights belong to the competence of the courts, except for the exceptions established by the law.

3.3. Legal indeterminacy by regulations, administrative rulings and/or case law

Within the boundaries of the constitutional principle of legality for taxation (see 1.1), regulations (Royal or Ministerial Decrees), general and individual administrative rulings (administrative circulars, advance tax rulings) and case law can clarify indeterminate legislation.[11]
Tax authorities may only clarify how vague tax rules have to be applied in specific situations or may give ancillary executive rules to make an application of tax legislation possible.

3.4. Binding force of administrative rulings

Firstly, the tax administration may issue a general administrative ruling, such as an administrative circular. These circulars mostly give an interpretation of tax law that will be applied by the tax administration to specific transactions. Only members of the tax authorities are bound by these circulars.

Secondly, a taxpayer may obtain – on his request – an individual advance tax ruling from the Belgian Service of advance decisions in tax matters (the 'Advance Ruling Commission').[12] The purpose of such an individual tax ruling is to increase legal certainty for taxpayers regarding the tax consequences of their transactions. In Belgium, an advance tax ruling is a unilateral decision that binds neither the

[11] F. VANISTENDAEL, "Legal Framework for Taxation", in V. THURONYI (ed.), *Tax Law Design and Drafting*, Washington D.C., International Monetary Fund, 1996, 34-37.
[12] P. CAUWENBERGH, A. GAUBLOMME, L. HINNEKENS, "Transfer Pricing in Belgium – Rulings and Practice", *Bulletin for International Taxation* 2008, 390-392.

taxpayer nor the courts. If the Ruling Commission issues a positive ruling, only the Belgian tax administration is bound by it. The tax administration, however, is not bound by the individual tax ruling if:[13]

the conditions to which the transaction was made subject were not satisfied;

the description of the envisaged situation or transaction was incomplete or incorrect;

essential aspects of the transaction were realized in an other way than described by the taxpayer;

the applicable international, European or domestic laws have changed;

the advance decision is not compatible with international, European or domestic law;

the consequences of the transactions, as a result of one or more subsequent transactions, have changed (drastically).

4. Relationship between the tax administration and the domestic tax courts

4.1. Control on the application of tax law by the tax administration

As mentioned in 2.3., Article 159 of the Constitution prescribes that all independent domestic courts apply general, provincial or local (tax) decisions and regulations provided that they are in accordance with the law. This article implies the independent judicial review of the legality of the executive power. On the basis of Article 259, first indent, 32° of the Code of Civil Procedure, the Tax Chambers of the Courts of First Instance (and subsequently the Courts of Appeal and the Supreme Court) are competent to judge disputes with respect to the application of tax law by the tax administration.

Moreover, by virtue of Article 180, second indent of the Constitution, the Court of Audit of Belgium (Rekenhof) is, among other matters, charged with the general supervision of the legality of operations of the tax administration for the establishment and the collection of the rights received by the State, tax income included. The Court of Audit may not intervene in individual tax files. Its purpose is to provide the parliament with macro budgetary information about the development of the State's income and about the problems which may arise in this context. The control concerns the different phases of the revenues, i.e. the establishment of the determination of what is taxed, the settlement and the collection of the taxes. A protocol about the way the supervision is exercised has been signed by the Minister of Finance and the Court of Audit.[14] The Court of Audit is a collateral body of parliament.

[13] Article 23 of the Law of 24 December 2002 to reorganize the corporate law and to introduce a new system for advance rulings, *Official Gazette* 31 December 2002.
[14] Protocol of 22 December 1995, *Official Gazette* 31 January 1996.

As mentioned in 1.3.2., some members of the House of Representatives recently submitted a draft bill to establish a Committee 'F' (for Finance).[15] This new Committee would not only control the compatibility of the draft tax bills on governmental initiative with the principle of equality, but also the application of tax law by the tax administration. Taxpayers may address the Committee 'F' that can start an investigation about the equal treatment of taxpayers regarding general administrative rulings and comments. The purpose of this control is that the circular in question may be defeated or the law will be modified if this should prove necessary.

4.2. Influence of rulings and binding information emerging from the tax administration

As mentioned in 3.4., domestic courts are not bound by rulings and information from the tax administration in Belgium.

Those rulings could be very useful for the interpretation of the law by the courts, however. Unfortunately, specific data are not available.

Furthermore, courts can take into account the fact that the tax administration has made an administrative ruling. In other words, to solve a dispute between the tax administration and the taxpayer, the court can take into account that the tax administration has – by means of an administrative ruling – created a legal expectation in the taxpayer that in his individual transaction tax law will be applied in this or that way. In the current state of the Supreme Court's jurisdiction, taxpayers' expectations based on *contra legem* rulings are not taken into account[16].

4.3. Influence of Belgian case law and/or the ECJ case law on the application of the law

In general, the tax administration takes into account the decisions of the Supreme Court and the European Court of Justice. However, the tax administration is not obliged to do so (see 4.5).

4.4. No principle of reciprocal observation of the interpretation of tax law by the tax administration and domestic courts

In Belgium the principle of reciprocal observation of the interpretation of tax law by the tax administration and the courts is not known.

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[15] Law proposal for the regulation of the control of the Belgian Service of Federal Finance, 9 Juli 2008, *Parl. St.* Kamer 2007-2008, No. 51, No. 1341/001 and No. 1348/001.

[16] Supreme Court (Cass.) 30 May 2008, see: S. VAN CROMBRUGGE, in: *Fiscoloog*, 2008, No. 1124,. 6-9.

4.5. Binding force of the decisions of supreme courts and/or the ECJ

Only the parties to the case are bound by a judicial decision. In Belgium, previous court decisions do not have a legally binding nature or the 'force of precedent'.[17] Thus, the tax administration is not obliged to follow the decisions of the Supreme Court in later, similar cases. On the basis of Article 6 of the Code of Civil Procedure, the courts may not, in the disputes submitted to them for judgment, make any decision by way of general provisions qualifying as a rule. Moreover, one and the same specific claim may not be brought to a court at the same hierarchical level more than once (Article 23 Code of Civil Procedure). This is the principle of the authority of court decisions or *res judicata*. This authority of court decisions thus only applies to parties of the specific case.

However, the Supreme Court decisions have a certain 'gravitational force'. This means that these court decisions are vested with a certain normative authority without actually making them formally (legally) binding. This is the reason why the tax administration takes into account the decisions of the Supreme Court.

Regarding the decisions of the Constitutional Court and the European Court of Justice, the tax administration is not bound to an answer to a preliminary question when it is not a party to the case. Even when the Constitutional Court answers that the law violates the Constitution, the tax administration may apply that law. The law still takes part in the Belgian legal system, until the parliament has modified or removed the law.[18] Only when the Constitutional Court nullifies a tax statute is this judgment generally binding.

4.6. Circumvention of domestic courts' case law

Normally, the tax administration follows the Supreme Court decisions and the lower court's case law that has become *res judicata*.

5. Relationship between different legal sources (legal pluralism)

[17] M. ADAMS, "Precedent versus gravitational force of court decisions in Belgium: between theory, law and facts", in E. HONDIUS (ed.), *Precedent and the Law*, Brussels, Bruylant, 2007, 150-151 and 160-162.
[18] Questions and answers, *Parl. St.* Kamer 2007-2008, No. 004, 160 (question No. 48 of 22 October 2007).

5.1. Reaction of the parliament, tax administration and courts before the different legal sources in tax matters (tax treaties and other treaties, EC Treaty, secondary law and soft law)

Although the Constitution is the highest-ranking internal norm, Belgium has also recognized the system of legal monism (see 5.2), so that the internal and international/European legal systems form a unity.[19]

International law does not need to be translated into national law, before it has material effects on the parliament, the tax administration, the courts or the taxpayers. Treaties take effect only after they have received the approval of the houses of parliament on the basis of Article 167 of the Constitution, however. This approval act is not considered normative. International law may be applied directly by a national court, and may be invoked directly by citizens, just as if it were national law. A court may refuse the application of a national rule if it contradicts an international rule, because the latter has priority. In Belgium, the principle '*lex superior derogat legi inferiori*' applies to all (parliament, tax administration, courts and taxpayers).

Consequently, the hierarchy of norms in Belgium implies that all types of national law (acts, regulations, decisions, ordinances, circulars, even the Constitution) – irrespective of their being issued by the legislative or executive power – can never be in conflict with international/European norms (primary or secondary law). The courts also have to respect European Community case law. In other words, Belgium has recognized the principle of primacy of international and Community law as forged by the European Court of Justice (ECJ) in the 1960s.
In order that the Belgian domestic judge can directly apply an international rule, which is not implemented in the internal law, the rule needs to have some direct effect. Therefore, according to the jurisprudence of the ECJ, the international/European Community law must be precise, clear and unconditional and the law may not call for additional measures. Only then will primary and secondary law safeguard the rights of individual taxpayers to invoke an international or Community provision, irrespective of the existence of a national text. In other words, the international/European rule has to be 'self-sufficient'.

[19] L. HINNEKENS, J. MEEUSEN, "Fiscaal recht in de Europese Unie: een schets van het institutioneelrechtelijk kader", in B. PEETERS (ed.), *Europees belastingrecht*, Gent, Larcier, 2005, 13-18.

5.2. Recognition of the hierarchy of different tax legal sources by the constitution and the different domestic powers (parliament, tax administration and courts)

The question about the relationship between international and national law is a question that should be answered in the Constitution of each country. However, the Belgian Constitution does not answer this question directly. Only Article 34 of the Constitution determines indirectly that the exercising of specific powers can be assigned by a treaty or by a law to institutions of public international law. This article gives a constitutional basis for the transfer of sovereignty to international and supranational institutions.[20] The question whether the international law is immediately applicable in the Belgian legal system, or if this law must be implemented first, is not answered by the Constitution.

Therefore, in 1971, the Supreme Court recognized the primacy of every international or supranational rule over each internal law, as a consequence of the nature of the international law itself and on the condition that the international or supranational law has direct effect.[21] The primacy of international and supranational law with direct effect has been recognized as a general principle.[22]

Nevertheless, the Constitutional Court nuanced this judgment of the Supreme Court by stating that no international treaty may be approved contrary to constitutional law.[23] Despite this condition, the Constitutional Court may only control the compatibility of the approval act (see 5.1) – thus not the treaty itself – with a series of constitutional rules.

5.3. Taxpayers' access to different legal remedies that assure effective protection of rights granted by tax treaties, EC law and domestic law

The principle of effective remedies in national courts applies in Belgium. The effective enforcement of Community law in national courts is guaranteed: as far as we know there are no different legal remedies for EC law or domestic law.

[20] K. RIMANQUE, *De grondwet toegelicht, gewikt en gewogen*, Antwerp-Oxford, Intersentia, 2005, 106.
[21] Supreme Court (Cass.) 27 May 1971, *Arr.Cass.* 1971, 959, *J.T.* 1971, 460 with Opinion Ganshof van der Meersch.
[22] Supreme Court (Cass.) 5 December 1994, *J.T.T.* 1995, 41; Supreme Court (Cass.) 17 January 2002, No. 20020117-10, www.cass.be.
[23] Constitutional Court 3 February 1994, No. 12/94.

Canada: Separation of Powers in Tax Law (Martha O'Brien) [1]

1. Introduction – the Canadian framework

Canada is a parliamentary democracy with "a Constitution similar in Principle to that of the United Kingdom".[2] Canada is a federal state, with jurisdiction to tax accorded to both the federal and provincial (and territorial)[3] governments by the constitution. In this article, the discussion of the various powers of different levels of government, and of the roles of ministries and agencies within government, will be limited to direct taxes, and specifically the individual income tax and corporate profits tax. These are by far the most important taxes levied by Canadian governments,[4] although the federal goods and services tax ("GST", a value-added tax), federal excise taxes, and provincial and territorial sales taxes are also important sources of government revenue.[5]

2. Constitutional jurisdiction over taxation of income of individuals and corporate profits

The Canadian constitution grants residual power to the federal government over all matters not exclusively reserved to the provinces. The ten provinces have sovereign legislative authority within the legislative areas reserved to them. The federal government has general power "for the raising of Money

[1] I wish to thank Mr Michael Hiltz and Mr Blair Dwyer for their insights into the roles of the CRA and other groups in the development and drafting of tax legislation.

[2] Preamble to the Constitution Act, 1867, formerly the *British North America Act* (of the UK Parliament). Canada's head of state is Queen Elizabeth II; her Governor-General for Canada represents the Queen in Canada. Following a general federal election, the Governor-General invites the leader of the political party holding the greatest number of seats in the House of Commons to form Her Majesty's government, officially referred to as the Governor-General in Council led by the prime minister. The provincial executive branches of government are formed in essentially the same way.

[3] The Yukon Territory, the Northwest Territories and Nunavut do not have the constitutional status of provinces within the federation, but exercise powers devolved from the federal government. Each of the territories imposes an income tax on essentially the same legislative template as the provinces, as described below. Further discussion of the distinctions between territorial and provincial status and taxation powers are beyond the scope of this paper.

[4] Personal income tax contributed 46.6%, and corporate income tax 16.8% of total federal budgetary revenues in 2007-2008.

[5] Inheritance and wealth taxes as such do not exist in Canada. Capital taxes are imposed by a few provinces on corporate capital, at very low rates and sometimes as a form of minimum corporate tax. There are also numerous other taxes, both direct and indirect, at the sub-national level on specific types of transaction or property, such as property transfer taxes on registration of real property transactions, hotel room taxes, medical and hospital insurance taxes, municipal property taxes on real property, and carbon taxes, not all of which exist in all provinces and vary greatly in the way they are imposed and collected.

by any Mode or System of Taxation".[6] The provinces have exclusive legislative authority for "Direct Taxation within the Province in order to the raising of a Revenue for Provincial Purposes".[7] The result is that both federal and provincial governments have, and exercise, legislative authority to impose direct taxes, which include income and corporate profits taxes. (In Canada, "income tax" refers to both income tax on individuals and the taxation of corporations on their profits, and includes taxation of capital gains.) The federal income tax system is contained in the *Income Tax Act*, and as explained below, provincial income tax is largely harmonized with the federal tax, and collected and administered (with two exceptions) by the federal authorities. This paper will therefore confine itself to discussion of the separation of powers in relation to federal, and to a lesser extent provincial, income taxes.

It should also be noted that some recent land claims settlement agreements with First Nations provide for taxation by First Nations governments, including the imposition of income taxes on First Nations territory. Under the Yukon First Nations self-government and land claims settlement agreements among the First Nations, the Yukon Territory and Canada, the federal government has ceded its tax "room" to a number of First Nations governments. The federal Canada Revenue Agency collects income tax owing by residents of First Nations territory, called "Settlement Land" and remits 95% of it to the First Nations government.[8] In British Columbia, the Nisga'a Final Agreement provides for direct taxation, including the imposition of income tax, by the Nisga'a Lisims Government to raise revenue for Nisga'a Nation or Nisga'a village purposes. This income taxation has not yet been implemented.[9]

Historically, the federal government has exercised the more significant role in defining the income tax base, and administering, enforcing and collecting both federal and provincial income taxes. The first federal income tax was imposed in 1917 under the *Income War Tax Act*,[10] and was intended to provide a temporary source of additional revenue for the federal government for its military efforts during the 1914 – 1918 war in Europe. However, the IWTA was not repealed after the war ended, and during the

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[6] Constitution Act, 1867 subsection 91(3).
[7] Constitution Act, 1867, subsection 92(2).
[8] *Yukon First Nations Self-Government Act*, S.C. 1994, c. 35, and *First Nations (Yukon) Self Government Act*, S.Y. 1993, c. 5.
[9] Property, including income, of Indians situated on Indian reserves is exempt from taxation by either level of government under the federal *Indian Act*. The modern land claims settlement agreements provide that the *Indian Act* no longer applies to the First Nations people and territory covered by the agreement. It should be noted that progress in implementing other forms of taxation, and specifically the GST and certain excise taxes on First Nations territory has advanced more than income taxation.
[10] The *Income War Tax Act* became notable for the degree of discretion accorded the Minister of National Revenue to determine tax consequences and liabilities, and the lack of a functioning and accessible process of appeal to an independent judicial authority. See Lefebvre, MacGregor and Olsen, "Income Tax Litigation," (1995), Vol. 43, No. 5 *Canadian Tax Journal*, at pp. 1861-1865. The process of reform to ensure full application of the rule of law began with the *Income Tax Act* of 1948.

1920s and 1930s all the provinces came to impose provincial income and corporate profits taxes, on various bases and at various rates, as well.[11]

The necessity at both levels of government to raise revenue to combat the economic depression of the 1930s gave way in 1941 to the federal government's greater requirements to finance the war effort. The provinces agreed to cede income tax jurisdiction temporarily to the federal government under a system of "tax rental agreements", which were replaced in 1962 by a first generation of tax collection agreements ("TCAs"). The TCAs were (and are) bilateral intergovernmental agreements according to which the federal government is the sole collector, administrator and enforcer of income taxes on behalf of the provinces (other than Quebec, and in the case of corporations, Alberta).[12]

The TCAs created a harmonized national income tax base by requiring "agreeing provinces" to adopt the federal definition of income for tax purposes. Canadians resident outside Quebec therefore file a single tax return with an annexed provincial schedule calculating provincial tax liability. (Quebec residents file a separate provincial return with Quebec's separate tax authorities.) In exchange for the provinces' agreement to harmonize their tax bases, the federal tax authority, the Canada Revenue Agency (CRA) collects, administers and enforces provincial as well as federal income tax law, without charging the provinces for the service, and remits the amount of provincial tax to the appropriate provincial government's revenue department. This results in cost-effective and efficient collection of tax, and streamlines the administrative process. To a very large extent, the provincial income tax statutes incorporate by reference the federal tax base. Under the second generation of TCAs in force since 2000, each province determines its own tax rates for both individuals and corporations which are applied to the provincial tax base.[13] The provinces also usually provide for tax credits that mirror the federal ones, and may also provide for additional incentives or benefits that the federal government does not. A national formulary apportionment system, based on payroll and gross revenue, applies to allocate income among the provinces where a business is carried on by a taxpayer in more than one province.

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[11] This unfortunate situation, which made tax compliance extremely difficult for Canadians who had property or economic activities in more than one province, is often referred to in Canadian tax literature as the "tax jungle".

[12] The history and operation of the tax collection agreements are explored in detail in Munir A. Sheikh and Michel Carreau, "A Federal Perspective on the Role and Operation of the Tax Collection Agreements" (1999) Vol. 47, No. 4 *Canadian Tax Journal* 845-60 and Canada, Department of Finance, Federal Administration of Provincial Taxes: New Directions (Ottawa: Department of Finance, 2000).

[13] As noted, Quebec maintains a separate income tax system, with its own administration and collection. However, the tax base as defined in Quebec's tax legislation is not widely divergent from the federal income tax base, and of course Quebec residents are subject to the federal system as well. Alberta's separate corporate tax administration is also very similar to the federal system. All provinces apply the same test for provincial residence of individuals, for determining the existence of permanent establishments of corporations, and for attributing profits to PEs in each province.

The evolution of the system over the course of the 20th century has resulted in a dominant legislative and administrative role for the federal government in relation to income tax. Amendments to the definition of the tax base, administration and collection measures, and the setting of federal rates and brackets occur through the federal budgetary and legislative process. The provincial legislatures exercise budgetary and legislative authority primarily over their tax rates and brackets. Both levels of government provide progressive tax rates for individuals, preferential rates for small Canadian corporations, basic exemptions for personal and family situation and tax credits that promote certain activities or behaviours according to the policies of the provincial government in power.[14]

There are three federal ministries that play significant, complementary roles in the tax system. The federal department of finance ("Finance") is under the political responsibility of the minister of finance, an elected member of parliament and the second most senior member of the executive branch. Finance is responsible for tax policy, federal budgets and the drafting of amendments to the *Income Tax Act*.[15]

The Department of National Revenue has political responsibility for tax administration, collection and enforcement. The Canada Revenue Agency ("CRA") is a quasi-independent agency that actually carries out the functions of administration and collection of federal taxes, as well as provincial income tax on behalf of the provinces and territories (and the participating Yukon First Nations).[16] The CRA is the governmental organ that is most properly referred to as the "tax authorities" and is the competent authority for international tax administration.

The CRA is governed by a board of management consisting of fifteen members appointed by the Governor in Council. The provinces and territories nominate eleven of the fifteen members. The board's chairman is a senior civil servant, the Commissioner and Chief Executive Officer of the CRA.

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[14] A recent example is the introduction of a carbon tax in 2008 by the British Columbia government. A reduction in income tax for both individuals and corporations at the same time is intended to result in a revenue-neutral shift to promote greener technologies and lower consumption of greenhouse gas producing fuels.

[15] R.S.C. 1985 (5th Supp.) c. 1 as amended. In this article this statute may be referred to as the "Act".

[16] The reason for creating the CRA under a separate statute in 1999 was to separate it and its functions from the political and bureaucratic structures and processes of the federal government, so that taxpayers would be assured of political neutrality in their tax affairs. The agency was originally called the Canada Customs and Revenue Agency; the customs function was transferred to the Canada Border Services Agency in 2003. See Rob Wright, "The Canada Customs and Revenue Agency: Structure and Objectives", *Report of Proceedings of Fifty-First Tax Conference,* 1999 Tax Conference (Toronto: Canadian Tax Foundation, 2000), 19:1-4. (Mr. Wright was the first CRA Commissioner and CEO). See also Alan Nymark, "Strategic Priorities for the CCRA," *Report of Proceedings of Fifty-Fifth Tax Conference*, 2003 Tax Conference (Toronto: Canadian Tax Foundation, 2004), 6:1-6.

The Appeals Directorate of the CRA also hears and rules on a taxpayer's initial administrative appeal (called an "objection") of a tax assessment.

The third ministry with a role in the tax system is the Department of Justice Tax Section, which provides legal advice and representation to the CRA in tax appeals.

3. The federal legislative process

The constitution requires "money bills" for spending public revenue or imposing taxes (and in particular for amending the *Income Tax Act*) to be introduced in the House of Commons,[17] the lower house of directly elected members of parliament, rather than in the Senate, an appointed body. The Supreme Court of Canada has characterized this as an expression of the constitutional principle of "no taxation without representation".[18] All votes on money bills are, by constitutional convention, votes of confidence, so that defeat of a government-sponsored revenue bill results in the government falling, and new national elections.

Annual budgets are normally presented to Parliament by the minister of finance in February or March, and tax bills may be introduced in the House at any time in a parliamentary session. The budget is subject to policy analysis in the form of pre-budget consultations conducted by the House of Commons Standing Committee on Finance,[19] (SCF) in the weeks leading up the budget. Anyone may make submissions to the SCF, and its sessions are open to the public and media, and are televised and broadcast on the internet.[20] Recently it has become common for Finance to invite public comment on the budget. The budget is subject to vigorous debate in Parliament, and once adopted, the tax measures contained in it are implemented by means of one or more tax bills. Money bills are introduced by the minister of finance[21] in the House of Commons, and are referred to the SCF, normally following second reading. The SCF will study the bill clause by clause, may hear witnesses including experts, receive briefs from the public, including advocacy groups, and may propose amendments to the bill before it goes back to the House for third reading and the final vote. Again there is often intense debate in the House before passage of the bill, and in the case of a minority

[17] *Constitution Act* 1867, s. 53.
[18] *Re Eurig Estate* [1998] 2 S.C.R. 565 (Supreme Court of Canada).
[19] This is a permanent committee with membership of twelve MPs from both government and opposition parties in rough proportion to the election results, chaired by an MP from the governing party.
[20] The actual contents of the budget have been a closely-guarded secret until the minister of finance delivers the budget speech in the House of Commons. However, in recent years there have been official pre-budget announcements that have somewhat diminished the secrecy of the contents. In respect of specific tax amendments, it is still the rule that these are kept secret to prevent taxpayers trading in anticipation of the changes.
[21] Individual members of Parliament may also introduce money bills, but these are very rarely adopted.

government, the possibility that the tax bill will be defeated and the government will therefore fall. Once passed by the House, the bill proceeds to the Senate for a similar process of debate, committee review and adoption by vote[22] before receiving Royal Assent from the Governor-General, bringing it into force.

The policy development and drafting of amendments to the Act, whether through the budget or the more frequent "technical" amendments are the purview of Finance. Finance regularly canvases the CRA regarding its view of the most pressing problems related to administration of the Act with a view to amending the Act to rectify these problems. The CRA also frequently takes the initiative to forward requests for amendments to Finance. It is by no means a certainty, however, that the CRA will obtain all the changes it requests. There are joint Finance-CRA drafting sessions in preparing the budget, primarily so that the CRA can give its advice as to whether a proposed initiative can be effectively administered. There are also informal exchanges of information between the CRA and Finance. The CRA is only one of many groups, including charities, industry, the legal and accounting professions, which lobby for changes to the Act with varying success. The contact information for the Finance official with responsibility for a proposed amendment is published, and groups and individuals are encouraged to suggest changes. The success of such proposals depends in large measure on the sophistication with which it is presented and its coincidence with government policy.

There is extensive case law, dating from decisions of the Judicial Committee of the Privy Council (of the United Kingdom) in the 19th century and continuing unabated in the 21st century, which set out and apply the constitutional requirements for valid provincial and federal tax laws and in particular the division of powers between federal and provincial governments.[23] More recently, the constraints placed on tax authorities by the Canadian Charter of Rights and Freedoms (the "Charter")[24] have been the subject of numerous judicial decisions. Lawyers, accountants, economists and others, both scholars and practitioners, have created a large body of literature analysing, criticizing and commenting on the constitutional requirements of the exercise of the taxing power, tax policy and tax laws.[25]

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[22] The leading view is that the Senate may reject, but may not amend a money bill. See Driedger, Elmer A. "Money Bills and the Senate" (1968), 3 *Ottawa L. Rev.* 25.

[23] See for example the iconic work, by La Forest, G. V. *The Allocation of Taxing Power Under the Canadian Constitution*, 2nd ed. Toronto: Canadian Tax Foundation, 1981.

[24] The Charter was adopted with other amendments to the constitution in 1982. It drew a degree of inspiration from the European Convention on Human Rights, but there are very significant differences as well. Anyone subject to Canadian federal or provincial law may challenge the compatibility of that law with the Charter. If the law is incompatible, it is not applied, and may be declared void.

[25] The leading professional and academic institution in taxation in Canada is the Canadian Tax Foundation, founded in 1945 (www.ctf.ca). The great majority of tax lawyers, accountants and economists, as well as tax scholars, are members of the Foundation. It publishes the Canadian Tax Journal, and holds high level annual conferences of experts regionally, nationally and internationally. Papers from the conferences are published by the Foundation.

The Act is an extremely detailed and complex enactment, with precise provisions defining the tax base, the taxpayer, the tax consequences of transactions, reporting and payment requirements and other matters. There are numerous deeming provisions that dictate a tax result that would not otherwise apply. In Canada, the legal form of a transaction is normally the basis for determining its tax consequences, unless the legal form does not reflect the real transaction, and is a mere sham or artifice. Further, the courts have indicated that in general taxpayers may arrange their affairs so as to minimize their tax liabilities, so long as they accurately report their tax position under Canada's self-assessment system. In no instance does the Act allow the CRA to apply its discretion conclusively to determine a tax result as all decisions are subject to appeal or judicial review. The precision and detail in the drafting of the Act removes a great deal of interpretational ambiguity. The fundamental structure and central concepts of the current Act have been in place since a major reform was undertaken and a new Act adopted in 1972, followed by a further reform in 1988. Judicial interpretation and application of most areas of income tax law is generally well-developed. It is largely where innovative or unusual transactions have been undertaken that novel and difficult interpretational issues still arise. This is not to say that the amount of litigation is diminishing, only that the legal framework for resolving most issues is now well established.

There are numerous specific anti-avoidance provisions in the Act, including provisions that direct that the form or legal effect of certain transactions or arrangements may be disregarded for tax purposes. The Act also imposes a test of "reasonableness" in some instances, particularly in relation to amounts claimed as deductions. This allows the CRA to challenge amounts claimed by the taxpayer as excessive, but the determination of reasonableness is ultimately for the Tax Court.

In 1988 Parliament enacted the general anti-avoidance rule, or "GAAR"[26] which allows the CRA to reassess "as is reasonable in the circumstances" to deny any tax benefit from a transaction that is motivated by tax avoidance rather than *bona fide* business, investment or family purposes. The transaction or series must also reasonably be considered to result directly or indirectly in a misuse of a provision of the Act, the Regulations,[27] a tax treaty or certain other enactments, or an abuse having regard to the provisions of the latter taken as a whole. In summary, the taxpayer may be reassessed if his transaction was undertaken primarily for tax avoidance purposes and is abusive of the technical provisions or overall purpose of the Act or certain other enactments. The GAAR is most likely to be

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There are many other public policy institutions that contribute to the discussion on tax issues, including the Canadian Taxpayers Federation, the Institute for Research on Public Policy and the CD Howe Institute.

[26] *Income Tax Act* s. 245.

[27] Regulations are "hard law", adopted by the Governor in Council under authority delegated by the Act.

relied on by the CRA to reassess a taxpayer where a complex or unusually structured transaction or series yields a tax result that seems contrary to the intention or purpose of the Act.[28]

The Canadian tax system relies on annual self-assessment by taxpayers. In reviewing a taxpayer's tax return, the CRA has discretion as to whether to challenge or accept the taxpayer's reporting or characterization of receipts and disbursements, claims for deductions and credits, etc., and is not bound to audit or reassess every taxpayer who is in the same situation. If the CRA does decide to audit and then reassess a taxpayer, the latter has extensive statutory rights to administrative and judicial review.[29]

The first level of appeal, which is administrative in nature, is called an objection. An Appeals Officer in the Appeals Directorate of the CRA reviews the assessment and hears the taxpayer's arguments. The objection process is usually not successful,[30] but accords the taxpayer an opportunity to discover more fully the factual and legal basis of the reassessment and how it might be overturned. Objections are usually successful only because the CRA has assessed on a misunderstanding of the facts, or a misapplication of its own policy. It is not clear whether the Appeals Officer has jurisdiction to determine the constitutional validity of a statutory provision; to our knowledge this has never occurred. The Appeals Directorate is obviously not fully independent of the CRA or of government.

The taxpayer whose assessment is confirmed by the Appeals Directorate may appeal to the Tax Court of Canada, and then, on points of law only, to the Federal Court of Appeal and, with leave, to the Supreme Court of Canada. All of the courts of Canada are fully independent of political interference in the discharge of their duties. The judges of the Tax Court of Canada (TCC) are senior tax lawyers, many of whom were in private practice representing taxpayers, both corporate and individual, for many years, although some have been in government service prior to appointment. The judges of the Federal Court of Appeal (FCA) are usually elevated from the TCC or the Federal Court Trial Division, or are senior lawyers with expertise in federal law. The justices of the Supreme Court of Canada (SCC) are highly respected jurists, usually elevated from the superior courts of the provinces or occasionally very senior lawyers or legal academics. Some judges are appointed based on their perceived political views

[28] Another area in which discretion is accorded to the CRA is transfer pricing. The CRA may adjust a taxpayer's income for tax purposes based on the reasonableness of the allocation of costs and prices between non-arm's length taxpayers, and penalties imposed where the taxpayer did not make reasonable efforts to determine and apply arm's length prices or allocations. As the competent authority under Canada's tax treaties, the CRA has substantial discretion to resolve a taxpayer's status or liability to tax in consultation with other countries' tax authorities.

[29] See for a fuller description of the audit and reassessment process, Alexandra K. Brown and Roger Taylor, "A Practical Guide to the Audit and Audit Issues," Report of Proceedings of Fifty-Ninth Tax Conference, 2007 Tax Conference (Toronto: Canadian Tax Foundation, 2008), 17:1-10.

[30] The CRA revealed that Canada-wide, the rate of full success by taxpayers at the objection stage was 16% in response to a question at the annual Quebec tax conference and reported in technical interpretation document 2006-0196041C6.

and the degree to which their views accord with the government's policies, but there is no concern expressed in legal literature regarding the independence of the judiciary from government. There is of course sometimes intense criticism of judicial rulings and attitudes.

The TCC[31] has jurisdiction to determine that a law is inconsistent with the constitution, including the Charter, and is invalid to the extent of the inconsistency.[32] Further appeals lie to the FCA and SCC, both of which also have inherent jurisdiction to declare legislation to be constitutionally invalid. The federal and provincial governments are bound by such declarations.

The strictness of the application of the rule of law in resolving tax disputes is exemplified by the inability of the CRA, represented by the Department of Justice, to settle a tax appeal other than by application of legal principles. In other words, it is not open to the CRA to settle an appeal out of court by negotiating a mutually acceptable compromise as to the amount the taxpayer should pay, but only by negotiating a mutually acceptable resolution of the legal issues, with the actual amount to be paid determined by the way the legal issues are resolved.[33]

The common law approach to statutory interpretation applied by the courts in Canada leaves very little scope for a finding that a provision is legally indeterminate. The courts strive to find meaning in statutory language, and apply numerous interpretational maxims to avoid absurdity or vagueness. The SCC has ruled that a broad textual, contextual and purposive approach to statutory interpretation is appropriate.[34] In the case of the *Income Tax Act*, the detailed and precise drafting style leads primarily to a textual interpretation. Where there remains ambiguity, the context, and ultimately the purpose of the legislation is to be analysed to arrive at an interpretation that resolves the dispute. In extreme cases, where the latter process does not point to a result, there may be applied a residual presumption in favour of the taxpayer.[35] It is for Parliament to amend ambiguous statutory language.

Legal indeterminacy or vagueness of a legislative provision can be the basis of a judicial declaration that the provision is unconstitutional, in that it infringes the right to life, liberty and security of the person,

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[31] The Tax Court of Canada was first established in 1983, and has had exclusive original jurisdiction in tax appeals since 1991. This marks the final stage of evolution of Canadian tax law from a system subject, in earlier stages, to extensive ministerial discretion to one governed by law alone, and adjudicated by trial courts that are fully independent of the tax administration.

[32] *Nova Scotia (Workers' Compensation Board) v. Martin* [2003] 2 S.C.R. 504; applied to the Tax Court in *Canada (Attorney General) v. Campbell*, 2005 FCA 420 at paragraph 23. The jurisdiction of the Tax Court to award damages or grant another remedy has not yet been fully explored.

[33] *Galway v. M.N.R.*, [1974] C.T.C. 454, 74 D.T.C. 6355 (F.C.A.).

[34] *Canada Trustco Mortgage Co. v. Canada*, [2005] 2 S.C.R. 601, 2005 SCC 54.

[35] *Johns-Manville Canada Limited v. The Queen*, [1985] 2 SCR 46 and *Placer Dome Canada Ltd. v. Ontario (Minister of Finance)* 2006 S.C.J. No. 20; 2006 SCC 20.

and the right not to be deprived thereof except in accordance with the principles of fundamental justice, fundamental rights protected by s. 7 of the Charter. A further argument can be made that vague legislation violates the rule of law, a fundamental principle underlying the Canadian constitution as a whole and expressly confirmed in the preamble to the Charter. The SCC has ruled that vague laws have the potential to violate requirements of the principles of fundamental justice that citizens be provided with fair notice of prohibited conduct, and that there be adequate safeguards against selective and arbitrary law enforcement. The test of unconstitutional legal indeterminacy is strict, however, requiring that the law must so lack precision that it does not give sufficient guidance for legal debate.[36]

The GAAR itself was challenged as unconstitutionally vague in *Gregory v. The Queen*.[37] However, the FCA ruled that the constitutional issue could not be decided simply by evaluating the words of legislation; the test of vagueness was whether a court could effectively apply the GAAR to the facts disclosed by the evidence. The courts were able to find that the GAAR could be interpreted and applied to the facts as proven, and it was therefore not unconstitutionally indeterminate.[38] No tax provision has ever been held to be invalid on the basis that it is too vague. The courts have the final word, and so far have been able to interpret the Act and apply it in every case, occasionally resorting to the residual presumption in favour of the taxpayer.

4. Soft law

The CRA issues administrative guidance in the form of interpretation bulletins which indicate the CRA's assessing policy and internal approach to interpretation of the Act and regulations. It also issues information circulars, which are more practical guides to compliance, and technical interpretations, which are published[39] responses to specific questions of interpretation posed by individuals and their tax advisors. The CRA publishes Income Tax Technical News, a periodical describing, among other matters, changes in policy for the benefit of tax advisors and specialists. The CRA also publishes extensive plain language guides and instructions for completing forms. None of these administrative positions are binding on either the taxpayer or the CRA. The TCC, FCA and SCC generally regard interpretation bulletins as helpful aids to resolving a tax dispute, but by no means binding on the court. Some judges are more willing than others to prevent the CRA from reassessing contrary to its

[36] *R. v Nova Scotia Pharmaceutical Society* [1992] 2 S.C.R. 606; *Ontario v. Canadian Pacific Ltd.*, [1995] 2 S.C.R. 1031.
[37] 2000 DTC 6561 (FCA).
[38] This case was ultimately decided by the Supreme Court of Canada under the name *Mathew v. Canada*, [2005] 2 S.C.R. 643, 2005 SCC 55; the transactions concerned were found to offend the GAAR and accordingly the constitutional challenge to the GAAR was unsuccessful.
[39] The technical interpretations are obtained under the Federal Information and Privacy Act, which provides for public access to government information. All indications of the identity of any taxpayer are redacted, and the documents are published in full and in edited form by commercial publishers.

published policy to the detriment of a taxpayer who has relied on an administrative interpretation, but as a matter of law the CRA may do this, and it is the law that governs. There is no principle of reciprocal observation of the interpretation of tax law by the CRA and the courts; the rulings of the courts are binding on the CRA.

The CRA offers a service of providing advance rulings (for a fee), which it regards as binding, as to the tax consequences of a proposed transaction. The requesting taxpayer must disclose the names of transacting parties and the details of the proposed transactions; the ruling is binding on the CRA provided the actual transaction follows the proposal in all relevant details. The advance ruling process is commonly used for major transactions such as the issue, transfer or exchange of publicly traded securities, to provide certainty to investors. It is also used where an innovative transaction is contemplated, to test the anticipated tax consequences and the likelihood of reassessment. The CRA has recently sought to challenge the binding nature of an advance tax ruling by taxpayers, and was met with the following words from the Chief Justice of the Tax Court:

If the respondent [CRA] is now seeking to establish that advance rulings can be repudiated by the Minister after decades of reliance by taxpayers upon them, this proposition, which would startle most practitioners, should be tested in a full trial and not a preliminary motion. This preliminary motion is certainly not the time or place to discuss the complex issues arising out of the Minister's remarkable position. *The rulings process, which was created by Revenue Canada and has been enormously beneficial to taxpayers in creating certainty in predicting the tax consequences of commercial transactions, constitutes a fundamental cornerstone of Canadian tax administration*. The idea that a motions judge could, on the basis of a one hour argument without evidence, demolish one of the essential underpinnings of our system is, quite frankly, appalling. (Emphasis added.)[40]

Given that the rulings of the courts are binding on the CRA, the CRA must take these into account in deciding whether to reassess a taxpayer and defend that reassessment in the courts. The CRA will sometimes select a test case to reassess in order to obtain a judicial ruling on an interpretive or other issue of law that is either new, or has begun to arise frequently. Occasionally the CRA will comment on a ruling that is adverse to its position, to the effect either that it considers that the result applies only to the specific facts of the case, or that it does not accept the court's conclusions. These kinds of statements have no binding effect, but are of interest to tax advisors, as they indicate that the CRA is

[40] *Sentinel Hill Productions (1999) Corporation et al v The Queen*, 2007 TCC 472 at paragraph 12. This ruling is under appeal.

willing to test the issue again on different facts, or to present different legal arguments to try to win a new case.

The CRA cannot and does not circumvent the law as pronounced by the domestic courts. However, where a court has made a ruling that is contrary to the policy favoured by the CRA and Finance, it is not uncommon for Finance to propose an amendment to the Act to ensure that the outcome will be reversed in future cases. The amendment is usually made effective as of the date that Finance publishes draft amending legislation, which may be months, or even years, before the amending legislation actually comes into force. Retroactive effect of tax law to the date of announcement is therefore common, and is valid provided the intention of Parliament that the law apply retroactively is clear. However, there are some questionable examples of the use of retroactive legislation to a point in time before the change was announced. The most recent and perhaps most egregious example is the 2005 amendment to the GAAR to include the abuse of tax treaties in avoidance transactions, implemented some 17 years after the original GAAR provision was enacted and made retroactive to that original enactment. The constitutional doctrine of the supremacy of Parliament would allow such retroactive laws to be enforced in principle, although it can be anticipated that there will be challenges based on s. 7 of the Charter[41] or the principle of the rule of law.

In recent years Finance has adopted a practice of releasing draft legislation amending the Act at various times during the year, and not just in connection with the budget process. It has also frequently asked for comment on such draft legislation from tax lawyers and accountants and other interested parties, with the objective of refining the proposed amendments to apply more specifically to the situations that are intended to be targeted. When it releases draft tax legislation, Finance also provides "explanatory notes" that describe the effect the amendments are intended to have. The courts use the explanatory notes as an indication of the intention of Parliament, so that they have a potentially very significant influence on the outcome of a tax case where the language of the legislation is otherwise ambiguous.[42]

Another technique used by Finance, particularly where draft legislation has been released but changes in response to public submissions are anticipated, is to issue and publish a "comfort letter" indicating that it intends to issue a revised version of the proposed legislation that will have a particular effect or application desired by the taxpayer requesting confirmation of the way the legislation is intended to

[41] In *MIL (Investments) S.A. v. The Queen* 2006 TCC 460, the court quoted the SCC in characterizing this retroactive legislation as "legal but undesirable". The Federal Court of Appeal upheld the ruling that the use of the tax treaty did not offend the GAAR, but without specific comment on the desirability or legality of the retroactive legislation.
[42] The SCC relied heavily on the explanatory notes in interpreting the GAAR in *Canada Trustco*, note 34.

apply. These letters are regarded as binding at least as a practical matter, though their effect as a matter of law has not been tested.

5. Avenues of discretionary relief from taxes, penalties and interest

Where a taxpayer is liable as a matter of law for an amount of tax, an administrative penalty or interest on unpaid taxes, there are a number of discretionary reliefs that may be applied for. Under the *Financial Administration Act*,[43] the federal government (Governor in Council) may remit (forgive) such amounts where the enforcement of the law is unreasonable or unjust or it is otherwise in the public interest to remit the tax or penalty. Remission orders are not commonly granted, but are reserved for cases where there is clear hardship due to an unusual or unanticipated, though valid, application of the law.

Another avenue of discretionary relief is the so-called "Fairness Package" which provides the Minister of National Revenue (who delegates it to a competent person in the CRA) with the discretion to waive penalties and interest for late-filed returns or overdue taxes in cases of hardship. Illness, accident, family breakdown, natural disaster and other extreme adverse situations affecting the taxpayer's ability to comply with the Income Tax Act are taken into account. If the CRA official does not exercise his or her discretion in favour of the taxpayer, there is a right of review of the decision by the director of a district office or tax centre, and the decision of the latter is reviewable by the Federal Court (Trial Division).

A new office of the Taxpayers' Ombudsman began operations in February 2008. Its mandate is to assist taxpayers who encounter administrative difficulties in dealing with the CRA, by mediating between CRA officials and taxpayers in relation to service complaints.[44] At a high level, both Finance and the CRA are subject to review by the Auditor-General, an independent official who reviews the performance of federal departments and agencies, and reports to Parliament.[45]

6. Relationship between different legal sources (legal pluralism)

[43] R.S.C. 1985, c. F-11, s. 23(2).
[44] See the information provided on-line at http://www.taxpayersrights.gc.ca/mndt-eng.html , accessed 18 February 2008.
[45] See the Auditor General's report of November 2004, c. 6: "CRA: Resolving Disputes and Encouraging Voluntary Disclosure" at http://www.oag-bvg.gc.ca/internet/English/parl_oag_200411_06_e_14910.html#ch6hd3a , accessed 18 February 2008.

Canada has entered into bilateral tax agreements with approximately 90 other countries, including all the EU Member States except Greece. As a dualist theory country and a federal state, Canada can only give binding legal force to tax treaties by Act of Parliament. The practice is to enact a statute declaring the appended tax treaty to have the force of law in Canada, and that in the event of any inconsistency between any provision of the tax treaty and the law of Canada, the provision of the treaty is to take precedence to the extent of the inconsistency. (The EC Treaty does not affect the Canadian legal or tax system.)

Taxpayers may directly enforce in the courts the provisions of a tax treaty that has been brought into force in Canada. The courts give precedence to tax treaties over inconsistent provisions of the *Income Tax Act*, and interpret them as relieving in nature. However, the *Income Tax Conventions Interpretation Act* ("ITCIA")[46] provides for certain express legislative overrides of the Act bringing a tax treaty into force in Canada, and consequently of the treaty. The courts will give precedence to the interpretation provided for in the ITCIA over that provided in the tax treaty where the ITCIA so directs.

The courts apply the Vienna Convention on the Law of Treaties where they consider it helpful to interpret a tax treaty. They also refer to the OECD Model Convention and Commentary,[47] and in the case of the Canada-US Treaty, to the Technical Interpretation prepared by the US Treasury, which is explicitly adopted by Finance as conforming to its view of the correct interpretation of the Treaty. The Canadian tax courts also accept evidence of the rulings made by foreign courts in respect of tax treaty provisions and treat them as worthy of respect, and even persuasive, though not as binding on them.

Canada's tax treaties do not apply to provincial income tax laws. However, the provinces usually provide tax treatment consistent with federal treatment of foreign-source income that is subject to provincial taxation. For example, British Columbia provides a foreign tax credit to individuals who earn income from non-Canadian sources that mirrors the federal foreign tax credit,[48] even though it has no treaty obligation to mitigate juridical double taxation in this way.

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[46] R.S.C. 1985, c. I-4 as amended. The ITCIA was originally enacted to reverse a 1985 decision of the Supreme Court that gave effect to a static interpretation of tax treaties based on the provisions of the Income Tax Act that were in force at the time the Treaty was concluded, substituting the preferred ambulatory approach. It now contains a number of provisions that operate "notwithstanding" the provisions of a tax treaty or the statute giving it the force of law in Canada.

[47] It appears that Canadian courts' practice is to refer to the Model and Commentary that was in place at the time the particular tax treaty was negotiated and concluded, rather than subsequent versions. However, there has not been a clear statement from an appellate court on whether this is the correct approach. The leading decision on interpretation of tax treaties is *The Queen v. Crown Forest Industries Limited* [1995] 2 SCR 802.

[48] S. 4.71, *Income Tax Act*, RSBC 1996, c. 215 as amended.

Secondary law, or regulations made under the authority of a statute are equally as binding as primary law, and are subject to review for constitutional validity by the courts in the same way. Soft law is not recognized as legally binding by the courts
tax treaties. The writings of respected scholars and practitioners are also frequently relied on by the courts.

In Canada, "legal pluralism" refers to bijuralism, the fact that Québec is governed by a civil law system while the rest of Canada is governed by a common law system. This has sometimes resulted in difficulties in applying the Act to transactions or property interests that are unknown to the common law, or in difficulties in interpreting the Act in relation to such transactions. A series of studies undertaken several years ago[49] has resulted in an exhaustive process of amendment to make the Act equally applicable to equivalent transactions in both systems.

[49] See (2003), *Canadian Tax Journal* Vol. 51 No. 1 for a collection of articles on this topic.

Denmark: Separation of Powers in Tax Law (Jacob Graff Nielsen)

1. Relationship between the parliament and the tax authorities: the influence of the tax authorities on tax legislation

The legislative competence belongs jointly to the King (the government) and the Danish parliament (Folketinget) pursuant to the Danish Constitution (sec. 3). The Government has competence to introduce bills (government bills) according to sec. 21 of the Constitution as have all other members of the parliament pursuant to the Constitution sec. 41 (private bills). Almost all enacted tax law bills are government bills due to the fact that the government secures a parliamentary majority for tax law bills before introduction in the Danish parliament. During the parliamentary year from 1 October 2006 to 30 September 2007 the Minister of Taxation introduced 25 tax law bills and 22 of these were passed. Other members of the parliament introduced one tax law bill that was passed. During the ensuing parliamentary year from 1 October 2007 to September 2008 the Minister of Taxation introduced 39 tax law bills of which 35 were enacted.

The Danish Tax Ministry is divided into the Department (Departementet), the Danish Customs and Tax Administration (SKAT) and the National Danish Tax Tribunal (Landsskatteretten). As a rule, the Department handles the preparatory work in connection with the drafting of tax law bills, and the initiative for new legislation can come from the members of the government or from members of other political parties that support the government. On a regular basis tax law bills are introduced as a part of comprehensive political agreements, but more often the Department takes the initiative on bill preparation. This initiative is often based on the Department's law supervision programme which calls for changes due to flaws in the existing tax legislation.

The drafting of the tax law bills is most often handled by the Department and this is generally done by setting up project groups comprising members of the Danish Customs and Tax Administration and, if relevant, representatives from other ministries, tax advisor organizations and universities etc. Occasionally, the Ministry of Taxation has set up actual tax law commissions with an external chairman and these commissions may draft actual bills that the Government can choose to introduce in the

parliament, revise or ignore. This was, for instance, the case with the extensive income tax law reform in Denmark that was passed in the late spring of 2009.

The Government plays a very active role in the drafting of tax law bills in Denmark.

All bills introduced to the Danish parliament are required to go through three parliamentary readings or debates as provided in the Constitution sec. 41. At the first reading the principal aspects of the bills are discussed prior to the bills passing to the second reading. Between the first and second parliamentary reading, tax law bills are referred to the Fiscal Affairs Committee, which is composed of Members of the parliament. The Fiscal Affairs Committee submits a report that often contains amendments to the original tax law bill and a minority in the committee has the opportunity to express political viewpoints concerning the tax law bill or parts of the bill in this report. During the second parliamentary reading the bill is discussed both in general and in detail and eventual amendments from the Fiscal Affairs Committee are also scrutinized. At the end of the second reading the amendments are put to a vote and subsequently the bill passes to the third reading unless it is decided to refer the bill to the Fiscal Affairs Committee a second time. In general, the debate during the third reading of bills is limited, but it is possible to propose amendments to the bill and put these amendments to the vote. Finally, the entire bill is put to the vote in the parliament.

Even though the constitutional requirement for three parliamentary readings in Denmark may seem circuitous, the procedure ensures that the members of parliament have the opportunity to discuss the tax law bills both in general and in detail.

However, the complexity and level of detail of tax law bills particularly in recent years do raise the question whether the members of parliament are in reality able to comprehend the many complex questions involved in new tax legislation. Some details are discussed during the three readings in the parliament, but most details of interpretation are based on the preparatory work by the Tax Ministry Department.

The parliament does not passively accept the tax law bills that are introduced by the Government. Tax law bills are discussed as thoroughly as possible in the parliament, but it is a fact that tax law bills are often so complicated and extensive that the parliament cannot in reality take all aspects of tax law bills into consideration.

The problem regarding the complexity of tax law bills is widely acknowledged and the procedural regulation in the Constitution related to the passing of law bills is not seen as a part of the problem. The Ministry of Taxation has initiated programmes to simplify Danish tax legislation, but different factors such as the internationalization of corporate taxation, EC law and the freedom of movement are challenges to Danish tax legislation. There have been quite a few examples of very complex tax law bills in recent years, which presumably have been difficult for the Danish parliament to deal with.

It is, however, almost always a part of the Department's drafting of tax law bills to submit drafts for a broad, hearing including organizations with an interest in the relevant bill. This hearing takes place before the introduction of the bill to the parliament. At the same time bills are uploaded on the Tax Ministry's homepage. Responses to the hearing procedure are subsequently uploaded on the Tax Ministry's homepage and sent to the Fiscal Affairs Committee.

2. The meaning of legal indeterminacy in tax matters

The level of detail and precision of the Danish tax legislation varies.

The basic elements in the Danish income tax system are found in secs. 4-6 of the Danish State Tax Law, which was originally enacted in 1903. These three sections are undoubtedly vaguely phrased, leaving a considerable margin for interpretation. The vague nature of these basic and important sections has led to a large number of cases relating, amongst other things, to income allocation and income fixation. While the advantage of this type of basic and vague legislation, on the one hand, is the legislation's flexibility and tenability, the obvious disadvantage, on the other hand, is an evident need for extensive secondary regulation and case law. In addition, the taxpayer cannot at all rely on the Danish State Tax Law secs. 4-6 when trying to clarify how an alienation, i.e. the sale of real estate, is taxed.

More recent tax legislation has an increasing tendency to be extensive, detailed and thorough. This is presumably due to the wish to avoid indeterminate regulation and tax avoidance. The large number of cases brought before the Danish courts of law each year indicates that very detailed tax legislation does not for that very reason solve the problem of tax avoidance.

In general, Danish tax legislation can be considered relatively detailed and extensive and this tendency is confirmed by recent tax legislation.

Based on sec. 43 of the Danish Constitution according to which taxation must be based on legislation, the majority of tax law theorists adduce that the extensive and detailed Danish tax legislation is a necessary evil. It is also generally acknowledged that detailed tax legislation constitutes a problem for taxpayers, tax advisors and tax authorities who find it difficult to see through the hundreds of tax law sections some of which cover several text book pages each. The extension of tax legislation has not decreased the necessity] for other sources of law such as government orders; administrative notices from the State Customs and Tax Administration, Tax Assessment Guides and case law, etc. Another problem in connection with detailed and extensive tax legislation is the lack of flexibility and subsequent frequent changes to the legislation. Currently these disadvantages are well known and the Tax Ministry aspires to reduce them, but it is not expected that the extensive Danish tax law tradition will change in the near future.

The advantages and disadvantages related to vague and indeterminate tax legislation are mentioned above.

The Danish courts regard themselves competent to control the constitutionality of tax legislation although the Constitution contains no provisions regarding this competence. Both Government and parliament have accepted this competence.

All tax cases must undergo a mandatory administrative complaints procedure ending at the National Tax Law Tribunal under the Tax Administration Act sec. 48. The taxpayer or the Ministry of Taxation may appeal complaints before the National Tax Law Tribunal before the ordinary Danish courts at the city court (byret) level under the Tax Administration Act sec. 48 (3) and sec. 49. Due to the Danish two-instance principle, the city court's judgments in tax law cases may be appealed to the High Court (landsretten). The city court may refer tax law cases of a principled nature to the High Court as first instance, and these rulings may be appealed to the Danish Supreme Court. This is the consequence of a reform of the Danish court system that was put into effect in 2007. Before this reform all tax law cases were brought before the High Court as first instance.

The possible unconstitutionality of legal indeterminacy has been discussed intensively in later years in Danish tax law theory. The discussion has been based on an interpretation of the Constitution sec. 43 and as stated above this constitutional provision is considered the main reason why Danish tax

legislation is, as a matter of principle, so extensive and detailed. There have been several cases regarding the constitutionality of tax legislation, but tax legislation has never been declared unconstitutional.[1]

It must be concluded that possible legal indeterminacy in tax legislation is not considered unconstitutional according to Danish law. Even though it can be criticized that tax regulations are to some extent decided by interpretation and administrative practice, it is acknowledged that it would not be possible for the legislator to regulate all details. Tax regulation requires flexibility to, amongst other things, avoid tax evasion.

Generally, it is accepted that the legislator establishes the necessary legal foundation for taxation whereas the tax administration and the courts of law supplement the tax legislation by interpretation.

3. The consequences of legal indeterminacy in tax matters

The domestic courts have the final word in cases of legal indeterminacy.

As stated above, the domestic court's competence to examine the constitutionality of tax legislation is not established directly in the Constitution. However, the competence can probably be considered constitutional customary law.

Although the judicial basis of all taxation in Denmark must be ascribed to legislation according to the Constitution sec. 43 a wide variety of other sources of law are available for the person applying the law. These sources of law supplement legislation to fill out eventual indeterminacy. Some of these are written sources such as government orders, administrative notices and circulars, administrative assessment guides, while other sources of law are constituted by case law from the administration or from the domestic courts. Even customary law can be included in a legal argumentation, i.e. regarding assessment of goodwill although this is less frequent because of the requirement for legislation pursuant to the Danish Constitution sec. 43.

It is of course important to accentuate that international sources of law may be decisive. This will often be the case with supranational Community law. Double taxation conventions may also be of great importance as sources of law in a specific case along with other types of international law such as human rights.

1. Cf. SO 1971, p. 353 ff., SO 1972, p. 2 ff., UfR 1977.31 H, UfR 1977.37 H, TfS 1993, 368 H and TfS 2001, 290 H.

It is considered very difficult to provide an unambiguous answer to the question whether administrative rulings are binding on the taxpayers and/or courts in Danish tax law. The first part of the question concerns administrative ruling's binding effect on the taxpayer and this question is in reality related to the binding effect of administrative rulings on the tax administration itself. If the tax administration is bound by prior rulings in similar cases, then administrative tax rulings must be considered binding for the taxpayer. Secondly, the question involves the binding effect of the tax administration's rulings on the courts.

The taxpayer could choose to ignore administrative rulings but will then most certainly face legal proceedings and the risk of having his or her property seized by the tax administration. If the taxpayer disagrees with the tax administration, the taxpayer has to dispute the ruling by filing an administrative complaint unless it is possible to induce the administration to reassume the administrative tax assessment pursuant to the Tax Administration Act secs. 26 and 27. Administrative tax law rulings can de facto be considered binding for taxpayers although these rulings cannot be considered binding for the domestic courts.

In Danish administrative law the principle of equality ensures that subsidiary authorities are bound by administrative rulings made by superior authorities. For example, rulings made by the National Tax Law Tribunal are binding on the Customs and Tax Administration. Furthermore, the Danish Customs and Tax Administration considers itself bound by the administration's own rulings. The administration is, however, never bound by rulings that do not have the necessary legislative foundation.

Relating to the binding effect of administrative rulings for the courts there can be no doubt that these rulings are important sources of law for the courts. This is especially the case with rulings from the National Danish Tax Tribunal. In principle, the courts are not bound by administrative rulings, but in Danish tax law theory it presumed that the courts will comply with a continuous administrative practice in the case of uncertainty pertaining to interpretation of tax legislation. For a taxpayer in litigation against the tax administration this can be described as a heavy burden of proof against an interpretation that is in accordance with a continuous administrative practice.

In the case of uncertainty regarding a taxpayer's legal position it is possible to obtain a so-called binding statement according to the Tax Administration Act secs. 21-25. This statement is binding for the tax administration but not for complaints committees, tribunals or courts.

4. Relationship between the tax administration and the domestic tax courts

In the case of litigation the domestic courts control the application of tax law by the tax administration pursuant to the Constitution sec. 63.

Administrative rulings are not legally binding for the courts of law, but they play an important role as a source of law especially if the tax legislation suffers from indeterminacy and vagueness. The domestic courts often refer to administrative rulings in the very phrasing of judgments.

Case law from domestic courts and ECJ case law are binding on the tax administration in similar cases, so the tax administration is obliged to take judgments from these courts into account when applying the law. Where the application of judgments from domestic courts by the tax administration is considered very fundamental in Danish law, it often takes a longer time for ECJ case law to impact on the administration's ruling. Sometimes the tax administration has to adjust administrative practice as laid down in the Tax Assessment Guides because of a new interpretation by the domestic courts. The same can be the case as a consequence of ECJ judgments, but the legal extent and importance of ECJ judgments require careful consideration and this often takes time.

The Danish Customs and Tax Administration issues administrative notices (SKAT styresignaler/meddelelser) which, amongst other things, contain accounts of domestic court and ECJ judgments and the legal implications of these decisions. As a rule, these administrative notices also contain information about the resumption of tax assessment as a consequence of domestic court case law and ECJ case law.

The principle of reciprocal observation of the interpretation of tax law by the Tax Administration and domestic courts is not considered an actual legal principle in Danish law, but the effect is almost the same.

The Danish tax administration follows the judgments by the domestic courts many of which are published on the Customs and Tax Administrations homepage and in different tax law journals. All judgments regarding tax law cases given by the city courts, the High Courts or the Supreme Court are, as mentioned above, binding for the tax administration in similar cases, so the tax administration has to be attentive of new practice by the domestic courts. From time to time the tax administration issues notices concerning the administration's interpretation of controversial court judgments and this is often the case if the judgments give rise to doubt.

On the other hand, domestic courts do not actively observe the tax administration's interpretation of tax legislation, but it is an obligation for the court to involve relevant sources of law such as administrative practice in the cases brought before the courts. As mentioned above in section 3.4., a continuous administrative practice is very difficult for the taxpayer to dispute in litigation against the tax administration.

To conclude, a general principle of reciprocal observation of interpretation in tax law or administrative law theory is not recognized, but in effect the tax administration and the domestic courts follow the interpretation by the other party closely even though this reciprocal observation takes place in different ways.

The tax administration is legally bound to the decisions of supreme courts and/or the ECJ; this subject is discussed in more detail above. It is, however, a precondition, that the cases in question are similar.

The tax administration generally does not circumvent the case law of domestic courts. The Danish tax administration aims at implementing new case law loyally to the judgments. Below it is adduced, that sometimes judgments are given lesser importance in the Tax Assessment Guides and administrative practice than tax law theorists and advisors deduce from the judgment at hand. However, the approach taken by the tax administration of disputing new case law cannot be considered an actual or conscious circumvention.

5. Relationship between different legal sources (legal pluralism)

Since the mid-eighties the relationship between various legal sources has been much debated in Danish jurisprudence. It is now widely acknowledged that institutions involved in the creation and application of law do not take a strict hierarchical conception of the different national and international sources of law as their basis. Of course, the Danish parliament has to follow the procedure laid down in the Constitution regarding legislation and the tax administration and courts of law are bound by legislation. However, legislation is almost always only one of the wide varieties of sources of law that are involved in concrete tax law rulings. In many cases tax legislation only makes up the framework of the rulings and the more detailed basis of the rulings is found by consulting secondary sources of law including ministerial orders, circulars, administrative practice and court rulings. This does not mean that there is no hierarchy between the different sources of law, but it is seldom so that a clean conflict of different

sources of law leads to the overruling by one type of regulation. Instead, the sources of law function in a complex correlation.

The EC Treaty and other EU regulations and directives are a mandatory part of the decision-making in tax law cases if these sources of law concern the relevant case. As mentioned, the Danish parliament also takes possible EC implications of new tax legislation into consideration as a mandatory part of the legislation process. It still seems that EU regulation is interpreted somewhat defensively by the Danish parliament, the courts and the tax administration. In recent years, however, EC law plays an increasing role not only in the forming of new legislation but also in the application of law by the tax administration and the courts.

The Danish Government negotiates DTCs and since 1994 it has been compulsory for the Government to obtain approval from the parliament by passing a bill concerning the relevant DTC. Even though DTCs are regarded as normal conventions according to international law and the obligation to respect DTCs is deduced from the p*acta sunt* s*ervanda* principle, DTCs are interpreted loyally by the tax administration and the courts of law. Presently, Denmark has denounced the DTCs with Spain and France because renegotiations of the treaties have been unsuccessful, but the denunciation has been carried out in full accordance with the treaties. If a DTC leads to a more advantageous legal position for a taxpayer than the Danish tax legislation the taxpayer can choose treatment according to the DTC. This relation between DTCs and Danish tax legislation is called the Golden Rule.

From a very simplistic point of view, the Danish parliament, tax administration and the courts of law recognize the following hierarchy between the different sources of law: The Danish constitution, primary and secondary EU law, Danish legislation, ministerial orders, circulars/administrative notices (SKAT-meddelelser og styresignaler), tax assessment guides and non-binding guides and folders. Similarly, the following basic hierarchy can be identified concerning case law: ECJ judgments, Supreme Court judgments, high court judgments and city court judgments. At the administrative level: Rulings from the National Danish Tax Tribunal, rulings from the Tax Counsel (Skatterådet), rulings from tax appeal tribunals (skatteankenævn) and finally rulings from the Tax and Customs Administration.

As mentioned above, the correlation between the different sources of law is complex and legal issues are rarely decided merely by determining conflicts between different sources of law.

The mandatory administrative complaints procedure mentioned above, the legally binding statement from the Tax and Customs Administration and the possibility for the taxpayer to bring a case before

the ordinary courts offer the taxpayer an effective protection of rights granted by domestic law and DTCs.

The same cannot without some hesitation be said about the rights under EC law. The Danish courts of law are relatively reluctant to make a reference to the ECJ for a preliminary ruling in all civil cases. In recent years Danish courts made the following number of references covering all areas of law and not only tax law:

2003: 3

2004: 4

2005: 4

2006: 3

2007: 5

Compared to the extensive number of tax law cases brought before the courts it is natural to assume that Danish courts reject taxpayers' requests for a reference to ECJ for a preliminary ruling in a not insignificant number of tax law cases. Unfortunately, it is difficult to substantiate this assumption with further statistics.

With a low number of references to the ECJ for preliminary rulings in tax law cases, the protection of rights granted by EC law is in effect primarily based on the Danish courts' interpretation of EC law and ECJ practice. It lies outside the scope of this report to assess whether the domestic approach to the interpretation of EC law offers full protection of rights offered by EC law, but it can obviously be concluded that domestic Danish courts and the ECJ do not always share interpretational perspective when it comes to application of EC law.

France: Separation of Powers in Tax Law (Emmanuel de Crouy-Chanel and Alexandre Maitrot de la Motte)

Introduction

Separation of powers rings a familiar bell in the mind of French constitutionalists, not so much because of the writings of Montesquieu, although he is a huge and sometimes overwhelming influence, but because the Constitution of the Fifth Republic was intended by General De Gaulle, and indeed succeeded in this, as a reversal of the drift of republican constitutions (IIIrd (1870-1940) and IVth (1946-1958)) towards the dominance of parliament, as the only and true representation of the Nation, and therefore the only and true sovereign.

To counterbalance this tendency, the Constitution of 1958 has not only given to the government its own roots in the Nation, through a President that is no longer elected by the parliament, but has thoroughly organized the relations between the executive and legislative powers in such a way as to prevent the parliament from hampering the initiatives of the government. The field of the law was strictly defined and what is not a law matter is not under the legislative power of the parliament, the possibility for the parliament to overthrow the government was submitted to strict conditions of majority, and the legislative process was organized and controlled at each stage by the government. The unexpected apparition of the two-party system or, more exactly, the two-coalitions system in French political life, prompted by the election of the President of the Republic by universal suffrage, completed this constitutional system and gives the government, and its administration, an overwhelming influence over the parliament.

Nonetheless, even in this context, the principle of legality of the tax law was never disputed, being seen as a founding principle of the modern liberal state (see Article 14 of the Declaration of the Human and Citizen Rights of 1789). But, with a frail and dependent parliament, the vitality of this principle, and of the separation of powers which derives from it, may be questioned.

1. Relationship between the parliament and the tax authorities: the influence of the tax authorities on tax legislation

Regarding the relationship between the parliament and the tax authorities, four questions may be asked. The first one is whether the French government has a legislative competence in tax matters (1.1). Then, the second one is whether the government may draft tax bills proposals and present them to parliament (1.2). Thus, as the answers to those questions are positive, it will be asked whether the French government usually exercises that competence and if the French parliament passively accepts the draft bills provided by tax authorities or discusses them in detail and introduce changes to them (1.3). Finally, the reactions of the literature and the domestic courts will be examined (1.4).

1.1. Legislative competence of the government on tax matters

Mostly, the French government is not supposed to have a legislative competence in tax matters. According to Article 34 of the Constitution of 1958, tax is only within the legislative field[1]. Moreover, this rule is deeply rooted in French constitutional history as it comes from the Declaration of Human and Civil Rights of 1789, which is also of constitutional value[2].

Nevertheless, the government may have legislative competence as a consequence of some specific procedures. The statutes passed by the government are then called "ordinances" ("*ordonnances*"). The most frequent ordinances are the ones of Article 38 of the Constitution, according to which parliament may authorize the government, in order to implement its programme and for a limited period, to take measures by ordinance that are normally the preserve of statutory law. The enabling law sets a date for the government to table before parliament a bill to ratify the ordinances taken according to the enabling law. If the bill has not been tabled at the set date, then the ordinance will lapse. Other ordinances are (were) those of Article 16[3], Article 47[4], and Article 92[5].

[1] Under Article 34 of the French Constitution, "Statutes shall determine the rules concerning (…) the base, rates and methods of collection of all types of taxes", and only "Parliament shall pass statutes" (Article 24).
[2] Under Article 14 of this Declaration, "All citizens have the right to ascertain, by themselves, or through their representatives, the need for a public tax, to consent to it freely, to watch over its use, and to determine its proportion, basis, collection and duration".
[3] This article gives full powers to the president of the Republic to remedy to a crisis threatening the independence of the Nation. No tax ordinance has been made during the sole application of Article 16 in 1961. This article is not frequently used or used lightly.
[4] This article gives the authorization to the French government to bring into force a Finance Bill on which parliament has failed to reach a decision within 70 days. Article 47 has never been used.
[5] This article authorized the French government to adopt provisional measures during the first months of the Constitution. Article 92 was repealed in 1995.

Another key point is the scope of Article 34 of the Constitution, which mentions that the French Parliament has to determinate the rules concerning the "base, rates and methods of collection" of "all type of taxes". As the concept of "all type of taxes" does not cover fees and social security taxes or payroll taxes[6], the French parliament in practice has a reduced competence in tax matters.

1. 2. Ability of the government to draft tax bills proposals and to present them to parliament

Moreover, the greatest part of the French tax legislation is government-drafted, which contributes in reducing the powers of the parliament. Considering the Constitution, the right of the parliamentarians to initiate tax laws is doubly restricted.

First, Article 40 of the Constitution prohibits bills or amendments introduced by members of parliament that would result in a diminution of the public revenue. However, this article is construed as meaning a global diminution of public revenue, enabling a diminution to be compensated in the same bill or amendment with an increase of other public revenue. Formally admissible, the proposition is discussed even if the compensation is dropped along the way.

Second, Article 48 of the Constitution has for a long time reserved to the government the determination of the priority agenda of the two Houses of parliament (*Assemblée nationale* and the *Sénat)*, barring the possibility for a parliamentary bill to be discussed and passed. The constitutional reform of 23 July 2008 has modified this article and widened the access to its priority agenda for each House (two weeks every four weeks).

1. 3. Exercise of its competence by the government and reactions of the parliament

As the answers to the two first questions have been positive, it must then be asked whether the French government usually exercises its competences in tax matters and whether the French parliament passively accepts the draft bills provided by tax authorities or discusses them in detail and introduces changes to them.

Concerning the first question, it must be noted that the French government seldom uses ordinances, except for codification purposes.

[6] The French parliament is nevertheless involved through the discussion of and vote on an annual Social Security Finance Law.

Concerning the second question, it can be observed that tax provisions having a parliamentary bill as origin are very rare, but sometimes are a part of a special topic law. The parliament initiative is reduced to amendments of government drafts.

In this context, it can be added that before a general discussion, the draft bill is examined by a parliamentary committee (for tax bills, usually the Finance Committees of the *Assemblée nationale* and the *Sénat*), which issues a report for the House to which it belongs. The description of the bill by the reports is usually precise and clear, but it is mainly a description. The general impression is that the *rapporteurs* are heavily dependant on the information provided by the tax authorities. Discussions either in Committee or in the House are often quite disappointing with few in-depth commentaries and some broad (too broad) positions. One of the reasons is that the time limits for discussing the law are often tightened[7].

Nevertheless, changes may be introduced, even if they fall most of the time in two categories: the reformulation (called "*amendement rédactionnel*") of badly written drafts (not infrequent, alas) and the special interest amendments, which are often very precise and very technical if not cryptic. This is not to say that the government is fooled, but the discussion and negotiation are mainly carried on outside the Houses.

Actually, with the existence in the National Assembly of an absolute majority supporting the government, a parliamentary amendment is condemned to fail if expressly opposed by the government (with few and notable exceptions). The situation is a bit different for local tax laws, because the majority/opposition dividing line is less clear in such a case. Moreover, a large majority of parliamentarians also are in positions of responsibility at the local level (mayor, president of *département* or *région*) with a personal experience of local taxes and its problems or consequences. In this area, and especially before the Senate, the government may see its tax drafts challenged.

1. 4. Reactions of the literature and of the domestic courts

Scholars are unanimous, after having described the parliamentary competence deriving from the legality principle, in defining it as "only formal" (*purement formel*). The vote of the parliament is necessary, but parliament has a very little power to modify a draft (and certainly not to initiate it) that is a product of a political and technical process exterior to the Houses. The practice is not restricted to tax questions, but the symptoms are here more acute.

[7] See Article 47 of the Constitution concerning the delays for budget bills.

As long as the legality principle is formally respected, the domestic courts do not have their say. In fact, they do abide with the legality principle by scrutinizing the parliamentary documents, when in doubt about the meaning of the law, in search of the "legislator's intent" (*intention du législateur*) even if they are aware[8] of the futility of such an intention.

2. The meaning of legal indeterminacy in tax matters

Concerning the meaning of legal indeterminacy in tax matters, four questions can be asked. The first two are whether the French domestic tax legislation is vague or very detailed when defining the tax object, the tax subject and the tax base (2.1) and the way the French literature evaluates the use of both techniques in tax legislation (2.2). Then, it may be asked whether an independent domestic court is obliged to control the constitutionality of tax legislation (2.3) and if, as the answer is positive, legal indeterminacy may be considered to be unconstitutional (2.4).

2. 1. Vague domestic tax legislation and large margin for discretion given to the French administration

French tax legislation is not very detailed, with regard to general definitions or usual concepts. The legislator rarely feels the need to define the terms he uses. For example, there is no legislative definition of the words "revenue", "wages" or "benefit".

The tax legislation may be a bit more precise when it creates tax exemptions, in order to prevent loopholes and, in some circumstances, an excessively restrictive interpretation by the tax administration.

2. 2. Evaluation of this vagueness by the French literature

Unfortunately, the French literature does not publicly criticize the vagueness of the tax legislation.

2. 3. Ability of an independent domestic court to control the constitutionality of tax legislation

If a voted (but not yet promulgated) law is referred to it, the Constitutional Council (*Conseil constitutionnel*, i.e. the French constitutional court) may control the constitutionality of the tax law. But

[8] The *Conseil d'Etat*, which also is a council of the government in the legislative process, considers itself as being in a good position to have such awareness.

only the President of the Republic, the Prime Minister, the presidents of each of the legislative chambers, or 60 members of each of the chambers may refer the law, meaning that a strong parliamentary opposition is needed to control the constitutionality of the legislation.

Tax courts are not yet allowed to control the constitutionality of any legislation.
A recent constitutional reform (July 2008) introduced the possibility of a control of constitutionality of not-yet promulgated laws, through the possibility to raise an exception of unconstitutionality. The Supreme Administrative Court (*Conseil d'Etat*) and Court of Cassation (*Cour de cassation*) will assess the opportunity to refer the case to the Constitutional Council, which must then give a ruling.

2. 4. Unconstitutionality of legal indeterminacy

When a law is deferred to the Constitutional Council, this court may decide that legal indeterminacy is unconstitutional. This happens when the parliament may be considered as not having determined the rules as it is supposed to[9]. An act has already been ruled unconstitutional on these grounds of "negative incompetence" (*incompétence négative*)[10]. Tax laws are regularly challenged on this ground[11] and, in one instance, have already been ruled unconstitutional[12].

3. The consequences of legal indeterminacy in tax matters

Four consequences of legal indeterminacy in tax matters can be examined: the final word regarding the interpretation of the rule (3.1), the basis of the final word on interpretation of indeterminate legal rules (3.2), the fulfilment of legal indeterminacy (3.3) and the binding role of administrative rulings (3.4).

3.1. The final word regarding the interpretation of the rule

As legal indeterminacy is rarely considered to be unconstitutional, the question is who has the final word regarding the interpretation of the rule: the tax authorities or the domestic courts.

[9] According to Article 34 of the Constitution, these rules concern (in tax matters) the base, the rates and the methods of collection of taxes.
[10] See Conseil Constitutionnel, decision No. 67-31 DC, 26 January 1967, "*Loi organique modifiant et complétant l'ordonnance n° 58-1270 du 22 décembre 1958 portant loi organique relative au statut de la magistrature*" and decision No. 83-162 DC, 20 July 1983, "*Loi relative à la démocratisation du secteur public*".
[11] See Conseil Constitutionnel, decision No. 2005-513 DC, 14 April 2005, "*Loi relative aux aéroports*"; decision No. 2004-511 DC, 29 December 2004, "*Loi de finances pour 2005*" and decision No. 2003-488 DC, 29 December 2003, "*Loi de finances rectificative pour 2003*".
[12] See Conseil Constitutionnel, decision No. 98-405 DC, 29 December 1998, "*Loi de finances pour 1999*", § 57-59.

In France, the tax administration may make executive orders. It also officially interprets the law and publishes statements: as will be explained (see § 3.4), the administration has the habit of commenting on and giving a statement on each law and tax treaty recently adopted, and this interpretation may be relied on against the administration by the taxpayers.

Thus, if the interpretation is favourable to the taxpayer, then the latter may ask to benefit from this interpretation. In this case the position of the administration is valid, but it has to apply the favourable interpretation.

And if the interpretation is unfavourable, then the taxpayer may contest it (or contest a taxation decision based on it) before the court. The final word regarding the interpretation of the rule thus belongs to the domestic courts.

The situation is different if the problem is the filling in of the rule (see § 1.1). An administrative regulation completing the law, if neither illegal nor unconstitutional (and that will be appreciated by the judge), is a rule that the court must apply. In this situation, the only means for the taxpayer is then to contest the legality of the administrative regulation filling in the law, which can be done by filing a complaint to the Supreme Administrative Court ("*Conseil d'Etat*") in order to obtain the abolition of the contested rule[13].

3.2. The basis of the final word on interpretation of indeterminate legal rules

Although the domestic courts have the final world on interpretation of indeterminate legal rules, there is no constitutional basis for this. In a general manner, no procedural principles are determined by the Constitution. It is the case law of the French highest administrative court that has laid down most of the principles (right to be heard, principle of giving reasons for a judgment, etc.), before being sometimes copied in the law ("*code de procédure civile*" and "*code de justice administrative*", i.e. the civil procedure act and the administrative procedure act), but not by the Constitution. And although those principles are also protected by international conventions (e.g. the European Convention on Human Rights (ECHR)) applicable in France, astonishingly - and contrary to its reputation of being a country that protects human rights -, France does ignore a lot of constitutional rights. Legal certainty and lawfulness, confidence in the legal situation, protection from inactivity of authorities and tax secrecy are not recognized by the Constitution. Only the legal situation and the executive's practice are legally

[13] This complaint is called "*Recours pour excès de pouvoir*".

protected, not due to Constitution's provision but thanks to the role the administrative court has wanted to play.

Despite the absence of a Constitutional basis for the domestic court having the final word on the interpretation of indeterminate legal rules, another explanation of the power of the courts is the fact that the administration is generally a defendant before the tax court, which thus has the last word. If the tax authorities were to enact a special regulation to make their point, the tax court would still refuse to apply it as illegal (according to its interpretation of the law). The problem exists when tax authorities use the legislator to win the day (see point 4), and this may be against the principle of separation of the powers[14] and against the principle of the independence of the judiciary[15].

3.3. The fulfilment of legal indeterminacy

As legal indeterminacy may create some of the difficulties described above, this indeterminacy is normally filled in by regulations and administrative rulings. These administrative rulings, with the meaning of general statement of practice, have a large place in the French tax system.

Mostly, this filling in is based on general instructions of the tax administration towards its agents[16], which are mainly published[17] in order for the taxpayers to know them. It may also take the form of the government's answer to a parliamentary question, which is a very useful way for the legal practice to obtain an administrative statement.

Contrary to general statements, the individual statement, even if promoted by the tax authorities, has not really become common in French practice. For a few years, the tax authorities have tried to promote such individual statements and many legislative reforms have been made in this way. But they do not have real success in practice[18].

Case law is also of great importance in reducing legal indeterminacy. Administrative law being mainly case law, the administrative courts have a wide experience in building a legal system on case law, and most of the leading concepts of tax law are now based on case law. For example, the case law has recognized some rights extracted from its own interpretation of the Constitution or of international

[14] As referred to in Article 16 of the French Declaration of Rights.
[15] See Article 64 of the Constitution.
[16] They are called "*directives*" and "*instructions*".
[17] The publications are made in the « Bulletin Officiel des Impôts ». They can be found on www.impots-gouv.fr.
[18] See Thierry Lambert, « Le rescrit: oui mai », *Bulletin Fiscal Francis Lefebvre*, 3/08.

conventions (the ECHR in particular). For example, this is how the respect of the defence rights[19], the right to be heard, the impartiality principle[20] or the motivation of the judgments[21] has been recognized.

3.4. The binding role of administrative rulings

Although the administration publishes various statements, administrative rulings are not binding on the taxpayer or the courts. However, they may be binding on the tax authorities.

First, the administrative rulings are not binding on the taxpayer, providing he is ready to assert his rights in court. They are only, for him, an interpretation of the law, but the court may decide that this interpretation is against the law. Due to the separation of powers, administrative rulings are not binding on the courts, either.

The situation is different for the administration. According to Article L. 80 A (general statement of practice) and Article L. 80 B (individual statement of practice) of the *Livre des Procédures Fiscales* (tax procedural code), the tax authorities cannot pursue a tax adjustment if the taxpayer has used the interpretation of the law that the administration had provided, either through a published general statement of practice or through a written individual ruling. Those articles have legal value and they are binding on the courts, even if the interpretation of the administration happens to be illegal or unconstitutional.

4. Relationship between the tax administration and the domestic tax courts

The relationship between the tax administration and the domestic tax courts leads to three types of questions: the courts' control of the application of tax law by the tax administration (4.1), the way each authority takes into account the rules coming from the other authority (4.2) and the way the tax administration is legally bound to the decisions of the court (4.3).

4.1. The courts' control of the application of tax law by the tax administration

[19] See Conseil d'Etat, 9e and 10e ss-sect., 5 June 2002, No. 219840, M. Simoens, *Revue de Droit Fiscal*, 2002, No. 41, comm. 810, Opinion J. Courtial, *Revue de Jurisprudence Fiscale*, 2002, No. 934, chron. L. Olléon, p. 951, *Bulletin des Conclusions Fiscales*, 2002, No. 113, Opinion. J. Courtial.

[20] See Conseil d'État, Ass, 3 December 1999, Didier.

[21] See Conseil d'Etat, 20 April 1966, Ville de Marseille, Rec. CE, p. 266;30 March 1994, Brasse, req. No. 122087;4 January 1995, Willerval et Spinder, req. No. 134754; or 27 March 1996, Zucca, req. No. 153894. See also Article 5 of the "*code des juridictions administratives*" adopted in 2000.

In France, tax rules are decided by the parliament, which is the only authority empowered by the Constitution to do this (Article 34). However, the administration may make executive orders, and it also officially interprets the law and publishes statements. In this context, the taxpayer may bring a complaint either against those executive orders and those statements or against his personal taxation.

If the taxpayer complains against the executive orders or the statements, he may file a complaint before the Supreme Administrative Court ("*Conseil d'Etat*") in order to obtain the abolition of the contested rule. The conditions which must be respected have few constraints: it is only necessary to have asked the administration to rescind the executive order or the statement, and that this preliminary request has been denied[22]. The taxpayer, which must also have an interest to act, then has a two-month deadline after the denial in which to file a complaint before the *Conseil d'Etat*.

If the taxpayer complains against his personal taxation, which is the most common procedure, he may file a complaint before the tax courts. The complaint may concern either the tax base or the refund of the tax. The main infringements that may be asserted are the illegality of taxation and the violation of a subjective right. They may be based on a violation of constitutional rights (e.g. the principles of the legality of the taxation and of equal taxation or the respect of defence rights), rights recognized by international conventions (the ECHR) and EC law (the free movement principle), or rights based on national tax acts (e. g. the territoriality principle, statute of limitation rules, amortization and provision rules, etc.).

It must be noted that France does not have special tax courts, but only ordinary courts. To put it differently, it is only the civil ("*tribunal de grande instance*", "*cour d'appel*" and "*Cour de cassation*") and administrative courts ("*tribunal administrative*", "*cour administrative d'appel*" and "*Conseil d'Etat*") that judge in tax matters. The competence of the courts depends on the type of the tax: the administrative courts are competent for income tax, land tax, payroll tax, corporate tax, capital gains tax and VAT; and the civil courts are competent for property tax, wealth tax and inheritance tax.

Both types of court follow then nearly the same procedure[23], which is set out in a special tax act called "*Livre des procédures fiscales*"[24]. This act refers sometimes to certain specific rules applying to ordinary courts (the form of the assignment, the number of memorandums, the obligation to be or not

[22] After four months, the absence of answer from the administration is considered a tacit denial.
[23] It must be added that it is not possible to appeal to both at the same time, as each jurisdiction is competent for certain taxes. Due to the dual competence, there are some differences in the proceedings of public law and private law, but they are minor.
[24] The *Livre des Procédures Fiscales* may sometimes refer to the ordinary law.

represented by a lawyer) that explains some differences between the civil and administrative courts. Moreover, the *Livre des procédures fiscales* has also been completed by the case law (for example, on the respect of defence rights[25]) since there is no legal protection safeguarded by constitutional provisions.

4.2. The way each authority takes into account the rules coming from the other authority

Two questions can be asked: the first one is whether the domestic courts, in their case law, take into account the rulings and the binding information emerging from the tax administration; and the second one is whether, reciprocally, the tax administration takes into account the domestic courts' case law and the case law of the European Court of Justice (ECJ) when applying the law.

Concerning the first question, the domestic courts do not in theory take into account rulings and binding information emerging from the tax administration. The reason is that these rulings and information are only interpretations of the rules by the administration, and they are considered as not having normative value. Only one exception to this principle exists because, when applying Article L. 80 A or B the *Livre des Procédures Fiscales*, the court has to oblige the administration to apply its own administrative statements. In this particular case, the court is not bound by the statement but it only has the role of forcing the administration to take into account its statement because the taxpayer has requested it. Moreover, courts keep an eye on the administrative statements of practice in order to know whether the case in point is a general practice or not.

The answer to the second question is different, as the French tax administration takes into account the domestic courts' case law and the ECJ case law when applying the law.
Most of the time, the French central administration publishes the main case law in its internal documents to be sure that each department will respect the case law. There are two reasons for this: the first one is that the tax administration wants to avoid too many condemnations (which are viewed badly by public opinion and which may lead to important costs); and the second one is that this publication is a convenient way for the administration to limit the scope that the application of the new case law will receive[26]. However, in some cases, where the financial stakes are high, the tax administration may choose to ignore the case law, either waiting for a reversal by a higher court, or a modification of the legislation by the parliament.

[25] See Conseil d'Etat, 9e and 10e ss-sect., 5 June 2002, No. 219840, M. Simoens, *Revue de Droit Fiscal*, 2002, No. 41, comm. 810, Opinion J. Courtial ; *Revue de Jurisprudence Fiscale*, 2002, No. 934, chron. L. Olléon, p. 951; *Bulletin des Conclusions Fiscales*, 2002, No. 113, Opinion J. Courtial ; Comp. Conseil d'Etat, sect., 7 December 2001, No. 206145, SA Ferme de Rumont, *Revue de Droit Fiscal*, 2002, No. 15, comm. 332 ; *Revue de Jurisprudence Fiscale*, 2002, No. 180, chron. J. Maïa, p. 287 ; *Bulletin des Conclusions Fiscales*, 2002, No. 24, Opinion F. Séners.
[26] See recently Conseil d'Etat, 13 February 2009, No. 298108, *Sté Stichting Unilever Pensioenfonds Progress et a.*, concl. E. Geffray, note V. Agulhon and N. Sénéchault, *Revue de Droit Fiscal*, 19 March 2009, No. 12, comm. 253.

Finally, there is no official principle of reciprocal observation of the interpretation of tax law by the tax administration and the domestic courts.

4.3. The way the tax administration is legally bound to the decisions of the court

In France, the tax administration is legally bound to the decisions of supreme courts and of the ECJ.

The administration carries out the tax legislation under the control of the tax courts (see *supra*), which is possible thanks to the organizational separation of administrative and judicial authorities. This separation is due to constitutional provisions and case law principles that allow the taxpayer to refer to the courts against a norm, a statement or a decision on personal taxation. As explained above, the relevant court is sometimes the judicial court in tax matters, and sometimes the administrative court in administrative matters (cancellation of norms and statements) or in tax matters (decisions on personal taxation). In the first case (judicial court), the applicable constitutional provision is Article 66 of the French Constitution; and in the second case, (administrative courts) it is the case law that protects the right to be heard[27].

It must also be noted that the refusal to apply a court decision would make the State liable to penalties. A retroactive modification of the legislation to modify the outcome would be ruled unconstitutional as a violation of the authority of a decided case ("*atteinte à l'autorité de la chose jugée*") [28].

But sometimes the administration circumvents the domestic courts' case law, either by modifying the law before a definitive decision is given in the case by the supreme court (i.e., after the decision by the court of appeal) or by modifying the law for the future to counter a specific court decision[29].

Finally, all jurisdictions may abolish decisions on taxation, and their power is in theory limited to the case which they are examining. But as usual, if a highest court claims a general principle (e.g. the equality principle or defence rights), this is then followed by the ordinary courts and respected by the administration. Sometimes the administration publishes statements explaining how it will respect the

[27] See Conseil constitutionnel, decision No. 80-119 DC, 22 July 1980, "*Validation d'actes administratifs*"; and Conseil constitutionnel, 23 January 1987, decision No. 86-224, "*Conseil de la concurrence*".
[28] See Conseil constitutionnel, decision No. 86-223 DC, 29 December 1986, "*Loi de finances rectificative pour 1986*".
[29] See for example law No. 2004-1485 (30 December 2004, *Revue de Droit Fiscal*, 2005, No. 7, comm. 201) adopted in order to paralyze Conseil d'Etat, Ass., 7 July 2004, No. 230169, SARL Ghesquière Équipement, *Revue de Droit Fiscal*, 2005, No. 12, comm. 302, Opinion P. Collin, note J.-L. Pierre; *Revue de Jurisprudence Fiscale*, 2004, No. 1019, chron. p.719; *Bulletin des Conclusions Fiscales*, 10/2004, No. 124, Opinion P. Collin; *BGFE*, 2004, No. 5, p. 14, obs. N. Chahid-Nouraï, about the impossibility of contesting the validity of the opening balance sheet.

tax law, although it also may happen that the administration requests the parliament to change the law in order to paralyze the case law[30]. In tax matters, the relationship between the taxpayer and the tax administration are thus unbalanced, as the taxpayer has no legal remedies to start proceedings again.

5. Relationship between different legal sources (legal pluralism)

Three questions can be asked: the first how the parliament, tax administration and courts react before the different legal sources in tax matters (5.1), the second one is how the hierarchy of different tax legal sources is recognized by the Constitution and the different domestic powers (5.2) and the last one is whether the taxpayer has access to different legal remedies that assure him effective protection of his rights granted by tax treaties, EC law and domestic law, or if those legal remedies are limited to the protection of rights granted by domestic law (5.3).

5.1. Reactions of the domestic powers to the different legal sources in tax matters

The reactions of the French domestic powers (parliament, tax administration and court) to the different legal sources in tax matters are various.

The parliament does not seem to anticipate tax developments at an international level. It ratifies conventions, transposes directives, and is very little concerned by soft law. It must be noted that the French parliament transposes EC secondary law with considerable delay (not only in the field of taxation).

The situation is very different with the tax administration, which has an old tradition of international cooperation and tax conventions. Therefore, the administration generally respects norms that are superior to the law (tax treaties and other treaties, EC treaty and secondary law).

The courts have long been very cautious about treaty law, notably EC law. But for 20 years, or so, they have accepted international law, mainly the EC Treaty and the ECHR, as a full legal source, meaning that they have accepted that it always prevail over the law, and according to the interpretation of an international court (the ECJ nad the European Court of Human Rights). Based on the *Gilly*, *Saint-Gobain ZN*, *Bouanich* and *Denkavit* cases, French courts recognize the superiority of EC law over tax treaties.

[30] *Ibid.*

5.2. Hierarchy of the different tax legal sources

This hierarchy that the court gives to the different tax legal sources is partly recognized by the Constitution, and partly recognized by the case law.

First, under Article 55 of the Constitution, treaties or agreements prevail over acts of parliament. But the domestic powers are compelled to consider that the constitution prevails over treaties or agreements. Some problems may consequently arise in the event of a conflict between an international norm and a constitutional norm (the subtlety is that the participation of the Republic in the European Union is also a constitutional principle (Article 88-1), so the conflict will be resolved in favour of the European norm, but hypothetically is a violation of the constitutional identity of France[31]).

Second, the case law recognizes the superiority of EC law over tax treaties, and also the superiority of EC law, tax treaties and national legislation over administrative regulations and administrative rulings.

Therefore, the hierarchy of the sources is the following:

The Constitution (which may be modified in order to authorize an international rule to enter into force[32], and which partly considers the EC Treaty as being constitutional[33]);

The EC Treaty;

EC secondary law;

International law and tax treaties;

Domestic law.

5.3. Access of the taxpayer to different legal remedies assuring effective protection of the rights

A French taxpayer is better protected by international law than by domestic law, notably the Constitution. The reason is that the national courts refuse to control the constitutionality of the law, considering that they are acts of the parliament, and thus depriving the taxpayer of the possibility of securing his constitutional rights[34]. In contrast, under Article 55 of the Constitution, the international conventions prevail over national law.

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[31] See Conseil Constitutionnel, decision No. 2006-540 DC, 27 July 2006, "*Loi relative au droit d'auteur et aux droits voisins dans la société de l'information*".

[32] See Article 54 of the Constitution.

[33] See Article 88-1 of the Constitution.

[34] The introduction in the constitution of the possibility of a constitutional challenge of an act of parliament after its publication may change the situation.

Therefore, French taxpayers have widely used the EC treaties or the ECHR (to which they have a direct access) to protect their rights.

Greece: Separation of Powers in Tax Law (Eleni Theocharopoulou)

Introduction

The separation of powers is a constitutional principle aiming at the organization of the state; it is safeguarded in Article 26 of the Greek Constitution, as a distinction both of state institutions and of state functions. In order for this distinction and its ramifications for tax issues to be understood, the following clarifications are required:

In Greek public law terminology, it is proper to speak of the legislative and the executive rather than of parliament and government, given the fact that, by virtue of the Greek Constitution, legislative powers are not exercised by the parliament alone, but by the parliament and the President of the Republic (Article 26 paragraph 1 and Article 42 paragraph 1 of the Constitution[1]), while executive powers are exercised by the President of the Republic and the Government (Article 26 paragraph 2 of the Constitution); furthermore, judicial powers are exercised by courts (Article 26 paragraph 3 of the Constitution).

Despite the fact that legislative functions are exercised by the institutions vested with legislative powers, the executive (the President of the Republic and the government and public administration in general) may legislate, that is enact, legal rules, but only on the basis of a special (legislative) delegation given to them by the institutions vested with legislative powers (Article 43 paragraphs 2, 4 of the Constitution). Taking that into account, laws (acts) are classified in the Greek legal order as formal statutes and substantive statutes. This classification is very important for tax matters, as only a formal statute is required by the Constitution for their regulation, while mere substantive statutes suffice for the regulation of secondary tax matters. Thus, a statute is formal when it is enacted by the parliament and promulgated and published by the President of the Republic, regardless whether it contains legal rules. A substantive statute contains legal rules and, depending on the institution that issues it, it may also be

[1] Article 42 paragraph 1 of the Greek Constitution: "The President of the Republic shall promulgate and publish the statutes passed by the Parliament within one month of the vote. The President of the Republic may, within the time-limit provided (….) send back a Bill passed by parliament, stating his reasons for this return". Article 42 paragraph 2 : "A Bill send back to parliament shall be introduced to the parliament's plenary session and, if it is passed again, by an absolute majority of the total number of members, following the procedure provided in Article 76 paragraph 2, The President of the Republic is bound to promulgate and publish in within ten days of the second vote."

formal, when it originates from the legislative, or merely substantive, when it is adopted by the executive. When the Constitution or a law refer to the regulation of a matter by statute, without determining that a formal statute is required for regulation, it is accepted that a mere substantive law is implied, in the sense that it suffices and that formal statute is not a prerequisite.

Having made the above clarifications, we can examine in detail: the relationship between the parliament and the tax authorities, in what extent tax authorities influence tax legislation (1), the meaning of legal indeterminacy in tax matters (2), the consequences of legal indeterminacy in tax matters (3), the relationship between the tax administration and the domestic tax courts (4) and finally, the relationship between different legal sources (legal pluralism) (5) in the Greek legal system.

1. Relationship between the parliament and the tax authorities: the influence of the tax authorities on tax legislation

1.1. The exceptional legislative competence of executive powers on tax issues: the literature and case law

The legislative competence of the government and of the executive in general is only exceptional in tax matters. The government and executive power generally do not enjoy legislative competence in tax issues, with the exception of legislative competence for non-substantive tax elements. This exceptional legislative competence is granted by virtue of a legislative delegation, whereas the legislative powers are in charge of the determination of substantive tax elements. This rule is constitutionally guaranteed and in legal theory is called "principle of (formal) legality of taxes", in the sense that a tax is imposed by formal statute (i.e. a statute enacted by parliament and the President of the Republic), given the fact that the application principle of democracy [2] is demanded for the tax levy.

Specifically, the legislative powers are competent for establishing substantive tax elements, which consist of tax subject, tax object, tax rate, tax abatements and exceptions (Article 78, paragraphs 1 and 4 of the Constitution)[3]. This happens because the Article 78 of the Constitution mentions that the determination of all these elements demands a statute enacted by parliament and the President of the

[2] The notion of the principle of democracy is defined in Article 1 paragraph 3 of the Greek Constitution, according to which "All powers derive from the People and exist for the People and the Nation; they shall be exercised as specified by the Constitution".

[3] Cf. Theocharopoulos L., Tax Law, General part, Thessaloniki 2002 (in Greek), pp. 111-113, Finokaliotis K., Tax Law, publishers Sakkoulas, Athens-Thessaloniki 2005 (in Greek), pp. 103-104, Fortsakis Th., Tax Law, Publishers Ant. Sakkoulas, 2008 (in Greek), pp. 70-73.

Republic (formal statute), meaning an act of legislative powers. Furthermore, by virtue of the Constitution, these elements should not be subject to legislative/statutory delegation. In other words, definitions of these elements by the executive powers is forbidden. Specifically, according to Article 78, paragraph 1 of the Constitution "no tax shall be levied without a statute enacted by the legislative powers (the parliament and the President of the Republic), specifying the subject of taxation and the income, the type of property, the expenses and the transactions or categories thereof to which the tax pertains". Furthermore, by virtue of Article 78, paragraph 4 of the Constitution, "the object of taxation, the tax rate, the tax abatements and exemptions (…) may not be subject to legislative delegation". Thus, the determination of substantive tax elements, which are the tax subject, tax object, tax rate, tax exemptions and abatements, by executive powers, one head of which is the government (Article 26, paragraph 2 of the Constitution) contravenes the Constitution.

For that reason, a statute enacted by parliament and the President of the Republic (formal statute) specifies explicitly and concretely the substantive tax elements, so that they are free from any arbitrariness or powers of discretion of the tax administration.[4]

As far as the restricted and exceptional competence of executive powers on tax issues is concerned, it should be noted that: a) By virtue of the Constitution, the restricted and exceptional competence of executive in tax issues refers to non-substantive tax elements as mentioned above and b) this regulatory competence of the administration is exercised within the limits of the legislative/statutory delegation given to the administration by the institutions vested with legislative powers (Article 43, paragraph 2 of the Constitution).

In order to make the allocation of competencies between legislative powers and executive powers on tax issues more comprehensible, case law of domestic courts and in particular of the Supreme Administrative Court (the Council of State (CoS)) is cited, referring to issues that may be regulated by the executive (on the basis of legislative/statutory delegation). Thereby non-substantive tax elements are distinguished from substantive tax elements, with for the determination of the latter the legislative powers being absolutely competent.

According to case law of the CoS, the competence of the executive is restricted in issues of procedural nature, related to tax levy and tax collection.[5] Furthermore, the CoS has held constitutional the

[4] Theocharopoulos L., Tax Law, General part, Thessaloniki 2002 (in Greek), pp. 127-128.
[5] Judgments of the CoS 924/1954, of Supreme Civil and Criminal Court (Areios Pagos) 5/1958 in Chatzitzani N., Tax laws as interpreted by the Council of State and the Supreme Court, Volume I, 1965 p. 29, (in Greek). See also L.Theocharopoulos, Tax Law, op.cit., (in Greek), p. 113. Judgments of the CoS 348/1953, 924./1954.

administrative act – which is definitely issued by virtue of a legislative delegation – on the basis of which net profit rates are specified for the determination of net income of self-employed persons.[6] Similarly, the CoS held constitutional the administrative act which determines the minimum of property prices per real estate zones and their fluctuation rates.[7] This is so, because these cases do not regard the determination of the tax object, but the regulation of special and technical issues concerning the assessment method of real estate market values.[8] On the contrary, in the case of stock transfer, meaning the taxation of benefit arising by stock transfer, the CoS decided that this particular benefit constitutes a tax object and for that reason, setting imputation assessment criteria of this benefit is only possible by formal statute, given the fact that these criteria constitute a conceptual specification of the taxable share benefit.[9] Of great importance are also the judgments holding constitutional, the act issued by the President of the Republic (and not by formal statute), regulating (certainly, on the basis of relevant legislative delegation) issues concerning the keeping of account books and records.[10]

Furthermore, the CoS has constantly held in its case law concerning the tax rate that the exact determination of the tax rate by administrative authorities is allowed on the condition that the maximum and minimum limits of the tax rate or at least the maximum limit of the tax rate is established by formal statute[11] (that is a statute enacted by parliament and the President of the Republic). However, the Greek Supreme Special Court[12] – which is responsible for reviewing exclusively the unconstitutionality of a formal statute [13]- has recently held that a formal statute should not only define the maximum limit of a tax rate[14]. According to this recent judgment of the Supreme Special Court, a formal statute should determine the exact percentage of the tax rate. The present case law will apparently affect in future the settled case law of the CoS and will lead to its alteration. In addition, as far as the tax rate is concerned, the case law of the CoS considers to be constitutional the discretion of the administrative authorities, granted by formal statute, to decide on their own initiative whether it is advisable to levy a tax, which is provided by formal statute in all its substantive elements (tax rate, tax subject and tax object). However, in this case, the levy of the tax by the administrative

[6] Judgments of the CoS 833/1959, 1259-1260/1987, 4354/1985, 2350/1993,1482/1994.
[7] Judgment of the CoS 230/2002.
[8] Judgment of the CoS 230/2002. On the same grounds also CoS 1522/1999.
[9] Judgment of the CoS 62/2001.
[10] Judgments of the CoS 852/1984, 4599/1987, 3353/1989, 3355/1989, 3357/1989.
[11] CoS 1654/1964 in: Directory of CoS Case law, 1961-1970, Volume IV, p. 12 (in Greek), also CoS 1580/1980, CoS 3039/1986, CoS 949/2000.
[12] According to Article 100 (1), item e of the Greek Constitution, the jurisdiction of the Supreme Special Court comprises "settlement of controversies on whether the content of a statute enacted by parliament is contrary to the Constitution, or on the interpretation of provisions of such statute when conflicting judgments have been pronounced by the Supreme Administrative Court (CoS), the Supreme Civil and Criminal Court (Areios Pagos) and/or the Courts of Auditor". See more on the role of the Special Highest Court see below under section 2.2.
[13] In case the provision is held unconstitutional, the judgment of the Special Highest Court is binding upon all parties (erga omnes).
[14] Supreme Special Court 8 / 2007

authorities should be justified in the relevant administrative act or in the relevant administrative file.[15] In practice, the discretion granted to administration by the formal legislator, concerns mainly local taxes. Therefore, this issue often concerns discretion granted to local authorities like the municipal councils.

Moreover, the executive power is allowed to determine – by legislative delegation - other levies, such as charges for public services, which are not taxes.[16]

Finally, an exception to the principle of (formal) legality of taxes is found in the rare case of imposition of taxes by the President of the Republic. This case concerns a legislative delegation to the President of the Republic, through a law laying down general directives, passed by parliament in plenary session and which sets time limits for the use of the above-mentioned delegation by the President.[17] This exception is provided by the Constitution in Article 78, paragraph 5, aiming to impose balancing or counteractive charges or duties and to impose, within the framework of the country's international relations with economic organizations, economic measures.

1.2. The initiative of the Government on tax bills and the parliament's role regarding their vote

The right to introduce bills belongs to the parliament and the government (Article 73, paragraph 1 of the Constitution). Bills introducing local or special taxes or charges of any nature on behalf of agencies or public or private law legal persons must be countersigned by the Minister of Coordination and the Minister of Finance (Article 73, paragraph 5 of the Constitution).

As mentioned above[18], the Government enjoys legislative competence only on non-substantive tax elements and only on the basis of a legislative delegation. As far as the parliamentary practice in the introduction of tax bills is concerned, it is observed that the Government enjoys the exclusive initiative in the introduction of tax bills. Tax authorities influence tax legislation to a major degree, since the Ministry of Finance introduces tax bills. Parliament usually accepts the bills provided by tax authorities, but modifications or amendments are likely to be made. The parliament is able to discuss the bills thoroughly, but whether sufficient knowledge of tax law is present in parliament is an open question.

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[15] See indicatively, among other judgments, CoS 3163/2006, CoS 2817 / 2000.

[16] See indicatively, among other judgments, CoS 3293/2005, CoS 3990/2000. Cf. CoS 838/2008, 611/2004, 2855/2004, 949/2000, 49/1991.

[17] This is the interpretation of Article 78, paragraph 5 in the jurisprudence, see CoS 49/1991, To Syntagma (Greek Legal Journal), p.415 (in Greek). For contrary academic views, see. Finokaliotis K., Tax Law, op. cit., pp. 107-109 (in Greek).

[18] See in detail above under section 1.1.

Parliament discusses the tax bills in detail, because by virtue of Article 76, paragraph 1 of the Constitution every bill and every law proposal must be debated and voted on once, in principle, article by article and as a whole. This is in conformity with the principle of the (formal) legality of taxes and the implementation of the principle of democracy. In addition, in the Greek legal order, parliament controls the tax authorities in an effectual way, especially including the vote of the annual State budget (Article 79 of the Constitution).

Concerning the codification of substantive tax provisions, this codification requires the same detailed discussion and procedure described in Article 76, paragraph 1 of the Constitution, given the fact that according to paragraph 7 of Article 76 of the Constitution, tax codes are excluded from the summary procedure described in Article 76, paragraph 6. This particular summary procedure may take place for voting on judicial or administrative codes.

Nevertheless, as far as the voting on codes is concerned, a relevant question arises in this regard in theory and parliamentary practice. Particularly, Article 76, paragraph 6 of the Constitution provides that judicial or administrative codes drafted by special committees established under special statutes may be voted on by the parliament's plenary session by a special statute ratifying the code as a whole. Furthermore, the constitutional provision of paragraph 7, Article 76 provides that, likewise, legislative provisions in force may be codified by simple classification or repealed statutes may be re-enacted with the exception of statutes concerning taxation.

This explicit exclusion regarding the tax law codification in summary procedure of voting on the judicial and administrative code aims to protect citizens from arbitrary imposition by the executive, which is actually done by the special committee in charge of drafting the relevant tax code. This prohibition is consistent with the principle of (formal) legality of taxes established in Article 78 of the Constitution, which prescribes that substantive tax elements are voted by parliament in a common voting procedure. They are actually voted according to the constitutional provision of paragraph 1, Article 76: they are voted on once in principle, article by article and as a whole. In contrast, the codes voted in parliament's plenary session takes place according to the constitutional provision of paragraph 6, Article 76 "by a special statute ratifying the code as a whole"

Concerning the interpretation and implementation of the particular constitutional prohibition regarding tax codes, there are conflicting views between theory and parliamentary practice.

The prevailing school of thought argues correctly that the codification of tax laws is prohibited in summary procedure, founding its arguments upon a grammatical and teleological interpretation. Nevertheless, as the constitutional exclusion of tax law codification by simple classification of tax provisions in force – codifications that can be controlled by national courts - is concerned, they lack validity. According to this theoretical view, the following may be noted:

- Tax provisions that were in force before the codes were voted and are also included in such codes are still in force.
- Tax provisions included for the first time in such codes are not in force.
- Tax provisions, which are not included in the above-mentioned codes and which were in force during the promulgation of the relevant codes, are still in force.[19]

In contrast, in parliamentary legislative practice the summary procedure is applied for tax codes, too. In this case, the point of view is that the codification of tax provisions which were in force is allowed by Constitution, only by simple classification. This point of view is grounded on the fact that such a codification is excluded by the relevant constitutional provision mentioned above and is aimed at preventing legislative complexity in Greece.[20] Thus, parliament's plenary session enacted, according to the summary procedure of paragraphs 6 and 7, Article 76, Law 2238/1994 by means of which pre-existing tax provisions for income were codified. Subsequently, the parliament's plenary session has ratified - in summary procedure - the codification of pre-existing VAT provisions, the codification of pre-existing provisions regarding inheritance tax, gift tax etc.

2. The meaning of legal indeterminacy in tax matters

2.1. Legal indeterminacy and discretion in tax legislation: what is the role of the administration?

As mentioned above in detail,[21] the principle of (formal) legality of taxes is safeguarded in Article 78, paragraphs 1 and 4 of the Constitution. Accordingly, a formal statute specifies explicitly and concretely the substantive tax elements and consequently the tax subject and object - i.e. the tax base - so that they are free of any arbitrariness and power of discretion of the tax administration. Consequently, the discretion of the administration is constitutionally prohibited regarding substantive tax elements,

[19] Theocharopoulos L., "The unconstitutionality of the ratification of the Code of Income Tax (CIT) through law 2238/94 and its legal effects", To Syntagma (Greek legal journal), 1997 (in Greek), p. 953 et seq.

[20] For more details about the interpretation and application of Article 76 paragraph 7 of the Constitution, prohibiting tax codes, see among others Theocharopoulos L., "The unconstitutionality of the ratification of the Code of Income Tax (CIT) through law 2238/94 and its legal effects", op.cit., p. 995 et seq.

[21] See above under section 1.1

meaning tax subject, tax object, tax abatements, exemptions and tax rate, .[22] For that reason, tax rules which are vague would contravene the Constitution and the Greek tax authorities never have the competence to typify and fill in the relevant legal gaps.

However, the tax authorities in practice play a significant role regarding the elucidation of law content by issuing explanatory directives consistent with the Constitution and the law.

The role of the administration in tax regulations, in which legal indeterminacy occurs, is a two-sided issue:

a) According to positive law and the relevant literature on tax law[23], in the Greek legal system there is no room for personal evaluation. That is because, as already elaborated above, the principle of (formal) legality of taxes and the narrow interpretation of tax provisions are in force. Therefore, for the Greek formal legislator (parliament and the President of the Republic according to Article 26, paragraph 1 of the Constitution), there is only one method by means of which the formal tax statute does not allow tax authorities room for discretion. Furthermore, vague concepts and formulation are not allowed regarding the substantive tax elements (tax subject, tax object, tax rate, tax abatements and exemptions, under Article 78 of the Constitution).

b) Nevertheless, the tax legislator in Greece is familiar with the following:

Technical-legislative indeterminacies are often observed in formal statutes due to bad wording and legislative complexity that often leads to a maze of rules in force. This why the promulgation of directives by the Ministry of Finance is actually necessary. The directives are made on almost every new tax statute.

These administrative directives addressing local tax authorities include guidelines and intend to clarify the statute, drafted in order to clarify indeterminacy and eventual apparent inconsistencies between new provisions and amendments of former statutes. The forwarding of such genuine directives – always addressing officials of tax authorities -, which do not imply enactment of new legal rules, is lawful and derives from the hierarchical structure of the administration, part of which is the tax administration. This hierarchical structure implies that tax administration bodies are integrated in the administrative hierarchy and are connected by a mutual hierarchical nexus. This means that the higher tax authorities have the right and are, actually, obliged in the above-mentioned cases to forward directives with guidelines for the following reasons: For the uniform implementation of tax statutes in the whole

[22] See relevant case law on tax rate and tax base above, under section 1.1

[23] Theocharopoulos L., Tax Law, op.cit., p.160, Finokaliotis K., Tax Law, op.cit., p. 87, Fortsakis Th., Tax Law, op.cit., Theocharopoulou Eleni, "The right to be heard before a negative administrative decision in tax procedures", Chr. Pr.L. (Greek legal journal) 2006, pp. 276-285.

country, for the guarantee of observance of the tax legality principle and for the equal treatment of taxpayers before the tax law, meaning the equal treatment of taxpayers by the tax administration.

It has to be remarked that explanatory directives are binding upon the tax authorities and taxpayers only if they are consistent with the Constitution and the legislation, while regulatory directives under the cover of interpretation of regulations (called regulations not truly interpretative), are invalid and lacking effect in the Greek legal order.[24]

2.2. Constitutionality control of tax legislation by independent domestic courts and the issue of legal indeterminacy

The independent domestic courts enjoy institutional and functional independence, by virtue of Article 87, paragraph 1 and 2 of the Greek Constitution. They are obliged to control the constitutionality of tax provisions, as well as of any legislative provision, according to Article 93, paragraph 4 of the Constitution. The latter article provides that the courts are bound not to apply laws the content of which is contrary to the Constitution. Furthermore, according to Article 87, paragraph 2, judges are in no case obliged to comply with provisions enacted in violation of the Constitution.

The characteristics of the above-mentioned judicial control are the following: It is an indirect control, and this is the reason why it is called incidental control. This control is incidental in the sense that the courts control the tax legislation with the occasion of a judicial action (brought before it) not against a formal statute (this is impossible in the Greek legal system) but against an act of the tax administration that is based on a statute provision, the unconstitutionality of which is consequently controlled indirectly. Furthermore, this judicial control takes place "ex officio" as well, without being necessary to raise a relevant objection. After all, this judicial control is a pervasive control, given the fact that it is exercised by all courts,[25] at every point of the proceedings, even during the court conference before the publication of the judgment.

[24] See D.Kontogiorga - Theoharopoulou, "The remedy of action for invalidation before the Council of State" University Class Materials 1976, p. 48 et seq. and the bibliography and CoS case law therein, id., "Mandatority and enforceability of "regulatory" ministerial directives", Volume in Honour of I. Deliyiannis, Volume IV, Aristotle University Publishers, Thessaloniki 1992, pp. 153-174 (in Greek).

[25] See on the control of constitutionality of laws, among others, Venizelos Ev. – Skouris V., Judicial control of unconstitutionality of laws, Ant. N. Sakkoulas Publishers, Athens – Komotini 1985, passim (in Greek), Manitakis Ant., Rule of Law and control of unconstitutionality of laws, Sakkoulas Publishers, Thessaloniki 1994, passim (in Greek), Spiliotopoulos Ep., Manual of Administrative Law, Ant. N. Sakkoulas Publishers, Athens 2005, p.444 (in Greek).

By virtue of Article 78, paragraphs 1 and 4 of the Constitution legal indeterminacy is not permitted regarding the substantive tax elements, as already discussed in detail above.[26]
In any event, in the Greek legal system in general, it has to be mentioned that there is no procedural possibility of direct appeal against a formal statute provision (consequently against a formal tax statute as well). The eventual unconstitutionality of formal statute provisions is controlled by all domestic courts, at each point of the proceeding only incidentally, in other words on the occasion of judicial action against administrative-tax act, which is based on the disputed legal provision.[27] In case a provision is held unconstitutional (for example, due to indeterminacy), it will not be applied in this specific case. Thus, the unconstitutionality of the same provision may be re-examined on the occasion of another case, by another court.

Furthermore, in case the requirements of Article 100, paragraph 1, item e of the Constitution are fulfilled, that is to say as far as the highest courts (Council of State, the Supreme Civil and Criminal Courts (Areios Pagos) and/or the Court of Auditors) have given conflicting judgments regarding the unconstitutionality of legislative provisions, the Supreme Special Court is responsible for reviewing the constitutionality of the provision in question and may declare the provision as invalid. In this last case, the provision in question may not be implemented and the re-examination of its unconstitutionality before any court is not permitted. However, the Supreme Special Court is not permitted to abolish this provision, because this would contravene to the principle of separation of powers safeguarded in Article 26 of the Constitution.

Moreover, eventual indeterminacy in a tax legislative provision is treated in the Greek legal order by the institutions responsible for the implementation of the relevant provision as follows - the tax administration, as the first institution implementing the relevant tax provision issues explanatory directives to clarify the text and its unclear points.[28]
The administrative (tax) court, which is the final court of the controversial legislative provision: On the one hand, according to Article 78 of the Constitution, it is obliged to apply the narrow interpretation and not any other interpretative method [29] to specify the content of the indeterminate provision and, on the other hand, in case the indeterminacy is not eliminated, the provision is considered to contravene

[26] Under sections 1.1 and 2.1.
[27] See above under section 2.2.
[28] See above under section 2.1.
[29] According to the Council of State case law, particular rules of interpretation apply to the interpretation of tax laws. Thus, the uniform interpretation of tax laws is imposed (CoS 32/1949) and in any case, tax laws may not be interpreted broadly (CoS 404 – 408 /1943, 1049, 1170, 1315 / 1949, 265 /1952). Moreover, tax laws may not be interpreted extensively (CoS 909 / 1939, 1922 / 1952). There is established case law especially for exemptions from tax liability and tax exemptions, the provisions of which need to be interpreted narrowly (CoS 2358 / 1947, 1089 / 1949). For the above case law, see Council of State Conclusions 1929-1959, National Printing House, 1961, p.438 (in Greek).

Article 78 of the Constitution. However in the case law of the Council of State, there is no judgment considering a tax provision unconstitutional due to indeterminacy.

3. The consequences of legal indeterminacy in tax matters

As already noted, national courts have "de facto" the final word for law interpretation,[30] on the occasion of applying the disputed provision for the resolution of a specific tax dispute.

Generally, in the Greek legal system the following is applied:
By virtue of Article 77, paragraph 1 of the Constitution, the authentic interpretation of the statutes should rest with the institutions vested with legislative powers. In case a law needs to be clarified, it may be interpreted by a new interpretative law, enacted by legislative institutions. The interpretative statute is a new statute which has retroactive force since the publication of the statute under interpretation. Nevertheless, if the new statute is not truly interpretative, then it must enter into force only as of its publication (Article 77, paragraph 2 of the Constitution).

Certainly, the tax authorities, who are primarily responsible for the implementation of tax law, are capable of issuing explanatory directives under the above-mentioned restrictive conditions.[31]

Finally, the domestic Administrative - Tax Courts and the Supreme Administrative Court (Council of State) have the final word in the interpretation[32] of the disputed provision of the tax law on the occasion of judicial appeal against a tax act based on this controversial provision.

It should be remarked that there is no procedural possibility in Greece to appeal to national courts for the interpretation of a legal provision. The judgment of the court regarding eventual unconstitutionality is incidental and "ad hoc", makes the relevant provision inapplicable, but it does not affect the validity of the provision for other cases. The provision held unconstitutional is inapplicable according to Article 93, paragraph 4 of the Constitution, which provides that national courts are bound not to apply a statute the content of which is contrary to the Constitution.[33]

Concerning the possibility of filling in the substantive meaning of eventual legal indeterminacies, the following should be remarked: The filling in of the substantive meaning of a tax law enacted by

[30] See above under section 2.2.
[31] See above under section 2.1.
[32] Otherwise there will be denial of justice.
[33] See above under section 2.2.

parliament and the President of the Republic is not possible by the issuing of regulatory administrative acts, nor through not truly interpretative regulatory directives, nor through creative interpretation by the competent courts, where an activist interpretation of the case law is not permitted. This very practice would contravene the principle of (formal) legality of taxes and the narrow interpretation of tax laws (Article 78 of the Constitution). Furthermore, such a practice would be also contrary to authentic interpretation of the statutes which should toile with the legislative powers (Article 77, paragraph 1 of the Constitution). [34]

As far as the filling in of the substantive meaning of legal indeterminacies by administrative directives is concerned and as to taxpayers' and Courts' commitment to them, the following should be remarked: According to what has been mentioned before, administrative directives addressing tax authorities' officials are binding upon the officials in charge only if they are consistent to hierarchical superior rules of law (the statute and the Constitution). In this framework, these internal administrative acts are binding upon taxpayers regarding the fulfilment of their tax obligations.

As far as the courts' commitment to the administrative directives is concerned, according to Article 87, paragraph 2 of the Constitution, judges in the discharge of their duties are subject only to the Constitution and the laws. Thus, the courts in no case take into account administrative directives. Accordingly, judges listen only to the voice of their conscience and they are not bound by explanatory administrative acts, because they are not subject to any hierarchy as are administration officials and consequently tax authorities' officials.

4. Relationship between tax administration and domestic tax courts

4.1. Judicial control of the application of tax law by the administration

As already mentioned, according to the Constitution, national administrative - tax courts control the application of tax legislation by tax administration only incidentally and only on the occasion of a judicial administrative action (brought before them) against an act of the tax administration that is based on the said tax legislation.

It should be noted that, in the case of a regulation of the tax administration issued on the basis of legislative delegation (of Article 43, paragraph 2 of the Constitution), it is possible to directly challenge

[34] See above under section 3.2.

the regulation through an action for invalidation before the Council of State, which may wholly or partly annul the tax regulation.

Moreover, not only tax regulations but also individual administrative acts may be controlled for unconstitutionality or unlawfulness of the provisions of substantive law that form its basis by another criminal or civil court on the occasion of a criminal or civil trial.

4.2. Extent of binding force of administrative directives, information given by the administration, etc. on national courts

Regarding the taking into account of administrative directives by the case – law of national courts, these are not taken into account, as discussed in detail, as they do not constitute a source of law.

With regard to the binding force of "information" given by the tax administration on courts, it should be said that there is no connection between courts and the administration, unless the relevant question is posed in the frame of administrative - tax litigation. Thus, in this frame, it should be noted that the issue is controversial, as it is related to the applicable procedural system before the administrative - tax judiciary. On the basis of the Code of Procedure before the Administrative Courts (CPAC) that is currently in force[35], the system of judicial enquiry prevails, given the fact that administrative (tax) litigation aims at preserving the public interest, which is in principle contrasted to the position taken in civil litigation.

The above procedural system is characterized by particular principles as to the distribution of the burden of proof between the parties in administrative - tax litigation, i.e. the litigants and, in the specific case, also the administrative (tax) court. These procedural principles refer both to the role of administrative (tax) court in tax litigation, out of which derives also the extent of the binding force of litigants' allegations on it, as well as to the burden or proof borne by the parties, as procedural equals in tax litigation, namely of the tax administration that issued the challenged act as a party holding the administrative file, and of the tax subject whose action initiates tax litigation in the first instance.

[35] Code of Procedure before the Administrative Courts (CPAC), law 2717 / 1999, Official Gazette A 97.

With regard to the role of the administrative (tax) court in tax litigation- which is governed by the inquisitorial system- and the binding force of litigants' arguments upon it, and in particular of the arguments of the tax administration, the following principles apply[36]:
i) the principle of discovery of the objective (substantive) truth ex officio (Article 33 CPAC), by virtue of which the court may order the supplementing of evidence and the performance of any necessary act ex officio;
ii) the principle of preliminary evidence[37]; and
iii) the principle of free use and evaluation of evidence by the court, unless otherwise stipulated in a special statutory provision (e.g. increased probative effect of public documents).

Therefore, in accordance to the above principle, an administrative (tax) court has increased powers and is not bound in principle by the administrative file and the arguments of the tax administration as a litigant, but only under certain conditions.[38]

In particular, according to Article 33 of the Code of Procedure before the administrative courts, tax courts are responsible for the progress of litigation. To this end, the court orders the performance of any necessary procedural action and takes all appropriate measures to discover the truth and the most expedient delivery of the judgment. According to Article 146 CPAC, evidence is based on the data included in the administrative file according to Article 149, as well as on the data that resulted from evidence in proceedings before the court.[39]

Moreover, by virtue of Article 148 CPAC, the court uses means of proof according to its judgment and evaluates them freely, individually or in conjunction with one another, unless otherwise provided for in a specific legislative delegation. It appears from the provisions in this article that the court only takes into account evidence that has been produced admissibly, e.g. as preliminary evidence, but this is still evaluated freely, in order for the court to form its own view. An exception to this rule is posed by Article 171 on the probative effect of public documents[40].

[36] Kontogiorga – Theocharopoulou Dim., Evidence in administrative litigation, Speech at the 2nd Congress of Administrative Judges, November 30– December 2 1990, op. cit., p. 36 et seq. (in Greek) and the footnotes therein.
[37] Theocharopoulos L., Tax law, op. cit., p.328.
[38] See below under b.
[39] According to Article 147 CPAC the following are means of proof: tangible evidence, expert reports, documents, litigant's confession, explanations offered by the parties, testimony and judicial presumptions. It is certainly possible to exclude one or more means of proof, if so expressly provided for by the law governing the legal relation. The means of proof produced and invoked by a party are the same for the other litigants as well.
[40] For more details, see below under b.

In contrast to civil litigation, the inquisitorial system that applies in tax litigation reserves a broad spectrum of powers, initiatives as well as obligations for the administrative court, aiming at the discovery of the objective truth. The powers and obligations of the administrative court comprise, among other ones, the examination (even on its own motion) of the legal foundation of the challenged act or omission, on the one hand, (Article 79 CPAC), and, on the other hand, the delivery of a preliminary ruling for the completion of evidence (Articles 152 and 153 CPAC), also on its own motion, if it is deemed "necessary". In other words, in case the evidence produced by the parties is insufficient for the administrative court to form its own view or if the court has reached a temporary factual dead end, the court is to order the supplementing of evidence[41].

However, the administrative court may not disregard or exceed the rules of the law of evidence (Articles 144 to 186 CPAC), which include the rules on the burden of proof[42]. Therefore, the provisions of Article 145 CPAC define that: each party has to prove the facts invoked in support of its arguments (certainly only these facts that have direct or indirect influence in the outcome of litigation) –unless otherwise provided for by the legislature – and the other litigant is entitled to counterproof. Litigants are entitled to invoke the data that are in the administrative file according to Article 149. The litigant against whom a legal rebuttable presumption is invoked bears the burden of rebuttal. Furthermore, the provisions of Article 145 should be interpreted in conjunction with those of Article 33 of the same Code, which establish the inquisitorial system, in view of the public purpose that they mainly serve in tax litigation.

This means that the administrative (tax) court may not dismiss single-handedly the factual arguments of the litigants by holding that they were not able to prove the factual foundation of their claims. On the contrary, by virtue of the principles of the inquisitorial system that apply in administrative (tax) litigation, the court is obliged to proceed on its own motion with supplementary evidence, as long as it has not formed its mind based on the data included in the file, in application of Article 151 CPAC[43] [44].

The case law of the Council of State seems to be moving to same direction in tax disputes[45]; it is thereby accepted that the meaning of Article 151 CPAC before administrative - tax courts is that the administrative court may but is not under obligation to order the supplementing of evidence, when the

[41] K. Yiannopoulos, "Evaluation of evidence by the competent court", Diikitiki Diki (Greek legal journal), 2004 p. 306 et seq. (in Greek).
[42] See. Chatzitzanis N., Code of Procedure before Administrative Courts, Ant.N. Sakkoulas Publishers (in Greek).
[43] Article 151 CPAC provides that, following a request of a litigant or on its own motion, the court may order by ruling the supplementing of evidence by any appropriate means of proof, if it deemed this necessary.
[44] K. Yiannopoulos, "Evaluation of evidence by the competent court" (in Greek), op. cit., p.306 et seq.
[45] See CoS 109/1996 , 3108 / 1996, 190 /1995, 2054 / 1995, 2170 / 2003.

litigants, who bear the burden of proving the factual foundation of their arguments, did not produce sufficient evidence or any evidence at all. This reference to the possibility of administrative (tax) courts to supplement evidence reflects usual practice and refers to the cases where the evidence produced is sufficient for the court to form its own view. In the opposite case, the court not only "may" but "ought to" order the supplementing of evidence.

It should be noted that this case law does not and cannot mean that the competent court has to form its view only from the existing evidence[46] and exclusively on the basis of Article 145 CPAC on the burden of proof. On the contrary, according to Article 144 of the CPAC, the administrative courts takes into account, even on its own motion within the sense described above, other data as well: commonly known facts, i.e. facts that are so widely known that there is no reasonable doubt that they are true, as well as facts that are known to the court due to previous judicial actions. The courts take equally into account the lessons of common experience, even through judicial presumptions, as well as foreign law, as long as this is known to the court, legal custom and common practice. These provisions, based on the inquisitorial system, deviate from those of Article 145 CPAC and reconfirm the general inquisitorial principle which is mainly found in Article 33 of the same Code. Thus, the burden of proof, if it is not completely abolished, especially where its effects are concerned, is mitigated to a considerable extent and illustrates the dynamic role of the administrative (tax) court, so that the tripartite structure of administrative (tax) court proceedings is supported.[47]

Nevertheless, in the same cases, not only is the invocation of this data by litigants for proving their factual allegations allowed, but it is advisable, in order to assist the court in the discovery of objective truth. Moreover, according to wording of Article 151 CPAC, the administrative (tax) court may order by preliminary ruling the supplementing of evidence, while, according to the wording of Article 155, paragraph 1 CPAC the court may request by decision from third parties information and data that is necessary for the discovery in the case.[48]

Further, the CPAC enumerates in Article 147 exhaustively the legal means of proof before competent administrative courts and does not leave them at the discretion of the tax administration. Subsequently, their elements and the method of production are defined in detail in Articles 156 to 185. In particular, the following are stipulated in Article 147 as means of proof: a) tangible evidence, b) expert reports, c)

[46] See also Article 146 CPAC.
[47] Kontogiorga – Theocharopoulou Dim., op.cit., Speech at the 2nd Convention of Administrative Judges, 30 November– 2 December 1990, op. cit., p. 36 et seq. (in Greek) and the footnotes therein.
[48] Ap. Gerontas, "The burden of proof in administrative litigation", Efarmoges Dimosiou Dikeou (Greek legal journal), special issue II, pp.19-21 (in Greek).

documents, d) litigant's confession[49] e) explanations offered by the parties, f) testimony, and g) judicial presumptions.[50] This clearly results from all these provisions that no means of proof that are not enumerated in Article 147 CPAC are not admissible in administrative (tax) courts, nor are the aforementioned means of proof to be taken into account by the court, if the parties have not complied with Articles 156 to 185 CPAC that determine in detail the elements of the means of proof and the way they should be submitted to the court, by virtue of the principle of preliminary evidence. Finally, it should be noted that even through judicial presumptions, which are by definition related to indirect evidence, the powers of administrative (tax) courts are enhanced, given the fact that courts are frequently called upon to deduce consequences with regard to unknown things from known things, based on the lessons of common experience and reason (enriched by generally accepted principles of science and art)[51].

With regard to the binding force of public documents upon courts, it is noted that, according to Article 171, public documents that have been drafted by the competent institution by observing all statutory formalities have full probative force for the information stated in them, either that the person that drafted them acted or that the information stated took place before him, and counterproof on such information is only possible if these documents are challenged for falsity. Otherwise, the content of public as well as private documents is freely evaluated, according to the provisions of Article 148. Other evaluations by public institutions that are included in public documents are also freely evaluated by administrative - tax courts, while counterproof against them is also permissible. Moreover, audit reports that are drafted by tax institutions have the full probative force of Article 171, paragraph 1 [52], except for the information contained in them and the confession of the auditee.

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[49] In the Greek legal order, the notion of litigant's confession is used in the frame of criminal trial as well as administrative litigation.

[50] In the Greek legal system, judicial presumptions are distinguished from legal presumptions. The latter are specifically and individually provided for by the legislator. The former are stipulated by the law (CPAC) as a category of legal means of proof in the framework of administrative litigation. Judicial presumptions are not foreseen one by one, by the legislator, but it is for the Court to deduce their existence in a certain case, i.e. to deduce conclusions with regard to unknown things from known things, based on the lesson of common experience and reason (enriched by generally accepted principles of science and art)

[51] See Dim. Kontogiorga – Theocharopoulou, Speech at the 2nd Convention of Administrative Judges, November 30– December 2 1990, op. cit., p. 39, J-Ph. Colson, L' office du juge et la preuve dans le contentieux administrative, these, 1970, p. 77 et seq., B. Pacteau, Contentieux Administratif, 2nd ed., PUF 1989.

[52] See below under b. It should be clarified that, as concerns confession as a means of proof, it was accepted by the Council of State that there can be no confession of the State (of the Tax Administration) or acknowledgement that is binding upon the court, as king as no such binding force is provided for in express provisions (CoS 306/1954, CoS Conclusions 1929-1959, National Printing House, 1961, p. 442). Since 1999, this case-law has been codified in the CPAC currently in force, and therefore only the confession of the private party litigant is included in the means of proof to be taken into account by the court, according to Article 147 CPAC, as presented earlier. Nevertheless the most usual means of proof in administrative court practice are documents, both public and private, while tangible evidence and expert reports are rare. Testimony that was taken in preliminary evidence procedure is not uncommon. Unfortunately, this testimony is not taken by observing the conditions of Article 185 of the Code of Procedure before Administrative Courts and in that way evidence is rendered inadmissible.

As a consequence of the above, the dynamic role of administrative – tax courts in the respective litigation is evident. This role is inherent in the inquisitorial system that is currently in force and is justified by the need for discovery of objective truth (in the public interest) and by the need for limitation of the inherent de facto inequality of the parties, i.e. between taxpayers and tax administration, as the latter holds the data on the case or is close to facts that have to be proved.[53]

With regard to the burden of proof of the litigants as procedural equals in tax litigation, namely of the tax authority that issued the act being challenged as the party holding the administrative file, and of the tax subject whose action initiated the tax litigation in the first instance, the following should be noted:

The burden of proof of the tax authority is fulfilled by production in court of the evidence it holds.

As mentioned above, this data is taken into account by the court only as long as it constitutes a lawful means of proof. Certainly because of the position of each litigant in administrative (tax) litigation, there is a differentiation in the means of proof that each litigant has to produce.

With regard to the tax authority, its main means of proof is the public document that its officials draft after the performance of an audit, usually called the audit report. It is a public document that contains a description of all actions undertaken by the public officials that drafted the document, everything that took place before them, as well as their further findings. The audit report is conclusive evidence as far as the actions of the authors of the report and everything that took place before them are concerned.[54]

It is, however, common practice that the tax authority will also produce other documents, both public and private, in court.[55] Article 173 CPAC does not distinguish between submitted copies of public and

[53] Kontogiorga – Theocharopoulou Dim., 2nd Congress of Administrative Judges, op. cit., Theocharopoulos L, Tax Law , op. cit., p.296, J-Ph. Colson, L' office du juge et la preuve dans le contentieux administrative, these, 1970, p. 77 et seq.

[54] Should a private party litigant wish to challenge some of the aforementioned facts that are certified as true in the report, he should challenge the audit report as falsified (see Articles 169 et seq. CPAC, as well as Articles 144 et seq. of the Code of Tax Procedure (CTP)). Nevertheless, as far as the opinions of the authors, other information and any confessions taxpayer are concerned, the audit report is freely evaluated and there may be counterproof (CoS 377/2007, 893/2001, 2071/1990).

[55] Under the previous regime (i.e. the regime of the CTP), according to Article 146 (1) CTP, when the public documents submitted by the tax authorities were non-certified copies of the original documents, it has been held that they cannot be taken into account by the court (CoS 1325/1988). In case the submitted documents were copies of private documents, according to Article 146(2) of the same code, then their content could be co-evaluated along with the remaining evidence.

private documents, while it is stipulated that they may be evaluated by the court, as long as the latter is convinced of their accuracy from other data[56].

A question arises in cases where the administration refuses to produce critical evidence in court, claiming that this evidence comprises confidential documents. It has been held,[57] however, that reasons of this nature may in principle justify a restriction of the right of free access of the litigant to the file submitted in court; nevertheless, under no circumstances is the non-submission of confidential information in court justified. Any other opinion would negate the purpose of classification of certain information as confidential, would amount to a complete exclusion of judicial control in significant areas of administrative action and would constitute a drastic restriction of the right to judicial protection that would violate the Constitution (Article 20 paragraph 1) and Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)[58]. Therefore, in case the justification of the challenged administrative act is based on confidential information, the administration is, on the one hand, not obliged to mention in the main body of the challenged act the facts that emerge from the above confidential information, but, on the other hand, it should submit the said confidential information for consideration by the court, in a way that is certainly compatible with their classification as confidential.

Finally, the Council of State has held[59] that only testimony taken according to the rules in Articles 152 et seq. CTP constitute lawful means of proof during the procedure before administrative courts. Administrative - tax courts may not take into account testimony that does not meet the requirements of the above provisions, not even by virtue of the principle of free evaluation of means of proof by courts under Article 124 CTP, as this principle presupposes the use of means of proof prescribed by statute. Nevertheless, this testimony may be taken into account, if was not given in order to be produced in the administrative - tax court but was given according to administrative procedures[60]. Concerning this issue, the meaning of the provisions in Articles 147, 148 and 179 CPAC is analogous. Thus, the tax authority

[56] Thus, the Supreme Administrative Court in interpreting Article 173 it held that it results from these provisions that simple copies of documents that are means of proof are taken only subsidiarily into account by the court, which, being convinced of their probative value, is to co-evaluate them along with the remaining evidence produced, without these copies, photocopies, etc. having to be necessarily certified (CoS 3561/2005).
[57] CoS 4600 / 2005, 3631 / 2002 .
[58] Ratified by Legislative Decree 53/1974 (Official Gazette A 256).
[59] Based on the conjunction of the provisions in Articles 123, 152 and 154 CTP that were previously in force.
[60] Consequently, testimony in the form of solemn declarations of law 1599/1986, as well as sworn testimony of third parties given before a notary, which have substantial influence upon the outcome of the proceedings in progress before an administrative court, is not considered to be lawful means of proof and may not be taken lawfully into account, not even for the extraction by the Court of judicial presumptions, as the necessary formalities prescribed by the CTP were not observed in order to ensure their validity, because it is testimony that was given in violation of Articles 152 et seq. CTP. However, the above restriction does not apply in case the solemn declaration was not given to be submitted to an administrative court, but was taken according to administrative procedure or its content refers to the audit report.

has proved its views on the fictitiousness of invoices by producing an extrajudicial statement made according to administrative procedures and not in view of the trial; it thus constitutes extrajudicial testimony that may not be taken into account according to the meaning of these provisions. [61]

With regard to the time of submission of evidence by litigants and subsequently about the taking into account of the relevant evidence by the court, the following should be mentioned: Article 150 CPAC provides that: "Documentary evidence and testimony of Article 185 should be submitted to the court at the latest until the day immediately preceding the day of the first hearing on the case. Submission at a later hearing is only admissible when timely submission was impossible, according to specifically justified judgment of the court".

Moreover, in Article 96 of the same code entitled "Change of object – new claims and evidence" it is provided that: "2. It is permissible to put forward new factual allegations in appellate litigation, as long as they refer to issues that were challenged in the first instance litigation and their submission was deemed to be justified."

It follows from these provisions that, in principle, the production of new evidence by the litigants has to be in the form of preliminary evidence and in particular by the day immediately preceding the first hearing of the case. Production at a later stage is in principle not allowed; it may, however, be admitted in court by a specially justified ruling only in the special case where its timely production was impossible.

It has been held that, according to Article 96 CPAC, introduction and production of new means of proof in appellate litigation is only permissible only to prove new factual allegations, when their submission only in the second instance is duly justified and not when they aim to prove allegations that were also put forward in the previous instance.

4.3. The binding force of case law upon the tax administration

The tax administration takes into account the case law both of national courts and the ECJ. In fact, it is under an obligation to take into account the relevant case law, in case it has received a circular that informs it about the content of the relevant judgments. When there is an ad hoc res judicata, it is bound by it.

[61] CoS 2931/2006.

There is no principle of reciprocal observation of the interpretation of tax law by the tax administration and domestic courts.

With regard to the legal binding force of the administration by case law, the following applies: In the Greek legal order, by virtue of Article 95, paragraph 5 of the Constitution, the tax administration has to conform to the "res judicata" of court judgments that may not be challenged by ordinary or extraordinary methods of review. Only in case there is no res judicata, i.e. there is no ad hoc court judgment, the administration applies the particular provision to the particular taxpayer, by interpreting the particular provision according to its opinions and on its own responsibility (disciplinary, civil, criminal). Therefore, if there is a court judgment in another case, the administration is under no obligation to uphold the interpretation of the particular provision, as there is no res judicata to bind it. Nevertheless, the administration usually follows the said interpretation of the provision, especially when it is interpreted in a judgment of the Council of State, i.e. the Supreme Administrative Court of the country.

The infringement of the obligation of the administration to adhere to court judgments (Article 95, paragraph 5 of the Constitution), generates responsibility for each competent instrument, as stipulated by law. A law determines the necessary measures to ensure the compliance of the administration.

Nevertheless, in practice the administration adheres to judgments only in case there is an ad hoc judgment on the matter, while it is possible to disregard case law in another case for which there is no res judicata, despite the fact that it is case similar to the one that has already been ruled on. When the administration is convinced that the final judicial decision is wrong or not "acceptable" because, e.g., it is too expensive for the public, it will delay compliance with it. Certainly, by virtue of the Constitution, administrative/tax authorities are bound to accept the (from their point of view) wrong decision. Nevertheless, it very often happens that they try in another similar case to convince the court to decide in a different way. In addition, they often try to influence the parliament to change the law.

5. Relationship between different legal sources (legal pluralism)

5.1. Legal pluralism

The parliament, the tax administration and the Greek domestic courts comply with different legal sources, depending on the legal source's position in the hierarchy of sources of law.

The sources of law[62] are distinguished in those of a national and of supranational level.

The classic written legal sources of tax law at the national level are hierarchically classified as follows: sources at the constitutional level (the Greek Constitution, primarily), sources at the formal statute level, sources at the substantive statute level or at the level of tax regulatory act and finally the tax assessment at the personal level. Nevertheless, it is observed that even in the same rank in the hierarchical structure of legal sources, there is an internal hierarchical structure based on different criteria, the most important of which is the formal criterion in the sense that the institution/organ and the process is of high importance (depending actually on the hierarchical classification of the institution that issued the act). For example, a formal statute voted by the parliament's plenary session is of a higher rank than any other formal statute voted by sections of the parliament.

The classic written tax law sources at the supranational level are established in Article 28, paragraph 1 and 2 of the Constitution. Particularly, this article refers to special rules of international law and to the rules of EC law.

Concerning the rules of international law, they "shall be an integral part of domestic Greek law" (Article 28, paragraph 1 of the Constitution). In detail, according to Article 28, paragraph 1 of the Constitution, rules of international law are divided in two categories: the generally recognized rules of international law and the international conventions/treaties.

The generally recognized rules of international law, as well as international conventions/treaties as of the time they are ratified by statute and become operative according to their respective conditions, are an integral part of domestic Greek law and prevail over any contrary provision of the law. The rules of international law and of international conventions are applicable to aliens only under the condition of reciprocity.

Under the category of international conventions as described in Article 28, paragraph 1 of the Constitution fall double tax treaties concerning income tax, capital tax and inheritance tax. These treaties must consequently be ratified by formal statute in order to be integrated in the domestic legal system. After having been ratified, these treaties prevail over any other legal rule, and are classified between the Constitution and a formal statute. Consequently, their integration in the domestic

[62] On the sources of law, see among others, Tachos A., Greek Administrative Law, Sakkoulas Publishers, Thessaloniki – Athens 2005, p.94 et seq. (in Greek).

jurisdiction does not occur "ipso jure" -as opposed to generally recognized rules of international law - and their amendment or repeal by the enactment of a new statute is not possible after their ratification (unless this very same procedure is followed).

Greece has concluded various bilateral double tax treaties[63] that constitute the international tax law of Greece and which, after having been ratified by statute,[64] prevail[65] over any contrary provision of the law.[66]

As far as the OECD Model Tax Convention on Income and on Capital and its Commentaries is concerned, they are not part of the Greek international tax treaty law, because the OECD Model Tax Convention has not been ratified by statute, as defined in Article 28 of the Constitution regarding the enforcement of international conventions/treaties. Nevertheless, bilateral double tax treaties follow the

[63] Especially the treaties for the avoidance of double taxation on income that were signed by 2006 by Greece are included in the two volumes published by the Directorate of International Economic Relations (IER) of the Ministry of Economy and Finance in English and Greek entitled: "Avoidance of Double Taxation with regard to Income and Capital", September 2006, Conventions, Forologiki Epitheorisi .

[64] See, among others, Theocharopoulou Eleni, Taxation of income derived from electronic commerce, Ant. N. Sakkoulas Publishers, Athens, Greece, 2007, p.40 (in Greek).

[65] For the legislative supremacy of the said tax treaties over national law, according to Article 28 of the Constitution, see the relevant case law of the Council of State 3416/2004, 1975/1991, TrDPrAth 7956/2005. See also. Theocharopoulou Eleni, Taxation of income derived from electronic commerce, Ant. N. Sakkoulas Publishers, Athens, Greece, 2007, p. 40 (in Greek). The same in Anastopoulos I. – Fortsakis Th., Tax Law, op. cit., 2003, p. 362, No. 399 (in Greek), Finokaliotis K., Tax Law, Sakkoulas Publishers, Athens - Thessaloniki 2005, p. 230, No. 503 (in Greek), Barbas N., Taxation of income, Sakkoulas Publishers, Athens - Thessaloniki 2003, p. 354, (in Greek), Chrysogonos K., Individual and Social Rights, Ant. N. Sakkoulas Publishers, Athens, Greece, 1998, p. 14, (in Greek). However, it was held in a large number cases that tax treaties supercede the general provisions of national law as special provisions, especially tax treaties that were concluded before entry into force of the 1975 Constitution, given the fact that at the time their superlegislative effect was not provided in the Constitution. The aforementioned judgments were passed on the basis of the "lex specialis derogat legi generali", see CoS 3450/2005, DEfAth 3100/2001, CoS 4078/1997, 1038/1994, 1627/1991, DEfAth 1315/1991, CoS 550/1991, CoS 3016/1986. See Theocharopoulou Eleni, Taxation of income derived from electronic commerce, Ant. N. Sakkoulas Publishers, Athens, Greece, 2007, p.40 (in Greek).

[66] The pre-EU international tax treaties for the avoidance of double taxation also remain in force for Greece, as for every Member State of the EU (compare Vogel K., Double Taxation Conventions, Kluwer Law and Taxation Publishers, 2nd Edition, Deventer-Boston 1997, p. 74), but also according to the interpretation of Article 307 EC (according to Article 307 of the EC Treaty "The rights and obligations arising from agreements concluded before 1 January 1958 or, for acceding States, before the date of their accession, between one or more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of this Treaty. To the extent that such agreements are not compatible with this Treaty, the Member State or States concerned shall take all appropriate steps to eliminate the incompatibilities established. Member States shall, where necessary, assist each other to this end and shall, where appropriate, adopt a common attitude. In applying the agreements referred to in the first paragraph, Member States shall take into account the fact that the advantages accorded under this Treaty by each Member State form an integral part of the establishment of the Community and are thereby inseparably linked with the creation of common institutions, the conferring of powers upon them and the granting of the same advantages by all the other Member States.", see Prevedourou Eug., Article 307 in Skouris V., Commentary of the EU and EC Treaties, Ant. N. Sakkoulas Publishers, 2004, pp. 1678-1687, (in Greek), Member States are under the obligation to ensure the compatibility of these conventions with Community law (see Finokaliotis K., Tax Law, 2005, op.cit., pp. 230-232, Nos. 504-506 (in Greek), Chatzioakimidou Eu., Tax Treaties. Their application in partnerships, Nomiki Vivliothiki Editions, 2005, p. 47 and the footnotes therein (in Greek). For the above issues, see Theocharopoulou Eleni, Taxation of income derived from electronic commerce, Ant. N. Sakkoulas Publishers, Athens, Greece, 2007, pp. 40-41 (in Greek).

OECD Model Convention's content and the rules on the allocation of tax sovereignty indicated by this Model Convention.[67] [68]

With regard to EC law, it may be deduced from the conjunction of paragraphs 1 and 2 of Article 28 of the Constitution, as well as from the rules of Community law itself (the binding force of which varies according to whether it is primary or secondary law), in which cases it forms part of the national legal

[67] Theocharopoulou Eleni, Taxation of income derived from electronic commerce, Ant. N. Sakkoulas Publishers, Athens, Greece, 2007, pp. 41-42 (in Greek). It should be noted that the OECD Model Tax Convention is prescriptive and not binding. According to the OECD Model Tax Convention, States are allowed to take uniform action against double taxation. On the recommendation of the OECD Council: Member states should comply with the OECD Model Tax Convention and its Commentaries when signing or revising bilateral double tax treaties. They should also take into consideration reservations of tax administrations which are formulated in the same text (of the Commentaries). Revisions of the OECD Model Tax Convention and its Commentaries should also be taken into consideration by tax administrations, when they are asked to apply bilateral double tax treaties provisions, in case they are based on the OECD Model Tax Convention, see OECD, Model Tax Convention on Income and on Capital, Introduction, p. 7, No. 3. Nevertheless, this does not imply that Commentaries of the Model Tax Convention constitute a legal commitment [Contra Vinieri V., who claims that Commentaries are legally binding, see "The meaning of the term "resident" in double tax treaties", Epixeirisi (Greek legal journal) 2/2005, p. 275 (in Greek)], although the Commentaries were jointly agreed and accepted or even through reservations which were formulated about this issue by representatives of the Ministries of Finance of the OECD Member states. Only double tax treaties concluded between two states are legally binding on international level – as expressly cited repeatedly in the Introduction to the OECD Model Tax Convention (OECD, Model Tax Convention…, op. cit., Introduction, p. 15, No. 29). Commentaries concerning the OECD Model Tax Convention do not constitute annexes of the bilateral double tax treaties, but are nevertheless widely recognized by States as interpretative tool for uniform application of the particular treaties (OECD, Model Tax Convention..., op. cit., p. 15, No. 29 and p. 10, No. 15). Furthermore, the case law of the Court may take them into consideration, when interpreting bilateral treaties (OECD, Model Tax Convention ..., op. cit., p. 15, No. 29.3).

[68] The interpretation of bilateral tax treaties should follow the provisions of the Vienna Convention on the Law of Treaties of 1969 (ratified in Greece by Decree 4021/1974). According to Article 31, paragraph 1 of the Vienna Convention, treaties must be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose, see Roukouna E., International Law, t. A., Athens 2005, p. 147 (in Greek), Theocharopoulou Eleni, Taxation of income derived from electronic commerce, Ant. N. Sakkoulas Publishers, Athens, Greece, 2007, p.43 (in Greek), Finokaliotis K., Tax Law, op.cit., p. 230, No. 503, Anastopoulos I. – Fortsakis Th., Tax Law, op. cit., p. 363, No. 401. Concerning the interpretation of bilateral tax treaties according to the provisions of Vienna Convention, see Chatzioakimidou Eu., Tax Treaties. Their implementation on partnerships, op. cit., pp. 60-67 and references. However, the view (see Theocharopoulou Eleni, Taxation of income derived from electronic commerce, Ant. N. Sakkoulas Publishers, Athens, Greece, 2007, p. 43) that Commentaries to the Model Tax Convention should be particularly taken into consideration (both by the administration and the courts), in case a provision of the bilateral double tax treaty is identical to that of the Model Tax Convention, is correct. Furthermore, it is not correct to claim that issues not mentioned in the bilateral double tax treaties are "filled in /supplemented" by provision of the OECD Model Tax Convention, even more where the Model Tax Convention provision existed before the conclusion of the bilateral treaty at stake. Given the fact that the states concluding the treaty have taken into consideration the OECD Model Tax Convention (and the Commentaries) and follow its formulation or, on the contrary, deviate from its wording, their intention is clear. Besides, the respective treaty signed by the states and ratified by statute is the double tax treaty in force and not the OECD Model Tax Convention. Thus, an incorrect interpretation of the Vienna Convention was produced by judgment No. 9360/2000 of the Administrative Court of First Instance in Athens: the "intepretation" and the "completion./supplement" of the provisions of Article III of the treaty between Greece and the USA, according to Article 7, paragraph 3 of the OECD Model Tax Convention and particularly based on the incorrect arguement that the above-mentioned article (of the Model Tax Convention) is not abolished because it was considered special in comparison with the later enacted general domestic law provision. There is confusion in the present judgment regarding particularly the fact that the articles of the OECD Model Tax Convention do not constitute provisions of Greek legislation since they have not been ratified by statute, as provided for by Article 28 of the Constitution. Consequently, given that the OECD Model Convention is not part of Greek law, it cannot constitute a special Greek statute prevailing over a general Greek statute. Concerning this issue, see Theocharopoulou Eleni, Taxation of income derived from electronic commerce, Ant. N. Sakkoulas Publishers, Athens, Greece, 2007, p.43 (in Greek)

order and what its position in the hierarchy of sources of law is. The position of EC law may be inferred from the ECJ case law but also from the jurisprudence of the highest national courts (Supreme Court, Council of State, Court of Auditors and Supreme Special Court).

According to Article 28, paragraph 2 of the Constitution, authority under the Constitution may by treaty or agreement be vested in agencies of international organizations, when this serves an important national interest and promotes cooperation with other states. A majority of three-fifths of the total number of members of parliament is necessary to enact the law ratifying the treaty or agreement.

It is generally accepted that primary EC law has direct effect in Member States and on their nationals. Nevertheless, various opinions have been supported in our country with regard to the hierarchical classification of EC law in relation to national laws and national constitutions, such as: the super-legislative power of Community law or only of primary Community law, the latter of which is also more accurate, the supremacy of EC law over the Constitution, the supremacy of the Constitution over Community law or relations of equality between the two legal systems (or at least the lack of competition between them), unless civil liberties and the foundations of democracy are at stake, in which case EC law prevails. In any event, it is certain that EC law enjoys super-legislative power in Greece by virtue of Article 28, paragraph 2. Thus, national courts control (national) statutes for their compatibility with the said EC law only incidentally, in the same way that they control the eventual unconstitutionality of a statute. With regard to secondary Community law, it has firstly no direct effect and secondly, its content, particularly in tax issues, e.g. directives related to tax issues, is transposed into the Greek legal order by statute.

Regardless of the aforementioned views contained in theory and case law about the position held by EC law in the hierarchy of the sources of law, it is unequivocally recognized that in practice EC law possesses a last resort "enforcement apparatus" of its rules with regard to national law; that is, the imposition of pecuniary penalties on behalf of European institutions, European funding and European support programmes, so Member States have to comply with EC law, in order to receive these funds. As a result, the priority of EC law in the national legal order is ensured.

Beyond written sources of law, unwritten sources are also accepted. Through the latter sources, new legal rules are created through interpretation by the institution applying the law, which constitute soft law. However, the enactment of such rules is very limited in Greek tax law, due to the principle of the formal legality of taxes.

5.2. Taxpayers' legal remedies for the protection of their rights

In general, remedies that are available to taxpayers in the Greek legal order ensure effective protection, whether they involve the protection of rights enshrined in the Greek or in the Community legal order. With regard to tax treaties, as outlined above, due to the fact that they are applicable in the Greek legal order only after their ratification by law, they constitute from that moment on national law; therefore, the same taxpayers' remedies that are available for the protection of rights by national law apply also for rights derived from these treaties.

6. Conclusion

It follows that the hierarchy of sources of law in Greece is consistent with and follows the separation of state institutions and functions of Article 26 of the Constitution and the priority of the democratic principle of Article 1 paragraph 3 of the Constitution. The supremacy of the formal legislator is thus ensured, and is almost dominant in tax matters. At the same time, however, judicial review of the executive (or the public administration, as it is otherwise called, which also includes tax authorities) and the legislator is ensured. The latter is reviewed in the infrequent cases of unconstitutionality of laws or of its conflict with (at least) primary EC law. Judicial review safeguards at the same time the basic civil and human rights against the arbitrary imposition of taxes by the tax authorities.

Italy: Separation of Powers in Tax Law (Lorenzo Del Federico with the collaboration of Riccarda Castiglione and Francesca Miconi)

1. Relationship between the parliament and the tax authorities: the influence of the tax authorities on tax legislation

The Italian Constitution grants legislative competence to the government. However, it is necessary to distinguish between legislative competence and normative power, by which is meant those acts which have the form of a law but are subordinate to the law. According to Articles 76 and 77 of the Italian Constitution, the government has the power to issue acts which have the same force as laws. In particular, Article 76 of the Constitution provides that the parliament may delegate the legislative power to the government. In this case the parliament defines the principles and the criteria which the government has to follow and the act of the government is called a "legislative decree". The legislative decree is largely used in the Italian system so that extremely technical and complicated subjects, such as the tax matters, are dealt with by a technical authority. However, this procedure causes an excessive interference of the government in the legislative power.

In addition, the government may adopt, for reasons of necessity and urgency and for a limited period of time, "decree laws" (Article 77 Constitution), which must be forwarded to the parliament to be converted into law within maximum 60 days, otherwise such degree laws lose their effect from the beginning. Decree laws are often used in the tax field too, and they find their justification in the necessity for the government to intervene rapidly and without advance warning in some economic fields.

The government can also issue regulations which do have not the same effect of law and which usually take the form of the ministerial decree and have the function of completing the regulation of a tax. The principle of legality (Article 23 Constitution) does not admit independent regulations, at least for what concerns the substantive aspects of taxes regulation.

The activity of the government in proposing tax bills takes different forms. The simplest way of making a proposal to the parliament is to present draft legislation in the fiscal field. Article 87 of the

Constitution provides that the government has the initiative in legislation; in other words, it may propose new laws which are discussed in and voted on by the parliament. In fact, the parliament may ratify or convert the decree law into a law, or totally or partially modify it. Italy also has the Finance Act in which the government may determine extra demands on financial resources, fixing a limit to the public debt and list the estimated revenues (Article 81 Constitution). The Finance Act must be presented by the government by 30 September and the parliament has time to examine it and modify it or amend it by 31 December.

In the course of time the government has used its legislative competence more and more. Legislative decrees are, for example, used very often in tax matters. This is because they are thought to be the best instrument in a technical field like the tax one. For this reason the government is considered to have more latitude than the parliament and so can adopt more complex laws. However, over the course of time Italy has witnessed a misuse of this power by the government, both for political reasons (long time for parliamentary work, difficulty finding a majority) and technical reasons (necessity of introducing continuous modifications in the fiscal discipline and adoption fiscal measurements in a short time). We can make the same comments concerning the decree laws. These, in fact, were initially used to allow rapid modifications of the fiscal system but ended up being used with excessive frequency, also to obviate the difficulty of finding solid majority in the parliament (often the government asks for the conversion of a law decree into law, a vote of confidence. If the government receives a vote of no confidence from the parliament, the government is ousted). Also, regulations in the fiscal field are quite frequent due to the necessity of the administration issuing acts which integrate parts of the tax laws or regulate technical details.

The Italian Constitution recognizes to the government the competence to present draft bills, such as the Finance Act. Like any other proposal these draft bills must be approved by the parliament, which also considers possible amendments. It must be observed, however, that as the government has the majority in the parliament, the proposals made by the government are more easily approved than those presented by others. Moreover, the government, because of the particular technicality of the fiscal subject, and also because tax matters play a crucial role on the political scene, has a fundamental role in the legislative initiative. The law decrees must be immediately transmitted to the Parliament which must meet to examine it and decide whether to convert it into a law or not, eventually modifying it, but necessarily within 60 days, otherwise the law decrees loose its effect from the beginning.

In the Italian system the use of the legislative power by the government is very frequent. The decree laws, for example, allowed only in cases of urgency and necessity, are just because of this characteristic

often used in the fiscal field. In the last years, however, this instrument has been commonly used, even though the Constitution considers it to be exceptional. According to the literature, the excessive use of the decree laws increases the uncertainty of the legal system. This situation, in fact, emphasizes the problem of the relations between decree laws not converted into laws and those only partially converted, and the fiscal situations which they have been temporally regulating. The criticism expressed by the literature has been incorporated in some laws, and in particular in the Taxpayer's Statute (hereinafter: Statute) or Taxpayer's Bill of Rights – law No. 212 of the 27 July 2002, which contains general principles of the tax system (Article 1 of the statute). In the statute is provided that " it is not possible either to levy new taxes by law decree, or to extend taxes to other categories of subjects" (Article 4). Article 3 of the Statute has specifically codified for the tax field the principle that measures may not be retroactive. According to the Supreme Court decisions, this means that in the interpretation of tax laws, when two alternatives are possible, those must be preferred which do not imply a retroactivity of the tax measure less favourable for the taxpayer.

In addition, Article 1 of the Statute, in order to avoid the introduction of new rules through retroactive interpretation, provides that in tax matters the adoption of interpretative rules may be done only in exceptional cases and with the authority of the parliament.
Thus, while the application of Article 4 has limited the use of decree laws, the utilization of legislative decrees is still very frequent.

2. The meaning of legal indeterminacy in tax matters

According to the Italian Constitution (Articles 23 and 53), tax law must define the tax object, the tax subject, i.e. the person on whom the tax is levied, the taxable income, and the tax rate used to calculate the amount of taxes which the taxpayer must pay.

Apart from the constitutional principles, the Italian tax laws are so detailed that they tend to regulate all the practical situations. Notwithstanding this fact, there are many decrees and circulars issued by the tax authority and the Tax Agency, which make the fiscal rules even more detailed.

The use of detailed legislation has been thought to ensure more legal certainty and more guarantees for the taxpayer. Since the 80s, the tax laws, which used to be general and abstract, have become more detailed in order to avoid the use of discretionary power by the tax authorities and to strictly guide taxpayer behaviour. As a result, there has been a massive production of detailed rules which refer to practical cases. In the past years, the tendency to avoid this kind of regulation has increased: more room

is given to rulings so the taxpayers may ask the administration the correct way to act in a particular situation or in their personal case and when the rules are not clear. The tax authorities and the taxpayers are always in favour of detailed rules. The literature and the courts, instead, prefer law with a traditional structure, in other words laws which are general and abstract.

In the Italian system the control of the constitutionality of tax legislation is in the hands of the Constitutional Court. Also, the legislative decrees and the decree laws are subject to this kind of control. The Constitutional Court does not have the power of the initiative of constitutional control, not even with respect to tax law. The access to this kind of judgment can start in two different ways:
1) at the initiative of a domestic court (tax court, civil court or administrative court) and it is strictly connected to the solution of the concrete case that the court must decide on.
2) directly, in the case of the relationship between state laws and regional laws, or rather when the State or a Region believe a State law or a Regional law to be in conflict with the Constitution.
The first procedure is the most common one in the tax field.

Since the criteria for deciding whether a tax law is in conflict with the Constitution are the rules and principles contained in the Constitution, a tax law which is indeterminate, in other words which is not clear or which lacks a definition of the tax subject, the tax object or the tax base, could be declared unconstitutional. The tax laws, however, in the Italian system are very detailed so it is not possible to speak about indeterminacy of the tax legislation. Therefore, the possibility of a tax law being unconstitutional because of its indeterminacy is only hypothetical as there is no case law. The situation is different with respect to those laws which are difficult to interpret.

3. The consequences of legal indeterminacy in tax matters

As stated above, in the Italian legal system, tax laws are extremely detailed; thus, it is really rare that they are indeterminate. As regards the different problem of the interpretation of complex rules, the courts have the final word on interpretation, and in particular the Supreme Court, which has to assure the uniformity in the application of the laws. The Constitutional Court, instead, controls the correspondence between the laws and the Constitution.

In administrative fields, thus outside court procedures, complex cases may lead to ruling procedures which are decided by the tax authorities.

The duty to guarantee the exact observance of laws, uniformity in the interpretation of laws and the unity of the national legal system is within the competence of the Supreme Court. This principle is not in the Constitution but is provided for in national laws. However, it is a principle generally accepted by the Italian legal order because it is strictly linked with Article 111 of the Constitution, which covers the role of the judiciary.

The tax laws are extremely detailed. However, if they contain elements which make them difficult to interpret and to apply, the tax authorities may issue regulations and administrative rulings. As regards regulations, those which have the function of completing and integrating tax matters are usually provided for by the law.

As concerns the administrative rulings, we can make the following distinction: there are acts of income tax assessment are issued by the tax authority in its relation with the taxpayers. They are simply administrative acts which the taxpayers may appeal before a tax court. If the assessment is not brought before a court, it becomes definitive and binds both taxpayer and courts.

There are then circulars and resolutions, which are acts usually coming from the central office of the tax authority and which represent the "interpretation of the administration". Circulars and resolutions are not legal sources so they are binding neither for the taxpayer nor for the courts. Circulars have the function of commenting in general on a specific law, whereas resolutions are decisions of the administration on specific practical cases. In other words, circulars are internal acts of the administration and they have the scope to give directions to the tax offices. In the Italian system the interpretation of the laws is in the hands of the courts, which may (but this is not compulsory), follow the decisions, the circulars or the resolutions of the tax authorities. These acts are not binding on the taxpayers, either, and they remain free to act differently. In some cases, however, the law provides that administrative rulings are binding on the taxpayer. This happens, for example, for rulings issued according to Article 11 of the Taxpayer's Charter. It is a ruling which, as provided for in Article 11, para. 2 of the Statute, is binding only for the taxpayer who applied for the ruling and only for that case.

4. Relationship between the tax administration and the domestic tax courts

Italian courts may control the application of tax law by the Italian tax administration.
Italian courts are called upon to control the application of tax law by the tax administration when the taxpayer challenges a tax act and complains about the unsuccessful or not correct application of a specific tax rule. In this case the court will examine whether the tax administration, carrying out its

powers, has applied the tax law or not. For example, the taxpayer can ask the annulment of the notice of a tax assessment for lack of motivation (Article 7 of the Taxpayer's Charter).

The court can decide both on the conformity of the act with substantive norms (the duty of justification, the time limit, the correct preliminary investigation, etc.) and about the merits of the tax claims (whether the tax is due or not, if the rules concerning depreciation or the rules concerning the accrual or cash basis have been applied correctly or not).

In their case law, domestic courts take into account rulings and binding information emerging from the tax administration, even if the courts are not obliged to observe them.

The decisions issued by the tax administration can be classified in *circulars*, *rulings and binding information*, which can be included in the general class of *resolutions*. Both resolutions and rulings (or binding information) are decisions of the administration concerning practical cases that can be requested from the Central Office by the taxpayer or by the local offices. However, only rulings and binding information concern a specific legal regime.

With respect to the *circulars*: usually, after a new law has been adopted, the tax administration issues acts for the interpretation of the new law. Therefore, circulars have the function of commenting in general on a specific law. They are internal acts of the administration. They are not legal sources and they therefore have binding force neither on the courts nor on taxpayers. They have only the aim of giving directions to the tax offices. They cannot be contrary to laws, decree laws, legislative decrees and regulations.

If the tax administration changes the given interpretation of a law, the legitimate expectation of the taxpayer is protected. In fact, if the taxpayer has taken a certain course of action following the interpretation of the tax administration and this interpretation is changed, Article 10 of the Taxpayer's Charter provides that the taxpayer may not be penalized and interest may not be imposed on the taxpayer that has followed the interpretation of the tax administration.
Article 10 of the Taxpayer's Charter can also be applied to the tax administration's *resolutions*, *rulings and binding information*.

In the Italian legal system there are different kinds of tax rulings, such as the ruling ex Article 21 L. 413/1991, the ruling ex Article 11 Law. 212/2000 and the ruling ex Article 37 bis (8), DPR 600/73.

Usually the rulings have binding force only for the tax administration and never for the courts and the taxpayer (the ruling ex Article 11 Law. 212/2000 and Article 37 bis (8) DPR 600/73). In some cases the ruling may also have binding force for the taxpayer, as in the ruling ex Article 21 L. 413/91, which provides that the ruling has binding force only within the scope of the specific tax relationship and that if the taxpayer does not operate in conformity with the ruling, the taxpayer has the burden of proof. Finally, there is the binding tariff information of the customs administration (EC Reg. No. 2913/92) that binds all these subjects.

The Italian tax administration takes into account the domestic courts and the ECJ case law when applying the law. With reference to domestic courts' case law, it is necessary to note that the tax administration is not obliged to take into account precedents when applying the law, because they bind only subjects interested in the case and only for that specific case. Anyway, when established case law is developed, the tax administration usually follows it.

It is not the same for the case law of the European Court of Justice (ECJ). In fact, the ECJ decisions play an important role for the interpretation and application of tax law. The ECJ preliminary ruling for the interpretation of European principles is binding for the specific case and must be followed for all cases concerning the same legal issue. Consequently, the tax administration is obliged to take into account the ECJ case law when applying the law.

It is important to note that in the past the tax administration as a rule did not take into account the ECJ case law, but in the last twenty years the situation has changed.

In Italy there is no principle of reciprocal observation of the interpretation of tax law by the tax administration and domestic courts.

In fact, in the interpretation of the law, both the domestic courts and the tax administration must observe the normal rules of interpretation as they are imposed by the Italian legal system.
Anyway, while courts are never obliged to follow the interpretation given by the tax administration, because it are not binding for third parties, the tax administration is obliged to follow the interpretation given in the final decision, at least for the specific case. For other similar cases the tax administration is not obliged to follow the case law, but, usually, when established case law is developed the tax administration follows it. In these cases, the tax administration often issues a circular concerning the interpretation of the law.

Generally speaking, the tax administration is legally bound to the decisions of the domestic Supreme Courts and to the decisions of the ECJ. It should be noted that in Italy there is the Supreme Court of Cassation, which is entitled to control the application of tax law and the Constitutional Court, which is entitled to control the compatibility of (fiscal) law with constitutional standards.

With reference to the decisions of Supreme Court of Cassation, the tax administration is legally bound to the decisions of this Supreme Court only if it is party to the suit. Only in this case is the tax administration obliged to take into account the decision of the Supreme Court when applying the law, but usually when established case law is developed, the tax administration follows it.

With reference to Constitutional Court's decisions, the tax administration is legally bound to observe the Constitutional Court's decisions in general. In fact, the declaration of unconstitutionality is binding not only for future events, but also for events in the past. Anyway, the declaration of unconstitutionality is not binding for res iudicata and for definitive acts and decisions.

With reference to the decisions of the ECJ, the preliminary ruling for the interpretation of European legal principles is binding for the specific case and must be followed for all cases concerning the same legal issue. This means that the decisions of ECJ are recognized as a legal source of domestic law and consequently courts, private citizens and the tax administration are legally bound to these decisions.

Usually the tax administration does not circumvent the domestic courts' case law.

As a rule, final decisions are binding only on the party to a suit; consequently, the tax administration as well as the taxpayer is obliged to comply with the decision. Therefore, a court's decisions are followed by the tax administration, but sometimes, when case law against the tax administration develops, the tax administration tries to obtain positive changes in the law.

5. Relationship between different legal sources (legal pluralism)

In the Italian legal system there is a strong transposition of international and European legal sources by parliament, tax Administration and courts (more by high courts than courts of first instance).
Article 117 of the Constitution, as revised in the 2001, provides that "*legislative power belongs to the State and the Regions in accordance with the Constitution and within the limits set by European Union law and international obligations*". This means that the Constitution expressly provides that domestic law (and tax law as well)

must be in conformity with both the Constitution and EC Treaty rules (not all academic commentators agree with this theory).

For the implementation of the different legal sources in tax matters, EC Treaty tax rules, as well as other international tax treaties, need to be implemented through an ordinary law authorizing the ratification of the convention.

For secondary Community legislation, the procedure of ratification is not necessary. Secondary legislation requires that the specific European act be transposed into national law. In particular, European *regulations* are directly applicable; *directives* need a domestic act to be implemented.
In Italy the topic concerning the legislative and administrative transposition of European law has been problematic in the past. To remedy this situation an annual European law has been introduced which includes all the measures necessary for the implementation of European acts and/or ECJ decisions.

Italy has a rigid constitution with the following hierarchy of legal sources:
At the highest level there are the Constitution and the constitutional laws, included rules concerning the regions with special statutes. Tax provisions included in these laws are binding on laws of lower status and they are considered the constitutional standard for the review of legality.

Between laws included in the highest level and those included in the lowest level there are legal acts in which reinforcement clauses are inserted, for example the Taxpayer's Charter.

Because of the legality principle (Article 23 of the Constitution) in the Italian legal system, laws, legislative decrees and decree laws are considered primary legal sources.
Domestic regulations are included in the secondary legal sources. They are legislative acts of the public administration and may be introduced by the State or local authority. It is provided that the regulation is subordinate to constitutional and ordinary law, but it takes priority in the regulations of the local authorities.

Article 1 of the preliminary rules of the Italian civil code provides for "experience" as a legal source. Because of Article 23 of the Constitution, the tax administration's experience is not relevant for the establishment of the law. Consequently, the only field where "tax experience" has importance is the international tax system.

In the hierarchy of tax law sources, European laws are located at a level higher than domestic law. Consequently, in the case of a conflict between a Community law provision and a national provision the former takes precedence over the latter.

Usually the taxpayer has access to different legal remedies that assure him/her effective protection of rights granted by tax treaties, EC law and domestic law.

If, for the solution of a pending case before a domestic court, it is necessary to start a preliminary ruling on the interpretation or the validity of the rule, the domestic court may decide *incidenter tantum,* or, on the basis of Article 234 EC Treaty may start a preliminary ruling procedure before the ECJ. The preliminary ruling for interpretative issues is certainly very important for the protection of taxpayers' rights violated by an infringement of European law. In fact, when taxes contrary to European law affect the taxpayer, he/she has a personal direct and current interest in contesting the tax levy through the appeal of the tax act or the reimbursement action.

Practice shows that while the supreme courts pay attention to European tax issues, the same cannot be said for the first-instance tax courts (Commissione provinciale e regionale). In fact the latter do not pay much attention to European tax rules. This behaviour, probably, comes from the tax judge's *status* and from the lack of impartiality of the tax judge compared with the Ministry of Economics.

While the rights provided by the EC Treaty find an effective protection in the Italian legal system, Italian courts are reluctant to apply principles provided by the European Convention on Human Rights (ECHR) to tax matters. Actually, through the reception of these principles by the ECJ, they come within the European legislation and from it, in some way, they come within the national legal systems and are beginning to be applied in all fields of law (included tax law) and also in the field of administrative actions, as well as in the field of tax actions (but always with many difficulties).

As has been said, the Italian tax courts and often those of the other European states are reluctant to apply the principles of the ECHR also in the field of taxation. Besides, the ECJ has traditionally been very cautious in extending to the field of taxation the guarantees offered by the ECHR.
However, in its decisions, the European Court of Human Rights (ECtHR), over the course of time, has arrived to recognize the application of the ECHR to the following tax matters:

1. fiscal administrative penalties (established and settled case law);
2. tax allowances (ECHR 26.3.1992, Editions Pèriscope v. France);

3. tax refunds (ECHR 3.10.2003, Buffalo v. Italy; ECHR 22.10.2003, Cabinet Diot v. France; ECHR 22.10.2003, Gras Sayoye v. France) ;
4. pre-emptive right of the tax authority (ECHR 22.9.1994, Hentrich v. France);

In the decision 21.2.2008 Ravon v. France, the ECtHR surprisingly extended the legal protection provided by the ECHR to the tax examination field. In this case the ECtHR considered the French tax law in conflict with Article 6, para.1 of the ECHR, even though, according to French law, the taxpayer has the right to appeal to the Supreme Court as well as to ask for damages.

Japan: Separation of Powers in Tax Law (Konosuke Kimura) *

1. Relationship between the parliament and the tax authorities: the influence of the tax authorities on tax legislation

To answer the question of whether the government has competence in tax matters, it is necessary to distinguish between several kinds of legislation. In general, taxes may only be levied on the basis of a law (Article 84 Constitution of Japan[1]) and law (the Acts of parliament, or the primary legislation[2]) is enacted by parliament (on a national level). On the other hand, there are many secondary statutory instruments (i.e. cabinet orders and regulations of ministers, what are known as *Rechtsverordnung* in Germany); they are secondary, delegated or subordinate legislation.

When we consider the Cabinet of Japan to be the government[3], the Cabinet[4] has secondary legislative competence generally (including on tax matters). Within the sphere of the primary legislation enacted by the parliament, the Cabinet may enact legally binding cabinet orders without any further control of the parliament. Additionally, such secondary statutory instruments are only allowed to set out details on the law passed by the parliament[5].

Thus, the government has secondary legislative competence on tax matters[6].

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1 See for the Constitution of Japan: http://www.japaneselawtranslation.go.jp/law/detail/?ft=1&re=01&dn=1&co=01&ky=%E6%86%B2%E6%B3%95&page=7 ; The Constitution of Japan, in: Luney, Percy R./Kazuyuki Takahashi(ed.), Japanese Constitutional Law, University of Tokyo Press, 1993, pp. 319-329(Appendix).
http://en.wikipedia.org/wiki/Constitution_of_Japan

2 See for Japanese law translations:
http://www.japaneselawtranslation.go.jp/?re=01 as of 11. November 2009.

3 Yoshida, Yoshiaki, Authority of the National and Local Governments Under the Constitution, in: Luney/Takahashi(ed.), footnote 1, pp.109-121.
See Government of Japan:
http://en.wikipedia.org/wiki/Government_of_Japan

4 See Cabinet of Japan:
http://en.wikipedia.org/wiki/Cabinet_of_Japan

5 See legislative, administrative and judicial system as a whole:
A Country Study: Japan
http://lcweb2.loc.gov/frd/cs/jptoc.html
in Chapter 6 - The Political System (Donald M. Seekins).

6 Sugai, Schuichi, Legislation by Government, in: Sugai, Shuichi/Itsuo Sonobe, Administrative Law in Japan, Gyousei Tokyo, 1999, pp. 59-69 (Postwar Government Legislation).

According to the Constitution[7] of Japan there are two different ways of submitting draft bills to the parliament:

- the Cabinet [8]may submit bill to the parliament ("cabinet bills"). Usually a ministry (in the case of national tax bills the Ministry of Finance or in case of local tax bills the Ministry of Internal Affairs and Communications[9]) prepares the draft bills. The drafts then undergo an expertise procedure and are finally submitted to the parliament through the Cabinet; and
- Any member of parliament may submit drafts.

Presenting cabinet draft bills (known as government bills) is the most common way to start the legislative process in the field of tax law.

General tax policy is determined by the Ministry of Finance, one of the most powerful government departments, headed by the Minister of Finance, a member of parliament drawn from the governing party. The Ministry of Finance is the sole instigator of tax bills. The Ministry of Finance prepares draft bills which are then presented to special interest groups with a request for their expert opinions. Usually numerous changes are made in this stage of the legislative process. Afterwards the (in many cases modified) draft is discussed within the Cabinet, which finally submits the draft to the parliament as a 'government bill'.

Almost all taxes are contained in primary legislation, i.e. Acts of parliament and will go through the procedures described above. Secondary legislation, regulations in the form of statutory instruments put forward by the Cabinet or Ministers, are not subject to parliamentary scrutiny and its competency and may only be challenged before the courts on limited grounds.

As mentioned above, government bills are the most common way that the legislative procedure in the field of tax law is started. Sometimes tax bill drafts are submitted by Members of parliament to the parliament.

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[7] Takahashi,Kazuyuki, Contemporary Democracy in a parliamentary System, in:Luney/Takahashi (ed.), footnote 1, pp. 87-107.

[8] The National Diet is composed of two houses - the House of Representatives and the House of Councillors. Under the parliamentary Cabinet system adopted by the Constitution, the prime minister is chosen from among the Diet members by a resolution of the Diet, and a majority of the ministers of state are required to be chosen from among the Diet members. Furthermore, the Cabinet is held collectively responsible to the Diet in the exercise of executive power, and if the House of Representatives passes a vote of non-confidence, the Cabinet is required to resign en bloc or the House of Representatives is dissolved in order that an appeal may be made directly to the country through an election.
See http://www.shugiin.go.jp/index.nsf/html/index_e_guide.htm
See Diet of Japan:
http://en.wikipedia.org/wiki/Diet_of_Japan

[9] Local taxes are not mentioned below.

The tax authorities may not submit draft bills. However, a civil servant of the tax authorities explains them to parliament[10], when the government (i.e. the Cabinet) needs assistance in explaining them to parliament. Furthermore, government bills, before discussed by the parliament in a plenary meeting, are subject to discussion at a meeting of the Financial Standing Committee of the parliament. The Financial Standing Committee discusses the draft and submits a report to the parliament[11].

It depends on the decision of the tax authorities whether tax authorities provide draft bills directly to parliament or not. The Minister of Finance has no power to submit the draft bills of tax law to parliament. However, he may submit them to the Cabinet, which can submit them to parliament.

The very strong position of the Ministries in the law-making process in general is in practice approved. In the field of tax law, the vast majority of Acts of parliament are based on tax bills drafted by the Ministry of Finance and in most cases only marginal changes are made by the parliament in a plenary discussion and only small changes are usually made by the Financial Committee of the parliament. However, it must be kept in mind that few members of the Financial Committee of the parliament themselves have the required expertise to draft complex tax bills and have an implicit influence on the process of drafting within the tax authorities , since they play roles such as lobbyist. Therefore, it makes sense to leave the drafting to experts of the Ministry of Finance and to discuss these drafts with other experts before they are presented to the parliament by the government.

Moreover, the number of parliament Member's bills is small. Hence, the Cabinet and the Minister of Finance usually issue a huge number of secondary statutory instruments (i.e. Cabinet Orders and Regulations of the Finance Minister). Additionally, the National Tax Agency in the Ministry of Finance issues numerous tax rulings, circulations as well (i.e. administrative regulations, administrative statements) which are not law.

In the literature there is much criticism of the above situation. The influence of the secondary statutory instruments and administrative regulations seem to be greater than the primary legislation (Acts of

[10] See Guide to House of Representatives:
http://www.shugiin.go.jp/index.nsf/html/index_e_guide.htm
See Guide to House of Councillors:
http://www.sangiin.go.jp/eng/law/diet/index.htm
[11] See Legislative Procedure of Japan :
http://www.sangiin.go.jp/eng/guide/legi/index.htm
See THE JAPAN DIGEST FORUM – 20 January 1999
Policy Need: Restructuring Japan's Legislative Process
by Steven C. Clemons
http://www.steveclemons.com/A-RestJapLeg.htm

parliament) on tax matters. Furthermore, the parliament does not make the general rules in the General Taxation Act (i.e. Kokuzei-Tsusoku-Hou) which should prevent taxpayers from tax avoidance and tax sham structures, since the member of the Financial Standing Committee in the parliament as lobbyist is not interested in such general rules.
In a passive manner, the courts[12] of Japan take the opportunity provided by the fundamental constitutional rule (i.e. the separation of powers) to limit the power of the government and the tax authorities. There is no special constitutional court in Japan, even though the Supreme Court may make decisions in the light of the Constitution of Japan.

The literature is critical of this situation. The lack of independence of the parliament from the government or Ministries and the passive response of the courts are often criticized. The influence of the Cabinet enacting the secondary statutory instruments and the Ministries announcing administrative regulations seems to be stronger than the legislative power of the parliament in tax matters. Many rulings in the case law do not seem to aim at reducing the influence of the government and Ministries on tax law. The fact that the Cabinet normally is formed by the same political party that dominates in the parliament often creates a special kind of cooperation: The Ministry of Finance will draft a tax bill to reach a goal that was not obstructed by the courts. One reason is that the members of the Supreme Court are appointed by the head of the Cabinet. In addition, the parliament has never controlled such an appointment up until now, although it may control it.

Parliamentary scrutiny of tax legislation can be regarded as inadequate in Japan. There are certain reasons for this:
the nature of the subject matter (often extraordinarily complex); and
the parliamentary timetable (unless the Act of parliament follows the government bills).

However, in my opinion, the National Diet, and especially the House of Councillors, should scrutinize the secondary legislation and administrative regulations, if necessary.

2. The meaning of legal indeterminacy in tax matters

Article 84 of the Constitution requires definite legal provisions and concepts on tax matters. Japanese domestic tax legislation is relatively clear, when defining the tax object, tax subject and/or tax base, leaving a small margin for discretion. On the other hand, there are many statutory Instruments (i.e.

[12] Luney, Percy R., The Judiciary: Its Organization and Status in the parliamentary System, in:Luney/Takahashi(ed.), footnote 1, pp.123-149.

cabinet orders and regulations of Finance Minister) which contain very detailed provisions and compensate for indeterminate concepts.

Tax legislation in Japan is detailed, which is part of the reason for its extraordinary length and complexity. However, unfortunately there is a wide range of indeterminate legal concepts, for example "inappropriate", "fiscal residence" or "income"[13].
The use of provisions with undefined/indeterminate legal terms is quite common in Japanese law (including tax law). In general, the use of provisions with undefined /indeterminate legal terms is inevitable in law. Moreover, a distinction has to be made among (1) provisions with undefined/indeterminate terms, (2) discretionary provisions, which give the tax authorities room to manoeuvre, and (3) provisions which give the tax authorities a small amount of room for consideration[14] when applying such norm. The use of discretionary provisions in the legal field of tax liability/tax reduction is not allowed since the exercise of such discretion leads to arbitrariness of the administration. On the whole, Japan can be regarded as having a rule-based rather than principle-based approach to legislation. However, more recently, the notion of principle-based drafting has spread to the Ministry of Finance, which is considering it in relation to anti-avoidance legislation.

Basically, according to Article 84 Constitution of Japan. "the public administration shall be based on law especially in the area of taxation." The rule of law[15] obliges the legislator to make law which sets out details so clearly and definitely that the administration can act without being arbitrary.

However, based on certain decisions of the Supreme Court, the legislator may desist from making such binding rules concerning administrative acts[16] and leave it to the administrative authority to act in a certain way, especially in the field of tax administrative procedure[17]. Though administrative discretion allows several legitimate types of administrative act[18] in the field of tax administrative procedure, legal boundaries and the legislator's intention should be taken into account. Within the range given by law the tax authorities have to make its decisions taking equitableness, expediency and all circumstances of the case into account.

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13 See Kadomatsu, Narufumi, Introduction to Japanese Law (2003/2004 Winter Semester, LMU) http://www.law.kyushu-u.ac.jp~kado/kougi/LMU/Japanese_Law.html
14 Kamata, Taisuke, Adjudication and the Governing Process: Political Questions and Legislative Discretion, in:Luney/Takahashi (ed.), footnote 1, pp. 151-172.
15 Urabe, Noriho,Rule of Law and Due Process: A Comparative View of the United States and Japan, in:Luney/Takahashi(ed.), footnote 1, pp. 173-186.
16 See Sugai/Sonobe, footnote 6.
17 Sonobe, Itsuo, Reflections on the Japanese Administrative Procedure Law, in: Sugai/Sonobe, footnote 6, pp. 141-142.
18 Sonobe, Law Relating to Administrative Function, in: Sugai/Sonobe, footnote 6, pp. 109-113 (Administrative Action).

Unlike administrative discretion, provisions with undefined/ indeterminate terms or provisions with a margin of consideration do not entitle the administrative authorities to act in different ways. Although the meaning of these provisions is very abstract and vague, they allow just one possible administrative decision. Strictly speaking, these are binding provisions – but they give a certain leeway to the administrative authorities because of the natural linguistic impreciseness.

Finally, I would like to point out a new tendency (i.e. a more purposive approach). The courts have started interpreting teleologically the relevant provisions of income tax law, corporate tax law and inheritance tax law in a few cases of abusive tax avoidance since there is no set of general provisions about anti-tax avoidance and anti-sham transactions or about the basic concept of fiscal domicile. These issues have nothing to do with discretionary provisions. It is simply a teleological interpretation[19] aimed at the abuse of law or rights.

Some of the literature in Japan criticizes the volume of administrative notices, circulars and rulings on tax matters. Furthermore, the increase in the volume of law (including secondary statutory instruments) would mean that those taxpayers cannot get a view of tax law as a whole and then cannot understand the provision involved.

The balance between the volume of undefined/indeterminate provisions and the volume of precise provisions should be considered and thought through; it is necessary to find a balance between both approaches. Law should be detailed enough to rule strictly what has to be done in a specific case. At the same time it should be readable and understandable for any taxpayer as to the fundamental facts (i.e. *grundlegender Tatbestand*) of tax liability/ tax reduction.

Legal tax norms should be divided three groups and allocated to (1) the primary legislation made by the parliament, where the fundamental facts of tax liability/tax reduction must be described as well, (2) the secondary statutory instruments made by the Cabinet or the Minister of Finance, which are delegated or subordinate legislation and (3) the administrative regulations written by the tax authorities. Secondary, tax law should employ mathematics in the legal field of tax liability/ tax reduction and tax rate and schedules. Third, we should abolish one part of the tax system (especially provisions concerning personal income allowance to secure the existence minimum) and integrate that part with

[19] Sonobe, Law Relating to Administrative Function, in: Sugai/Sonobe, footnote 6, pp. 104-106 (The Interpretation of Administrative Law).

the social security system using the tax credit scheme. This abolishment and integration leads to simplification of the tax law.

There is no constitutional court in Japan. However, the Supreme Court may control the constitutionality of tax legislation. Nevertheless, it does so rarely. The Supreme Court is obliged to test application of tax legislation for its constitutionality and has no competence to repeal the concerned tax legislation if it is not constitutional.

The Supreme Court has declared a law unconstitutional due to legal indeterminacy in a few cases.

The constitutional principle of tax legality (*Legalitätsprinzip für Abgaben*; Article 84 Constitution) is part of the rule of law, and therefore part of the constitutionality principle. This principle of tax legality requires the lawmaker to sufficiently determine legal provisions. Administrative acts should be bound to the law and predictable for all citizens. Although the necessity for clearly stating the essential substance and competences of administrative acts is beyond doubt, the degree of determination is a more complex question: On the one hand, administrative power must be controlled. On the other hand, a certain flexibility is required.

Provisions with undefined/indeterminate terms and provisions with room for consideration therefore do not automatically infringe the constitutional principle of legality. The constitutionality of indeterminate provisions also depends on the affected field of tax law, for instance tax liability/tax reduction or tax administrative procedure.

3. The consequences of legal indeterminacy in tax matters

In order to understand the following sections, it is important to mention the different sources of (tax) law in Japan:
legislation of parliament: law;
secondary statutory instruments (binding)[20]: law;
administrative rulings (non-binding statements)[21]: not law (i.e. not legal rules), but soft law in some cases;
case law: Strictly speaking, binding only the parties before courts, but in practice the supreme case law

[20] Sonobe, Law Relating to Administrative Function,in:Sugai/Sonobe, footnote 6, p.108(Delegated Legislation).
[21] Sonobe, Itsuo, Law Relating to Administrative Function,in:Sugai/Sonobe, footnote 6,p.107(Administrative Circulars).

may be binding generally.
tax treaties: According to the generally accepted opinion in Japan, they prevail over Acts of the parliament; I do not support this position because of the necessity of an override and on the grounds of some articles of the Japanese Constitution.
customary law: not allowed in the field of tax law.

The final word in a case of legal indeterminacy lies with the courts. The domestic courts[22], especially the Supreme Court, are responsible for the final word concerning the interpretation of the specific indeterminate legal provisions. The courts are entitled and obliged to control the interpretation of vague tax provisions by the tax authorities.

The constitutional basis for the tax authorities or the courts having the final word on the interpretation of indeterminate legal rules lies in the constitutional principle of the separation of powers, with the judiciary charged with the function of ensuring the administrative acts in accordance with their legal powers and obligations.

The Constitution of Japan is dominated by several general principles. The most important are: the dignity of human beings, fundamental human rights, democracy, welfare[23] and last but not least the rule of law. The rule of law contains a couple of sub-principles. One of them is the overall subjection of the administration to the primary and secondary legislation. This sub-principle is not affected by indeterminate terms used by legal rules. The administration must interpret these indeterminate terms and the courts are entitled to control the process of interpreting and its results. Moreover, there is a constitutional basis exclusively for every court of Japan, especially the Supreme Court, which has the final word on interpretation of indeterminate legal rules. If the tax authorities, however, exercise their right to enact secondary statutory instruments (i.e. cabinet orders or (binding) regulations of the Minister of Finance, in which they substantiate undefined provisions, each court is bound to this interpretation, because the courts may control the application of regulations to the concrete cases and adjudicate the regulations on their legality and constitutionality.

The secondary statutory instruments (especially regulations issued by the Minister of Finance) normally fill in the legal indeterminacy of legislation. Although few of the secondary statutory instruments give substance to indeterminate provisions in Japan, administrative rulings and case law take over this part.

[22] See Judicial system of Japan
http://www.courts.go.jp/english/
http://en.wikipedia.org/wiki/Judicial_system_of_Japan
[23] Osuka, Akira,Welfare Rights, in: Luney/Takahashi (ed.), footnote 1, pp. 269-287.

The tax authorities make available to the public a considerable amount of their internal practice guidance (i.e. administrative rulings as well) and frequently publishes statements as to how they interpret legislation. These statements are not binding on taxpayers, who may challenge them in court if they disagree with the authorities' interpretation, but they provide extremely useful guidance for the taxpayers.
Administrative rulings and case law may be employed to fill in the indeterminacy.
Administrative rulings basically do not bind the courts. Judgments of a court are generally only applicable to the case under litigation, but the court in a new case may refer to such judgments in a new case if the facts of other cases are similar.

The extent to which such general guidelines issued by the tax authorities are binding on the tax authorities is perhaps not entirely settled. Authoritative decisions on indeterminacy can only be made by courts or subsequent legislation.

Administrative rulings are basically binding neither on the taxpayer nor on the courts. At the same time taxpayers should assume that the civil servants of Ministry of Finance (the local tax agencies/tax offices) will act on basis of their own rulings. A binding occurs if an administrative ruling becomes typical by repetition and in conviction that everybody agrees on it. It becomes soft law. Such a soft law is binding because everybody else may expect to be treated in the same way for reasons of equality[24]. Besides, the courts use to apply them to every case because of the rule of anti-discrimination. Exceptionally the courts shall avoid applying them to a few cases, if applying the specific provision of administrative rulings might cause an inequity in the individual case. Recently the High Courts and the Supreme Court do not mention the administrative rulings in many cases since they are not law.

4. Relationship between the tax authorities and the domestic tax courts

Where requested to do so by the taxpayer, the courts control application of the law. The application of tax law by the tax authorities is adjudicated by the local tax offices and the Financial Tribunal which belong to the tax authorities, as well as the District Courts, the High Courts and the Supreme Court[25].

[24] Tomatsu, Hidenori, Equal Protection of the Law, in: Luney/Takahashi(ed.), footnote 1, pp. 187-204.
[25] Sugai, Judicial Functions and the Government, in: Sugai/Sonobe, footnote 6, pp. 73-99.

The Financial Tribunal[26] adjudicates as second instance in the tax administrative procedure on tax law cases. This Tribunal is an administrative body but it is provided with the independency of a 'tribunal' in the meaning of Article 99 General Taxation Act. The decision of the Tribunal replaces the decision of the first instance before the local tax office.

Against the decision of the Financial Tribunal the taxpayer may file an objection with the District Court due to illegality of the decision or due to the violation of guaranteed rights by the law or the Constitution. Additionally, the High Court and eventually the Supreme Court is also called to adjudicate on the legality or the constitutionality of law and administrative acts.

Basically, the courts are independent and do not have to consider any administrative rulings or binding information mentioned above. Administrative rulings are basically not law. In practice, except to the extent that the courts will hold them to them in appropriate circumstances. The District Courts used to take into account administrative rulings on tax matters. Moreover, every court must take into account the secondary statutory instruments enacted by the Cabinet or the Minister of Finance in their case, if one includes the secondary statutory instruments under "*binding* information emerging from the tax authorities". It is the duty of the every court to check the secondary statutory instruments for their conformity with the original or higher statutory instruments.

The tax authorities generally apply the law as they understand it, whether deriving from legislation or decisions of courts. The Japanese tax authorities generally take case law into account. It has sometimes sought to change the effect of a court's decision through legislation, but until it is so changed, it respects that decision. However, there may be areas at the margins where the tax authorities can be criticized for taking a slightly biased interpretation of a judicial decision: it issues its own ruling when it does not accept the case law fully. That ruling is partially different from the holdings of case law.

It is hard to say whether there is a principle of reciprocal observation of the interpretation of tax law by the tax authorities and the courts. In Japan such a principle is not known. Formally, the courts and the tax authorities are entirely independent. Inevitably, there is some degree of overlap.

The tax authorities are always bound to the final courts decision in the particular case of litigation. This decision, however, does not apply automatically to other similar cases. Practically, the tax authorities

[26] Sugai, Judicial Functions and the Government, in: Sugai/Sonobe, footnote 6, pp. 83-99(Administrative Tribunals and Judicial Review).

will make their decisions taking the final courts findings into account, whenever the facts of another case are similar to the case which has been finally decided by the courts.

By the way, the final judgments made by not only the Supreme Court by also the District and High Courts are binding on the tax authorities.

As mentioned above, in general the administration accepts the courts' case law. However, in the event that the tax authorities lose a case, they exceptionally will find a path to escape by giving rulings. Sometimes, different arguments could be made in order to tackle similar situations. Alternatively, the tax authorities comment on a judgment by stating that it only has significance for the case being litigated. Sometimes, different arguments can be made in order to tackle similar situations, but this would not strictly be described as circumvention. Finally, the tax authorities sometimes seek to reverse the impact of court decisions (usually prospectively) by legislation.

5. Relationship between different legal sources (legal pluralism)

There is a set of rules in the specific Act[27]. Basically, parliament, the tax authorities and courts try to make their own instruments described below in accordance with all the different legal sources on tax matters.

The hierarchy of legal sources is as follows: Constitution, Acts of Parliament, tax treaties and other treaties, secondary statutory instruments (i.e. cabinet orders, regulations of ministries), and soft law (including administrative rulings and international practice).

Japan has a rigid constitution with the hierarchy of legal sources as outlined above.
Under the doctrine of parliamentary sovereignty, the Constitution is very much at the top of the hierarchy. At the highest level are the Constitution and the constitutional laws. Tax provisions of the primary legislation included in these laws are binding on the secondary statutory instruments and they are considered constitutional standard for the review of legality.

Because of the legality principle (Article 84 Constitution), in the Japanese legal system Acts of parliament (the primary legislation) are considered the primary statutory instruments. Cabinet Orders and Regulations of Ministers are included in the secondary statutory instruments. They are legislative

[27] Hou no Tekiyou nikansuru Tsusoku-hou(Act of General Rule concerning the Aplication of Law) 21/6/2006, Law No. 78.

acts of the public administration and may be introduced by the State.

The taxpayer has access to different legal remedies under domestic law.
The domestic legal remedies focus on rights granted by domestic law. Nevertheless, taxpayers are allowed and asked to claim their rights granted by tax treaties as well. However, rights in treaties may only be relief upon if these treaties are incorporated into Japanese law.

Netherlands: Separation of Powers in Tax Law. The Quest for Balance (Hans Gribnau)

In memory of Henk te Niet, tax scholar, colleague, friend, 1967-2009

1. Introduction

The imposition of taxes is founded on the idea that the legislature is constitutionally authorized to disregard ownership rights. However, the principles of a State under the rule of law prevent the imposition of taxes being solely a matter of government politics and wholly within the sphere of legislative freedom. The rule of law aims at protection against arbitrary interferences and use of power. The imposition of taxes is an exercise of power with an inherent risk of abuse of power. Distribution of power according the principle of separation of powers is an important instrument to protect taxpayers against arbitrary interferences and abuse of power.

Checks and balances are a complement to the distribution of power among the branches or powers of government – legislative, executive, and judicial. Checks and balances control power. With regard to lawmaking in the Netherlands, the democratically legitimized legislature gains priority. Because of the principle of legality, tax laws are the focal point for tax collection and the adjudication of conflicts with respect to tax collection. However, the tax administration has a great influence on the actual content of tax law and sometimes seems to be the key player in tax matters. Tax law bears the stamp of the tax administration. Vagueness in tax law greatly contributes to this dominant part played by the tax administration with respect to the laws in force and their application.

This contribution will examine these and other aspects of the notion of separation of powers in Netherlands tax law. The main problem to be addressed will be: what are the consequences of the use of vague norms by the tax legislator for tax authorities, tax courts and taxpayers? To address this problem a number of research issues will be dealt with. Legal and political practice and theory will be examined in different ways to do justice to the different issues and their theoretical aspects. The research problem, therefore, is a mix of different kinds of research questions. These questions may be of a descriptive, comparative, explanatory or evaluative nature. To answer these questions different sources will be used: legislation, parliamentary proceedings, case law, administrative rules, literature

(jurisprudence and legal theory). Studying these kinds of sources accounts for a traditional legal research methods with theoretical reflections by way of supplement. Source references will be used to make this research more transparent.

I will start with some preliminary observations which elaborate on the principle of separation of powers and the notion of vagueness. These observations provide a background for a better understanding of the shift of power from the legislator to the tax administration in the Netherlands. Part of this shift of power is due to the increasing use of vague norms in tax legislation. Here, the courts act as a countervailing power, though with a fairly limited impact. The tax legislator often counters case law which it deems unfavourable, mostly for budgetary reasons, by introducing 'reparation legislation.'

Preliminary Theoretical Observations

2. Lawmaking and separation of powers

2.1. Democracy, rule of law and separation of powers

Traditionally, two elements enhancing the legitimacy of tax laws are distinguished. Taxation needs democratic legitimacy, i.e., the consent of parliament, which represents the citizens: no taxation without representation. However, taxation is also a matter of law, for, in a constitutional democracy, government is only allowed to interfere with the liberties of the citizens by means of law. The rule of law, therefore, has special significance for the levying of taxes.

Part of the ideal of the rule of law is the idea of government *per leges*.[1] Government must function through laws. However, general and abstract laws must be applied by the administration, and the judiciary has to adjudicate disputes between taxpayer and tax administration. Lawmaking, applying the law and adjudication on the law are all forms of exercising power. According to the principle of separation of powers, these three branches of government are divided. Thus, the exercise of the power to apply the tax law is subject to judicial supervision. Abuse of power should be prevented by limiting power and by putting in place checks and balances.[2] Power needs control. The principle of checks and balances prevents one of the powers from becoming too powerful through balancing power of the two other branches of government. Different actors which have been given lawmaking functions can check in a

[1] H. Gribnau, 'General Introduction', in G.T.K. Meussen (ed.), *The Principle of Equality in European Taxation*, The Hague, London, Boston: Kluwer Law International, 1999, pp. 1-33, at pp. 6-8.
[2] 'Ambition,' in the classic formulation of Publius [Madison], 'must be made to counteract ambition.' See J. Madison, A. Hamilton & J. Jay, *The Federalist Papers* (1788), London etc.: Penguin Books, 1987, p. 319 (No. 51).

certain way the other actors, which in their turn have also been given (part of) a certain function. 'Check' means in this respect: the being informed about, the supervision of, the judging of, and possibly redressing of the way in which (constitutional) powers are being used or will be used.[3] To conclude, the notion of separation of powers is essential to law, be it lawmaking, law applying or adjudicating. Inherent to the concept of separation of powers is that the power to apply the general and abstract laws is not part of the power of the legislature, but is attributed to the administration. This considerable power to determine the meaning and scope of the norm in concrete cases is checked by the judiciary.

What does this essential notion 'separation of powers' mean? The notion of separation of powers is threefold. First, there is a functional differentiation between the branches of government – legislative, executive, and judicial. All the powers of government are divided among the three branches, must be exercised by one of them. This functional differentiation between the branches or powers is conceptually distinguished from the institutional separation of powers; the three functions should be allocated to different agencies. A third aspect is the division of power at the personal level: different persons should staff these agencies.[4] In the Netherlands, with its parliamentary system of government, there is a lack of institutional separation of powers. Statutes are made by government and parliament acting together. Thus, in the field of tax law, the State Secretary of Finance is not only co-legislator but also head of the tax administration. As such, he is politically accountable for the performance of the tax administration to parliament.

2.2. The dynamic model of separation of powers

Nowadays, a legal system is more than a set of laws which merely need to be applied by administration and judiciary. The legislature, administration and judiciary are all active in framing the legal system. The democratically legitimized legislature gains priority in view of the abstract, general and impartial character of the legislative process that guarantees a certain amount of rationality of law. The legislature determines the direction of society, and which policies should be implemented, while taking into account the general legal principles.

Because in the Netherlands lawmaking is not the exclusive prerogative of the legislature, the doctrine of the separation of powers must not be conceived in a rigid way.[5] In a strict conception, the idea of the doctrine of the separation of powers is conceived as a strict separation of powers in a State, being the

[3] M.T. Oosterhagen, *Machtenscheiding*, Rotterdam: Gouda Quint, 2000, pp. 366-7.
[4] M.J.C. Vile, *Constitutionalism and the Separation of Powers* (1967), Indianapolis: Liberty Fund, 1998, p. 14.
[5] W.J. Witteveen, *Evenwicht van machten*, Zwolle: W.E.J. Tjeenk Willink, 1991.

three main agencies of government: the legislature, the executive, and the judiciary. Consequently, each of these agencies has its own exclusive function.[6] However, it is possible to define four functions of government – rule-making, a discretionary function, rule-application and rule-adjudication – but 'quite impossible to allocate them exclusively to different branches of government.'[7]

Instead of this strict version of the separation of powers doctrine, we should think more in terms of checks and balances of powers. Obviously, if the creation of law were entrusted to one power only (i.e. the legislature), chances are that this dynamic view of law would be doomed to remain pure theory. Montesquieu was aware of the fact that abuse of power should be prevented by creating an institutional structure in which power is distributed amongst various governmental institutions. Without a balance of power freedom will inevitably perish.[8] Montesquieu, therefore, advocated a division of labour in order to establish a balance. Consequently, 'the separated persons not only checked each other; they were functionally specialized.'[9]

This is the dynamic model of the separation of powers: an institutionalized balance of powers. Under the modern rule of law, arbitrariness and abuse of power are prevented by a system of checks and balances. A system of checks and balances serves to prevent accumulation of power and to control abuse of power. For that matter this lawmaking system should be embedded in a larger system of checks and balances; 'well-developed alternate centers of power such as strong legislatures, courts, political parties, and regional governments, as well as independent universities and news media.'[10] Thus, 'a democratic social order requires a separation of power so that no one social institution or force dominates the polity.'[11] In this respect, independent central banks may also be seen as a countervailing power in a system checks and balances.[12] The public may also check the abuse of power. Because information is power, access to information and a free press are necessary to enable public scrutiny of the use of public powers. As a result, the distribution of competencies amongst various institutions, and a duty of accountability of each

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[6] Vile 1998, p. 14 et seq.

[7] Vile 1998, p. 402.

[8] Montesquieu, *The Spirit of the Laws* [1748], A.M. Cohler et al. (eds.), Cambridge: Cambridge University Press, 1989, XI, 6. See R. Bellamy, 'The Political Form of the Constitution: The Separation of Powers, Rights and Representative Democracy', in R. Bellamy & D. Castiglione (eds.), *Constitutionalism in Transformation. European and Theoretical Perspectives*, Cambridge: Blackwell Publishers, 1996, p. 25 et seq.

[9] J.N. Shklar, *Montesquieu*, Oxford: Oxford University Press, 1987, p. 113. Montesquieu adapted the theory of mixed government to the underpinning of a system of divided powers, in order that the 'varying passions and interest' of the different classes of society should ensure that no one man or group of men gained arbitrary power (Vile 1998, p. 103). The American Founders, on the other hand, 'recast the elements involved from legalized social orders – crown, nobility, and commons – which had never been a direct part of their lives, to functioning branches of government – executive, legislative, judicial – which had been'; B. Bailyn, 'Politics and the Creative Imagination', in Idem, *To Begin the World Anew: The Genius and Ambiguities of the American Founders*, New York: Knopf, 2003, p. 33.

[10] F. Zakaria, *The Future of Freedom. Illiberal Democracy at Home and Abroad*, New York: W.W. Norton & Company, 2003, p. 103.

[11] D. Kellner, 'Habermas, the Public Sphere, and Democracy', in L.E. Hahn (ed.), *Perspectives on Habermas*, Chicago and La Salle: Open Court, 2000, p. 276.

[12] See I. Shapiro, *The State of Democratic Theory*, Princeton: Princeton University Press, 2003, pp. 109-110.

and every institution, is embedded in a larger system of checks and balances. Within these institutions, e.g., the executive, competition among bureaus may ensure quality and efficiency, preventing abuse of monopolistic power.[13]

The creation of law is based on a balance between or co-operation of authorized powers. Here, the creation of law or law making is a broader notion than legislation only, with powers – legislature, administration, and judiciary – involved. Neither of these powers can determine on its own what counts as law in a society. Various authorized institutions - legislature, administration, and judiciary - create law by co-operation. According to Montesquieu, these three powers, 'as they are constrained to move by the necessary motion of things, they are forced to move in concert'.[14] They are partners in the business of lawmaking.[15] Of course, partners may quarrel and have different views as to best way to serve the purpose of their business and achieve their common goal. After all, justice is conflict.[16] Nonetheless, there is a mutual interdependence, because the powers separated are the powers of 'the same state that has to act with at least a minimal degree of coherence and integrity to be a functioning state at all.'[17] So there has to be an understanding that they are engaged in a common enterprise, for the different powers should be exercised in a coherent way over time. For this, there 'has to be some reciprocal understanding among those who exercise different powers about the conditions and effects of their exercise.'[18]

Legislators create statutes which cannot be implemented without being interpreted by the court. The court, therefore, is a partner in 'the legislature's creation and implementation of statutes, even if this partnership is a limited one.'[19] The legislature which determines the purpose of the statutes is the senior partner in lawmaking, while the court acts as a junior partner. Constitutional review puts a check on legislative power. The same goes for the (tax) administration which has to apply tax statutes to concrete cases. Tax statutes cannot be implemented without being interpreted. Through its interpretation of the tax statute the tax administration must give effect to the purpose of the tax law. Thus, the tax administration, acting as a junior partner, has to interpret and specify the norms of the general and abstract tax statutes. Judicial review of administrative actions is a check on administrative power.

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13 D.C. Mueller, *Constitutional Democracy*, Oxford: Oxford University Press, 1996, pp. 257-258.
14 Montesquieu 1989, XI 6, p. 164. See K.M. Schönfeld, 'Rex, Lex et Judex: Montesquieu and la bouche de la loi revisited', *European Constitutional Law Review*, 2008, pp. 274-301.
15 Gribnau 1999, pp. 23-24.
16 S. Hampshire, *Justice Is Conflict*, London: Duckworth 1999.
17 N. MacCormick, *Questioning Sovereignty. Law, State, and Nation in the European Commonwealth*, Oxford: Oxford University Press, 1999, p. 84.
18 Ibidem.
19 See A. Barak, *The Judge in a Democracy*, Princeton: Princeton University Press, 2006, p. 17.

2.3. Separation of powers in Netherlands constitutional legal culture

In Netherlands constitutional legal culture, but also in official papers by the Netherlands government and in debates in the Netherlands parliament, the idea of separation of powers (or *trias politica*) is often referred to. Although is has not been laid down in the Netherlands Constitution, it is implicitly present. For a good understanding of the structure of the Netherlands government, at least for the separation of powers among the most important actors at the central government level, insight knowledge of Netherlands constitutional history seems to be more useful than knowledge of theories on the separation of powers. Theoretical approaches to the separation of powers as given by Locke, Montesquieu and Madison (one of the founding fathers of the American Constitution), or examples created in constitutional practice elsewhere, as in France or the United States, have only played a modest role in the constitutional development of the Netherlands.[20] Nonetheless, the Dutch philosopher Spinoza reflected in as early as the seventeenth century on political power, inspired by the Netherlands constitutional structure and other political writers, like the De la Court brothers, who were at the time prominent Dutch regents. In his political work Spinoza elaborately fleshed out the idea that power is to be checked by counter-power.[21]

As for constitutional history, distribution of power is a hallmark of Netherlands constitutional history. From the Old Republic of the unified Netherlands until the Kingdom the Netherlands, there have always been groups in competition with each other. This perpetual competition can be found among provinces and Union, among regents and citizens, among federalists and unitarists, among (radical) democrats and moderates, among liberals and anti-revolutionaries, among 'left' and 'right', and so on and so forth. This continuing struggle for power gave way over the years to the fact that distribution of power, position, powers and government positions were important although unlabelled themes in the constitutional development of the Netherlands.

3. Vagueness

According to the notion of separation of powers, the power to apply the general and abstract tax laws is attributed to the administration. The tax administration has to apply tax statutes to concrete cases. Tax

[20] Oosterhagen 2000. Consequently, the first Netherlands Constitutions were not based on a system of separation of powers. Oosterhagen (at p. 371) concludes that separation of powers '*as a system* does not exist and has never existed in the Dutch constitutions.'

[21] Spinoza, *Political Treatise*, Tr. by Samuel Shirley, with Notes and Introduction by Barbone and Rice. Indianapolis/Cambridge: Hackett Publishing Company, 2000. See Neumann's introduction, in Montesquieu, *The Spirit of the Laws* (F. Neumann ed.), New York Hafner Press 1949, p. lvii and J.L.M. Gribnau, 'La force du droit. La contribution de Spinoza à la theorie du droit', (1995) 35 *Revue interdisciplinaire d'études juridiques*, pp. 19-39.

statutes cannot be implemented without being interpreted. Through its interpretation of tax legislation the tax administration must give effect to the purpose of the tax law. Thus, the tax administration, acting as a junior partner, has to concretize, clarify, and specify the norms of the general and abstract tax statutes. This executive power to determine the meaning and scope of the statutory norm in concrete cases is a considerable power which should be exercised conscientiously and responsibly.
In applying the law the tax administration almost always has some latitude. This latitude may lead to uncertainty for the taxpayer and unequal treatment of taxpayers because different tax inspectors may use this latitude in different ways. The presence of latitude is due to several factors. First, the statutes may expressly grant discretion. Secondly, there is openness, and, therefore need for specification and interpretation of the norm, due to vagueness. Thirdly, the legislator may deliberately formulate rules too broadly, leaving it up to the courts or the tax authorities to tailor the rule more precisely.

To introduce the problem of vagueness it may be useful to make a threefold distinction with respect to the openness of statutory law. A word is ambiguous when it has more than one meaning, e.g., the term 'law.' It has a different meaning in different contexts, which may lead to a lack of clarity in use. The property of words results in a lack of clarity in use.[22] A vague concept has one meaning and its application is unclear in some cases. There are some subjects that unquestionably fall within its scope, some subjects that unquestionably do not fall within its scope and there is a third class of subjects which cannot classified with certainty. Finally, there is 'evaluative openness' in expressions (open concepts) such as 'common manners' (*goede zeden*) and 'good faith' (*goede trouw*).[23]

Here, I will start with a very broad meaning of vagueness and then I will proceed with vague norms and open norms which relate to the powers of tax administration.

3.1. Vagueness and the tax administration's latitude

Legal rules involve classifying particular cases as instances of general terms, bringing particular situations under general rules. These rules are expressed in words, but words have a penumbra of uncertainty. General terms have 'a core of certainty and a penumbra of doubt.'[24] The legal philosopher H.L.A. Hart popularized this metaphor of (linguistic) indeterminacy as a penumbra. 'Whatever device, precedent of legislation, is chosen for the communication of standards of behaviour, these, however

[22] T.A.O. Endicott, *Vagueness in Law*, Oxford: Oxford University Press, 2000, p. 54.
[23] See R. Alexy & R. Dreier, 'Statutory interpretation in the Federal Republic Germany', in D.N. MacCormick & R.S. Summers, *Interpreting Statutes: A Comparative Study*, Aldershot etc.: Dartmouth , 1991, pp. 74-75.
[24] H.L.A. Hart, *The Concept of Law* (1970), Second Edition, Oxford: Oxford University Press, 1994, p. 123.

smoothly they work over the great mass of ordinary cases will, at some point, where their application is in question, prove indeterminate: they will have what has been termed an *open texture.*'[25]

The meaning of the most precise expression, rule, or concept is potentially unclear 'as a consequence of our imperfect knowledge of the world and our limited ability to foresee the future.'[26] This is the open texture of law, which might be seen as vagueness in the broad sense.[27] Consequently, legal terms are provisional in nature; they are in need of elaboration and further development time and again. The seemingly most precise term may turn out to be vague when confronted with an instance unanticipated when the term was defined. As a result of this open texture, law is always in need for interpretation, for, human legislators can have no complete knowledge of 'all possible combinations of circumstances which the future may bring.'[28] As a consequence of this open texture of law there is latitude for courts and administration.

Concepts do not always have well defined characteristics. Frequently there is a hard core of characteristics, but we are in the dark with respect to the exact boundaries ('intensional vagueness'). A lack of clarity about the exact boundaries of a concept or expression leads to lack of clarity with respect to the cases or subjects which meet its characteristics. The boundaries of this set of cases or subjects are unclear ('extensional vagueness').[29] A vague predicate such as 'tall' or 'thin', or 'reasonable' is not fully precise across the full set of phenomena to which it might be applied. There is an 'unsettled region of borderline cases, an unsettled region whose beginning and end are themselves only vaguely specifiable.'[30] An expression, therefore, is vague if there are borderline cases for its application.[31] For example, in the case of 'reasonable' some possible instances of conduct are such that we can neither correctly affirm nor correctly deny that they are reasonable. Consequently, the concept or expression needs to be interpreted before applying it.

This vagueness is a common feature of law. Law is very often vague which leads to indeterminacies in the application of the law to the facts of a case. The requirements of the law in particular cases are indeterminate. This may be due to vagueness of language, but vagueness is not merely a matter of (legal) language. Of course, natural language contains vague and confused notions giving rise to

[25] Hart 1994, pp. 127-128. See W. Twining & D. Miers, *How To Do Things With Rules*, Butterworth: London, 1976, p. 124 et seq.
[26] F. Schauer, *Playing by the Rules*, Oxford: Clarendon Press, 1991, p. 36.
[27] Endicott 2000, p. 37.
[28] Hart 1994, p. 128. He continues: 'This inability to anticipate things brings with is a relative indeterminacy of aim.'
[29] M.A. Loth, *Recht en taal. Een kleine methodologie* [1984], Arnhem, Gouda Quint, 1991, pp. 76, 96.
[30] M.H. Kramer, *Objectivity and the Rule of Law,* Cambridge: Cambridge University Press, p. 70.
[31] Endicott, p. 31. Hart and Schauer seemingly concentrate on possible borderline cases, because of the essential incompleteness of empirical descriptions; Endicott extends vagueness to actual borderline cases (pp. 37-38).

ambiguity and controversy. This is partly due to different usages of language in all kinds of contexts. Often the attempt to specify a vague or confused notion in a particular context, 'would mean to assign a new use to it, and thereby increase the confusion to that notion outside the specific context in which it was clarified.'[32]

According to Endicott, vagueness is an essential feature of law, because the general evaluative and normative expressions that the law uses ('good', 'right', 'to be done', etc.) are necessarily vague. They express judgments about what is good and what is right, etc., and there are no sharp boundaries in all contexts to the correct application of these general evaluative and normative expressions. Thus, not only are the linguistic expressions the law uses necessarily vague, but due to their context dependence general evaluative and normative considerations are necessarily vague, too.[33] As a consequence of vagueness the law is indeterminate, i.e., there is no single right answer to a question of law, or to a question the application of the law to the facts of a case. Vagueness accounts for indeterminacy in the application of law to a particular case. Along with express grants of discretion and conventions giving courts or administrations power to develop the law, vagueness is one of the most important sources of judicial or administrative metaphorical discretion. In order not to confuse this phenomenon with discretion, I shall use the term 'norm-related latitude.'[34]

As for tax matters, the result is that the administration inevitably has some lawmaking power. The tax administration often has to make a choice as to the specific meaning of a general norm. To ensure a uniform interpretation and application of the tax legislation, the tax administration has to formulate policies containing standards for all the tax inspectors and other member of the tax administration's staff. The proliferation of tax legislation has resulted in the proliferation of these administrative policy rules. As a result, the citizens are governed by administrative rules, rather than by statutes. This accounts for a major shift of power to the tax administration.

3.2. Vague and open norms

On the one hand, legislators should avoid introducing vague norms; on the other hand, the legislator cannot foresee all kind of possible circumstances in advance and regulate every matter in detail. Consequently, the legislator may choose to use vague norms to leave flexibility to the actors who take care of the execution, implementation and enforcement of legislation. However, the previous section

[32] See C. Perelman, *Justice. Law and Argument. Essays on Moral and Legal Reasoning*, Dordrecht etc.: D. Reidel Publishing 1980, p. 96.
[33] Endicott 2000, p. 136.
[34] Endicott 2000, p. 2. On the notion of discretion, see R. Dworkin, *Taking Rights Seriously*, London: Duckworth, pp. 35-39. Administrative discretion is never absolute; it is always checked by legal principles.

showed that vague norms are not always consciously and purposively introduced. On the contrary, the legislator may even explicitly want to avoid vague norms, but it frequently just fails to do so. Often, therefore, vague norms are not deliberately introduced in legislation.

The task of concretizing and specifying vague norms may be attributed to different actors. There may be liberty for administrative bodies to specify vague statutory standards, which are open-ended. The norm may be vague in order to enable the administrative body to perform an appointed task.[35] But the legislator may also introduce these open-ended norms in order to enable taxpayers or the courts to develop the norm.

3.2.1. Discretion

To be sure, we should distinguish this norm-related latitude resulting from vagueness – vagueness of a norm which must be specified – from discretionary powers. An administrative body has discretion or discretionary powers if it has the choice to decide on the use of its power, without any standard or guideline for the use of this power. The distinction between discretionary and mandatory powers (which involve vagueness), though not an absolute distinction, is relevant for the extent of judicial review. In the case of discretion the courts exercise much restraint. If the administration goes beyond the limits of its discretion, the decision is reviewable. The courts, moreover, will check whether formal requirements have been respected and whether the administrative body has misused its discretionary powers.[36]

In tax law discretionary powers do not often occur, for, the tax administration generally has mandatory powers due to the great weight of the principle of legality in tax matters (enshrined in Article 104 of the Netherlands Constitution).[37] Thus, a statutory provision may stipulate that the tax inspector 'can' do something, without laying down any standard or guideline for the use of this power. According to Article 6:6 of the General Administrative Law Act (*Algemene wet bestuursrecht*), the administrative body may declare an objection inadmissible if the objection does not meet specific requirements.[38] In certain

[35] H. Wißman, *Generalklauseln. Verwaltungsbefugnisse zwischen Gesetzmäßigkeit und offenen Normen*, Tübingen: Mohr Siebeck, 2008, p. 301.
[36] T. Koopmans, *Courts and Political Institutions: A Comparative View*, Cambridge: Cambridge University Press, 2003, pp. 110-111.
[37] For the exercise of discretion by revenue authorities and criteria governing this exercise, see D. Bentley, *Taxpayers' Rights: Theory, Origin and Implementation*, Alphen aan den Rijn: Kluwer Law International, 2007, p. 292 et seq.
[38] These requirements are stated in Article 6:5 General Administrative Law Act; the notice of objection should, e.g., give one's name and address and state the administrative decision against which the objection is lodged. Article 6:5 also applies to notices of appeal. Taxpayers may appeal to an independent court. However, before lodging an appeal the taxpayer has to object to the tax inspector.

cases the tax inspector may fine the taxpayer who has not satisfied his statutory obligations. Here, the tax inspector has discretion to fine at all and as to the level of penalty.[39]

3.2.2. Vague norms

In contradistinction with norms that confer discretionary powers, vague norms (*vage normen*) do indicate a standard or guideline for the use of administrative power. However, they do not lay down a very precise standard or guideline for this use of power, which leads to indeterminacy in the application of the law. Consequently, the administrative body itself has to concretize the norm and make it more precise. A vague norm might be regarded as a kind of frame: a frame 'within which are the indefinite different ways of sharpening the vague expression of the norm'.[40] This administrative latitude is norm-related, i.e. not to formulate a norm, but to further develop an existing (statutory). The administrative body has to specify the vague norm and 'formulate an individual norm by choosing any of the sharpenings within the frame – any of the admissible sharpenings.'[41]

These vague norms are well known in administrative law. The peculiarities of the norm to be applied, and therefore of the decision or action to be taken, are not completely fleshed out in legislation. Thus, the administrative body has to develop the norm and in doing this exercises lawmaking power. As shown above, the legislator may try prevent vagueness, but will never be able to ban vagueness. As result, the legislator may introduce vague norms *contre coeur*, i.e., without really wanting to confer some liberty to specify a norm on an administrative body.

Often, however, the legislator consciously and purposively introduces vague norms. Consequently, there is room for evaluation by the administration which enables effective and flexible action and individual dispensation of justice. This is at the expense of legal certainty and equality, because administrative action becomes less predictable and tax inspectors may diverge in their specification of the norm. Thus, statutes may contain some standards, but put the assessment of them entirely in the hands of public authorities. Outside tax law, we find examples such as a mayor of a city who may forbid a demonstration if it could, in his view, present a danger to public safety. Thus, the legislator leaves the content and scope of the norm indeterminate, which have to be specified partly in the light of various circumstances which have to be valued in a concrete case.[42]

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[39] Article 67 et seq. General Taxes Act (*Algemene Wet inzake Rijksbelastingen*).
[40] Endicott 2000, pp. 61-62 referring to Kelsen.
[41] Endicott 2000, p. 62.
[42] H.F.M. Crombag et al., *Een theorie over rechterlijke beslissingen*, Groningen, H.D. Tjeenk Willink: 1977, p. 116 et seq. See P. Popelier, *Rechtszekerheid als beginsel voor behoorlijke regelgeving*, Antwerpen, Intersentia, 1997, p. 534 and B. Peeters

In Netherlands tax law these deliberately vague norms are called open norms (*open normen*) or, sometimes, open concepts (*open begrippen*). Open norms are a species of the genus vague norms. Open norms belong to the domain of the courts. They have to specify the content and scope of the open norm. It is left to the courts to flesh out these standards and to determine their exact meaning. Because of the great weight of the principle of legality, therefore, it is not the tax administration but the courts which have to concretize and specify these vague norms in the end (though the legislator sometimes interferes with case law deemed inexpedient). The courts may follow the tax administration's specification of a vague norm, for the tax administration has to provide an interpretation, applying the law in concrete cases. To be sure, the courts are not bound by the tax administration's specification and interpretation. The tax administration for its part usually follows the courts', particularly the Supreme Court's, interpretation of the open norm. Examples are 'bad faith' (when to file a tax return) and 'gross culpability' in the context of fines. Substantive tax law also offers examples. To prevent base drain Article 10a of the Corporate Tax, an anti-abuse provision, contains the open-ended standard 'an according to Netherlands standards reasonable levy'.[43] Another example of an open norm in Netherlands tax law is 'charity' (*algemeen nut beogende instelling*). It is the judiciary's task to remedy the indeterminacy by specifying this open concept (norm) which consequently evolves in case law. However, this open-ended statutory standard gives the taxpayer in spite of the existing case law little grip.[44]

3.2.3. Open norm: goed koopmansgebruik

As we saw in the previous section, the legislator may introduce vague norms consciously and purposively. If these deliberate vague norms confer the power to specify the norm to the courts, they are conceptually distinguished from other vague norms in law, and called open norms. I will elaborate on this phenomenon and look in detail at one particular example. This open norm, known as *goed koopmansgebruik*, regards the taxpayer's freedom and judicial lawmaking, rather than the tax administration's (norm-related) latitude.

These open concepts or open norms are laid down in legislation to enable law to be responsive to changing opinions concerning law in a community. Flexibility is needed in order to keep pace with

& T. Wustenberghs, 'De verenigbaarheid van vage en onbepaalde normen met het fiscaal legaliteits- en rechtszekerheidsbeginsel', *Algemeen Fiscaal Tijdschrift*, 1999, pp. 94-112.

[43] This open-ended standard was partly a codification of existing case law and partly a corrective measure in response to existing case law. It was introduced in spite of the Council of State's plea in favour of a more precise legislative norm. See *Parliamentary Papers* (*Kamerstukken) II*, 1995/1996, 24 696, B, p. 7.

[44] A non-exhaustive enumeration of instances might give the taxpayers more to hold on to; cf. *Rapport van de Commissie algemeen nut beogende instellingen*, Deventer: Kluwer, 2007, pp. 51-52.

societal, economic or technical developments rather than to respond to different situations. [45] One of the reasons is that the legislator possesses insufficient technical knowledge to formulate clear and distinct rules. The matter in hand may also be too complex conceptually to be regulated in detail. A matter with strong ideological implications (for example, euthanasia) may be a third source of open norms in legislation.[46] Fundamental rights and legal principles, such as the principle of equality and the ability-to-pay principle, are well-known examples.[47] Whatever the source of the presence of an open-ended norm in legislation, the executive and the judiciary have to make the rules more concrete to give people real guidance as to the legal consequences thereof. They have to reduce the legal indeterminacy. Open norms – possibly together with more concrete rules – do guide to a certain extent the interpretative activities of the executive and the judiciary. In order to enhance legal certainty and equal treatment of taxpayers, it is necessary that these partners in the business of lawmaking take seriously their collective responsibility to elaborate the given norm 'in the spirit of the law.' [48]
Maybe the most famous example of an open norm is *goed koopmansgebruik*, which determines annual profit accounting; see Section 3.25 Personal Income Tax Act 2001 (*Wet Inkomstenbelasting 2001*).[49] Interestingly, it is up to the taxpayer to fill in the details of the open norm, rather than the tax administration, as is the case with vague norms with regard to administrative powers. This open norm offers the taxpayer a broad margin of freedom to make a choice between several options of tax accounting. His choice is controlled by the courts. The annual profit is determined according to *goed koopmansgebruik* which is related to the principle of business economics. *Goed koopmansgebruik* regards a consistent behaviour that is independent of the probable outcome and which can only be changed if this is justified by *goed koopmansgebruik*.

An open concept like *goed koopmansgebruik* requires an 'evaluative judgment' as indicated by the word '*goed*' (good). There is an area of discretion but the choice is not left to the administration. The interpretation of these open concepts ultimately falls within the competence of the courts.[50] Typically, the courts, not the legislator, determine the content of open norms such as *goed koopmansgebruik* by

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[45] An administrative example other than tax law is in the concept of 'a healthy and safe working environment' embodied in the Netherlands Working Conditions Act 1998; A. Azimi, *Open norm als maatwerk?*, Nijmegen: Wolff Legal Publishers, 2008.
[46] See Perelman 1980, p. 105 'Confused notions constitute, in the theory and practice of actions, especially in public action, instruments of communication and persuasion which cannot be eliminated.'
[47] R. Alexy, *A Theory of Constitutional Rights* [1986], Oxford: Oxford University Press, 2002, pp. 42, 372.
[48] B. van Klink, *De wet als symbool. Over wettelijke communicatie en de Wet gelijke behandeling van mannen en vrouwen bij de arbeid*, Deventer: W.E.J. Tjeenk Willink, 1998, pp. 101 et seq.
[49] See A.O. Lubbers, *Goed koopmansgebruik (Een onderzoek naar de rol van wetgever en rechter bij de introductie en ontwikkeling van goed koopmansgebruik)*, Amersfoort: SDU, 2005, and P. Essers & R. Russo, 'The Precious Relationship between IAS/IFRS, National Tax Accounting Systems, and the CCCTB', in P. Essers et al. (eds.), *The Influence of IAS/IFRS on the CCCTB, Tax Accounting, Disclosure, and Corporate Law Accounting Concepts*, EUCOTAX Series on European Taxation, Alphen aan den Rijn: Kluwer Law International, 2008, pp. 34-36. In German '*goed koopmansgebruik*' is translated as '*guter Kaufmannsbrauch*' in English as 'sound business practice'.
[50] Koopmans 2003, p. 111.

developing general rules for deciding case by case. In this, they leave the taxpayer a broad margin of choice. The annual profit accounting freedom of taxpayers, therefore, is primarily delineated by case law, not by tax legislation. Here, the courts should see things more from a legislative perspective than in cases which concern legal protection or 'simply' explain the law, for they are acting as a deputy legislator.[51] As such they should take into account legislative policy considerations, such as budgetary consequences.[52]

3.3. Over- and under-inclusiveness

In passing, it should be mentioned that the general nature of legislative rules is another source of administrative (norm-related) latitude. Legislation consists of rules which are general prescriptions. General and abstract rules promote certainty and equality but there also is a drawback. However, rules can be under- or over-inclusive, for they are less than perfectly fitting generalizations. These generalizations encompass a set of facts which stand in a relationship of probabilistic causation to the justification, i.e., this set of facts is probabilistically related to likelihood or incidence of the justification. A rule such as 'no vehicles in the park' does not contain vague or open norms,
but it predicts, so to say, that cars in a park are a nuisance. As often true as this may be, this does not go for an ambulance which enters the park to transport casualties to a hospital. Consequently, fewer or more cases fall under the rule than its aim justifies. Rules can sometimes yield outcomes other than those that would be indicated by direct application of the rationale or justification lying behind the generalization.[53] Applying a rule, therefore, will some time or other lead to mismatches between the general nature of the rule and the goal which this rule serves, which is the underlying justification. This under- or over-inclusiveness is an inevitable phenomenon.[54] Over- and under-inclusiveness might be repaired by the administration or the judiciary to give the taxpayer certainty with regards to the actual application of the law.

However, sometimes rules are deliberately formulated too broadly, i.e. over-inclusively. As a result, more cases fall under rule than justified by underlying aim of rule.[55] Some anti-avoidance provisions to prevent tax evasion or abuse or undesirable use of tax legislation are a case in point. They are

[51] J.W. Zwemmer, 'De taak van de Hoge Raad in belastingzaken', *Weekblad fiscaal recht* 2002/6468.
[52] R.H. Happé, *Schuivende machten. Over trias politica en gelijkheidsbeginsel in het belastingrecht*, Deventer: Kluwer, 1999, p. 45.
[53] Schauer 1991, p. 32: 'The generalization of the rule's factual predicate is over-inclusive if it encompasses states of affairs that might in particular instances not produce the consequence representing the rule's justification, even though the state of affairs, *as a type*, is probabilistically related to likelihood or incidence of the justification. The factual predicate is under-inclusive if it occasionally fails to indicate the justification in cases in which is present.'
[54] This in contradistinction with 'particularistic decision-making' which focuses on the particular situation, case, or act, and thereby comprehends everything about the particular decision-prompting event that is relevant to the decision made'; Schauer 1991, pp. 78-79.
[55] See D. Bijl & J. van der Geld, *Overkill in fiscale wet- en regelgeving*, Deventer: Kluwer, 2009.

deliberately formulated too broadly to put off taxpayers.[56] The result is uncertainty for taxpayers. This over-inclusiveness might be repaired by the tax administration using policy rules to give the taxpayer certainty with regards to the actual application of the law (see § I.3.3. below). Thus, as a matter of fact power is conferred on the tax administration and, consequently, the taxpayer depends for certainty (and therefore equal treatment) on the tax administration. The courts check this latitude, but not that many taxpayers disagreeing with an administrative policy rule will actually lodge an appeal to challenge the tax administration's interpretation. In spite of judicial control, therefore, administrative policy rules largely determine the actual scope and content of tax legislation. These administrative rules determine the rights and duties of the taxpayer, rather than the provisions of the tax statutes. This entails a major shift of power to the tax administration.

4. Major influence of the tax authorities on tax legislation

4.1. Legislative competence for tax matters

According to Article 81 of the Constitution, the power to enact Acts of Parliament (*wetten in formele zin;* statute law) rests jointly with the government and the States General .[57] This general procedure also applies to tax legislation. Both government and the States General may initiate legislation. The procedure for enacting Acts of Parliament varies depending on whether a bill is presented by the government or by the Lower House (House of Representatives, *Tweede Kamer*) of parliament.[58] The general procedure is as follows.
A proposal initiated by the government is prepared by civil servants in a ministry or several ministries jointly. During the preparatory stage the representatives of social groups, e.g., employers' organizations and trade unions, and experts are usually consulted.

The government may also ask the Supreme Court (*Hoge Raad*) to give advice or information, according to Article 74 of the Judiciary Organization Act (*Wet op de Rechterlijke Organisatie*), which, however, does not occur very often. If the government does so, the Supreme Court is obliged to give advice or information. The same holds for the Procurator-General, the head of the Public Prosecution Service (Article 120 of the Judiciary Organization Act).[59] The proposal is discussed, together with the

[56] Although the Netherlands government has adopted general criteria for good legislation such as legality and conformity with general principles of law (legal certainty!) and simplicity, clarity, accessibility.
[57] See K. Kraan, 'The Kingdom of the Netherlands', in L. Prakke & C. Kortmann (eds.), *Constitutional Law of 15 EU Member States*, Deventer: Kluwer, 2004, p. 621et seq.
[58] In some cases, the Constitution precludes the possibility of parliament taking the initiative, viz., for certain decisions concerning the King and the General Budget Bills.
[59] The Council for the Judiciary (Raad voor de Rechtspraak) advises government and the States General in policy matters relating to the administration of justice (Article 95 of the Judiciary Organization Act). This council is an

accompanying Explanatory Memorandum, in the Council of Ministers. Then the bill together with the authorization of the King, goes to the Council of State (*Raad van State*) for advice (Article 73 of the Constitution[60]). Another independent advisory board, the Netherlands Advisory Board on Administrative Burdens (*Actal*), advises the government and parliament on the impact of regulatory pressure from the bill.[61]

Following this, the bill is brought before parliament, i.e., the Lower House, together with the Explanatory Memorandum. At the same time the advice of the Council of State is published. This advice, together with the ministers' answers, is laid down in a further report to the King. From June 2009 on, parliament (and the government) may for two years profit from civil society's digital input, for at that time government started an experiment with internet consultation. In order to enhance transparency of the legislative procedure and the quality of legislation, citizens, enterprises and societal organizations (civil society) can become acquainted with proposals and make their opinions and wishes known.[62]
The Lower House considers the bill in a committee, the Standing Committee on Financial Affairs, before it is considered in plenary session. The committee presents one or more reports, to which the Minister gives a written answer where necessary. In principle, the plenary discussion starts with two rounds of general deliberations, after which the individual sections and the preamble of the bill are debated. Amendments can be made, which, are discussed with the bill and put to the vote. If the (amended) bill is rejected, that is the end of the bill. The ministers may amend the bill at any stage up to the moment of the vote. The members of parliament may also propose amendments.

If a bill is approved by the Lower House, it is sent to the Senate (*Eerste Kamer*), which also has to approve the bill. Thus, the Senate balances the power of the Lower House. The key function of the Senate is to test the quality of legislation in terms of its legitimacy, feasibility and enforceability. Again, the bill is examined by the relevant committee, the Standing Committee on Finance, before the Senate starts discussing it at a public plenary meeting. The Senate does not have the right of amendment nor can it send back the bill to the Lower House; it can only accept or reject a bill.[63] This is a check on the Senate's power. Although the text of the bill can no longer be amended, its meaning can be clarified in

organization for the operational and administrative managements of the courts and is responsible for the allocation of budgets. Furthermore, it may give the Minister of Justice, at his request, the information required for the exercise of his duties (Article 105 of the Judiciary Organization Act). See Kraan 2004, p. 632.
[60] See also Article 15, Council of State Act (*Wet op de Raad van State*).
[61] Actal acts as a watchdog and facilitator, giving backing to the Netherlands government's own objective to bring about a 25% net reduction in the overall administrative burden by 2011.
[62] Here, citizens may put checks and balances in place against the official circuit, for legislation seems to have degenerated to being an instrument of administration and politics.
[63] In the same vein, the Senate's power is checked by the lack of a right of petition.

the deliberations in the Senate, which is of use for the interpretation of legislation.[64] The government may withdraw a bill as long as the Senate has not voted on it (Article 86 of the Constitution). On the other hand, the Senate may put such pressure on a government minister by cogent arguments and reasoned criticism that he chooses to present a supplementary bill (*novelle*).[65] After a bill has been passed by the Senate, the King must ratify it (Article 87). This ratification makes the bill an Act of Parliament. It is extremely rare for this ratification to be refused (the ministers bear responsibility for such a refusal). After its publication in the Official Gazette (*Staatsblad*), the Act enters into force at a time to be determined by or pursuant to the statute.[66]

Parliamentary bills are treated in the same manner as government bills. Only the Lower House has the right to propose bills (Article 82 of the Constitution). Every member of the Lower House may lodge an initiative. Government tends to involve itself only to a moderate extent in the discussion of parliamentary bills in parliament. After its approval by the Senate, the bill is considered in the Council of Ministers. After ratification by the King, the Act of Parliament is published.

4.1. 1. Influence of the tax authorities on tax legislation

Netherlands tax legislation nowadays exhibits a tantalizing complexity due to its ongoing proliferation. The tax legislator keeps striving for effective and timely control of the growing complexity of society. Of course, tax legislation has to keep pace with social, economic and technical developments, which accounts for part of this proliferation. Furthermore, the tax legislation also reacts to unintended use of tax legislation, tax avoidance and tax evasion by taxpayers. Lack of information about the facts and the way in which taxpayers will comply or circumvent new tax legislation (information asymmetry) accounts for uncertain effects of new legislation.[67] Consequently, the legislator reacts to unwanted and undesirable taxpayer behaviour by repairing and amending by the tax law which adds to the complexity and lack of consistency over time. This often leads to detailed legislation and may even lead to 'overkill' in anti-abuse provisions. As a result, tax legislation is often amended in order to adapt to changing circumstances. However, frequent adaptation implies the risk of inaccurate or inconsistent tax legislation and, thereby, threatens legal certainty.

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[64] In some court judgments reference is made to the reports of the Senate on the debates on draft legislation.
[65] The supplementary bill goes through the same procedure as every other bill; it is submitted to the Council of State for its opinion, and is then debated and passed by parliament.
[66] Article 7 of the Publication Act (*Bekendmakingswet*) provides that an Act which does not contain a provision to the contrary enters into force on the first day of the second calendar month after the date of publication.
[67] H. Vording & J.L.M. Gribnau, 'Assessing Corporate Tax Reform: Incomplete Information and Conflicting Interests', in J. Verschuuren (ed.), *The Impact of Legislation: A Critical Analysis of Ex Ante Evaluation*, Leiden/Boston: Martinus Nijhoff, 2009, pp. 229-251.

The view, advocated by the Netherlands government, that the use of tax legislation for non-tax goals is 'an integral part of government policy' provides another explanation of the overwhelming complexity of tax legislation. Netherlands tax law contains all kinds of instrumentalist incentives mostly in the form of tax reductions, e.g., for commuting by bike, employee's training, day-care centres, production of Dutch movies, research and development, ecologically sound investments or the letting of rooms by private persons.[68] This overuse of taxation to achieve disparate goals and objectives has also resulted in excessive complexity of the tax laws. Tax legislation is often hobbled by reasons of political opportunity and the need to reconcile disparate interests. This is partly due to the interference of pressure groups in the legislative process. Pressure groups seek to create and preserve expenditures in the form of tax exemptions and attempt to shift the burden of taxation in their own favour. Most pressure groups operate behind the scenes; due to their good connections with the Ministry of Finance they are able to bring about bills drafted by the Ministry of Finance.

Because most legislative proposals pass parliament without essentially being changed, government determines the content of Acts of Parliament to a large extent. This also holds for tax legislation.

In practice, government, i.e. usually the State Secretary (*staatssecretaris*) of Finance, plays a pre-eminent role in the legislative process. Most Acts of Parliament are the result of government initiatives. Members of parliament generally lack (technical) know how, experience, and time to be able to draft bills, tax bills included. Members of parliament have hardly any staff members with expertise in the field of tax law who can deal with its intricate complexities. Thus, parliament is hardly able to counterbalance the factual power of State Secretary of Finance who is supported by many competent officials at the Ministry of Finance. Members of parliament are not supported by similar officials. There is asymmetry of tax law knowledge, budgetary knowledge and factual knowledge with regard to the implementation and effects of tax laws.

4.1. 2. Limited influence of parliament

The average time for getting a bill passed by parliament is fairly long, partly because of the unlimited validity of bills that have been introduced; it usually takes several years to get a bill of some magnitude passed by parliament. Tax bills usually take less time. Often government uses budgetary arguments to

[68] See J.L.M. Gribnau, 'Equality, consistency, and impartiality in tax legislation', in H. Gribnau (ed.), *Legal Protection against Discriminatory Tax Legislation*, The Hague, London, Boston: Kluwer Law International, 2003, pp. 7-32. More recently, the legislator seems to exercise more restraint with respect to this instrumentalism.

put pressure on parliament (in July 2009, it took only eight days to repair a leak 'caused' by a Supreme Court ruling).[69]

In the context of the annual budget a bulk of unrelated rules is assembled modifying numerous existing statutes in several massive laws, always within a tight time schedule for parliament.[70] The bill is brought before parliament about the middle of September, while the statute has to enter into force 1 January, of the next year.
The preparative stage of tax legislation nowadays often includes a white paper and consultation of stakeholders. This may take some time but once a bill is brought before parliament the government tries to wind up at a great pace. The parliamentary process nowadays often looks like a pressure cooker. This even goes for major tax reforms like the Personal Income Tax Act 2001 (*Wet op de Inkomstenbelasting 2001*), which was adopted within a year. Another example is the corporation tax reform 2007 (*Werken aan winst*). The current reform of the inheritance tax will meet with the same fate. So even though parliament sometimes discusses the draft bills provided by tax authorities in detail (introduces minor changes to them), all too often it lacks time.

The Lower House has the right of amendment. Frequently these amendments are introduced quite late; they are not sent to the Council of State for advice. These amendments accordingly suffer from a lack of quality. Consequently, amendments add to the already existing vagueness and lack of transparency of tax legislation.

The Senate has no right of amendment; but often investigates the legal quality of (tax) bills in depth. The Senate may ask the State Secretary of Finance in his capacity of co-legislator to make voluntary changes in the bill or to introduce changes wished for next year.

4.2.Literature on the legislative process in tax matters

[69] This ruling concerned an exit tax in relation to pension claims, see E.C.C.M. Kemmeren, 'Exitheffing bij pensioenen: Financiën is hardleers', *Weekblad fiscaal recht* 2009/6820 and P. Kavelaars, Conserverende aanslagen en verdragen (2)', *Nederlands Tijdschrift Fiscaal Recht Beschouwingen* 2009/29.
[70] The Tax Plan (*Belastingplan*) contains tax measures which regard the State budget and the purchasing power of the citizens; the remaining tax measures are to be found in the 'Other Tax Measures' (*Overige fiscale maatregelen*). Furthermore, there is the less pressing matter of tax technical maintenance which is to be found in a separate maintenance bill (*Fiscale onderhoudswet*). Aside from the annual budget, sometimes several unrelated tax measures are presented in one bill, although in 1993 the Senate requested the Secretary of Finance to abstain from this strategy (often based on a package deal to ascertain the support of sufficient members (and parties) of parliament).

Tax literature takes a critical stance towards the hurried pace of tax legislation and the pivotal role of the State Secretary of Finance in the legislative process. In his capacity of co-legislator, he is responsible for the continuous initiating activity of the government in tax matters. The feverish pace of the legislative process partly accounts for the lack of quality of tax legislation. Because the State Secretary of Finance is co-legislator and head of the tax administration, the legislator often adopts the perspective of the tax authorities to advance the efficient implementation of legislation.[71] The legislator and the tax administration seem to merge. The tax administration has an interest in legislation without many technical sophisticated provisions. Simple legislation is a blessing for the tax inspector. Tax laws with fewer nuances are easier to apply. It enables the tax administration to gain major advantages from computerization and it may reduce the number of areas sensitive to dispute (taxpayers may be less inclined to start expensive and time-consuming legal procedures).[72] In the Netherlands, the tax levied on income from savings and investments, e.g., is based on the assumption that a taxable yield of 4% is made on the net assets, irrespective of the actual yield. The tax administration is not required to check the actual income received from different sources such as interest, dividend, capital gains, and losses.[73] This example shows that the interest of the tax administration often prevails over the taxpayers' interest, because parliament does not adequately check the power of the tax administration to influence the content of tax legislation. This tax law runs the risk of neglecting relevant differences between taxpayers. In the same vein, the tax legislator puts too much stress on the budgetary consequences when introducing or changing tax legislation. The State Secretary of Finance often acts as guardian of the budget, frequently at the expense of the legal protection of the taxpayer.

No wonder that the literature in the Netherlands is quite critical and sometimes suggests ways of reinforcing the capacity of parliament to counterbalance the factual power and superior power of State Secretary of Finance who is supported by many competent officials at the Ministry of Finance.[74] Members of parliament should be supported by a number of competent officials who are well at home in tax law, to compensate for the asymmetry of (technical) tax knowledge as well as factual knowledge

[71] According to Montesquieu, judiciary power has real importance only in regimes where the legislative and executive powers are confused; Montesquieu 1989, XI 6, p. 157. See P. Manent, *An Intellectual History of Liberalism*, Princeton: Princeton University Press, 1994, p. 56.

[72] H. van Arendonk, 'Fixed Amount Taxation with Respect to Income from Capital in Personal Income Taxation', in P. Essers & A. Rijkers (eds.), *The Notion of Income from Capital*, Amsterdam: IBFD, 2005, p. 103 et seq., at pp 119-120.

[73] As is the case for many other fictions, the taxpayer is not allowed to prove the contrary. i.e., that the fiction does not correspond to reality. Another example is the disappearance of the deductibility of professional expenses in 2001, because this deduction generated too many conflicts between taxpayers and tax authorities, which did not sound very convincing because more than 95% of the taxpayers made use of the lump-sum allowance for professional expenses.

[74] See R.H. Happé & H. Gribnau, 'Constitutional limits to taxation in a democratic state: The Dutch experience', *Michigan State Journal of International Law*, 15 (2007) 2, pp. 417-459, at pp. 425-428.

with regard to the implementation of tax law. Another remedy to the lack of quality of legislation could be a well staffed Council of Tax Advisers (*Raad van Fiscale Adviseurs*) which should check draft tax bills. This Board, made up of members of parliament, should have an independent staff.[75]

The domestic courts for their part do not consider it their task to comment on this situation; for them it is a fact of (tax) life. Nonetheless, the failure of parliament to exercise adequate control over government and the tax administration has led to attempts by the judiciaries to fill this vacuum. Indeed, there has been a change in the attitude of the courts to the power of the tax authorities and their (administrative) decisions.[76] The courts are more willing to develop rules (e.g. principles of proper administration) which restrain the exercise of administrative power and even to protect fundamental rights against infringements by the tax legislature; the minimal conditions of personal freedom against the State, needed to make the otherwise enormous extent of state power tolerable to everyone, depend on the institutional protection of rights.[77]

In this way, the courts may act as an 'essential safeguard against (…) unjust and partial laws' in the public interest of the protection of the rights of individuals.[78]

5. The meaning of legal indeterminacy in tax matters

5.1. Vagueness of tax legislation and tax administration's latitude

Netherlands tax legislation is detailed as well as vague. The principles of legality and *lex certa* demand precise legislation in order to enable the taxpayer to calculate his tax liability. The legislator often reacts to taxpayers who are playing around with precise and narrowly drawn rules. In general, unintended use of tax legislation, tax avoidance and tax evasion by taxpayers leads to the introduction of new precise tax legislation. In addition, the instrumentalist legislator tries to be very precise in order to achieve the desired behaviour of taxpayers. But 'tax expenditures and tax instruments come and go as throw-away-

[75] P.H.J. Essers, 'De wenselijkheid van een Raad van Fiscale Adviseurs', in *Dat is verder geen probleem. Vriendenbundel Jaap Zwemmer*, Amersfoort: SDU 2006, pp. 52-54. He refers to the U.S. Joint Committee on Taxation.
[76] H. Gribnau, 'General Introduction', in G.T.K. Meussen (ed.), *The Principle of Equality in European Taxation*, The Hague, London, Boston: Kluwer Law International, 1999, pp. 18-20.
[77] R.H. Happé, *Drie beginselen van fiscale rechtsbescherming*, Deventer: Kluwer, 1996.
[78] Publius [Hamilton], in Madison 1987, p. 441 (No. 78), p. 441.

goods'.[79] This lack of consistency in time accounts for taxpayers' uncertainty; they have difficulties in tuning their life and plans to tax legislation.[80]

Increasingly, however, vague concepts are introduced in domestic tax legislation, for example, 'other property rights with the economic value' (*overige vermogensrechten met waarde in het economische verkeer*) in Article 5.3 para. 2, sub f of the Personal Income Tax Act 2001.
As already mentioned, sometimes anti-abuse provisions are also deliberately indeterminate to put off taxpayers (*chilling effect)*, leaving the tax administration a large latitude to determine the law (see, for example, Article 10a of the Corporation Tax; see 3.2.2 of the preliminary observations).

This norm-related latitude is deliberately introduced. However, the tax administration often has norm-related room at its disposal which was not deliberately introduced; it may even be the case that tax legislator did want to avoid this latitude, but failed to do so. As shown above, the administration has to apply the general and abstract norm, but often cannot but determine the content of the norm *in concreto* (see the preliminary observations). All too often, statutory provisions are not tailored to specific categories of taxpayers with relevant differences in the light of the rationale or justification behind the provision. The hurried pace of the legislative process produces sloppy legislation and increasingly vague provisions. The complexity of tax legislation accounts for a lack of transparency. It does not come as a surprise that the taxpayer regularly loses his way in the resulting forest of tax rules.

Therefore, an increasingly important role is assigned to the tax administration, which has to concretize, clarify, and specify – not just state – the norms of the general law.[81] This is a general phenomenon. The modern administration exhibits such complexity of structure and such a proliferation of rules that the earlier conception of an 'executive' putting into effect, under the direction of ministers, the commands of the legislature is no longer tenable. The administration has assumed an autonomy of its own.[82] The tax administration can often 'design such regulations to suit its own policy preferences and administrative convenience.'[83]

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[79] A. Rijkers, 'Ability to pay and privileges', *Steuer und Witschaft*, November 2005, p. 328.
[80] H. Gribnau, 'Legal Principles and Legislative Instrumentalism', in A. Soeteman (ed.), *Plurality and Law, IVR-Congress Amsterdam, 2001, Volume 2: State, Nation, Community, Civil Society*, (Archiv für Rechts- und Sozial Philosophie, Beiheft 89), Wiesbaden: Franz Steiner Verlag, 2003.
[81] J.L.M. Gribnau, *Rechtsbetrekking en rechtsbeginselen in het belastingrecht. Rechtstheoretische beschouwingen over navordering, toezegging en fiscale vaststellingsovereenkomst*, Deventer: Gouda Quint, 1998, p. 184 et seq. 'Concretization' of a general norm by the administration has an independent, formative component.
[82] Vile 1998, p. 401.
[83] S. Gordon, *Controlling the State. Constitutionalism from Ancient Athens to Today*, Cambridge (Mass.), London: Harvard University Press, 1999, p. 344.

The more provisions of tax statutes have to be interpreted and specified, if only because of the sheer increase in tax legislation, the more power the tax administration has at its disposal. The increasing complexity, vagueness and lack of transparency are the real causes of the shift of lawmaking power to the tax administration, rather than expressly granted discretions to define the tax object, tax subject and/or tax base.

5.2. Evaluation of the use of indeterminate and determinate concepts

5.2.1. Vagueness of tax legislation

As shown in 3.1. of the preliminary observations, one can never completely avoid vagueness in tax law. However, the tax legislator should avoid vagueness as much as possible so as to make the application of tax law less indeterminate. Tax legislation should be formulated as precisely as possible in order to enhance certainty and equality.
However, the sheer increase in tax legislation, and as a consequence the increasing complexity and lack of transparency partly spoils the effect of precise provisions. The increasing complexity of tax law is partly due to the instrumentalist legislator who has to formulate very precise norms to prevent unintended or undesirable use of the incentives, but this instrumentalism nonetheless adds to the complexity of rules.[84] Furthermore, tax statutes, like all rules, have a core meaning and a penumbra of doubt where their meaning is more uncertain (see 3.1. of the preliminary observations). 'The more complex and changing the phenomenon being regulated, the wider that penumbra is likely to be.'[85] Uncertainty of rules, moreover, is created in juxtaposition with other rules. When regulating complex phenomena, economic and technological change can create conflicts between existing rules. Change may also create an overlap in the penumbra of different rules. Creative non-compliance may even exploit the uncertainty due to the over- and under-inclusiveness of complex tax statutes.[86]

Although the tax legislator should avoid vagueness, there is more to this phenomenon. Vagueness may add to a degree of flexibility in the law which allows the tax administration to do justice to specific circumstances of a case. Vague norms and indeterminate concepts have the advantage of a certain flexibility when applied in specific situations or in the future. The content of the norm may keep pace with societal, economic or technical developments, without too much interference by the legislature. Thus, the constancy of the tax statutes through time, an aspect of legal certainty, is improved. Rigid

[84] H. Gribnau, 'Legal Principles and Legislative Instrumentalism', in A. Soeteman (ed.), *Plurality and Law, IVR-Congress Amsterdam, 2001, Volume 2: State, Nation, Community, Civil Society*, (Archiv für Rechts- und Sozial Philosophie, Beiheft 89), Wiesbaden: Franz Steiner Verlag, 2003.
[85] J. Braithwaite, *Markets in Vice, Markets in Virtue*, Oxford: Oxford University Press, 2005, p. 146.
[86] Braithwaite, pp. 147-149.

norms are not always a blessing. To avoid this disadvantage of unworkable 'hard and fast rules' the tax legislator may introduce vague norms leaving the task of concretizing and developing the norm to the tax administration and the judiciary. Legislation is a balancing act. Here, the principle of proportionality is an important standard.[87] Therefore, good and lasting grounds for introducing deliberately vague (open) norms are needed.[88] However, even if the decision to introduce vagueness is well-founded, the legislator should offer taxpayers, tax administration and judiciary sufficient guidance as to the aim and desired content of the norm. The legislator should formulate a clear frame which delineates the possible 'sharpenings' of the norm (see 3.2.2. of the preliminary observations). Unfortunately, the tax legislator nowadays too often fails in this respect.

5.2.2. A shift of power

However, the use of vague norms in tax law results in a shift of power to the tax administration and the courts; for, in this way, they get more power with regard to the specification and concrete application of the law. Consequently, the predictability of tax statutes, another aspect to legal certainty, may diminish. Furthermore, this shift of power might be seen as an abdication of the democratically legitimized legislature. The literature takes a critical stance towards the increasingly important role assigned to the tax administration, which has to concretize and specify the norms of the statutes in policy rules. Vagueness leads to more (norm-related) latitude for the tax administration. The tax administration often has to make a choice as to the specific meaning of vague or open norms, even though the courts have the final word. They have to be interpreted and specified in policies containing standards on how to respond to them. These policies are often laid down in rules and disseminated within the administration in order to be applied by tax inspectors (see above).[89] Vague tax legislation, therefore, implicitly confers norm-related latitude to the tax administration. Consequently, vague tax legislation is part of a larger picture with important implications for the doctrine of separation of powers. Another part of this larger picture is the legislator's lack of impartiality due to the tax administration's dominant part in the legislative process.

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[87] J.L.M. Gribnau, 'Rechtsbeginselen en evaluatie van belastingwetgeving', in A.C. Rijkers & H. Vording (eds.), *Vijf jaar Wet IB 2001*, Deventer: Kluwer, 2006, p. 306. See ECJ 29 April 2004, Nos. C-487/01 en C-7/02, (*Gemeente Leusden*).

[88] The open-ended standard 'an according to Netherlands standards reasonable levy' (see 3.2.2 above) did not last long. Recently it was replaced by a precise norm, i.e., a fixed rate.

[89] H. Gribnau, 'Soft Law and Taxation: The Case of The Netherlands', 1 (2007a) *Legisprudence* 3, pp. 291-326, at pp. 301-303.

The literature also takes a critical stance towards deliberately vague anti-abuse provisions to put off taxpayers (*chilling effect)*, at the same time leaving a large margin for discretion for the tax administration to determine the law.

As for open norms, such as *goed koopmansgebruik,* the development of the content legal norm is left to the judiciary. The legislator explicitly leaves the task of determining the actual norm, i.e., legislating, to the judiciary who acts as a deputy legislator. So [Thus, (?)] the judiciary has to provide the taxpayers with legal certainty. However, in spite of a massive amount of case law, many unanswered questions exist with respect to the meaning of *goed koopmansgebruik* in areas like intangibles, hedge accounting, leasing and work in progress. The taxpayer's legal certainty is also affected by changes in case law, because from time to time, the Netherlands Supreme Court changes its mind. Furthermore, sometimes the legislator neglects the power conferred on his deputy and overrules the quasi-delegated power of his deputy. Budgetary unfavourable decisions of the Supreme Court, for example, have provoked the legislator to interfere by introducing legislation that overrules case law with respect to *goed koopmansgebruik*, sometimes with retroactive effect.[90] Another invasion of the judiciary's power is the 2007 introduction of several regulations. The legislator found budgetary revenue to finance the reduction of the tax profits rates by restricting depreciation possibilities. These regard depreciation possibilities for, inter alia, real estate and good will, and on profit deferrals with respect to work in progress. By taking back the power delegated to its deputy, the legislator, therefore, does not always abide by the rules of the game. The legislator should adopt a reserved attitude by refraining from intervening in case law which it regards as unwelcome purely for budgetary, economic or instrumental reasons.[91] Here, we see the division of power and the cooperation between the powers involved at work. All powers, the legislature, tax administration, and judiciary should abide by the rules of the game and sustain their part. This also goes for the tax administration which must be willing to give rulings in the domain of tax profit determination and to refrain from making policy rules aimed at exploring the boundaries of the law in general and of *goed koopmansgebruik* in particular. Unfortunately, the tax administration increasingly tends to disregard these rules of the game. Neither does the Supreme Court always stay in character by providing general rules in order to point the way for the development of law and by pointing out how a specific decision relates to previous decisions.[92]

5.2.3. Open norms and consultation

[90] J.L.M. Gribnau, 'Trias politica in fiscalibus: Een kwestie van geven en nemen', in Idem, *Bijdragen aan een rechtvaardige belastingheffing*, Amersfoort: SDU Fiscale & Financiële Uitgevers 2007, pp. 101-109.
[91] See P. Essers, *De toekomst van goed koopmansgebruik na de invoering van International Financial Reporting Standards in 2005*, Deventer: Kluwer, 2005.
[92] Essers & Russo 2008, pp. 39-40.

At the moment, a debate is in progress on the possibility of open concepts (or open norms) to reduce the regulatory and administrative burden of taxpayers and to facilitate flexibility in the application of the tax laws. The resulting reduction in taxpayers' compliance costs may be a serious incentive to comply. Stevens advocates the use of open concepts to give the taxpayers more freedom and to make room for the creativity of entrepreneurs and to promote the possibilities of reasonable application of the tax law by the tax inspector.[93] Groups of taxpayers and the tax administration may engage in deliberation about the best and most practical interpretation of the norm. Thus, taxpayers involved may be consulted in order to interpret, develop and elaborate open norms. This may smooth down conflicts and lead to improved compliance. Preparation and implementation of legislation will less be time-consuming, which results in cost reduction for government.[94] Fewer rules, therefore less complexity of the legal system, may lead to more effectiveness of the rules. It may even be possible to conclude covenants with groups of taxpayers or branches of business, as is already the case with respect to *goed koopmansgebruik*.

Taxpayers may, however, try to use their power in this more horizontal interaction to achieve privileges and to pay less than they are (statutorily) obliged to pay. But consultation processes and covenants should not influence the taxpayer's total tax liability. The tax administration, therefore, has a special obligation to guarantee such important procedural values as impartiality, equality, accountability, transparency, and publicity.[95]

5.3. No constitutional review

There is no constitutional court in the Netherlands. Every individual, therefore, may go to an ordinary court with respect to a claim based on the violation of an international treaty, for example, the European Convention on the Protection of Human Rights and Fundamental Freedoms (ECHR), but not with respect to a claim based on the Constitution. This is the case because of the ban on constitutional review: Acts of Parliaments are not tested against the constitutional principle of equality, but against the principle of equality of Article 14 ECHR and Article 26 International Covenant on Civil and Political Rights (ICCPR).

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[93] E.g., L.G.M. Stevens, 'Durf te vertrouwen op open normen', *Weekblad fiscaal recht* 2007/6737.
[94] I. Pröpper, 'Communicative Steering and Regulation: Shifting Actors, Objectives and Priorities', in P.B. Boorsma, K. Aarts & A.E. Steenge, *Public Priority Setting: Rules and Costs*, Dordrecht etc.: Kluwer Academic Publishers, 1997, p. 243. He mentions also relevant limitations and risks.
[95] J.L.M. Gribnau & A.O. Lubbers, 'Terugkoppeling in het belastingrecht: analyse en conclusies', in J.L.M. Gribnau, A.O. Lubbers & H. Vording (eds.), Terugkoppeling in het belastingrecht, Amersfoort: SDU, 2008, pp. 191-196.

Actually, the ban on the testing of Acts of Parliaments against the Constitution does not apply in practice. Article 94 of the Constitution obliges the court to test Acts of Parliaments against the equality principle of these international human rights treaties. The result is indirect constitutional review of tax legislation. This Netherlands constitutional conception of the direct effect of international law means that the techniques operated by the Netherlands courts are exactly the same as those developed by constitutional courts of its continental neighbours in reviewing the constitutionality of statutes.[96] This protection of individual rights is a check on legislation.

However, with regard to legal indeterminacy the taxpayer is none the better for this indirect constitutional review. Legal indeterminacy is not regarded as unconstitutional; neither is it considered to be protected by international law provisions which have direct effect in the Netherlands legal order.

5.4. Legal indeterminacy in tax matters not unconstitutional

In the Netherlands, legal indeterminacy is not considered to be unconstitutional. Although the principles of legality and *lex certa* demand clear-cut tax legislation, a prohibition on legal indeterminacy in (tax) legislation is not enshrined in the Netherlands Constitution.
Consequently, the courts do not protect the taxpayer with regard to vague statutory norms and the resulting legal indeterminacy. Because legal indeterminacy is not a norm enshrined in an international treaty; the courts cannot test (tax) laws against it. The courts, therefore, cannot offer much protection to taxpayers against deliberately indeterminate anti-abuse provisions meant to put off taxpayers (*chilling effect)*. The tax administration is left with large latitude to determine the law.

However, there is one rather famous case, concerning ex-warrant bonds, of the reverse of a vague statutory provision, i.e., a precise text, which nonetheless did not convey the legislator's intention. The legislator formulated this intention in the parliamentary proceedings but found it too difficult to express its intention clearly in the text of statute. The legislator refrained from doing so, trusting the judiciary to apply its intention. However, the Supreme Court kept to the clear text and did not follow the intention of the provision.[97] Recently, we have seen more discrepancies between text and the intention of the statute, because of the casuistic lawmaking by the legislator.[98]

6. The consequences of legal indeterminacy in tax matters

[96] See Happé & Gribnau 2007, pp. 433-458.
[97] Decisions of the Supreme Court of 24 January 1996, *BNB* 1996/138 and of 13 March 1996, *BNB* 1996/194. See J.E.A.M. van Dijck, 'De ex-warrantobligatie', *Weekblad fiscaal recht* 1996/6198.
[98] As Advocate General Wattel pointed out in his Opinion of 11 May 2009, *Vakstudie Nieuws* 2009/28.7.

6.1. Judiciary has final authority with respect to legislative interpretation

6.1.1. The judiciary

Judicial independence is generally considered a fundamental value of the rule of law; it is instrumental to the protection against arbitrary interferences and use of power. Independence of the judiciary is part of the notion of distribution of power according the principle of separation of powers. Therefore, judicial independence serves to prevent accumulation of power and to control abuse of power. As such, it is an important instrument to protect taxpayers against arbitrary interferences. In the Netherlands constitutional order, independence of the judiciary is seen as an essential principle, though it is not explicitly mentioned in the Netherlands constitution. The guarantees for judicial independence are to be found in unwritten constitutional law, statute law and are also partly based on European norms, in particular the ECHR.[99]

The consensus on the value of judicial independence regards the judicial system as a whole in relation to others branches of government (institutional independence), and 'the individual members in relation to the judicial system, in particular in relation to the judicial body in which they function.'[100] In principle, this individual independence applies also to individual judges or courts with respect to their relations to other judges or courts. However, consultation within courts on 'judicial policy' or on certain points of reference to be used by the court is not precluded. To be sure, consultation on how to decide a particular case is unacceptable. General consultation, on the other hand, aimed at broad harmonization of policy within one court itself, or between different courts and tribunals, has become a generally accepted phenomenon.[101] Consequently, consultation enhances uniformity, equality and certainty of the administration of justice.[102]

Judicial independence being highly valued, the doctrine of *stare decisis* is not formally in place in the Netherlands. Adjudication, however, can be regarded as an ongoing dialogue with precedents, for the

[99] Though the scope of Art. 6 ECHR which grants citizens a right of access to an independent and impartial court when charged with criminal offences or involved in a dispute about civil rights does not apply to tax proceedings (except for tax decisions which include a fine for the taxpayer). EHRC 12 July 2001, No. 44759/98, *Ferrazzini v Italy*.
[100] R. de Lange & P.A.M. Mevis, 'Constitutional Guarantees for the Independence of the Judiciary', in J. van Erp (ed.), *Netherlands Reports to the Seventeenth International Congress of Comparative Law*, Antwerpen etc.: Intersentia, 2006, pp. 327-348 at p. 327.
[101] De Lange & Mevis 2006, p. 335. There is some discussion with regard to the impartiality of the 'deputy judge' (*rechter-plaatsvervanger*) – .perhaps a typically Dutch phenomenon. This is a lawyer with relevant professional experience who takes part in the administration of justice on an incidental basis. This deputy judge, an academic, solicitor, corporate lawyer, tax consultant, administrative officer, etc., usually operates within a three-judge chamber.
[102] With regard to the organization and management, the Council for the Judiciary (*Raad voor de Rechtspraak*) plays an important role.

case law of the Supreme Court is *de facto* a source of law. The Supreme Court's case law is in fact authoritative for other courts (not *de iure* since it is not legally binding). Both the Supreme Court itself and the lower courts tend to follow its case law, 'both on legal ground (equality) and for pragmatic purposes (saving parties the trouble of cassation).'[103] As stated above, individual independence applies also to courts with respect to their relations to other courts. Consequently, lower courts retain the authority to decide cases contrary to the precedents of higher courts, where they consider the precedent to be wrong.[104]

6.1.2. Primacy of the legislature

As a result of the separation of powers, the courts, especially the Supreme Court, have the final word regarding the interpretation of legislation. Consequently, the courts interpret, concretize and develop legislative provisions. However, with regard to lawmaking in the Netherlands, the democratically legitimized legislature is gaining [or: has (?)] priority. This primacy of the legislature is a result of the distribution of power in our democratic system. The courts should respect this primacy of the democratically legitimized legislature in lawmaking. The principle of legality requires the judiciary not to step into the legislature's shoes. Moreover, though the domestic courts have the final word with regard to the interpretation of legislation, the tax legislator may overturn judicial rulings deemed undesirable by amending, replacing or removing the disputed legislative provision.[105]

In practice, with regard to the interpretation of the tax rules, the tax administration takes the lead by deciding concrete cases and issuing policy rules (administrative rules). Most taxpayers will not contest these concretizations of vague laws, because of the lengthy, expensive and time-consuming legal proceedings. As a result, the concretization and interpretation of vague laws by the tax administration is often decisive for the meaning of the statutory provision. Sometimes members of parliament call the State Secretary of Finance, head of the tax administration, to account. However, frequently the questioner is sent off none the wiser.

As for testing tax law against the principle of equality, the Netherlands Supreme Court acknowledges the primary (wide) margin of appreciation of the legislator. This holds for judging the equality of cases as well as for judging whether there is an objective and reasonable justification for any inequality of

[103] M.A. Loth, 'Courts in Quest for Legitimacy: A Comparative Approach', in N. Huls, M. Adams, & J. Bomhoff (eds.), *The Legitimacy of Highest Courts' Rulings*, The Hague: T.M.C. Asser Press, 2009, p. 278.
[104] See J. Bell, *Judiciaries within Europe: A Comparative Review*, Cambridge: Cambridge University Press, 2006, p. 366.
[105] According to Bartel, member of the Netherlands Council of State, this occurred less than ten times in the last ten years; J.C.K.W. Bartel, 'Reparatie van arresten', in R. Pieterse, *Draaicirkels van formeel belastingrecht*, Den Haag: SDU 2009, p. 35.

treatment. With regard to the actual testing of tax legislation, however, the Netherlands Supreme Court shows too much deference with regard to the question of whether legislative discrimination is unjustified (wide margin of appreciation). This is also the case with respect to the elimination of unjustified discrimination (granting the legislator an indefinite *terme de grâce*). The Supreme Court also showed this by deciding that the principle of equality of Article 14 ECHR and Article 26 ICCPR does not require that the Netherlands legislator elaborates the law in such a way that every inequality or disproportionality is avoided in every conceivable situation.[106]
Especially considerations of feasibility or the wish to prevent abuse of the law are relevant in this context. The Supreme Court has explicitly accepted these considerations as grounds justifying an unequal treatment. Also in a few earlier judgments the Court decided that the roughness, i.e., over-inclusiveness, of the law was acceptable, in some cases even without referring to the specific reason for the litigated classification. A certain measure of roughness had been a legitimate reason for the discrimination.[107]

Nonetheless, the Netherlands Supreme Court case law concerning the principle of equality shows that the Netherlands Supreme Court has made a valuable contribution to the constitutional system of checks and balances. The Court underlines the significance of the principle of equality for fair tax legislation. After all, each violation of the principle of equality damages the quality of the tax system.[108]

6.2. Constitutional basis of courts

The constitutional basis for the domestic courts is their competency to decide cases brought before them by taxpayers against the tax administration (tax inspector). Chapter 6 of the Constitution deals with the administration of justice; Article 112 of the Constitution attributes responsibility for judging disputes on civil rights and obligations to the judiciary. The judgment of administrative disputes, which do not arise from relations under civil law, may be granted by statute either to the judiciary or to tribunals which do not form part of the judiciary. It is determined by statute which courts form part of the judiciary.

With regard to the legal framework of the appeal procedure, it is important to note the applicability of general administrative law in the field of tax law. General administrative law is the *lex generalis* and administrative tax law is the *lex specialis*. Tax law is part of administrative law, so the General

[106] Decision of the Supreme Court of 10 June 2005, *BNB* 2005/319.
[107] Decisions of the Supreme Court of 16 September 1992, *BNB* 1993/21, and 15 December 1999, *BNB* 2000/57 and HR 10 June 2005, *BNB* 2005/319.
[108] Happé & Gribnau 2007.

Administrative Law Act applies. This statute contains the uniform law of administrative procedure which applies to tax procedure. However, for tax procedures some provisions in the General Taxes Act (*Algemene Wet inzake Rijksbelastingen*) contain exceptions - in favour of the tax administration. These exceptions have decreased in the past ten years.

Accordingly, different statutes regard the judicial competence in tax disputes. Article 8:1 of the General Administrative Law Act (*Algemene wet bestuursrecht*) provides that the taxpayer may appeal to a District Court (*rechtbank*) against a decision on an objection by the tax administration.[109] The Tax Division, part of the Administrative Division in the District Courts, will deal with his appeal. Judgments of the administrative court in first instance may be appealed to the Tax Division of the Courts of Appeal (*gerechtshoven*); Article 28 of the General Taxes Act. Next, appeal in cassation may be lodged with the Tax Division of the Supreme Court (Article 78 of the Judiciary Organization Act, *Wet op de Rechterlijke Organisatie*, in conjunction with Article 28 of the General Taxes Act). For that matter, the Netherlands Supreme Court is not to be understood as a third instance court (next to the courts of first instance and the appellate courts), but rather as offering a form of judicial review – checking whether the law is correctly applied.

6.3. Repairing legal indeterminacy

Legal indeterminacy is normally repaired by case law, because courts decide on vague tax statutory provisions. They will try to specify the statutory provision with the common judicial techniques. They will, for example, study the Explanatory Memorandum and the debates in the Lower House and the senate. Literature may also be of great help. Case law, therefore, is very important to protect the taxpayers against undesirable consequences of vague norms. Because of the great weight of the principle of legality the powers of the tax administration are mostly mandatory powers. Consequently, in principle the courts do not leave the tax administration much latitude in the concretization and specification of vague and open norms (which are deliberately vaguely formulated by the legislator). But the courts do take certain reasons for some latitude into account such as a degree of efficiency in the bulk process of tax collection. However, there seems to be more room for this latitude with respect to vague norms than when dealing with open norms or concepts. After all, in the case of open norms courts act as deputy legislator.

[109] Before lodging an appeal the taxpayer has to object to the tax inspector (Article 8:1 read in conjunction with Article 7:1 of the General Administrative Law Act). The objection procedure is an 'administrative phase' which implies a possible revision of the assessment rule. Within six weeks of the date of the assessment, the taxpayer may file a notice of objection with the inspector.

Beside the courts, lower legislative authorities and the tax authorities play an important part with respect to repairing legal indeterminacy. They may reduce vagueness in order to enhance legal certainty and equality. To this effect, they may use regulations and administrative rules.

6.3.1. Regulations

The legislator may delegate part if its lawmaking power to government or a minister; central government uses this power by laying down a generally binding regulation or order in council (*algemene maatregel van bestuur*).[110] A minister will also use this delegated power by down laying down a generally binding regulation, which is called a decree order (*ministeriële regeling*).[111] Article 89 of the Constitution provides the statutory basis for both kinds of generally binding regulation.[112] The use of generally binding regulations frequently occurs in tax matters, which results in delegated lawmaking by the State Secretary of Finance.

Regulation is a more flexible way of legislating, the procedure being simpler than ('formal') legislation by government and parliament together, though it is subject to parliamentary scrutiny. This way details may be specified in regulations, preventing further complexity of tax statutes. Officials with in-depth knowledge may draft the regulation and direct participation of taxpayers is possible. However, parliament and the public at large will acquainted with the regulation afterwards, at the cost of legal certainty.[113] The specific conditions stipulated in the regulation may even be more stringent than justified by the parliamentary discussion.[114] A partial remedy is sometimes found in statutes which stipulate ex ante cooperation of parliament with regard to regulations (*voorhangprocedure*).[115] Article 16 of the Netherlands VAT, for example, delegates the possibility of partly or fully excluding the right of deduction in particular circumstances to the government. After establishing the resulting regulation, an order in council, a bill aimed at approval of this order, has without delay to be sent to parliament. If parliament does not approve, the order in council will be withdrawn.[116] Another example is to be found

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110 These regulations are published in the Netherlands Official Gazette (*Staatsblad*).

111 These regulations are mostly published in the Netherlands Government Gazette (*Staatscourant*).

112 See Kraan 2004, p. 624. Like statutes, regulations are generally binding (and applicable) regulations (*wetten in materiële zin* or *algemeen verbindende voorschriften*); R. Seerden & F. Stroink, 'Administrative Law in the Netherlands', in R. Seerden (ed.), *Administrative Law of the European Union, its Member States and the United States*, Antwerpen/Oxford: Intersentia, 2007, p. 170.

113 Examples are the regulation of mergers and of substantial participation; see H.P.A.M. Van Arendonk, 'No taxation without representation: over legaliteit en legitimiteit', in *Liberale gifte. Vriendenbundel Ferdinand Grapperhaus*, Deventer: Kluwer, 1999, pp. 17-30, at 19-20. He especially criticizes the environmental taxes.

114 Van Arendonk 1999, p. 19 gives the example of concern financing.

115 W.J.M. Voermans & S.C. van Bijsterveld, "Inleiding hoofdstukken 5 en 6: wetgeving, bestuur en rechtspraak", in A.K. Koekkoek (ed.), *De Grondwet. Een systematisch en artikelsgewijs commentaar*, Zwolle: W.E.J. Tjeenk Willink, 2000, p. 409; W. van Wijk, W. Konijnenbelt & R. van Male, *Hoofdstukken van bestuursrecht*, Den Haag: Elsevier Juridisch, 2005, section 6.64, p. 214.

116 The resulting regulation containing exclusions of the right of deduction is called *Besluit uitsluiting aftrekbeperkingen omzetbelasting 1968*.

in Art 5.14, para. 7 Personal Income Tax Act, which regards an exemption for what are known as social-ethical investments: the regulation concerning specific details of this provision will be send to parliament at least four weeks before it is laid down. This way some parliamentary control is ensured. A regulation may be tested by the courts against the constitution in the case of an appeal to the court by taxpayers.

6.3.2. Administrative rules

Administrative rulings or rules constitute a form of soft law. In the Netherlands they are called policy rules (*beleidsregels*). Administrative bodies use these policy rules to set out the way they will make use of their powers.
This form of administrative rule-making to a certain extent compensates for the loss of legal certainty and equality inherent to the growing complexities of tax laws.[117] The amount of administrative rules is enormous. Administrative rules enable the tax inspectors to coordinate their behaviour with each other, secure a reduction in individual decision-making error, and a reduction in individual decision-making costs. To be sure, policy rules are concerned here, not secondary (delegated) legislation on the basis of some kind of delegated legislative power conferred by an Act of Parliament. These policy rules, sometimes also known as quasi-legislation, are laid down by an administrative body as a form of self-regulation over the exercise of its administrative powers.[118] They enhance legal certainty and legal equality, but of course, suffer from a lack of democratic legitimacy, being issued by the tax administration and not by the tax legislator.[119] The amount of policy rules in tax law is massive; taxpayers rely on the guidance with respect to tax law these policy rules purport to give.

Two kinds of administrative policy rules can be distinguished. On the one hand, there are the policy rules which interpret the law. The lack of clarity of legislative provisions and case law is dispelled by the tax administration's indication of its view of the regulation's meaning. On the other hand, there are administrative rules which contain viewpoints of the tax administration that go further than a simple interpretation of the existing rule. In some situations, a strict, textual interpretation of the tax legislation

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[117] Happé 1996, p. 31, Gribnau 1998, p. 182 et seq. ; S.J. Schønberg, *Legitimate Expectations in Administrative Law*, Oxford: Oxford University Press, 2000, p. 13.
[118] Administrative or policy rules serve the tax administration's "strategic' goal of unity of policy and execution in respect of taxpayers, existing and new principals and external supervisors, as well as other legislative enforcement organizations with which it cooperates'; M. Alink & V. van Kommer, *The Dutch Approach. Description of the Dutch Tax and Customs Administration* (Second Revised Edition), Amsterdam: IBFD, 2009, p. 108.
[119] Public authorities must base their decisions on carefully weighed, knowable policies, preferably laid down in policy rules. The original draft of the General Administrative Law Act contained an obligation for administrative authorities to establish policy rules. See G. ten Berge & Ph. Langbroek, 'Towards integrated lawmaking by administrative courts and public authorities', in F. Stroink & E. van der Linden (eds.), *Judicial Lawmaking and Administrative Law*, Antwerpen/Oxford: Intersentia, 2005, p. 260.

is found to be too restrictive or unjust. The tax administration frequently takes a position which is not covered by a narrow, restricted reading (interpretation) of the tax statute, so as to enhance the aim and intent of the legal provisions. In these positions *praeter legem* (i.e., beyond the letter of the law), which favour the taxpayer, the tax administration puts aside the text of the statute in order to do justice to its spirit.[120]

The tax administration has a duty to concretize tax legislation and, therefore, a duty to formulate policy rules.[121] However, the tax administration is not always willing to give policy rules in domains where legal certainty and equal treatment is lacking and sometimes makes policy rules aimed at exploring the boundaries of the law. Policy rules may also lack impartiality due to the tax administration's (sometimes excessive) focus on efficient tax collection. If the tax administration does not give a clear interpretation of an unclear statutory provision, greater legal protection is advocated for taxpayers, especially taxable persons subject to VAT and withholding agents, who choose a reasonable interpretation of the unclear statutory provision concerned.[122] Intermediaries, such as enterprises and employers, are charged with task of levying of taxes paid on a return basis, for example, VAT and taxes on wages which entail administrative obligations and costs, without being paid for it. The taxable persons (the supplier of goods and services) and the withholding agent are charged with a task which normally belongs to the tax administration. This compulsory role of deputy to the tax administration involves major administrative costs. Therefore, they should not be faced with needless and avoidable transaction costs (informational and negotiation costs) as a result of unclear tax provisions on top of these administrative costs.[123]

Clearly, the tax administration's power is growing. Consequently, accountability of the tax administration is of growing importance. Political accountability depends on the fiscal know how and experience within parliament. But where 'the executive is strong it will often be able to ride out political criticism, whether voiced on the floor of Parliament or through committees.'[124] In my opinion, this holds for the Netherlands tax authorities and tax administration. This makes the efficacy of legal controls as a method to hold the tax administration's power accountable all the more important.

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120 Happé 1996, pp. 36-38.
121 Happé 1996, pp. 31-32.
122 J.E.A.M. van Dijck, 'Onduidelijke wettelijke begrippen', *Weekblad fiscaal recht* 2006/6688, pp. 1129-1130.
123 J.L.M. Gribnau, Wat maakt u zo bijzonder? Herendiensten en rechterlijk overgangsrecht', *Weekblad fiscaal recht* 2007/6736, p. 1073.
124 P. Craig & A. Tomkins, 'Introduction', in P. Craig & A. Tomkins (eds.), *The Executive and Public Law: Power and Accountability in a Comparative Perspective*, Oxford: Oxford University Press, 2005, p. 12.

Mostly, administrative policy rules state the point of view of the tax administration as to the application of the substantive tax law, but sometimes they concern the use of the powers of the tax administration, for example, its information gathering and investigating powers. More recently, with regard to the establishment of administrative rules, some kind of participation can be observed of the taxpayers affected by the rule to be established. This participation often improves user-friendliness and reduces the administrative burden of administrative rules. Thus, these rules are formulated with an eye to their feasibility and practicability, especially, though not exclusively, important for companies. It goes without saying that these administrative rules should be established within the legislative framework. Of course, public participation may not result in a shift of the tax burden to other groups of taxpayers. Here, as elsewhere, the tax administration has a special obligation to guarantee such important values as impartiality, equality, accountability, transparency, and publicity (see I.2.2 above).[125]

6.4. Legal status of administrative rules

In the Netherlands administrative policy rules are based on existing administrative power. A policy rule is 'an order which lays down a general rule for weighing interest, determining facts, or interpreting statutory regulations in the exercise of an power of an administrative authority.' [126] The administrative body must act in accordance with its policy rules, unless this would have consequences for one of the interested parties, which due to special circumstances would be disproportionate to the aim pursued by the policy rule in question (Article 4:84 of the General Administrative Law Act). This duty to derogate is an essential feature of the concept of policy rule.[127]

The administrative authorities use policy rules to promote certainty and equality in the application of the law, and because they are competent to establish these rules, they are bound by them. In order to improve administrative rule-making transparency, the contents of internal guidelines and procedures are often published. Consequently, they are of an external nature, providing the taxpayer with guidance as to the expected behaviour of the tax administration. Thus, the taxpayer may derive legal certainty from administrative rules. By way of (external) self-binding policy rules, they have legal consequences; they are enforceable.[128]

Consequently, administrative rules are legally binding on the tax inspector, but they are not binding like statutes. Moreover, though they legally bind the tax inspector, the courts are not bound by them. The

[125] Gribnau 2007a, pp. 308-312.
[126] J.G. Brouwer & A.E. Schilder, *A Survey of Dutch Administrative Law*, Nijmegen: Ars Aequi, 1998, p. 31.
[127] In this respect, policy rules differ from generally applicable regulations. See Seerden & Stroink 2007, p. 171.
[128] Gribnau 2007a, pp. 307-308.

tax administration may bind itself, but not the courts, with regard to the interpretation of statutes. Therefore, taxpayers may directly appeal to a statute itself if they deem the tax administration's interpretation of that statute unfavourable. However, legal proceedings being lengthy, expensive and time-consuming, not many taxpayers will lodge an appeal on this ground.[129]

Thus, the partial shift of lawmaking and taxing power from the legislature to the tax administration is in a way compensated for by the judiciary. In this respect it is important to mention the check on the tax administration's power, viz. its behaviour towards the taxpayer, exercised by the courts. They not only use the statutes which confer competencies to the tax administration but also what are known as the general principles of proper administration. The major principles of proper administration are the principle of legitimate expectations and the principle of equality, which demands consistency in the application of tax law.[130] These general principles of proper administration protect people against illegitimate government intervention – in addition to the principle of legality. Thus, the courts keep checks and balances in place to compensate for the growing power of the tax administration and the lack of impartiality of the tax legislator (which is partly due to the relatively limited power of parliament in tax matters).

7. Tax administration and the courts: cooperation and conflict

7.1. Courts control application of tax law

One of the core elements of the idea of checks and balances is the independent judicial review on the legality of the executive power.[131]

The most important dispute settlement power of the (administrative) court is the annulment of the decision of the tax administration (Article 8:72 of the General Administrative Law Act). As a result of the annulment, the tax administration will be obliged under the law to take a new decision. If the court holds that the administrative body is not prepared to observe the judicial decision, it may set a term for the (new) decision to be taken by the administration. In addition, the court may decide that, where the administrative body fails to comply, and for so long as it fails to comply, it will forfeit a penalty for each

[129] See P.J. Wattel, 'No taxation without representation', in A.W. Heringa et al. (eds.), *Verhalen over de grondwet*, 's-Gravenhage: SDU 1993, p. 198.
[130] See Happé 1996, pp. 109 et seq.
[131] See Seerden & Stroink 2007, pp. 196-199 and R. Sommerhalder and E. Pechler, 'Protection of Taxpayers' Rights in The Netherlands', in D. Bentley (ed.), *Taxpayers' Rights: An International Perspective*, Gold Coast: The Revenue Law Journal (Bond University) 1998, pp. 310-330.

day of non-compliance (Article 8:72, para. 7 of the General Administrative Law Act). The court can therefore force the administration to take a new decision.
Usually, however, in tax matters the court determines that its judgment will replace the decision annulled by it, instead of ordering the tax administration to take a new decision.
Thus, the court takes an administrative decision. Strange though this may seem, in tax matters this is long-standing practice. In 'general' administrative law the legislature may have conferred the administration discretionary powers (discretion), and therefore more than one decision may be (legally) correct. Consequently, judicial settlement is precluded, since the court must respect the administration's discretionary powers. However, in tax law, the tax administration hardly possesses any discretionary powers. Therefore, the tax court's decision will usually replace the tax administration's decision.

7.2. Courts and administrative rules

As shown above, the Netherlands courts take into account administrative policy rules; however, the courts are not bound by these rules (see above I.3.4.). The courts, moreover, do not apply these rules ex officio.[132]

The tax administration may also bind itself (even unwillingly) by other actions than such policy rules (administrative rulings), such as individual communications. This may be a commitment (promise), for example, with which the tax administration declares itself bound to a certain position, and even an implicit positioning that may be deemed to endorse a certain viewpoint of the taxpayer. On the basis of the principle of legitimate expectations the tax administration may be bound to this information or position.[133]

7.3. Tax administration's attitude towards case law

The tax administration usually takes into account the decisions of the Supreme Court and the European Court of Justice (ECJ). The tax administration is bound by decisions of the judiciary, though sometimes it willingly deviates from it. For example, the State Secretary of Finance sometimes establishes an administrative policy rule to instruct the tax inspectors not to apply particular case law which he deems undesirable, often for budgetary reasons. At the same time, the State Secretary of Finance, as co-legislator, will initiate a draft bill, to 'repair' this judicial interpretation retroactively ('reparation legislation').

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[132] R. den Ouden, 'Halve oplossingen', *Nederlands Tijdschrift Fiscaal Recht* 2008/19, p. 1 advocates the ex officio application of policy rules by the courts.
[133] Happé 1996, pp. 109-275.

7.4. No reciprocal observation of the interpretation of tax law

In the Netherlands the principle of reciprocal observation of the interpretation of tax law by the tax administration and domestic courts is not known. The courts are not bound by the interpretation given by the tax administration, because it is not binding on others. The tax administration, however, is bound by the interpretation given in the final decision in a specific case. In similar cases the tax administration may not be obliged to follow the court's case law, but, in practice, the tax administration follows established case law. In these cases, the tax administration frequently issues an administrative rule concerning the interpretation and application of the case law.

7.5. Tax administration legally bound to judicial decisions

Once a court decision is final, it resolves the dispute between the tax administration and taxpayer. The parties to the case are bound by a judicial decision, so the tax administration has to execute the judicial ruling. With regard to the controversy between the tax administration and taxpayer at hand, the courts may not make any decision by way of general dispositions qualifying as a rule, no *Arrêts de Règlement* are allowed according to Article 12 of the General Provisions Act (*Wet Algemene Bepalingen).*

As to the question of whether previous court decisions do have a legally binding nature or the 'force of precedent', the answer is that the tax administration is bound by decisions of the Supreme Court. The tax administration is bound to follow the Court's interpretation of the tax law in other cases. This is an informal constitutional principle. The tax administration, therefore, takes into account the decisions of the Netherlands Supreme Court. Of course, the tax administration may litigate the question of the scope and meaning of a Supreme Court interpretation of tax law.
The tax administration is also bound by the decisions of the ECJ.

7.6. Circumvention of domestic case law

The tax administration sometimes willingly deviates from decisions of the judiciary, although the tax administration is bound by its case law. The State Secretary of Finance sometimes instructs the tax inspectors not to apply case law because he, as co-legislator, will initiate a draft bill, to overrule this case law retroactively.

Furthermore, in its fight against undesirable structures the tax administration sometimes takes up unreasonable, hopeless and incorrect positions in policy rules. More tax is levied than is justified,

because the taxpayer cannot but agree to the tax administration's position. The taxpayers will not appeal to the court, as a result of which the courts are not able to check the tax administration's abuse of power [134]

8. Relationship between different legal sources (legal pluralism)

8.1. Monist system

The Netherlands adheres to a monist system for the relationship between international treaties and domestic law. In general, (legal) monism means that the various domestic legal systems are viewed as elements of the all-embracing international legal system, within which the national authorities are bound by international law in their relations with individuals, regardless of whether or not the rules of international law have been transformed into national law.[135] In this view, the individual derives rights and duties directly from international law, which must be applied by the national courts and to which the latter must give priority over any national law conflicting with it. This is the case in the Netherlands. Consequently, the tax administration by virtue of this 'customary rule, is bound to grant precedence to international law.'[136]

8.2. Hierarchy of legal sources

Article 94 of the Constitution provides that no national regulation may conflict with treaty provisions 'that are binding on all persons.' Most of the provisions relating to human rights in the ECHR and the ICCPR, according to the case law of the courts, are binding on all persons. Treaty provisions take precedence over Acts of Parliament (statute law) as well as over other generally binding rules.

The rule that 'provisions that are binding on all persons' prevail over domestic law (Article 94) applies likewise to the decisions of international organizations. These decisions are published in the Treaties Series, in the Office Journal of the European Communities, or in other sources.[137]

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[134] See R.H. Happé, 'Ongewenst grensverkeer tussen politiek en belastingrecht. Een pleidooi voor meer scheiding der machten', *Nederlands Juristenblad* 2008, p. 757-758 and P.H.J. Essers, 'Het ondernemerschap van de commanditaire vennoot', *Weekblad fiscaal recht* 1993/6053, p. 688.

[135] P. van Dijk et al. (eds.), *Theory and Practice of the European Convention on Human Rights,* fourth edition, Antwerp/Oxford: Intersentia, 2006, pp. 27-28.

[136] E. Alkema, 'The Commentaries on the OECD Model Tax Convention on Income and on Capital – Effective in Domestic Law or in Need of Alternatives', in S. Douma & F. Engelen (eds.), *The Legal Status of the OECD Commentaries*, Amsterdam: IBFD, 2008, p. 183.

[137] See Kraan 2004, p. 627; cf. L.F.M. Besselink (ed.), *Constitutional Law of the Netherlands*, Nijmegen: Ars Aequi, 2004, pp. 127-145.

Consequently, the courts have to respect European Community case law, because of the primacy of international and EC law.

Note with regard to EC law, that the law of the European Community forms an independent legal order which has been received into the legal orders of the Member States. The law of the European Communities is supranational law which constitutes what is known as the First Pillar of the European Union. EC law has direct legal consequences for the Member States and their citizens. Community law is an integral part of the internal law of each Member State and is to be applied throughout the Community; and the national courts of the Member States can also be regarded as Community courts. This is the phenomenon of an integrated legal order: EC law lays down the rule, national law and national agencies must ensure that the Community rule is actual applied and obligations arising under Community law are complied with – when necessary after transposition of EC law into national law.

One of the key notions here is the notion of direct effect, laid down for the first time in a judgment delivered by the ECJ in 1963 *Van Gend & Loos* (ECJ 5 February 1963, Case 26/62 [1963] ECR 1). Here the Court held that the Community constituted a new legal order of international law for the benefit of which the States limited there sovereign rights. So, at its core, the European Union is based on the restriction of sovereignty for the benefit of the Union itself. Furthermore, the subjects of this new legal order comprised not only Member States, but also their nationals. Thus, according to the ECJ, the Treaty created individual rights, a check on the power of national governments and legislators, which national courts must protect.[138] This principle of direct effect has the effect that individuals may secure recognition and enforcement of their rights in the national courts, whereas, the national courts are the principal instruments for the effective application of EC law. Consequently, EC law prevails over conflicting national law; this is the primacy of EC law.

8.3. Taxpayers' legal remedies

The principle of effective remedies in national courts applies in the Netherlands. The effective enforcement of Community law in national courts is guaranteed: as far as we know there are no different legal remedies for EC law or domestic law.
Taxpayers may appeal to the courts against a decision by the tax administration (see 3.2). For example, a taxpayer lodged an appeal challenging some exclusions of the right of deduction as determined by a regulation established by the Netherlands government, an order in council (*Besluit uitsluiting*

[138] According to the former Advocate General at the ECJ F.G. Jacobs, *The Sovereignty of Law: The European Way*, Cambridge: Cambridge University Press, 2007, p. 39: The *Van Gend & Loos* ruling, 'although at the time controversial, was crucial to the effectiveness of Community law and indeed to the very existence of the rule of law.'

aftrekbeperkingen omzetbelasting 1968; see § 3.3 above). He argued that this regulation violated the European VAT Directive.[139] The Netherlands Supreme Court ruled that some exclusions indeed constituted a violation. The question of violation with regard to another exclusion was referred to the ECJ for a preliminary ruling under Article 234 of the EC Treaty.[140]

9. Conclusion

The research problem of this contribution was: what are the consequences of the use of vague norms by the tax legislator for tax authorities, tax courts and taxpayers? To address this problem a number of research issues are dealt with. Important research results are to be found throughout this contribution. It is no use to repeat them all. Here, I only will present the main conclusions in the light of the problem as defined.

This research shows a shift of power from the legislator to the tax administration in the Netherlands. The tax administration's dominant part in the legislative process accounts for the tax legislator's lack of impartiality. Parliament fails to exercise adequate control over government and the tax administration in tax matters. Consequently, there is a major (sometimes excessive) focus on efficient tax collection at the cost of the legal protection of the taxpayer. The hurried pace of the legislative process produces sloppy legislation and increasingly vague provisions. The complexity of tax legislation accounts for a lack of transparency. It does not come as a surprise that the taxpayer is regularly kept in the dark about the exact meaning and scope of tax legislation. Vagueness is a major and increasing source of the tax administration's (norm-related) latitude, i.e., its lawmaking, law applying and taxing power. The proliferation of (tax) legislation has resulted in the proliferation of administrative latitude and power. The tax administration uses administrative policy rules to set out its interpretation and specification of vague expressions and vague norms in statutes and case law. The amount of policy rules in tax law is massive; taxpayers depend on the guidance with respect to tax law these policy rules purport to give. Because of this, most rules which determine the rights and duties of the taxpayer are not statutes but administrative rules.

The courts provide only a limited check on this growth of administrative power. In principle, due to the great weight of the principle of legality, it is not the tax administration but the courts which have to concretize and specify vague legislative norms. In practice, however, the tax administration's interpretation is frequently leading, if only for the taxpayers' reserve to start legal proceedings to test

[139] The many EU directives on value added tax that have been issued limit or sometimes entirely discard national sovereignty as regards the system, the base, the exemptions, and the rates of turnover taxation.
[140] Decision of the Supreme Court of 14 November 2008, *FED* 2009/32.

the tax administration's interpretation. With respect to open norms, the legislator is increasingly putting its stamp on their concretization and specification. The legislator shows less respect for the courts acting as a deputy legislator in tax matters; not so much by determining the frame for future 'sharpenings' of the norm, but rather by overruling the quasi-delegated power of its deputy. Consequently, the powers of the legislator and the tax administration are growing and seemingly merging, but the courts and the taxpayers are losing ground.

Poland: Separation of Powers in Tax Law (Krzysztof Lasiński-Sulecki and Wojciech Morawski)

1. Relationship between the parliament and the tax authorities: the influence of the tax authorities on tax legislation

The Polish government is entitled to draft tax bills and present them to parliament on the basis of Article 118 of the Constitution of the Republic of Poland[1]. The current government (elected in autumn of 2007) has presented to parliament seven tax bills so far (by 8 August 2008). These bills were not aimed at introducing significant changes to any tax, although the changes proposed in the field of value added tax are rather substantial. Previous governments have also exercised this competence extensively.

The tax authorities themselves may not present tax bills to parliament. The Minister of Finance is a tax authority (although a rather specific one) within the meaning of Polish General Tax Law of 29 August 1997[2]. However, he may not present tax bills to parliament, either. Although he usually prepares such bills, officially they are prepared and presented by the government as a whole. Therefore, the Minister of Finance must seek approval of the government as a whole before his proposals are presented to parliament.

The commissions working in the lower house of the Polish parliament (*Sejm*) and the Senate may attempt to introduce changes to presented bills. It should furthermore be emphasized that the members of parliament, the commissions working in the *Sejm* and the Senate, often present tax bills – frequently dealing with the same taxes as governmental tax bills. Thus, bills presented by the government and by other bodies are frequently discussed together. Members of parliament prepare their own proposals of amendments within the field of tax law. These amendments are usually minor ones.

According to the 2007 annual report of the Supreme Administrative Court (www.nsa.gov.pl), although the government is the main initiator of the legislative process, impulses to commence the legislative process also come from a variety of other entities. At the stage of parliamentary work, it may be noted

[1] Journal of Laws (Dziennik Ustaw) 1997, No. 78, item 483 as amended.
[2] Dziennik Ustaw 2005, No. 8, item 60 as amended.

that legislative processes to amend tax laws are easily initiated. Such amendments are presented by members of parliament at different stages of parliamentary work. Thus, individual interests are represented. Ease of initiating the legislative process and the significant particularism of legislative initiatives lead to the disintegration of the legislative process, which affects the quality of the tax law. The view presented in the above-mentioned report corresponds with views voiced by practicing lawyers and academics. It should, however, be underlined that the legislative quality of tax bills presented by the government is also often assessed as unsatisfactory.

2. The meaning of legal indeterminacy in tax matters

Although it is rather difficult to assess a whole string of different tax acts, domestic tax legislation could probably be assessed as rather detailed – and casuistic. This does not mean, however, that all indeterminate concepts are avoided. Leaving an excessive margin of discretion for tax authorities might lead to tax provisions being declared contrary to the Constitution.

In the course of legislative work, the issue of excessive discretion of legal provisions arises. It is often emphasized that tax law should be briefly formulated. Nevertheless, one may observe constant increase in the length of tax laws. Regulation of value added tax and excise duties may serve as an example. At the moment of Poland's accession to the European Union one rather brief act – the Act of 8 January 1993 on Goods and Services Tax and Excise Duty[3] was replaced by two significantly longer acts – one of them regulating the Goods and Services Tax[4] and the other Excise Duties[5]. Both acts are accompanied by a number of – significant in volume – ministerial regulations. In effect, the length of the tax laws regulating the value added tax and excise duties has doubled.

Due to the lack of uniform legislative techniques, one may encounter critical remarks regarding both excessively casuistic and excessively vague provisions.

The constitutionality of tax legislation is subject to review by the Constitutional Tribunal (*Trybunał Konstytucyjny*). Its review proceedings may be initiated, *inter alia,* by individual complaint of a taxpayer or upon a request from an administrative court dealing with an individual case.

Local tax law (created by local self-government units) is subject to the control of administrative courts.

[3] Dziennik Ustaw 1993, No. 11 item 50 as amended.
[4] Act of 11 March 2004, Dziennik Ustaw 2004, No. 54, item 535 as amended.
[5] Act of 29 January 2004, Dziennik Ustaw 2004, No. 29, item 257 as amended.

The Constitutional Tribunal indicates that tax law provisions should be clear and precise. Lack of clarity and precision might be perceived as a violation of Article 2 of the Constitution (rule of law). However, cases where the Constitutional Tribunal held that tax law provisions were so indeterminate that they must be perceived as unconstitutional have been rare. (The Tribunal believes that declaring a provision unconstitutional is an extreme solution. It is only acceptable when the provision cannot be construed in any manner that would be in line with the Constitution. Therefore, vagueness of legal provisions is not sufficient reason to hold that a provision is unconstitutional, unless it is so vague that it cannot be understood.) This does not mean, however, that the Tribunal never rules a provision unconstitutional. For instance, in its judgment of 29 October 2003 (K 53/02), the Constitutional Tribunal held that legal provisions subject to its control were unconstitutional due to the lack of clarity. The same provision was simultaneously abolished and amended by two separate acts.

3. The consequences of legal indeterminacy in tax matters

Under Article 184 of the Constitution, the Supreme Administrative Court and regional administrative courts control the decisions of tax authorities. The courts' judgments are binding upon tax authorities only in particular cases. Therefore, in the case of legal indeterminacy, the administrative court has the final word regarding the interpretation of the rule.

Legal indeterminacy is usually filled in by administrative rulings and case law. Recently, it seems that a major role is played by administrative rulings issued by the Minister of Finance (or self-governmental tax authorities in the case of local taxes) in individual cases upon the request of a taxpayer (Art. 14 et seq. of the General Tax Law of 29 August 1997). These rulings are subject to the administrative courts' control. They are published on web sites (without the particulars of those asking for rulings).

The Minister of Finance also presents his position with regard to some tax interpretation problems of general interest. The Minister's opinion is presented in a written form and is usually available on the internet.
The role of the case law of administrative courts is also significant but one should bear in mind that their judgments are binding in individual cases only.

Administrative rulings are not binding on taxpayers. They are not binding on courts, either. Administrative rulings offer taxpayers a certain range of protection. In this sense, the administrative courts may be bound by the rulings as they may not issue a judgment which would deprive a taxpayer

of a protection derived from the ruling, even if the ruling (and the decision based thereon) is, according to the court, *contra legem*. Formally, an administrative ruling may not be taken into account or may be subject to change after the tax obligation has arisen. As a matter of principle, a taxpayer may be exempt from the obligation to pay a tax in such cases.

4. Relationship between the tax administration and the domestic tax courts

Application of tax law by the tax administration is subject to the control of administrative courts – regional administrative courts acting in the first instance and the Supreme Administrative Court acting in the second (final) instance.

Provisions regulating the issue of administrative rulings have been subject to a number of changes in recent years but in none of the cases were courts legally bound by the rulings. If courts were bound by administrative rulings, they would lose their independence.

Even at the time when there were no legal provisions on the consequences of taxpayers following official, published opinions of the tax authorities, courts and academics tended to think that following official, published opinions of the tax authorities may not be detrimental for a taxpayer. It was not clear, however, how this "detriment" should be understood.
Currently, in the case when an administrative ruling (individual or general interpretation) is not advantageous for a taxpayer, a court is not limited in any manner when issuing a judgment. If an advantageous (for a taxpayer) ruling is not taken into account by the tax authorities (impossible under the provisions in force until 30 June 2007), taxpayers may be exempt from the obligation to pay tax. Therefore, the problem of following administrative rulings by courts is deprived of any practical significance.

An important legal problem concerns the significance of individual rulings issued by tax authorities for a taxpayer other than the one being party to court proceedings. Such rulings are sometimes invoked by courts. This does not mean, however, that the courts follow the views expressed in the rulings. This may be the result of an enormous number of published – often contradictory – rulings. Until 30 June 2007 each head of a tax office, head of a customs office and each local tax authority could issue rulings on the interpretation of the tax law (with regard to taxes falling within its competence). As a result, one legal problem (or one legal provision) was often interpreted in numerous ways by different tax authorities and a taxpayer could nearly always find an advantageous interpretation. Since 1 July 2007, only the Minister of Finance (in fact, four tax chambers prepare such rulings) and local tax authorities

with regard to local taxes are competent to issue rulings. This may lead to a certain level of uniformity and increase in the role of rulings in the courts' practice.

The tax administration sometimes refers to the case law of both domestic courts and the European Court of Justice (ECJ) when presenting the grounds of its decisions.

The tax administration adheres in its practice to the judgments of the administrative courts, once the judgments on a particular matter are numerous and uniform. There are legal instruments which support such a process. The Minister of Finance issues administrative rulings (both general and individual interpretations of tax law). In the course of doing so, he is required to take into account judgments of courts, the Constitutional Tribunal and the ECJ. On the other hand, the Minister is not legally bound by the above-mentioned judgments.

The tax administration is legally bound by the judgments of administrative courts in individual cases. It is plausible that the tax administration undertakes measures not to follow a court's judgment, which it considers to be disadvantageous for the administration.

Portugal: Separation of Powers in Tax Law (António Carlos dos Santos and Paulo Nogueira da Costa)

1. Relationship between the parliament and the tax authorities: the influence of the tax authorities on tax legislation

1.1. Legislative competence on tax matters

Portugal is a Republic based on the rule of law as well as democratic and social principles[1]. The principle of separation of powers, a corollary of the rule of law and democratic principles, embodies a *triple perspective*: horizontal (between the legislative, the executive and the judicial powers, with the President of Republic granted a type of moderating power), vertical, namely between the autonomous regions and the central State, and the separation of powers between government and opposition[2].

From a legal and political point of view, the main competence on tax matters (creation of taxes and creation of the tax system) belongs to the parliament (*Assembleia da República*), in accordance with the political principle of no taxation without representation and with the juridical principles of legality and safety in order to provide taxpayers with the possibility of foreseeing the *an* and the *quantum* of tax obligations[3] [4].

However, the Portuguese government has two types of competence in tax matters: a *delegated competence* by the parliament (within the framework, the limits and the political orientation of this institution) in

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[1] Article 2 of the Portuguese Constitution (*Constituição da República Portuguesa*). See: CANOTILHO, J. Gomes / MOREIRA, Vital, *Constituição da República Portuguesa Anotada*, Vol. I, Coimbra: Coimbra Editora, at 202-212.

[2] Article 111 and, in a general way, Part III of the Portuguese Constitution. See: MIRANDA, Jorge / MEDEIROS, Rui, *Constituição Portuguesa Anotada*, t. III, Coimbra: Coimbra Editora, at 251-255; OTERO, Paulo (org.)/ PINHEIRO, A. S / LOMBA, P., *Comentário à Constituição Portuguesa*, Vol. III, t. 1º, Coimbra: Almedina, 2008, at 55-68; CANOTILHO, J. GOMES, *Direito Constitucional e Teoria da Constituição*, 7th ed., 2003, at 250. There is another kind of vertical separation of powers on taxation concerning the distribution of power in taxation between the European Union and the Portuguese Republic. About the influence of the European tax law in the Portuguese tax system. See: SANTOS, A. Carlos dos, "Política orçamental e fiscal 20 anos depois" in ROMÃO, António (org.), *A Economia Portuguesa 20 Anos depois da Adesão*, Coimbra: Almedina, 2006, at 437-489.

[3] Article 103/2, of the Portuguese Constitution. See: NABAIS, Casalta, *Direito Fiscal*, 5th ed., Coimbra: Almedina, 2009, at 137-138; SANCHES, Saldanha, *Manual de Direito Fiscal*, Coimbra: Coimbra Editora, at 123-128 and 173-177; CAMPOS, D. Leite de /CAMPOS, Mónica Leite de, *Direito Tributário*, Coimbra, Almedina, 1997, at 90-115.

[4] Constitutional Court (*Tribunal Constitucional*), judgments 504/98, of 2 July and 63/2001, of 13 February.

matters considered by the Constitution to be a relative exclusive competence of parliament (*reserva relativa*), concerning essential elements of taxation (tax subject and tax object, exemptions, rates, taxpayers´ rights, penalties)[5] and a *shared competence (concurrent or joint competence)* with the parliament, in other tax matters (recovery, inspection, procedure, for example)[6]/[7]. Nevertheless, in all these cases, the parliament may have the final word, because it has the right to exercise an *ex post* control of government legislation[8].

The government still has two important powers concerning taxation: the power of negotiation of double taxation agreements, even if the final approval is a parliamentary competence, and the power to participate in the tax law process as a member of the Council of the European Union.

1.2. Legislative initiative of the government

In all matters, including the right to propose tax bills to the parliament, the government is endowed with the right of *legislative initiative*, side by side with the assigned concurrent competence of parliament. In taxation, a main part of the use of this tax competence occurs, each year, during the presentation of the State Budget proposal[9]. Numerous tax modifications are normally introduced at this precise moment in time, even alterations without a correlative relationship with the Budget itself, such as procedural matters.

As far as current tax legislation drafting is concerned, we can also observe the enormous influence of the tax administration[10].

1.3. Exercise of legislative competence for tax matters by the government

The most common form of enacting tax laws is based on a government proposal. However, on occasion we can also observe the approval by parliament of tax proposals originating from a parliamentary party. Hence we can go so far as to say that until the present day, the main reforms in

[5] Article 165/1, i) of the Portuguese Constitution and Article 227/1, i), concerning the Regional parliaments of Madeira and Azores.
[6] Article 198/1, a) of the Portuguese Constitution.
[7] Constitutional Court, judgments 205/87, of 17 June 461/87, of 16 November and 500/97, of 10 July.
[8] Article 169 of the Portuguese Constitution.
[9] Articles 105 and 106 of the Portuguese Constitution and Law No. 91/2000, of 20 August, concerning the Budget Framework Law (*Lei do Enquadramento Orçamental*). About the State Budget, see: FERREIRA, E. Paz, *Ensinar Finanças Públicas numa Faculdade de Direito*, Coimbra: Almedina, 2005, pp. 135-155, and, in general, "Em torno das Constituições Financeira e Fiscal e dos Novos Desafios na Área das Finanças Públicas", in *Nos 25 Anos da Constituição Portuguesa,* Lisboa, 2001 and FRANCO, A. Sousa, *Finanças Públicas e Direito Financeiro,* Vol. I, 4th ed., Coimbra: Almedina, 1996.
[10] Namely through the proposals and studies coming from the Directorate General for Taxation (*Direcção Geral dos Impostos*) and the Customs and Excise General Directorate (*Direcção Geral das Alfândegas e Impostos Especiais de Consumo*).

taxation were approved by the government based on the use of delegated legislative power by parliament, outside the State Budget context. This was the case of the tax reform of the mid-nineteen eighties during which the introduction of Value Added Tax was approved (*Código do IVA*), new legislation concerning the personal income tax (*Código do Imposto sobre o Rendimento das Pessoas Singulares*) and corporate tax (*Código do Imposto sobre o Rendimento das Pessoas Colectivas*) was enacted and important modifications in procedure and sanctions as well as the restructuring of tax benefits were implemented. Furthermore, the same thing occurred in 1999 with the introduction of a General Tax Law (*Lei Geral Tributária*) and the reform of others taxes, notably, excise taxes (*Código dos Impostos Especiais de Consumo*) and the stamp duty (*Código do Imposto de Selo*).

From a technical point of view, the drafting of this legislation was prepared by *ad hoc* committees of tax experts, whose members were appointed by the government although committee members exercised their prerogatives with considerable independence as far as the end result is concerned.

The immense importance of the government's action, supported by the Administration and sometimes by external specialists, in tax matters is recognized by the Portuguese literature and accepted by the national courts. The tax constitution is very clear concerning this point. Moreover, we can even highlight the fact that before the democratic constitution, the executive branch already had, in practice, by delegation (*autorização legislativa*), or before the constitutional revision of 1971 directly, the main role in tax matters. [11]

This situation is normally explained by the difficulties that the vast majority of members of parliament have in dealing with a specialized area of knowledge. The literature in general underlines the knowledge gap of the most members of parliament and the absence of a good technical support in matters relating to tax law, accounting, public economy and other complementary areas.

1.4. Relationship between the parliament and the tax authorities concerning draft bills

Normally, the parliament does not passively accept the draft bills submitted by the government, even when the party supporting the government has a majority in the parliament. On a regular basis, tax proposals undergo fierce scrutiny (more politically than technically), namely in the Commission of the Budget and Financial Affairs. It is very common for the opposition to submit proposals for substantive changes, some of which are accepted. One of the main factors concerning the level of openness

[11] See: XAVIER, Alberto, *Manual de Direito Fiscal* I, Lisboa: FDL, at 111-113; COSTA, J. M: Cardoso da, *Curso de Direito Fiscal*, 2th ed. Coimbra, 1972, at 154.

regarding the probability that proposed modifications may pass is the existence (or not) of a parliamentary majority supporting the government. All in all, it is safe to say that the executive branch wields great influence as regards the preparation and drafting of tax laws.

2. The meaning of legal indeterminacy in tax matters

2.1. Determinability of tax rules

Normally, Portuguese tax legislation tries not to be very vague concerning the definition of tax object, tax subject and tax base. In particular, there is a tendency to define in a detailed manner tax object and tax subject even more than tax base [12] [13].

Nevertheless, indeterminate concepts, legal presumptions, general clauses and narrow and limited discretion are used in defining the tax object and tax subject[14]; tax base could, in certain circumstances, be defined with the permission to adopt indirect forms of evaluation and administrative discretion of the tax administration is allowed in reference to the application of law, under certain conditions, for instance, pertaining to tax agreements or tax benefits[15] [16].

When Portuguese law needs to develop or explain indeterminate concepts, secondary legislation is provided for by the executive branch or instructions or administration guidelines are implemented by the tax administration.[17]

There are contrasting views concerning the use of indeterminate concepts in tax legislation. Since the Democratic Revolution (1974), tax law has remained almost unchanged, despite the tax reform programme enshrined in the Constitution. Therefore, the main concern of the literature was to avoid or to prevent any abuse of power by the tax administration. Great attention was given to the principle of legality, to the construction of closed types and to ensuring legal certainty for taxpayers.

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[12] Article 8 of General Tax Law (*Lei Geral Tributária*).
[13] Constitutional Court, judgment 233/94, of 10 March.
[14] Constitutional Court, judgment 127/04, of 3 March. One example: following the European Code of Conduct concerning direct taxation, Portuguese law has introduced a general anti-abuse clause (Article 38/2 of the General Tax Law). However, absolute presumptions (*jure et jure*) are not accepted concerning rules of tax incidence (Article 73 of the General Tax Law).
[15] See Articles 87 to 90 and 37 of the General Tax Law and Article 5 of the Tax Benefits Statute (*Estatuto dos Benefícios Fiscais*).
[16] Constitutional Court, judgments 233/94, of 10 March, 756/95, of December 20, 236/01, of 23 May, and 127/04, of 3 March.
[17] Constitutional Court, judgments 236/01, of 23 May, 451/01, of 23 October, and 589/01, of 21 December.

With the consolidation of democracy, the new tax reform and the introduction of information technology and information systems in the tax administration, the climate was appropriate for a change of heart in the tax literature. Nevertheless, some authors (Nuno Sá Gomes, Manuel Pires and others, following Alberto Xavier[18]) have continued to defend the former position, being very critical in relation to the adoption of indeterminate concepts, the discretion of the tax administration, the approval of general clauses, and so on. However, a new generation of authors (Saldanha Sanches[19], Casalta Nabais[20], Ana Paula Dourado[21]) have recognized, in different ways, the impossibility or even the danger of rejecting indeterminate concepts, of constructing closed types and of not adopting general clauses.

In fact, a position based only on the predominance of the rule of law (namely, the letter of the law) could damage the principle of equality, and prove difficult to implement in a new information environment, could facilitate tax avoidance and, in the end, violate the principle of legality, seen from a substantive point of view. For that reason, it was important to strike a balance between all these principles. This new approach, with some variations and under certain conditions, accepts indeterminate concepts and a restrained margin of discretion of the tax administration. The administration or a constant judicial practice could fulfil the vacuity of the legal text, thus leading to the text becoming more and more concrete and clear.

2.2. Court control of the constitutionality of tax legislation

The control of constitutionality (organic, formal and material) of all laws, including tax law, belongs to the Constitutional Court. This court may give rulings regarding not only the unconstitutionality by action (the existence of legal norms violating the Constitution) but also the unconstitutionality by omission (a failure of legislation to fulfil the objectives of the Constitution).[22]

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[18] See: GOMES, Nuno Sá, *Manual de Direito Fiscal*, Vol. II, 9th ed., Lisboa: Editora Rei dos Livros, 2000, at 31-200; PIRES, Manuel, *Direito Fiscal, Apontamentos*, 3th ed., Coimbra: Almedina, 2008, at 100-105; XAVIER, Alberto, *Conceito e Natureza do Acto Tributário*, Coimbra: Almedina, 1972, at 339-380; *Os princípios da legalidade e da tipicidade da tributação*, São Paulo, 1978.

[19] SANCHES, J. L. Saldanha, *A Segurança Jurídica no Estado Social de Direito: Conceitos Indeterminados, Analogia e Retroactividade no Direito Tributário,* Cadernos de Ciência e Técnica Fiscal, No. 140, Lisboa: CEF/ DGCI, Ministério das Finanças, 1985; *A quantificação da obrigação tributária. Deveres de cooperação, autoavaliação e avaliação administrativa*, CCTF No. 173, Lisboa: CEF/ DGCI, Ministério das Finanças, 1995; *Os Limites do Planeamento Fiscal: Forma e Substância no Direito Fiscal Português, Comunitário e Internacional*, Coimbra: Coimbra Editora, 2006; *Manual de Direito Fiscal,* op. cit., pp. 173-177.

[20] NABAIS, J. CASALTA *O Dever Fundamental de Pagar Impostos*, Coimbra: Almedina, 1998.

[21] ANA PAULA DOURADO, *O Princípio da Legalidade Fiscal. Tipicidade, conceitos jurídicos indeterminados e margem de livre apreciação*, Coimbra, 2007, in particular Title III.

[22] Article 277 to Article 283 of the Portuguese Constitution. See: CANOTILHO, J. Gomes, *Direito Constitucional e Teoria da Constituição,* op. cit, at 981-1047.

There is preventive control (*ex ante*, before the law enters in force) and a posteriori control (*ex post,* after the law enters in force). While the first one only can be requested by institutional persons (the President of Republic, Prime Minister, a certain number of members of the parliament), the second one can, in a concrete way, be put forward by taxpayers in tax courts. In fact, in accordance with the Portuguese Constitution, all kind of courts should appreciate and decide a concrete question of constitutionality, even though it is the Constitutional Court that issues the final decision[23].
When the Constitutional Court has decided in three concrete cases that a legal norm is unconstitutional, it may declare the unconstitutionality of this norm, with general and mandatory force[24].

2.3. Constitutional perspective on the legal indeterminacy of tax rules

If we think about the concept of supply of services in VAT, we have to conclude that legal indeterminacy in tax matters cannot be avoided. However, the excessive indeterminacy of a tax rule (for example, the absence of a sufficient clarity and concreteness with the attribution to the tax administration of arbitrary powers) could be considered to be unconstitutional, because it would compromise the principles of legality and juridical certainty and damage judicial control over its application by the tax administration.[25]

One case of unconstitutionality concerning legal indeterminacy is the case where the executive branch approves tax laws acting under the delegation of the parliament, but this parliamentary authorization is generic or undetermined, namely with an absence of a clear political orientation. [26]

3. The consequences of legal indeterminacy in tax matters

3.1. Interpretation of tax rules and indeterminate concepts

The interpretation of tax law follows, bearing in mind the specificities to this particular field of law, the general rules of legal interpretation[27]. Tax authorities interpret and apply the tax law, including the indeterminate concepts. They exercise a certain margin of appreciation regarding the legal interpretation of certain tax norms.[28] They can also create rulings (to make these concepts more substantial and

[23] Article 204 of the Portuguese Constitution.
[24] Article 281/3 of the Portuguese Constitution.
[25] Constitutional Court, judgment 233/94, of 10 March.
[26] Constitutional Court, judgment 358/92, of 11 November.
[27] Article 11 of the General Tax Law and comments of GUERREIRO, António, *Lei Geral Tributária Anotada*, Lisboa: Rei dos Livros, 2000, at 83-88.
[28] Constitutional Court, judgments 233/94, of March 10, and 127/04, of March 3.

tangible) to concretize these concepts in a transparent way, especially in order to quantify the amount of tax owed. [29]

However, in the case of a dispute between the tax administration and the taxpayer, the latter has the right of appeal to a court with jurisdiction in tax matters. It is a vexed question to determine in these cases who has the final word regarding the interpretation of the rule, the tax administration or the courts.

The traditional legal doctrine advocates that this role is a competence of the courts. However, a new outlook (Ana Paula Dourado) defends the position that in cases where a certain margin of appreciation belongs to the tax administration, as in cases pertaining to the determination of the quantum of taxes, courts should only control the limits of the decisions of the ax authorities (i.e., the legality of the decision), but not its contents, if these decisions are plausible (defensible)[30].

Therefore, when the dispute is about the tax object or tax subject (whether to tax or not to tax), courts have the final word. In matters of tax quantification, when the issue is situated within the margins of the concept and more than one solution is possible, then, the court may accept the interpretation adopted by the tax administration, if it is a plausible one.

In accordance with the point of view of the above-mentioned author, this solution is the one that better suits the principles of equality and of practicability without compromising the principle of legality. But the question remains open.

3.2. Constitution, courts and the interpretation of indeterminate legal rules

In a concrete case, the constitutional basis for the domestic courts to have the final word on interpretation of an indeterminate legal rule is the fundamental principle of *legality* and of *court protection*.

The tax administration is always bound by the law. For that reason, even when interpreting and determining the content of indeterminate concepts, the tax administration's margin of appreciation remains subject to the limits of law. Thus, the judicial control over the administrative activity is a constitutional imperative.[31]

[29] Constitutional Court, judgments 233/94, of 10 March, 756/95, of 20 December, 236/01, of 23 May, and 127/04, of 3 March.
[30] ANA PAULA DOURADO, *O Princípio da Legalidade Fiscal. Tipicidade, conceitos jurídicos indeterminados e margem de livre apreciação*, *op. cit.*, 2007, at 759-780.
[31] Constitutional Court, judgment 114/89, of 12 January.

In the same way, citizens have the fundamental right of access to the courts as a way of protecting their basic tax rights. In the case of a dispute between taxpayers and tax administration, the former may appeal to the courts: This mode of protection of basic rights is inherent to a State based on the rule of law. Tax administration activity cannot be left outside the reach of judicial control.[32]

On the other hand, the constitutional basis for the attribution to the tax administration of the final word on the interpretation of indeterminate legal rules, in the event of a legal prerogative concerning a margin of appreciation belonging to the tax administration, is the principle of tax equality in conjunction with the principle of practicability.

3.3. Regulations, administrative rulings and case law

The tax administration may issue general rulings in reference to the manner in which indeterminate legal concepts should be interpreted. Administrative regulations may develop and complete legal regimes. They can even be used in the development of technical aspects concerning essential elements of taxation (subject to relative competence of parliament).[33] This possibility is recognized in the name of tax system *practicability*.

Case law is also very important concerning the filling in the gaps of legal indeterminacy. We can find some examples in the matter of anti-abuse clauses.

3.4. Implications of administrative rulings

In keeping with the current interpretation of the General Tax Law and the Code of Tax Procedure and Process, administrative guidelines or instructions are only mandatory to the tax officers, not legally binding neither on the courts nor on the taxpayers.[34] According to the mainstream opinion, they cannot be considered or be deemed to be an "authentic interpretation" of legal rules. Otherwise, the tax administration would be replacing the legislator and, as a direct result, colliding with the separation of powers.
Consequently, taxpayers may interpret indeterminate legal rules in a different way than the interpretation given by the tax administration. In this case, taxpayers may appeal to domestic courts. However, this position is now under discussion.

[32] See Article 268/4 of the Portuguese Constitution.
[33] Constitutional Court, judgment 236/01, of 23 May.
[34] Article 68 of the General Tax Law and Article 57 of the Code of Tax Procedure and Proceedings (*Código de Procedimento e Processo Tributário*).

4. Relationship between the tax administration and the domestic tax courts

4.1. Court control of tax law application by the tax administration

Domestic courts control the application of tax law by the tax administration in concrete cases when taxpayers appeal to them. A legal prohibition of judicial control over administrative rulings would be unconstitutional.[35] Despite these principles, for a long period, the courts, with the support of many authors, did not control so-called technical discretion.

Nowadays, there is a slight tendency to increase the number of judicial proceedings and control of the courts in concrete cases due to the failure of the administrative procedures and the conciliatory commissions to solve in an efficient way the disputes that arise between taxpayers and the tax administration.

4.2. Relevance of rulings and binding information provided by the tax administration

The tax administration is bound to the rules that it issues as well as to written information given to taxpayers about their tax situation and their compliance with their respective tax duties[36]. Therefore, in the presence of a dispute between a taxpayer and the tax administration involving those rules or binding information, the court must take them into account in the name of the constitutional principle of legal certainty.

As seen above (*supra*, 3.4), in certain cases, courts may take into account the interpretation of tax rules (including indeterminate concepts) adopted by the tax administration as long as the interpretation is a plausible one. As a consequence, in those cases administrative rulings may be taken into consideration by domestic courts.

4.3. Court decisions and tax administration behaviour

Court decisions only bind the tax administration in the case in dispute. Other cases that involve the same tax rules may be decided by the tax administration in a different way. Normally, the tax

[35] Article 20 of the Portuguese Constitution.
[36] Article 68/4 of the General Tax Law.

administration does not base its decisions on domestic court judgments. It is more difficult to ignore the case law of the European Court of Justice (ECJ) (mainly concerning VAT) in particular if ECJ case law is invoked by taxpayers.

Let it be said that the submission of proposals by the tax administration intended to modify certain laws interpreted by the judicial power in a fashion unfavourable to the Treasury's interests is very commonplace.

The feeling we have is that, in fact, domestic courts adhere more frequently to the interpretation of tax law issued by the tax administration, namely through the observation of general instructions/guidelines in comparison with whether and to what extent the tax administration adopts the interpretation provided for by Tax Courts of First Instance.

Russia: Separation of Powers in Tax Law (M. Sentsova and Danil V. Vinnitskiy)*

1. Relationship between the parliament and the tax authorities: the influence of the tax authorities on tax legislation

The legislative competence of the Government of the Russian Federation (hereinafter: RF) in tax sphere is defined in the Constitution of the Russian Federation, and given concrete form in the Federal Constitutional law of 11 April 1997 «On the Government of the Russian Federation». The order of exercising of that competence is defined in Regulations of the RF Government, approved by the Decision of 1 June 2004 № 260.

Legislative competence of the RF Government in the tax sphere consists in the following:
Firstly, according to item 104 of the RF Constitution, the RF Government has right of legislative initiative in the Federal Assembly (the RF parliament). This right is exercised, in particular, by introducing tax bills into the State Duma (the lower house of parliament of the Russian Federation.
Secondly, the RF Government has the right to make amendments to the tax bills which are under the consideration of the State Duma (Article 36 FCL «On the Government of the Russian Federation»).
Thirdly, the RF Government may submit to the State Duma and the Federation Council (Houses of the Federal Assembly) official opinions on the tax bills which are then considered by these houses.
Fourthly, according to Article 104 of the RF Constitution, the RF Government is obliged to draft the written conclusions on tax bills submitted to the State Duma. This legislative competence of the RF Government appeared for the first time in the RF Constitution in 1993. Its purpose is to officially inform the State Duma of possible budgetary consequences of enacted tax bills.
The conclusion of the RF Government on the tax bill should be received by the subject of legislative initiative[1] before the tax bill is brought to the State Duma. The RF Constitutional Court in the Decision of 29 November 2006 «On business about check of constitutionality of point 100 of Regulations of the

* Prof. Sentsova contributed sections I and V; Prof. Vinnitskiy contributed sections II, III and IV.

37 According to Article 104 of the RF Constitution, the power to initiate legislation belongs to the President of the Russian Federation, the Federation Council in addition to the RF Government, members of the Federation Council, deputies of the State Duma, legislative (representative) bodies of RF subjects, and also the RF Constitutional Court, the RF Supreme Court, the RF Supreme Arbitration Court concerning their enactment.

Government of the Russian Federation» came to the conclusion that a negative conclusion of the RF Government on a bill, including tax bills, is not an obstacle for bringing bills to the State Duma.

The right of legislative initiative belonging to the RF Government assumes the possibility of the RF Government to carry out the preparation of proposals on tax laws and to present them to the Federal Assembly. The RF Government sends proposals for federal bills introducing changes to the RF Tax Code several times per year.

The order of exercising of the right to initiate legislation of the RF Government, including in the tax sphere, is defined in «Regulations of the Government of the Russian Federation», approved by the RF Government, of 1 June 2004 № 260. According to the Regulations, the proposal of the federal tax law about the introduction of changes to the RF Tax Code should be presented to the RF Government by the Minister of Finance.

The RF Government constantly exercises legislative competence in the tax sphere. It is enough to mention that in 2008 the RF Government sent proposals on the tax bills to the State Duma about five times.

The RF parliament considers proposals of bills on taxes in detail. According to the State Duma Regulations, tax bill proposals introduced by the RF Government to the State Duma should be sent for preliminary consideration. The latter serves as one of guarantees for adoption of effective tax law.

The preliminary consideration of the tax law is carried out as follows:

1) the Chairman of the State Duma sends the tax bill proposal, brought by the RF Government in the Committee of the State Duma on the budget and taxes.
2) the Committee of the State Duma on the budget and taxes makes a decision about conformity of the tax bill proposal to requirements of Article 104 of the RF Constitution and Article 105 of Regulations of the State Duma. In other words, the Committee on the budget and taxes defines whether there is on the tax bill proposal a conclusion of the RF Government, and also whether all required documents are attached to the bill.
3) based on the conclusion of the Committee on the budget and taxes, the Council of the State Duma makes the following decision:
    a) appoints State Duma committees responsible for the tax bill proposal. As a rule this is the Committee on the budget and taxes.

b) includes the tax bill proposal in the law-making programme.
c) directs the tax bill proposal to the Committees and the Commission of the State Duma, the RF President, the Federation Council, the Public Chamber, the RF Constitutional Court, the RF Supreme Court and to the RF Supreme Arbitration Court for presentation of amendments and under the bill.

In addition, under the decision of Committee on the budget and taxes, the tax bill proposal may be sent for an expert opinion. The examination may be scientific, legal, or linguistic. When the preliminary consideration of the tax bill proposal presented by the RF Government is finished, the Committee on the budget and taxes sends the bill to the State Duma consideration.

The tax bill consideration in the State Duma is rather careful**.** The order of consideration is set by the State Duma Regulations. Consideration of the tax bill presented by the RF Government is carried out in three readings. In the first reading the tax bill concept is discussed. Depending on the results of the first reading, the State Duma may approve the tax bill proposal and continue work on it, taking into account amendments to the bill, or dismiss the proposal. In some cases the State Duma will submit the tax bill proposal, accepted in the first reading, for national discussion.

In the case of a tax bill deviation in the first reading, it goes back to the RF Government for completion. In the case of the tax bill proposal's acceptance in the first reading, it goes to all those with the right to initiate legislation. These persons have the right to make amendments to the tax bill accepted in the first reading. Amendments are made in the form of tax bill additions with new articles, changes of the edition of the articles, the suggestion on exceptions on concrete words, points, bill parts.

The Committee of the State Duma on the budget and taxes studies and summarizes all amendments made to the tax bill. It has the right to request an independent expert appraisal on the conformity of the amendments made to the RF Constitution and to constitutional laws. The Committee on the budget and taxes groups the amendments according to articles of the tax bill.

Depending on the results of consideration of the amendments made to the tax bill, the Committee on the budget and taxes draws up three tables of amendments on the bill. In the first table those amendments which are recommended by Committee on the budget and taxes for acceptance are considered. In the second table amendments which are recommended by Committee as a deviation are considered. In the third table amendments which are not accepted are considered.

The discussion of amendments is a difficult procedure. From the very beginning the State Duma votes on amendments to the tax bill proposal against which there are no objections. Then it votes on amendments to the bill on which there are objections. The results of consideration of the tax bill proposal in the second reading are reflected in the decision of the RF State Duma. If in the second reading the tax law proposal has not been approved, it is considered dismissed and goes back to the RF Government.

The tax bill proposal, accepted in the second reading, goes to Committee on the budget and taxes for legal updating, i.e. for an establishment of correct interrelation of articles and editorial updating. Depending on the results of the third reading, the tax bill proposal should be enacted as law.

Up until now problems of the mutual relations of the RF Government and the parliament in the tax sphere have not been given special attention by scholars in Russia. However, there are the scientific works devoted to the general problems of the interaction of the parliament and the RF Government. In particular, a monograph by Chuvalov entitled *"The Government of the Russian Federation in legislative process"* of 2004 is noteworthy,. In addition, problems of the interaction of the parliament and the RF Government are mentioned in scholarly works devoted to the separation of powers. Among these works, in particular, are the following: "Separation of powers", edited by M. Marchenko, Moscow, 2004, and "Problems of the parliamentary law of Russia" edited by L.Ivanov, Moscow. 1996; V. Uvachev, The mechanism of separation of powers in lawful state. Moscow, 2003.

As to the judicial interpretation of the mutual relations of the parliament and the RF Government in the tax sphere, this can be found in the Decision of the RF Constitutional Court of 29 November 2006 № 9-П «On the check of the constitutionality of point 100 of Regulations of the Government of the Russian Federation». In this decision the Court held that the Government is obliged to draw conclusions on tax bill proposals according to Article 104 of the RF Constitution. In addition, a negative conclusion of the RF Government on the tax bill proposal is not an obstacle for the sending of the bill by the Government to the State Duma.

2. The meaning of legal indeterminacy in tax matters

The RF Tax Code (Part I of the RF Tax Code has been in effect since 1 January 1999) states that in the Russian Federation a tax is deemed to be established only when taxpayers and taxation elements are

determined; these elements are, in particular: 1) tax object; 2) tax base; 3) tax period; 4) tax rate; 5) procedure for tax computation; 6) procedure and time periods of tax payment (Article 17).

Article 3 (6) of the RF Tax Code, which is considered to secure one of the principles of tax law, provides: "when establishing a tax all the elements of taxation should be determined. Legislation on taxes and charges should be formulated in such a way that everyone knows exactly what kinds of taxes (charges), when and in what order he/she will have to pay".

This rule and many other provisions of the RF Tax Code show explicitly that the Russian legislator proceeds from the intention to clearly and comprehensively regulate tax relations directly by law (statute), and namely – by the RF Tax Code which is adopted as a federal law (statute) and is binding on the whole territory of the Russian Federation.

In more detail, Article 4 of the RF Tax Code limits significantly the powers of executive bodies in taxation. In particular, these limitations can be seen in the following:

1) tax bodies do not possess powers to adopt any legal normative acts in the field of taxation; even interpretations which they issue are usually connected with the request of a certain taxpayer and as such are not intended for other taxpayers;
2) The RF Government and the RF Ministry of Finance may produce legal normative acts in taxation when it is provided for by a federal law, but they may not change or amend the RF Tax Code. Usually, these acts are adopted as the result of delegated powers to legislate. The acts of these executive bodies (even in the case of delegation) cannot concern the establishment of tax subjects, the objects of taxation, tax bases and other elements of taxation listed in Article 17 of the RF Tax Code.

The case law of the RF Constitutional Court (since 1995) which started to appear even before adoption of the RF Tax Code makes great demands on the determinacy of tax legislation (see below). However, the statutory regulation does not appear all that comprehensive in terms of certain aspects of establishing the *tax base*. A typical example here is the rule concerning the deduction of expenses from the tax base with the purpose of computing the tax on profit of organizations (corporate tax). Along with the detailed legislative regulation in Chapter 25 of the RF Tax Code, Article 252 provides also for general principles of recognizing expenses for tax purposes:

1) their economic justification;
2) confirmation by documents;
3) clear connection with the income (profit) received.

It does not appear possible to give a detailed explanation of these principles directly in the statute – the RF Tax Code. In this case the interpretation of these principles is made by courts and the case law on the disputes in this sphere is of great significance for the effective application of the tax law.

The academic literature and practical commentaries on tax matters are actually unanimous about the necessity of a detailed legal (statutory) regulation of tax matters, especially the direct regulation of the essential elements of taxation (including the tax object and tax base) by the RF Tax Code. On the whole, the negative attitude to the practice of rule-making by the tax authorities prevails.

Experts proceed from the idea that the powers to establish a tax and its normative regulation, *on the one hand*, and the powers to collect a tax, *on the other hand*, should be separated. Their combination can lead to the excessive concentration of tax powers and possible abuse. Besides, the tax authorities can often change their interpretations of a tax law, usually giving priority to the providing revenue for the budget. This is why their regulation is often perceived as legally unreliable and not quite stable.

For this reason, the legislator eventually deprived tax bodies, in principle, of rule-making powers in taxation (Articles 2, 3 and 4 of the RF Tax Code). They may only approve of some forms of tax declarations and reports and also give opinions to individual taxpayers' requests concerning the interpretation of a tax law, exercise tax control, hold inspections of taxpayers and so on.

In the Russian Federation there are three courts of high instance:

1) The RF Supreme Arbitration Court is in charge of courts which handle disputes between companies and businessmen including the disputes of these subjects with the tax authorities;
2) The RF Supreme Court is in charge of courts of general jurisdiction, which handle cases between individuals, including their disputes with the tax authorities;
3) The RF Constitutional Court handles cases concerning the contradictions of certain legal normative acts with the RF Constitution, including cases on the consistency of federal tax laws, the RF Government rulings on tax matters, the laws of the RF Subjects (Regions) on taxes with the RF Constitution.

All three courts are independent and differ from each other in their jurisdiction. The issues of the consistency of a law with the RF Constitution may only be examined by the RF Constitutional Court. Other courts may, in the framework of their jurisdiction, examine the consistency of an inferior legal normative act with the superior one (except for cases when this superior act is the RF Constitution).

For example, the RF Supreme Arbitration Court may override the RF Government ruling or an order of the RF Ministry of Finance on tax matters, having found them inconsistent with the RF Tax Code. But it is only the RF Constitutional Court which may assess the constitutionality of a normative act, for example, hold some provision of the RF Tax Code as being inconsistent with the RF Constitution and therefore not subject to application.

The principle of certainty and preciseness of a tax statute (legislative act) is considered to be one of the principles of tax law which is of constitutional significance. There are a number of examples where the RF Constitutional Court found a legislative act on taxes to be inconsistent with the RF Constitution and not subject to future application because of the indeterminacy of its certain provisions.

But, as a rule, such a violation was established in connection with violations of other constitutional principles. For example, if a legislative body (federal or regional) when enacting a tax does not secure sufficient certainty of its legal regime and delegates the detailed elaboration to the executive bodies, we can clearly see the violation of at least two principles of the RF Constitution. *Firstly*, the legislative body violates the principle of certainty of tax law and *secondly*, the executive body exceeds its competence if it tries to fill in the lacuna of the legislative regulation and to determine the legal regime of the elements of taxation (including the tax object and tax base) by its normative acts.

If a legislative body when enacting the elements of taxation uses uncertain and ambiguous concepts which allow arbitrary interpretations, several constitutional principles are violated. *Firstly*, the principle of certainty of taxation (Article 3 of the RF Tax Code) as such is infringed because the situation creates inadmissible legal indeterminacy in tax relations which will impede normal economic activity. *Secondly*, an inadmissible threat is created for the protected legal regime with regard to the taxpayer's property as he may actually be arbitrarily deprived of his property if a vague tax law is interpreted unfavourably to him (Article 34, 35 of the RF Constitution). *Thirdly*, the principle of equality in taxation is also violated, as a vague tax law cannot secure the uniformity of its application practice: it can be applied more favourably with regard to some taxpayers and less favourably with regard to others. This is a severe violation of the basic constitutional rules which is relevant not only for tax law but for other branches of the domestic legal system as well.

One of the good examples of when a tax rule was recognized to be unconstitutional due to its indeterminacy is the Decision of the RF Constitutional Court of 30 January 2001 No. 2-P in the case of verifying the constitutionality of Article 20 (1 and 3) of the RF Law "On the fundamentals of the tax

system in the RF" and also the Laws on the sales tax of several RF Regions (Chuvash republic, Kirov region and Chelyabinsk region)[38]. On the basis of this Decision, the sales tax which was introduced by the Laws of the RF Regions under the Federal law was held to be unconstitutional. One of the key grounds justifying the decision was the insufficient clarity and certainty of the Law which makes the recognition of a person as taxpayer depend on the form of payment for the goods sold. Articles 19 (1), 55 (3) and 57 of the RF Constitution were held to have been violated here.

In some cases the RF Constitutional Court, having recognized the indeterminacy of a tax law provision, may still not recognize it as unconstitutional but will give it a clarifying interpretation which follows from the *general sense* of the RF Constitution and the constitutional functions of the provision being challenged. This kind of practice has been expanding recently. As an example we can mention the RF Constitutional Court Decision of 14 July 2003 No. 12-P on verifying the constitutionality of Articles 4, 164 (1), 165 (1 and 4) of the RF Tax Code, Article 11 of the RF Customs Code, Article 10 of the RF Law "On the VAT"[39]. The case concerned the indeterminacy of the tax law provision which regulates what kind of documents can confirm the export of goods beyond the RF customs territory with the purpose of applying the 0% rate of VAT that is imposed in Russia

3. The consequences of legal indeterminacy in tax matters

If the legal indeterminacy of a tax law is recognized by the RF Constitutional Court as violating the RF Constitution, the law in question is deemed to be unconstitutional and not subject to application.
If the indeterminacy of a tax law is not challenged in respect to the possible violation of fundamental rights and freedoms, the application of the law is carried out as usual. It is the RF Ministry of Finance that can form the application practice of a tax law, clarifying its meaning at the request of certain taxpayers and on its own initiative. The tax authorities (the Federal Tax Service) possess the same powers but they must coordinate their position with the existing interpretations of the RF Ministry of Finance.

But the interpretations of the RF Ministry of Finance and the Federal Tax Service are only binding for their territorial subdivisions; neither taxpayers nor courts are obliged to be guided by them. As practice shows, taxpayers always challenge the decisions of the tax authorities based on the application of a vague tax law if they disagree with the interpretation offered by the tax authorities but the final word

[38] The Bulletin (Vestnik) of the RF Constitutional Court, 2001, No. 3.
[39] The Bulletin (Vestnik) of the RF Constitutional Court, 2003, No. 5.

belongs to the courts. Thus, State arbitration courts and courts of general jurisdiction (taking into account the rules concerning their jurisdiction) develop the interpretation practice of a vague tax provision.

It is worth noting that later on a taxpayer may challenge the constitutionality of a vague tax law provision in the RF Constitutional Court not only as it is but also taking into account the meaning of the provision under discussion, which has developed in court practice in the course of its interpretation. There were precedents when the RF Constitutional Court, having recognized a vague tax provision as constitutional on the whole, gave it a proper interpretation in the light of the RF Constitution. Such a new interpretation in fact corrected the already developed practice of some courts and tax authorities and was binding due to the rules of the Federal constitutional law "On the RF Constitutional Court".

There is a constitutional basis which determines the legal status of courts and their functions, in particular in interpreting laws. However, there are no rules of this kind specifically for tax law. Besides, the positions of the RF Supreme Arbitration Court and the RF Supreme Court, taken in connection with a dispute between the tax authorities and a particular taxpayer, do not have the nature of a precedent. In principle, the tax authorities can go on insisting on the previous interpretation of this category of cases in disputes with other taxpayers, hoping to reverse the practice to their benefit and to find new arguments. But if the practice becomes certain enough it often happens that the tax authorities begin to be guided by it because of the futility of disputes.

However, from a constitutional law perspective, tax provision interpretations given by the above-mentioned courts within the framework of certain cases, are not binding for the tax authorities. In this case the principle of separation of powers – judicial and executive – operates. The situation is different when the interpretation of an indeterminate tax provision is given by the RF Constitutional Court: as was mentioned above, such an interpretation becomes binding for all other courts and executive bodies, including the Federal Tax Service and the RF Ministry of Finance. Moreover, even the legislator has to take into account such interpretations and may not ignore them in the course of its future legislative decisions.

As was pointed out in the previous section, the legal indeterminacy is filled in by case law. Sometimes, the legislator itself, having received information about the numerous court disputes concerning the content of a particular tax law provision, can react promptly and make the wording of the law more detailed.

Complicated and indeterminate tax law norms are also filled in by different individual interpretations of the RF Ministry of Finance and the tax authorities at the request of individual taxpayers. It happens quite often that these interpretations are published by these authorities or put into the professional database of legal documents and in this way they become accessible to a wide range of taxpayers and influence their behaviour. However, from the legal perspective they remain non-binding for taxpayers. By getting acquainted with such interpretations, taxpayers can be more precise in evaluating whether they will have to be in dispute with the tax authorities due to their disagreement with the interpretation given by the tax authorities. As a rule, if companies and businessmen disagree with the position of the tax authorities, they often go to court, taking into account that the proceedings in State arbitration courts are relatively fast (six-nine months for all three instances: the first, appellation and cassation).

The rulings and recommendations of the Federal Tax Service and the RF Ministry of Finance are not binding for taxpayers and courts as, according to the general rule, they are considered to be neither *normative acts* nor *individual enforcement acts* that must be executed. They are seen only as *opinions* of these authorities. In particular, courts examine them along with the evidence and facts of the case. However, such rulings and recommendations are binding for all territorial tax authorities in the order of administrative subordination (RF Law "On tax authorities", Article 30 of the RF Tax Code).
In some cases the RF Ministry of Finance under Article 4 (1) of the RF Tax Code may give the form of normative legal act to their rulings. This happens quite seldom because of the general ban on any changes and amendments of tax legislation by acts of executive bodies. However, if any grounds are found in a law (statute) for the RF Ministry of Finance to adopt such a tax ruling, it will become binding for taxpayers and courts after its official publication and registration at the RF Ministry of Justice. But courts (we are referring to State arbitration courts and courts of general jurisdiction of any instance) may not apply it in a certain case if they consider that this ruling of the RF Ministry of Finance contradicts a tax legislative act (or another superior normative act) or that the RF Ministry of Finance exceeded its authority by adopting this act.

4. Relationship between the tax administration and the domestic tax courts

Courts of general jurisdiction and State arbitration courts (taking account of the established rules in their jurisdiction) have full control over the application of tax law norms by tax authorities. However, the control is usually initiated by a taxpayer or another subject who thinks that the decisions (actions) of a tax body have violated his rights. According to Articles 137-138 of the RF Tax Code, these taxpayers can challenge any actions and decisions of a tax body and its officials if they can prove that

these actions and decisions violate their legal rights and interests. The complaint may be made in accordance with the RF Civil Procedure Code or the RF Arbitration Procedure Code depending on what kind of court a taxpayer may go to.

According to the general rules (Chapters 19 and 20 of the RF Tax Code), the taxpayer may go to court straight away without trying to settle the dispute with tax authorities. As an exception, Article 102.2 of the RF Tax Code provides that the decision of a tax body to impose sanctions on a taxpayer should first be challenged in the superior tax body and only then, if the taxpayer is still dissatisfied with the decision, in court (in the usual order).

Further, there are many cases when courts exercise preliminary judicial control; for example, the tax authorities can collect a tax debt of an individual (a natural person) only by applying to the court and on the basis of court decision.

As mentioned above, courts take into account rulings (recommendations) and other information from the Federal Tax Service only as other facts of the case. Such rulings and recommendations are not legally binding on them. However, Article 111 (1 and 3) of the RF Tax Code contains an important exception. If it is found that a taxpayer followed an official ruling or recommendation of the tax administration or the RF Ministry of Finance and this ruling (recommendation) was held to be wrong from the court's perspective, the taxpayer may not be subject to any penalties or sanctions in connection with the respective violation of a tax law (in its correct interpretation). But in this case we are dealing with the special legal guarantees for taxpayers and not with the special powers of tax bodies.

Summing up the above, we can point out the following directions of the influence of case law.

1) The Federal Tax Service always has to apply and take into account in its activities the decisions of the RF Constitutional Court;
2) The case law of State arbitration courts and courts of general jurisdiction is not legally binding for the tax authorities, but in fact, they have to monitor it closely and take it into account; otherwise any of its decisions which contradict this case law can be overridden if a taxpayer goes to court. There are situations when the Federal Tax Service sends out State arbitration court decisions on recent cases (in spite of the fact that most of such materials are available for the general public) in order to draw the attention of territorial tax bodies to the changes in case law.

The Federal Tax Service of the Russian Federation as a non-Member State of the EU is not guided by the case law of the ECJ. The ECJ case law may be studied with regard to some complicated cases as examples of decisions on similar cases in foreign law.

The principle of reciprocal observation of the interpretation of tax law is not established by the RF legislation. Occasionally we even come across certain deviations in the interpretation of tax laws by different courts: the RF Constitutional Court, the RF Supreme Court, the RF Supreme Arbitration Court. These deviations are not of systemic character, though.

In the case of divergence in the interpretation of a tax provision between courts and the Federal tax administration, the latter sooner or later will have to step back because, if the case law is quite unanimous, each decision of any tax body which contradicts the interpretation developed by courts will be found invalid (although a taxpayer will have to initiate the court procedure). Moreover, a taxpayer may claim to the compensation of court expenses from the tax administration.

In practice, however, the interpretation of many indeterminate tax norms (e.g. Article 252 of the RF Tax Code) depends on different individual facts of a certain case which leads to divergence in the case law. In such conditions a tax body can make reference to the case law which is more favourable for its position with regard to the disputed tax provision.

The tax administration will be legally bound by the decisions given by the RF Constitutional Court with regard to the legal position in interpreting a certain tax law provision. If the RF Constitutional Court recognizes a certain provision as unconstitutional it becomes invalid and such a decision is also binding for any state authorities and other subjects.
The decisions of other RF superior courts are only binding for the tax administration within the framework of the case in which they were given. They do not acquire the nature of a precedent. The decisions of the ECJ are not binding as the Russian Federation does not have the status of an EU Member State.

As a rule, any indeterminate tax law provision results in differences in case law; in such circumstances different examples of court practice can be grouped according to typical facts which can influence the position of the court in a certain case. In any category of cases, if the tax administration disagrees with the developed case law interpretation, it tries to give new arguments (justification) in the further cases of this category in order to form a new and more favourable direction in court practice. As an example we can mention the disputes concerning the interpretation of Article 172 of the RF Tax Code, which

regulates the right for VAT deductions. The disputes were connected with the possibility of deducting the VAT amounts, which were previously paid as a part of goods price to the company which in fact does not exist or does not actually carry out any economic activities, from the VAT amount due to be transferred into the budget. Over the last eight years that this provision was in effect, the tax administration managed to implement essential corrective actions with regard to case law and persuade courts to interpret Article 172 more strictly when there is any suspicion of tax fraud.

5. Relationship between different legal sources (legal pluralism)

As a rule, in the practice of the tax administration and the courts, the RF Tax Code, and the decisions of superior courts (the RF Constitutional Court, the RF Supreme Arbitration Court are taken into consideration, first of all. In special cases international tax treaties are taken into consideration, in particular double tax treaties.

The RF Constitution recognizes the priority of customary principles and norms of international law and international treaties over domestic tax law (Article 15 of the RF Constitution). The hierarchy of domestic tax law sources is defined in Articles 1 and 4 of the RF Tax Code. The highest level in the hierarchy is that of the RF Tax Code. Federal laws about taxes and charges and tax laws of members of the Russian Federation must correspond to the RF Tax Code. Besides, legal acts of municipal unions on local taxes must be in conformity with the RF Tax Code.

Tax law acts of executive power (secondary law) in the tax sphere are accepted in special cases according to the RF Tax Code and cannot change or supplement tax laws.

The taxpayer has access to different legal remedies that assure him effective protection of his rights granted by tax treaties and domestic law.

The RF Tax Code includes certain rights of the taxpayer which mean that the following can be said about taxpayer protection:

1) the taxpayer has the right to present to the tax department written objections on the tax audit protocol.
2) the taxpayer has the right to participate in tax proceedings personally or through a representative.
3) the taxpayer has the right to give an explanation in the tax proceedings. This right is an essential condition of the tax procedure. The RF Tax Code establishes that violation by the tax

department of the essential conditions of procedure in a tax control is the basis for a cancelling a higher tax department or court decision about the responsibility of the taxpayer.

4) the taxpayer may appeal against an action of the tax department, or against actions or inactions of its staff.

5) the Russian legislation provides the taxpayer with the right to submit the complaint for revision by way of supervision of the judicial act which has entered into force.

6) in addition to the above, the Russian legislation provides for revision of judicial acts in the field of the taxation when there are new facts or circumstances. These are extraordinary measures against final tax decisions.

7) the RF Tax Code establishes that the taxpayer may apply for a refund of overpaid taxes within a period of three years after the day of the overpayment.

Serbia: Separation of Powers in Tax Law (Dejan Popović and Gordana Ilić-Popov)

1. Relationship between the parliament and the tax authorities: the influence of the tax authorities on tax legislation

In the Serbian legal system taxes may be introduced only through laws adopted by the parliament. This principle is based on the provision of Article 91.1 of the Serbian Constitution of 2006 (which corresponds to the provision of Article 52 of the Serbian Constitution of 1990), stating that *the funds from which the competences of the Republic of Serbia, autonomous regions and local governments are secured from taxes and other revenues determined by the law*. The Serbian Constitutional Court has explicitly confirmed the above principle in its 1994 decision[1] in which it deemed unconstitutional the government Decree dealing with the adjustment of the amounts of administrative fees for inflation.

However, the executive branch of the government (the Serbian government or the competent Ministry within it – usually the Ministry of Finance) is allowed to issue Decrees (the Serbian government) and Regulations (the competent Ministry) whose purpose is to further clarify the provisions of the relevant law.

Under Article 107.1 of the Serbian Constitution of 2006, the Serbian government is one of the persons/authorities which are entitled to propose laws to the Serbian parliament. In addition to the Serbian government, any member of parliament, the assembly of the autonomous regions, and at least 30,000 voters may submit legislation proposals, while the Serbian National Bank and the ombudsman may do so with respect to their particular areas of competence.

The Serbian government is predominant in drafting legislative proposals which are presented to the Serbian parliament. For illustration purposes, out of approximately 80 legislative proposals which are currently before the Serbian parliament only three have been drafted and submitted by persons/authorities other than the Serbian government.

[1] No. 357/93 of 2 June 2 1994.

With respect to draft tax bills, the Serbian government is virtually the only source from which they are submitted to the Serbian parliament.

All draft bills are discussed in detail by the Serbian parliament, while they may be subject to changes depending on the various situations.

In general, the parliamentary majority will support the draft bill presented by the government which it has elected. The draft bill may be subsequently altered by amendments, which if they are accepted by the government and competent parliamentary bodies, become an integral part of the proposal.

Amendments presented by the members of the opposition will usually only be adopted if the government which proposed the draft bill accepts them. However, in January 2009 lobbyists were able to create a majority in the parliament, encompassing votes from the opposition, as well as from some parties in the coalition government, to vote for an amendment on the Excise Duties Law that had not been approved by the Minister of Finance. The specific excise on cigarettes was decreased by that amendment, while the *ad valorem* excise was increased, thus discriminating against the more expensive brands. The Ministry of Finance has proposed the new amendments to the Excise Duties Law to the parliament, with the aim of eliminating such discrimination in taxation among cigarettes of different brands.

The issue of the separation of powers as described above has not been the subject of specific interest in the academic community in Serbia, nor has the Constitutional Court deliberated on it so far.

2. The meaning of legal indeterminacy in tax matters

The Serbian domestic tax legislation contains certain provisions which leave a considerable margin for discretion. One cannot characterize the tax laws as being excessively vague, given the fact that there are many cases of elaborately defined norms prescribing the tax object, tax subject, taxable base, etc. However, there are a number of legal norms that do not represent a solid base for interpretation, which is evidenced by a considerable number of requests submitted by the taxpayers for the opinions of the Serbian Ministry of Finance on the proper interpretation of both the tax laws and by-laws whose

purpose is to clarify them. However, the opinions of the Serbian Ministry of Finance are not binding and provide only limited security for the taxpayers.[2]

One finds certain comments, dilemmas, critiques, proposals, etc. in the domestic literature about the legislative technique employed in the Serbian tax legislation (e.g., Dejan Popović, Tax Law, Pravni fakultet Univerziteta u Beogradu, 2008. – thin capitalization rules; Dejan Popović and Gordana Ilić-Popov, Taxation of capital gains in Serbian tax law: three reasons for concern of tax lawyers, *in: Development of Serbian legal system and its harmonization with the EU law,* Pravni fakultet Univerziteta u Beogradu, Beograd 2008, pp. 51-57; Svetislav Kostić, Tax Residence of Individuals under Serbian Tax Law, Anali Pravnog fakulteta u Beogradu, no. 2/2008, pp. 320-340; Boris Begović, Gordana Ilić-Popov, Boško Mijatović, Dejan Popović, Reform of Taxation System, Center for Liberal-Democratic Studies, 2003).

Under Article 45 of the Serbian Constitutional Court Law, the Serbian Constitutional Court has the competence to control the constitutionality of all legislation including tax legislation. However, the Serbian Constitutional Court is not *obliged* to assess the constitutionality in cases where no such request or initiative was presented to it, although it may choose to do so.

Until now no tax rule has ever been declared unconstitutional due to legal indeterminacy in Serbia, while it would be highly questionable if legal indeterminacy could be considered as the basis for declaring a legal norm unconstitutional.

3. The consequences of legal indeterminacy in tax matters

The tax authorities in Serbia apply the law within the administrative procedure and issue acts applicable to individual taxpayers and their particular situations - decisions and conclusions (Article 34 of the Serbian Tax Procedure and Tax Administration Law). The Supreme Court is competent to decide on cases brought before it against the acts of the Serbian Tax Authority, provided that no further legal protection can be sought within the administrative proceedings. Naturally, judicial decisions are mandatory for all case participants including the Tax Authority. However, as part of the civil law family, under the Serbian legal system court decisions do not have the power of *stare decisis*, nor are the tax authorities bound to apply the judicial interpretation of legal norms in cases which are not covered by a

[2] The opinions of the Serbian Ministry of Finance on the proper interpretation of the legislation may even be the cause of further dilemmas, due to the fact that there have been situations of contradictory positions taken on identical or similar issues in subsequent opinions.

particular decision. On the other hand, consistent judicial practice may have a significant influence on the application and interpretation of the law by the tax authorities, particularly in situations where it is evident that their decisions will be overruled by the Supreme Court.

In Serbia the tax laws themselves provide directions as to which of their particular provisions will be more closely defined by regulations issued in most cases by the Ministry of Finance, or decrees issued by the government. Besides by-laws, legal indeterminacy in practice is mostly fulfilled by the opinions of the Serbian Ministry of Finance which are, as stated previously, non-binding. Despite being non-binding, the opinions of the Serbian Ministry of Finance are the only source in which to seek guidance on proper interpretation in most situations, as the tax jurisprudence of the Serbian Supreme Court is not very significant with respect to the scope of issues it dealt with so far.

Under the Serbian legal system, administrative interpretative rulings are not issued. Upon their request, the taxpayers may obtain non-binding opinions from the Serbian Ministry of Finance and/or the Serbian Tax Authority, while the same institutions issue instructions for internal use which are based on the hierarchical principle.

4. Relationship between the tax administration and the domestic tax courts

The Supreme Court is in charge of the judicial control of the application of the tax laws by the Serbian Tax Authority.

As previously explained, the Serbian Tax Authority does not issue rulings and binding information. Opinions of the Serbian Ministry of Finance do not have any legal force and only illustrate its current position on a particular issue.

The case law of the ECJ is not taken into account by the Serbian Tax Authority as Serbia is not a member of the EU. However, the ECJ case law, particularly with respect to VAT, may have an influence in resolving domestic legislation interpretation issues.

The case law of the Serbian Supreme Court would be taken into account by the Tax Authority, particularly in situations where the jurisprudence has taken firm ground on a particular issue.

Under the Serbian legal system, there is no principle of reciprocal observation of the interpretation of tax law by the tax administration and domestic courts.

The Serbian Tax Authority is not bound by the decisions of the ECJ as Serbia is not a Member State of the EU.

Supreme Court decisions are legally binding, as any court decisions, with respect to the particular case in which they have been issued and the parties involved. In other words, despite the ruling of the Supreme Court in a similar case, the Serbian Tax Authority may take a contrary position when dealing with a new situation.

On the other hand, Constitutional Court decisions are binding *erga omnes* and permanently prevent the application of the law, or its particular provision which has been declared unconstitutional.

There is a notable example where the case law of the Constitutional Court has been circumvented. Namely, Article 38 of the Property Taxes Law, which provided that the title to real estate may not be registered unless proof of paid property transfer tax, inheritance or gift tax is provided, was declared unconstitutional by the then Federal Constitutional Court in 2002, which stopped its application. However, in late 2004 the Law on the Changes and Amendments to the Property Taxes Law introduced Article 38a which is identical to the previous Article 38 (which was declared unconstitutional).

With respect to the decisions of the Supreme Court, the most significant problem exists in cases where so-called "limited jurisdiction" is applied. In other words, when the Supreme Court finds an individual act of the Tax Authority contrary to the law and annuls it, the issue is returned to the Tax Authority which is obliged to decide upon it again. Unfortunately, situations do exist where the Tax Authority will decide in the same manner again, contrary to the legal reasoning of the Supreme Court. Should this happen, the taxpayer must go through the same appeals process again (first within the administrative proceedings and then, if unsuccessful, file a lawsuit before the Supreme Court), while the Supreme Court will usually apply "full jurisdiction" and not only rule on the case, but also directly apply the law itself, bypassing the Tax Authority.

5. Relationship between different legal sources (legal pluralism)

Tax treaties submitted for ratification are adopted by the Serbian parliament without significant discussions.

The Serbian courts have so far never dealt with a case involving the proper application of a tax treaty. Therefore, it is not possible to provide an opinion on how they would react before them.

The Serbian Tax Authority in principle abides by the ratified tax treaties, while their interaction with the domestic legislation is not always given proper attention when drafting new legislative proposals. For example, the most recent proposed Law on the Changes and Amendments to the Corporate Income Tax Law (withdrawn) contained provisions which would amount to PE discrimination under tax treaties, while its current text contains no practical method of application of the right to a tax credit for taxes paid in the source state on royalties and interest.

In Serbia the Constitution is the most supreme legal act of the land with which all laws, by-laws, as well as international agreements entered into by Serbia must be compatible. By-laws and any other secondary legislation must adhere to the laws on which they were based.

Ratified international tax treaties are an integral part of the Serbian legal system and they derogate particular tax rules provided in domestic legislation.

Case law, academic works, comparative law and other secondary legal sources are not binding and their influence is dependent on the strength of the arguments and authority which stands behind them. The practice shows that there are cases in which academic works do influence the reasoning of the Tax Administration.

As Serbia is not a member of the EU, legal remedies are limited to the protection of rights granted by domestic law. However, due to the fact that ratified tax treaties are an integral part of the Serbian legal system, taxpayers may seek protection of their rights granted to them by tax treaties before domestic courts.

Spain: Separation of Powers in Tax law (M. Luisa Esteve Pardo)

1. Relationship between the parliament and the tax authorities: the influence of the tax authorities on tax legislation

In answering the question whether the tax authorities have an influence on tax legislation, it is first necessary to point out that in accordance with sections 31.3 and 133 of the Spanish Constitution (hereinafter: CE), the principle of legality governs tax matters. This constitutional principle requires that when a tax is created and its basic features regulated, it should be included in a legal rule, formally a law. These laws must be passed by parliament, which has competence over legislation. The principle of legality on tax matters is a feature of the principle of democracy which requires that the people's representatives grant their consent regarding new taxes and upon whom sovereignty rests regarding any changes. It is they who must decide on the basic features ("*No taxation without representation"*). This principle is also considered essential to the separation of powers.

The Constitutional Court considers that the principle of legality covers not only the creation of taxes but also the regulation of the basic features (Judgments of the Constitutional Court 37/1981, 6/1983, 179/1985, 19/1987). Generally speaking, the basic features of a tax are considered to be those related to identifying taxes (taxable object, taxpayers) and also those related to quantifying it (taxable income, tax rate, total tax). The taxpayer's rights and guarantees against the tax administration are also covered by the principle of legality.

In accordance with the CE (section 87), legislative competence belongs to the government, congress and senate[1]. The Spanish parliament or "*Cortes Generales*" has two chambers: the *Congreso de los Diputados* (congress) and the senate. Both are elected through secret, direct votes by universal suffrage, but the senate aims to represent the regions. This, however, has not been completely achieved.

The government's legislative competence is based on "*proyectos de ley*" or bills. It is by far the most common way of passing new laws. Legislative initiative from the *Cortes Generales -Congreso de los Diputados* and senate is carried out through a "*proposición de ley*" (white paper) and these initiatives are rather

[1] The Autonomous Communities in Spain, or "regions" may also request the government or parliament to present legislative initiatives.

common. However, the majority of cases are either rejected or withdrawn. This occurs in all matters, but in tax matters it is even more frequent.

There is a third way to change legislation, the "*iniciativa popular*" (public initiative) which requires over 500,000 certified bona fide signatures to be presented. However, taxation is among the matters excluded by section 87 CE, so public initiative in tax matters is impossible.

As regards the principle of legality, it is worth noting that according to the Constitutional Court this principle is "flexible" or "relative", which means a formal law must govern the basic aspects of a tax but the development regulations and other "non-essential" features may be established by other legal rules issued by the executive powers, i.e., the government. Among this type of feature are those related to procedures, periods and place of payment. This regulatory power, which is always inferior to a law, is called *potestad reglamentaria* (power of making secondary statutory rules). *Reglamento* is the name given to the general legal rules passed by the government. Spain's Treasury may also pass an *Orden Ministerial* (regulation belonging to tertiary legislation) regarding taxes. In this case, which is specifically provided for by law, a law may be developed directly through an *orden ministerial*. These regulations are rules for developing and executing laws and logically include tax matters[2]. The relationship between laws and regulations in tax matters is one of subordination.

Section 8 of Act 58/2003, 27 December, on General Taxation (hereinafter: LGT), much criticized by most experts, lists the features which must be included by law. This legal regulation does not imply specifying the principle of legality since a law does not bind the lawmaker in the future, as only the Constitution can do so. But it does have an effect of producing what is known as "*preferencia de ley*" (law takes preference). Once a rule reaches the level of a law and regulates an issue, although this issue is not covered by the principle of legality, its regulations may not be amended by a *reglamento* since a *reglamento* may never contradict or amend a rule at the level of a law. Thus, when regulated by law, this law must always regulate the matter, except when the lawmaker specifically separates this matter from being given a legal rank, allowing it to be regulated by rules inferior to laws. But, as mentioned above, this effect is not the result of the principle of legality but of the hierarchy of legal sources.

It is also worth pointing out that in Spain the state, autonomous communities and local authorities hold powers over taxation and therefore over regulatory powers in tax matters. However, while the state and regions' legislative power is developed through the *Cortes Generales* and regional parliaments,

[2] This is accepted by Spain's Constitutional Court's judgments 37/1981, 6/1983, 79/1985, 60/1986, 19/1987, 99/1987)

respectively, and the executive power through the respective governments, in municipalities – the most important local authority – there is just one authority, the Municipal Plenary session, which holds both executive and normative powers. Furthermore, local authorities, unlike the state and regions, do not have legislative powers, but powers to introduce regulations. Given the current principle of legality in tax matters, this means that local authorities in general and municipalities in particular may not create taxes in a completely independent manner. The existence of a local tax requires a rule with the category of a law to previously create the tax and regulate its basic features in order for the council to later be able to collect this tax and regulate certain aspects through municipal by-laws (equal to regulations).

Therefore, in Spain state and regional tax laws are passed by the *Cortes Generales* and the regional parliaments, respectively. Both the national and regional governments may pass regulations to implement these laws. Municipalities may not pass laws but by-laws (*Ordenanzas*) – equal to regulations – to implement laws[3]. These by-laws enable each council to set, for instance, the amount to be paid for local taxes between the maximum and minimum stipulated by law. This allows local taxes to vary to a certain extent in each municipality.

Finally, it is important to point out one peculiarity of the Spanish regulatory system taken from the Italian Constitution: according to the CE (section 86), in cases of extraordinary or urgent necessity the government may pass rules equal to laws. These are the so-called *Decretos-Leyes* (decree laws): laws passed by the government. These laws, as mentioned previously, may only be passed in cases of extraordinary and urgent need and must also be immediately validated by the Congress or enacted as a bill through the procedure of urgency.

There are some matters which may never be regulated by a *Decreto-Ley*: the legal system of the basic state institutions, rights, duties and freedoms of citizens contained in Part 1 CE, the system of Autonomous Communities, and the general electoral law. The issue here lies in the fact that the duty to pay taxes (section 31 CE) falls within Part 1 CE; despite this, the government has passed many *Decretos-Leyes* on tax matters.

Several of them have been contested in the Constitutional Court since it was deemed that the government did not have powers to pass this kind of measure on tax matters. Thus, Constitutional

[3] According to the Constitutional Court, the reason why these local authorities may not establish their own taxes, despite the fact that the municipal plenary sessions are groups voted by universal suffrage – i.e., they have democratic legitimacy - is that the "unified tax system in all the national territory is an unavoidable requirement for equality for all Spaniards" (Judgment of the Constitutional Court 19/1987). However, this argument is not applicable for the Autonomous Communities; these are allowed to create their own taxes through regional laws.

Court case law has changed over the years.

It first considered that *Decreto-Leyes* concerning tax matters were acceptable, provided they do not create taxes or regulate any basic features (Constitutional Court Judgment 6/1983). That is, the aspects of tax covered by the principle of legality may not be regulated by a *Decreto-Ley*, but a *Decreto-Ley* is acceptable in other respects. The Constitutional Court's position was rightly criticized by some authors who considered that in cases like these it was unnecessary to pass a *Decreto-Ley* since a *reglamento* would suffice. It would only be useful in cases of the aforementioned preference of law, i.e. the case in which a matter is already regulated by law though this was not strictly indispensable from the viewpoint of the principle of legality. If this occurs, the aforementioned matter may not be changed by a rule inferior to law - a *reglamento,* for example, which would lead to a phenomenon known as a *congelación de rango* or freezing of rank.

The Constitutional Court later changed its position (Constitutional Court Judgment 182/1997) and hekd that a *Decreto-Ley* was acceptable in tax matters as long as it did not substantially alter the taxpayer's rights. The *ratio decidendi* of this judgment lay in the fact that since Part 1 of the CE excluded regulating the rights, duties and freedoms of the citizens by *Decreto-Ley*, what it aims to avoid is major changes being made to these by the government, but if this action, such as a *Decreto-Ley,* does not cause relevant changes it would be acceptable according to the CE. This new position is clearly more in line with the sense of excluding certain matters from regulation by *Decreto-Ley*, but makes it less predictable and less clear from a legal security perspective, in which case a *Decreto-Ley* may or may not imply a substantial change for taxpayers. A case-by-case analysis of the Constitutional Court will be necessary. Spain's Constitutional Court has nevertheless taken a tolerant position as regards *Decretos-Leyes* on tax matters[4], especially when considering whether there is an "extraordinary and urgent need".

In addition to these *Decretos-Leyes,* there is another possibility that the government may pass regulatory acts equivalent to laws. These are *Decretos Legislativos* (Consolidation bills passed by the government) (section 82 CE), also taken from the Italian Constitution. In this case it is the parliament in Madrid (the *Cortes Generales*) which delegates competences to the government to pass rules with the category of laws. To achieve this, it must pass a *Ley de bases* (law governing the basis) which provides the scope of the powers delegated and the basis the government must respect. The aim is normally to pass a text drafted in accordance with the basis set by the Cortes or to authorize the government to rewrite several already existing legal texts and compile them into a single one. So, for instance, the aim is not to create new norms but to standardize existing ones. A rewritten text has been passed like this by a Legislative

[4] In the 1990s an average of two decree-laws was passed per month, most of them concerning tax matters.

Decree in the current law on corporate tax.

Following the above, to the answer whether the government has legislative competence on tax matters is positive:

- most laws passed are draft bills presented by the government
- under certain conditions it may pass *Decretos-Leyes* on tax matters
- it may pass Consolidation bills if the *Cortes* have previously delegated its powers.

It also holds powers over regulations so it may pass legal norms inferior to the law; these regulations may implement it and complement it.

The same may be said of the Autonomous Community governments, although in some regions – albeit few - it is not foreseen that they may pass *Decretos-Leyes*.

Whether the parliament accepts draft bills provided by the tax authorities mostly depends on majorities and the relative position of political parties in the Madrid parliament and regional parliaments. If the governing party has an absolute majority in both parliaments, the bill is often passed with few changes. When the government needs parliamentary support if it does not have a majority, what normally happens is they reach agreements with other political parties and in tax matters amendments and changes to the government's initial bill are usually demanded.

Since tax matters are complex and difficult to understand for most members of parliament, the bills and proposals of tax laws are usually studied, amended and passed by a Committee (section 75 CE). Indeed, there is a Committee of Economy and Treasury which has competence over tax matters and tax law initiatives are usually discussed in depth by this Committee.

Courts do not pass judgment on these matters and simply interpret the law. They do not examine nor their suitability or how they are passed. The only court that may do this is the Constitutional Court when deciding if the use of a bill on tax matters is constitutional or not or to decide on the extent of the principle of legality in tax matters.

Authors generally disapprove of the overuse of the *Decreto-Ley*. Most believe that its use is quite constitutional but should be reserved for really exceptional cases not as a means to get round the lengthy parliamentary procedures for laws.

2. The meaning of legal indeterminacy in tax matters

It is necessary to distinguish between laws which regulate state or regional taxes and the state law which regulates local authority taxes.

As regards the latter, state law leaves some margin for discretion to the councils so that they may exercise their tax powers through municipal byelaws (regarded as *reglamentos*). We must recall that local authorities have no legislative power and therefore may not enact laws. This degree of discretion allows councils to specify some aspects related to the amounts of taxes and thus exercise their powers to collect taxes.

In cases regarding the laws which regulate state or regional taxes, the regulation is generally quite specific. Despite this, or sometimes precisely due to it, doubts arise as to how to interpret the laws, whether a certain case is or is not included in the law, or cases where several different possible interpretations are possible. Unclear legal concepts are also used, such as, for example "the normal market value" (arm's length principle).

Techniques in tax legislation are often highly criticized: changes in the laws are quite frequent; indeed, this is so much so that interpreting whether which law was in force and applicable to a specific case is sometimes rather complicated. The tax legislator also usually acts in response to tax avoidance or evasion and therefore its rules are mostly a response to specific cases and not general ideas. This means that tax regulations are often difficult to interpret for laymen and sometimes even experts. It is also rather difficult to keep up to date with all the latest tax changes. All this is detrimental to the necessary legal security, which is also a constitutional value (section 9.3 CE)

This has led to several authors demanding a simplification of tax regulations and recommending several ways in which to achieve this.

The only court which may control the constitutionality of tax laws is the Constitutional Court, which is not part of the judiciary.

When doubts arise as to the constitutionality of a law, the other courts which are part of the judiciary, must present an "issue of constitutionality" before the Constitutional Court for it to decide.

The constitutionality of the regulations that are subordinate to laws may be controlled by any court.

In principle, a law will only be unconstitutional due to indeterminacy if what it does is leave a basic aspect of a tax "blank" and refer its regulation to secondary statutory rules, for instance, a *reglamento*. The principle of legality requires basic aspects of a tax to be included formally in a law; if its basic aspect is not regulated directly and refers it to a secondary statutory rule, then it would be unconstitutional.

This case was argued, for example, in the regulation contained in section 10 of Act 43/1995, 27 December, on Corporate Tax[5], regarding taxable income under the corporate tax. One sector of experts believed it was unconstitutional since it referred to the accounting profits and in Spain this is a norm equal to a secondary statutory rule which regulates accounting that must be done by companies in detail. Despite these arguments, an appeal or issue of unconstitutionality was never considered on this.

Other kinds of indeterminacy which may arise from laws would not be a reason for unconstitutionality per se.

3. The consequences of legal indeterminacy in tax matters

Spain is a country whose system is based on rule of law (section 1 CE) and all citizens and public powers are bound by the Constitution and legal previsions (section 9.1 CE). The Administration is specifically and fully subject to subordination to the law (section 103.1 CE).

Interpreting the laws is part of the legal duty exercised exclusively by the courts of justice (section 117 CE and section 5 of the Organic Law 6/1985, 1 July, of Judicial Power). Interpreting the rules is therefore the competence of the courts of justice.

In certain cases tax laws establish the general rules which are later implemented and specified by the *reglamentos* passed by the government. This occurs, for instance in the case of the income tax. Section 7.l) of Act 35/2006, 28 November, on the Income Tax which declares exemptions from income tax for "important prizes for art, literature and science with the conditions laid down by the regulations". Section 3 of the Income Tax Regulation[6] lays down the conditions whereby these prizes are regarded as

[5] The wording in the current section 10 of the Real Decreto Legislativo 4/2004, 5 March, whereby the revised text of the Corporate Tax Act is identical.
[6] Royal Decree 439/2007, 30 March.

exempt[7].

Statutory rules are compulsory for citizens and binding on the courts.

Another - quite different - issue is that regulations – whether on a statutory level or law – may lead to different interpretations. In these cases the Tax Office or the management of the tax authorities (*Agencia Estatal de Administracion Tributaria*) often pass regulations on how to interpret these for the administration. These regulations are provided for in section 12.3 LGT, are compulsory for the tax administration agencies and are published in the official journal. These regulations are not equal to a statutory law and do not change the legal code. They are orders given within the administration with no external effects.

Sometimes these regulations have led to an obligation being established for taxpayers. In such cases, courts have declared them to be null and void[8].

One option that may be used by the taxpayers in cases of indeterminacy is to submit a written query to the tax administration regarding the applicable tax regime in a certain case (sections 88-89 LGT). The administration must reply within six months. Once the reply has been issued it is binding for the administration in charge of applying taxes, but not for the taxpayer, despite the knowledge that if he chooses another system different from the administration this will lead to a dispute. It is also interesting to point out that the criterion established in the reply to the query will also be applicable to any other taxpayer who is involved in very similar acts and circumstances. Replies to the queries are published on the Spanish tax authorities' (*Agencia Estatal de Administracion Tributaria*) website[9].

One of the most frequent cases of indeterminacy is the value of assets or securities, since laws tend to refer to their market value. To avoid possible future problems or to at least ascertain the value the administration places on a certain asset or security in advance, the taxpayer may apply to the tax administration, when this is provided for in the law on a certain tax, to decide and provide in advance a binding valuation for tax reasons on income, products, assets, expenses and further features which affect debts related to tax (section 91 LGT). This is similar to advanced price agreements.

[7] In addition to other conditions, this article requires that the prize giver may not make use of or be involved in exploiting the work(s) for profit, the prize must be awarded for works completed or activities conducted prior to the contest, the contest must be national or international and must be announced in the Official State Journal or the Regional government's Journal and at least in one newspaper which is widely distributed nationally, etc.
[8] For instance, Madrid's High Court of Justice's judgment of 16 June 1994
[9] www.aeat.es.

The aim of this is to reduce the extremely high rate of ongoing disputes between the tax administration and taxpayers, which has brought administrative courts, competent to judge tax matters, almost to a standstill.

As mentioned above, administrative rulings are binding only on the administration. They are therefore not binding on taxpayers or courts, but since these rulings are public, taxpayers are aware of the tax administration's opinion and may opt to follow them and avoid problems with the administration or follow their own criteria, knowing that this will lead to a dispute with the administration.

As regards the courts, they are only subject to Acts and the *reglamentos*, not the administration's interpretative regulations. They are free to interpret the rules by following certain opinions set by case law from the High Court (*Tribunal Supremo*) and High Courts of Justice (*Tribunales Superiores de Justicia*) in each autonomous region.

4. Relationship between the tax administration and the domestic tax courts

One of the tasks of the courts of justice is to control the orders issued by the tax administration whenever these are appealed against by an individual.

Rulings and binding information emerging from the tax administration are not binding on the Courts. In some cases they are mentioned by the courts not as a principle to be followed but as an example.

This is different for civil servants from the tax administration who act as expert witnesses in courts. In this case courts usually follow the reports of these expert witnesses since they are normally considered to be reliable.

The administration is fully aware of the judgments handed down by domestic courts, but even in cases when lower courts apply known case law, if this is contrary to the administration's criteria, the administration will continue to appeal in the high courts against the rulings given in the lower courts, so much that some authors have even pointed out that when this occurs the administration should be sentenced to pay court costs.

Regarding case law of the European Court of Justice (ECJ), Spain's tax administration is more cautious, and has even urged legislation to be changed following rulings from the ECJ. This was the case of thin capitalization regulated under section 20 of the Corporate Tax Law, amended after the ruling from the

ECJ 12 December 2002 Lankhorst-Hohorst GmbH, As. C-324/00 – despite the fact that well-known members of Spain's tax administration had argued in writing the Spanish regulations on thin capitalization were not contrary to European law[10]. Also, the tax regime regarding dividends was amended following a ruling issued by the ECJ on 7 September 2004, Petri Manninen, As. C-319/02.

There is no reciprocal observation of the interpretation of tax law by the Tax administration and domestic courts, nor is it used in practice.

The courts need not follow the principles of the tax administration. Indeed, they usually do not do so and the tax administration does not actually follow court principles if it considers them to be against its interests.

In principle, the tax administration is legally bound to the decisions of supreme courts and/or the ECJ. What usually occurs is that it attempts to obtain case law in favour of its opinions despite having to appeal to higher courts to achieve it.

As mentioned above, when the domestic court case law goes against it, Spain's tax administration continues to fight the cases in higher courts to try to achieve rulings in line with its views. In exceptional cases the tax administration urges the government to introduce changes to the law to counterbalance case law or to accept it and immediately set in statutory law what has been established by case law.

One peculiarity exists in Spain regarding appeals on tax matters.

Tax administration orders may be appealed against, like all of the administration's orders, before the administration and if no favourable resolution is achieved then the courts of justice may be used. There is no specific tax court in Spain and the tax administration's orders are heard by the administrative courts which decide on all claims brought against the administration.

However, prior to using these courts the taxpayer must use the "*Tribunales Económico-Administrativos*" if he wishes to appeal against any order issued by the tax administration and file his claim. Despite their

[10] SANZ GADEA, E., "La subcapitalización", in Estudios financieros. Revista de contabilidad y tributación, No. 206, 2000, pp. 3-48 defended the Spanish regulation prior to the aforementioned ECJ judgment. Following this judgment the same author criticized it harshly and insisted on the compatibility of Spain's regulations with European law in Medidas antielusión fiscal, Documentos del Instituto de Estudios Fiscales, No.. 13, 2005, pp. 1-221, accessible on the internet at http://www.ief.es/Publicaciones/Documentos/doc_13_05.pdf

name they are not really courts, and do not form part of the judicial power. They are administration agencies formed by different members of the tax administration and other civil servants who are independent from the rest of the tax administration (sections 83.2 and 228.1 LGT). Claims in these courts are administrative appeals, not judicial proceedings. However, they still belong to the administration and their opinions usually reflect those of the administration, but not always. These courts have the advantage that one need not attend them with a lawyer or solicitor, and it is therefore much cheaper than other courts[11]. There are Regional *Tribunales Económico-Administrativos* and one Central *Tribunal Económico-Administrativo*, which presides over the more important cases and the appeals presented (voluntarily by the taxpayers prior to using the courts of justice) once the regional courts have rendered judgment.

These courts have often been criticized by some authors who mostly consider them to be an unnecessary obstacle to using the true courts of justice, which are really independent. This is especially due to the long appeal process.

However, when the Central "*Tribunal Económico-Administrativo*" passes a judgment[12] with which the General Director of Taxes – the managing director of the Tax Administration- disagrees, the General Director of Taxes may use the "exceptional recourse to unify opinions" (*recurso extraordinario para la unificación de doctrina*) (section 243 LGT). If this exceptional recourse is used, the Special Court to Unify Opinions is convened. This is made up of the President of the Central *Tribunal Económico-Administrativo*, who will preside over this tribunal with three other members, the Director General of Taxes, the Director General of the State Inland Revenue Service (*Agencia Estatal de Administración Tributaria*), the Director General or Head of the Department of the Tax Office who reports to the agency that has passed the order contained in the resolution in the appeal and the President of the Taxpayers' Defence Committee. The decision given by this court will be binding for the *Tribunales Económico-Administrativos* and the rest of the tax administration.

This possibility has been in force since 2004, and has been harshly criticized by authors who consider that if the tax administration disagrees with the opinions of the "*Tribunales Económico-Administrativos*", it should use the courts of justice which are competent to interpret the rules and not hold a kind of "council of wise men" representing the parties involved to try to force the "*Tribunales Económico-Administrativos*" to adopt their opinions.

[11] The difference is that tax matters are so complex that most taxpayers need a specialist lawyer or at least a tax adviser to file claims before the Tribunales Económico-Administrativos.

[12] As these are not really courts they pass decisions not judgments.

5. Relationship between different legal sources (legal pluralism)

With regard to different legal sources in tax matters, the parliament usually bears in mind and respects both international treaties and European law (both treaties and secondary law). If it fails to do so, this is mainly due to ignorance. The answer to this is different when soft law is involved. Though these are known, if they are considered to be seriously contrary to the Spanish interest or if other states ignore the soft law, cases may arise where the soft law is not taken into account. However, the general rule is to respect soft law.

The administration can do nothing more than respect international law and European law since Spain's Constitution highlights their position regarding the hierarchy and their introduction in domestic law. As regards soft law, the same answer applies as in the case of the parliament.

The courts of justice are somewhat different. Despite Spain being governed by the principle of *iura novit curia*, in many cases neither international or European laws are directly cited or courts fail to apply them due to ignorance. This ignorance also affects their position in the hierarchy of sources of law. Spain's courts are more used to applying domestic law and usually show a certain reluctance regarding rules of diverse sources. It must be recalled that Spain joined the EU relatively recently and was isolated internationally for many years. However, this reluctance and ignorance is generally limited to senior judges and this is becoming less and less common as new generations more familiar with the laws join the courts.

The CE is the supreme rule of all regulations, and section 95.1 provides "the conclusion of an international treaty containing stipulations contrary to the Constitution shall require prior constitutional amendment". Based on this section, it was discussed whether Spain's signing of the European Convention (which failed to prosper following its rejection by France and the Netherlands) required a constitutional reform. The conclusion was that such a reform was unnecessary.

As regards international treaties, section 96 CE provides that:
"1. Validly concluded international treaties, once officially published in Spain, shall be part of the internal legal system. Their provisions may only be repealed, amended or suspended in the manner provided for in the treaties themselves or in accordance with the general rules of international law."

As regards European law, the pre-eminent principles are accepted by the parliament, the tax

administration and the courts and with immediate effect. Sometimes, as mentioned above, some senior judges seem to be unaware of these principles. There is no specific recognition of these principles in the CE.

The law is subordinate in hierarchy to the CE and treaties, and below it come the *reglamentos*.

The Constitution does not specifically include this regulatory hierarchy but it is accepted by the parliament, tax administration and courts, bearing in mind the points mentioned above.

Despite knowing and accepting this hierarchy, the entire administration - not only the tax administration - tends to support ideas included in *reglamentos* above what is laid down by the law. This leads to the affected individuals challenging the *reglamentos* in court for being against the law, because they set higher limits than those included in it, among other reasons, and it is not uncommon for courts to declare some *reglamentos* null and void for being against the law or for exceeding their authority in developing it (*ultra vires*).

Taxpayers have access to an array of legal remedies that assure effective protection for their rights. However, Spanish cases, not only those regarding tax matters, do not usually reach the ECJ.

This is due to two reasons:

Often both the taxpayers and their lawyers or advisers are unaware of the rights granted by tax treaties or secondary EC law. As pointed out above, Spain joined the EU relatively recently and the impact of EC law has been rather unknown until lately. This has changed in recent years, especially with the increased knowledge of international tax law among jurists and advisors.

However, Spanish courts are somewhat reluctant – unlike the courts in other countries – to consider preliminary references since some senior judges consider the action of the ECJ to be an interference in their duties. Thus, few Spanish cases reach the ECJ. It should be pointed out, however, that some years ago there was a discussion about whether the aforementioned tax courts "*Tribunales Economico-Administrativos*" could make preliminary references to the ECJ and it has since been clarified that these administrative agencies may do so.

Sweden: Separation of Powers in Tax Law (Stefan Olsson)

1. Relationship between the parliament and the tax authorities: the influence of the tax authorities on tax legislation

According to the Swedish constitution (chapter 8 sektion 3 regeringsformen), regulations that concern the economic relation between the state and citizens and which place a burden on the latter must be laid down in the form of a parliamentary statute. As a consequence, the room for governmental bills regarding taxation is very limited. These bills are rather rare and usually concern very specific details, e.g. regarding VAT or excise taxes. Governmental bills may not add anything material to the parliamentary statute.

According to the Parliamentary Act (riksdagsordningen), proposals to the parliament may only be made (with some exceptions) by the government, a parliamentary committee or a single member of the parliament.[1] In fact, all statutes that are enacted by the parliament derive from governmental drafts. The government obviously has much more power over legislation than might appear from the Constitution. Of course, the drafting of new tax acts is also an important part of the financial policy of the government.

A draft is handled by a committee before the parliament takes a vote on it. The committee has the power to change or amend the draft, but in times of a stable parliamentary majority this is not very common. Usually, the political minority makes a reservation on the draft. To my knowledge, this has not been seen as a problem in literature. In earlier times, when the parliamentary majority was more unstable, the committees had more influence on legislation.

2. The meaning of legal indeterminacy in tax matters

Since taxes only can be levied by means of a statute, tax law cannot be too vague. The rule of law requires that indeterminate language not be used. But even if there is the legislator has the ambition to avoid the use of indeterminate legislation it is not possible to write statutes that do not need

[1] Chapter 3 section 1; chapter 3 section 7; chapter 3 section 10 riksdagsordningen.

interpretation or filling out. It should be pointed out that the definition of taxable income in the Swedish Income Tax Act is very broad and in principle covers all income from employment, capital and business.

The legislator also has different ambitions regarding different kinds of tax law. In the case of the close companies, the legislation has always been very detailed. As soon as a loophole that could be used by the taxpayer has been recognized, it is filled in by the legislator. But there is a central part of the income tax law that has not been regulated very specifically. This was obvious when some of the close company rules were abandoned in 1999 and superseded by common tax law principles. These were not regulated in detail, but derived from the principal statement in the Swedish income tax act that all income that derives from an employment should be taxed.[2] However, in some cases it was not even quite clear how these common principles should be applied in different situations.[3]

Sometimes the legislator leaves a large margin of discretion to the courts to fill in details in rather vague legislation. There have also been central tax law principles that have not been written down in law, but follow from the rulings of the Swedish Supreme Administrative Court and which have been used for decades without interference from the legislator. As examples can be mentioned the principles for determination whether a transfer of tangible goods or real estate should be taxed as a sale (with a capital gain or loss) or if it is a gift (from 2004 on, gifts are not taxable in Sweden).[4] I believe that it is generally accepted in the Swedish prevailing opinion that it is impossible for the legislator to write statutes that do not need interpretation or filling in.

According to the Constitution (chapter 11 section 14 RF), each court or public authority has the obligation not to apply a statute that obviously is in breach of a statute of a higher level, for example a tax act that does not comply with the Constitution. It is, however, extremely rare that a statute given by the parliament has been found unconstitutional. One example is the case of NJA 2000 s. 132, where transitional regulations regarding the application of a change in a statute where held in breach of the constitution. It is also very rare that tax legislation has been held in breach of the prohibition of retroactive taxation to the disadvantage of the taxpayer in chapter 2 section 10 RF.[5] It is more common that regulations given by the government or by the tax administration are held unconstitutional, since these bodies does not have any competence to give binding tax law.[6] The typical situation is, however,

[2] Chapter 11 section 1 Income Tax Act.
[3] SOU 1998:116.
[4] See RÅ 1943 ref. 19 och RÅ81 1:29.
[5] See for example RÅ82 1:74.
[6] For example RÅ 1987 ref. 21, RÅ 1988 ref. 146, RÅ 1988 ref. 151, RÅ 1996 ref. 5.

not that the government or tax administration have enacted a regulation which puts an obligation to pay tax on the taxpayer, but that a regulation limits an exemption from tax that has been laid down in a parliamentary statute.

Legal indeterminacy is not in itself unconstitutional. If a tax rule is vague it has to be interpreted by the tax administration and the administrative courts. But since there is a prohibition against taxation without the support of a tax act given by the parliament a rule that is too vague cannot be the grounds for taxation. It has been observed by legal scholarship that the Supreme Administrative Court has in recent years been more reluctant to interpret a tax rule far from the central wording regardless if it is to the benefit of the taxpayer or the tax administration.[7]

3. The consequences of legal indeterminacy in tax matters

In cases of legal indeterminacy, the Supreme Administrative Court has the final word regarding the interpretation of the rule (of course, except in matters regarding EC tax law). This is not pointed out in wording in the Constitution, except that no public authority may decide how a court should judge a single case.[8] But since the decisions of the tax administration can be appealed to the administrative courts, it is obvious that the Supreme Administrative Court has the final word.

As mentioned above, the room for the government to make binding rules is very limited. Binding rules may only be given when there is an authorization regarding the execution of the statute given by the parliament.[9] In the same way, the tax administration has a very limited room to provide binding regulations. In some cases, the Supreme Administration Court has held that the tax administration has gone beyond its competence and has regulated matters which according to the Constitution should be laid down in law by the parliament.[10]

However, the tax administration produces a lot of non-binding material. Of most importance is the *tax advice*, which is in theory not binding for either the taxpayer or the tax administration, but which in practice are followed strictly by the tax administration and to large extent by the courts. Apart from the common advice the tax administration also produces many so-called *standpoints*. These standpoints are in theory only directed to the authority itself, in order to make the interpretation of tax law equal in all parts of the country. The standpoints are, however, published on the tax administration's Internet

[7] See Tjernberg, Mats, Regeringsrättens strikta lagtolkning, Skattenytt 2003, pp. 14 – 22.
[8] Chapter 11 section 2 RF.
[9] Chapter 8 section 13 RF.
[10] See footnote 6.

portal as information. It is therefore likely that they also have influence outside of the tax administration.

4. Relationship between the tax administration and the domestic tax courts

The courts do not control the application of tax law by the tax administration except when there is an appeal by a taxpayer against a decision of the tax administration. Binding regulations must be taken in account by the courts, but as described above, common advice is not binding for the courts, but often is followed.

At the time of the Swedish accession to the EU, knowledge of EC tax law was limited in the tax administration. Since then, a major increase in competence has been made. The tax administration closely follows the development regarding direct and indirect taxation in the European Court of Justice (ECJ) case law. It has been observed in the prevailing opinion that the tax administration sometimes may take the position of a constitutional court and declare national legislation incompatible with Community law.[11] This situation has occurred e.g. regarding losses from business conducted abroad. The tax administration has taken a more liberal view in accepting losses from business conducted abroad than that which follows from the ECJ decision C-446/03 *Marks & Spencer*.

The case law of the domestic courts is not legally binding in Sweden, even if decisions by the Supreme Administrative Court are normally followed by lower courts and by the tax administration. Of course, the tax administration is bound by the principle of loyalty to comply with the demands of Community law.

The tax administration does not openly try to circumvent decisions of the Supreme Administrative Court. But the administration may argue that the circumstances in the pending case are not the same as in the court decision. New decisions from the Supreme Administrative Court and from the Administrative Courts of Appeal are published on administration's Internet portal. The tax administration gives their own comments on the cases. Since decisions from the Administrative Courts of Appeal have a rather low value as a source of law, it is not uncommon for these decisions to be criticized.

5. Relationship between different legal sources (legal pluralism)

[11] Påhlsson, Robert, Likhet inför skattelag, Uppsala 2007, pp. 200 – 203.

When a new tax act or changes in an existing act are being prepared in the Ministry of Finance, EC law is normally taken in consideration. Of course, interpretation of EC law is sometimes made in a way benefiting the fiscal interest, if possible.

In a recent decision, RÅ 2008 ref. 24, the Supreme Administrative Court held that an internal Swedish statute (regarding CFC regulations) should be applied instead of an older tax treaty. The decision has been criticized by legal scholars, since the Swedish state has an obligation to fulfil the demands of the tax treaty.[12]

According to chapter 8 section 3 RF, regulations regarding the relations between a private person (or a company) and the state (or municipality) must be given in the form of a parliamentary act. This has not only been seen as a hindrance for the government or the tax administration to establish binding regulations except regarding execution of parliamentary acts, it has been seen as a hindrance for the tax administration or a court to levy tax without the support of a parliamentary act.

The taxpayer has rather generous possibilities to appeal against a decision. An appeal (or a demand for a new decision by the tax administration) can be made up to six years after the year when the tax liability occurred. The formal possibility of an appeal does not necessarily mean that the taxpayer will be successful. EC law is supposed to be complied with by domestic law.

In cases of misbehaviour by the tax administration officials, it is possible to make a complaint to the Justitieombudsmannen (JO). The outcome of such complaints, however, is that the Tax Administration may only be criticised. If an obvious error has been made, it is possible to claim damages according to chapter 3 section 2 Act on Damages (1972:207).

[12] See Dahlberg, Mattias, Regeringsrätten och de folkrättsliga skatteavtalen, Skattenytt 2008, pp. 482 – 489.

Turkey: Separation of Powers in Tax Law (Billur Yalti) [1]

1. The relationship between the parliament and the tax authorities: the influence of the tax authorities on tax legislation

1.1. Competence on tax matters

The Turkish Constitution[2] (TC) defines the Turkish Republic as "a democratic, secular and social state governed by the rule of law" (Article 2, TC). Along with the doctrine of separation of powers, the Constitution regulates the three independent branches of government as the legislative, executive and judicial. Article 7 of the Constitution provides that the "legislative power is vested on the Turkish Grand National Assembly on behalf of the Turkish Nation. This power cannot be delegated". Under Article 8 of the TC, "the executive power and function shall be exercised and carried out by the President of the Republic and the Council of Ministers in conformity with the Constitution and the law". According to Article 9 of the TC, "the judicial power shall be exercised by independent courts on behalf of the Turkish Nation".

The Fourth Chapter of the Constitution, which is entitled "Political Rights ad Duties", comprises a provision on the obligation to pay taxes as follows (Article 73, TC):

"Everyone is under obligation to pay taxes according to his financial resources, in order to meet public expenditure.
An equitable and balanced distribution of the tax burden is the social objective of fiscal policy.
Taxes, fees, duties, and other such financial impositions shall be imposed, amended, or revoked by law.
The Council of Ministers may be empowered to amend the percentages of exemptions, exceptions and reductions in taxes, fees, duties and other such financial impositions, within the minimum and maximum limits prescribed by law".

[1] This report covers only Sections 1, 4 and 5 of the questionnaire on separation of powers provided by the EATLP.
[2] Official Gazette of 9.11.1982, No. 17863 (Rep.). Official translation published on the website of the Turkish Grand National Assembly , http://www.tbmm.gov.tr/english/english.htm.

In accordance with the rule of law, Article 73 covers the universally accepted fundamental principles of taxation that (1) taxes may be levied only if a statute lawfully enacted so provides, (2) taxes must be applied generally and equally, (3) taxes must conform to the ability-to-pay principle, and (4) taxes may only be allocated to public expenditures[3]. Since constitutional provisions have supremacy and binding force, tax laws may not be in conflict with the above principles; and the legislative, executive and judicial organs, and administrative authorities and other institutions and individuals are bound to this legal framework (Article 11, TC).

1.1.1. Primary legislative competence: the parliament (Article 73(3), TC)

Article 73(3) of the TC, which allocates the power to make tax laws to the parliament, regulates the legality principle which historically means that "no tax may be imposed without representation"[4]. As regards the formal context (*ratione personae*), the article attributes the taxing authority to the elected legislators. In terms of the material context (*ratione materiae*), it states that not only "taxes" but also "fees", "duties" and "other similar financial impositions"[5] must be *imposed, amended or revoked* by *"law"*. In interpreting the constitutional power designed for taxation and the meaning of the terms "imposition by law", the Turkish Constitutional Court (TCC) holds in its established case law:

" .... While designing the legality principle for all kinds of financial impositions, the basic intent of the legislators of the Constitution is to prevent arbitrary and discretionary practices. Where a law imposing a financial duty determines only the subject matter of the duty, it is not enough to consider that that duty is imposed by law. There are many elements of the financial impositions, such as the tax base, rates, assessment, accrual and payment procedures, penalties, statute of limitations, minimum and maximum limits. If a law does not contain such a framework, it is possible for it to give rise to arbitrary practices that can affect the social and economic positions, even the fundamental rights of individuals. In this respect, in the law, the basic elements of financial impositions must be clarified and be framed in a determinant and concrete way...."[6]

1.1.2. Secondary competence: the Council of Ministers

[3] Kaneti, Selim, Vergi Hukuku, 2nd edition, Filiz Kitapevi, Istanbul, 1989, p.30.
[4] Oncel, M./Kumrulu, A./Cagan, N., Vergi Hukuku, 14th edition, Turhan Kitabevi, Ankara, 2006, p.7; Saban, Nihal, Vergi Hukuku, 4th edition, Beta Yayınlari, Istanbul, 2006, p. 49; Gunes, Gulsen, Verginin Yasalligi Ilkesi, 2nd edition, 12 Levha Yayincilik, Istanbul, 2008, pp.13-14.
[5] In the literature, similar financial impositions are defined as impositions collected under public authority to finance special demands of special groups, Kaneti, p.7; See also, Basaran, Funda, "*Anayasa Temelinde Mali Yukumluluk Kavrami*", Oguz Imregune'e Armagan, İstanbul, 1998, pp.878-879.
[6] E.g. Constitutional Court, E.1977/109, K.1977/131, 29.11.1977 (Official Gazette of 8.3.1978, No.16222); Constitutional Court , E.1986/20, K.1987/9, 31.3.1987 (Official Gazette of 28.5.1987, No.19473).

1.1.2.1. Competence for tax rates (Article 73(4), TC)

The Turkish Constitution allocates the power to tax primarily to the parliament (Article 73(3)). In addition, under Article 91, which regulates the authority of the Council of Ministers to enact decrees having the force of law by an empowering law defining the purpose, scope, principles and operative period thereof, it is stated that "the fundamental rights, individual rights and duties included in the First and Second Chapter of the Second Part of the Constitution and the political rights and duties listed in the Fourth Chapter, cannot be regulated by decrees having the force of law except during periods of martial law and states of emergency"[7]. Since the obligation to pay taxes is regulated under the political rights and duties, the Council of Ministers may not be empowered to release a decree having the force of law on tax issues. However, Article 73 (4) of the TC regulates the secondary competence of the Council of Ministers which may be empowered by the parliament to amend only the percentages of exemptions, exceptions and reductions of taxes, fees, duties and other such financial impositions, within the minimum and maximum limits prescribed by law. The delegated power is always implemented by an ordinary decree of the Council.

The basic purpose of the delegation of power to determine tax rates or tax exemption, exception and reduction amounts is to enable governmental intervention in the economy easily and speedily where economic conditions or fluctuations necessitate an action to which the parliament may not respond on time because of the detailed and complicated procedural rules of the legislative process. The TCC explains the motive behind the delegation of power as follows: "In modern states, reducing or increasing tax rates is an effective instrument used to reach fundamental social-economic goals, such as to stimulate capital accumulation, to raise development pace, to prevent inflation and unemployment, to reduce balance of payments deficit, to refine consumption trends. .... The competence of the Council of

[7] Article 91 TC: "The Turkish Grand National Assembly may empower the Council of Ministers to issue decrees having the force of law. However, the fundamental rights, individual rights and duties included in the First and Second Chapter of the Second Part of the Constitution and the political rights and duties listed in the Fourth Chapter, cannot be regulated by decrees having the force of law except during periods of martial law and states of emergency.
The empowering law shall define the purpose, scope, principles, and operative period of the decree having the force of law, and whether more than one decree will be issued within the same period.
[...]
Decrees are submitted to the Turkish Grand National Assembly on the day of their publication in the Official Gazette.
Laws of empowering and decrees having the force of law which are based on these, shall be discussed in the committees and in the plenary sessions of the Turkish Grand National Assembly with priority and urgency.
Decrees not submitted to the Turkish Grand National Assembly on the day of their publication shall cease to have effect on that day and decrees rejected by the Turkish Grand National Assembly shall cease to have effect on the day of publication of the decision in the Official Gazette. The amended provisions of the decrees which are approved as amended shall go into force on the day of their publication in the Official Gazette".

Ministers is necessary to realize the very essence of the social-economic goals when existing economic conditions so require…"[8]

The authority may only be delegated by the parliament to the Council of Ministers which does not have further authority to re-delegate this power to any other governmental organ. Further, the Council of Ministers may only be authorized to determine tax rates, or amounts of exemptions, exceptions and reductions within certain limits; no further authority may be delegated to the Council of Ministers on basic elements of taxes or similar financial impositions. The parliament must set in the law the maximum and minimum limits; thus, it sets the framework where the Council of Ministers may reduce or increase the tax rates in between when it considers it necessary[9]. Consequently, the power of the Council of Ministers on taxes emanating from the parliament and originating from "a law" as such is characterized as an "adherent" and "subordinating"[10] authority[11].

On the basis of Article 73 (4), most of the tax laws enacted by the parliament comprise a provision delegating the power to the Council of Ministers on tax rates or similar amounts. The Council of Ministers usually exercises its competence and sets the rate structure at its discretion within a range prescribed in the law. For instance, under Article 28 of the Value Added Tax Law (VATL)[12], the standard VAT rate on taxable transactions is 10%. However, the Council of Ministers is authorized (1) to increase the standard rate to 40% and reduce it to 1%; and (2) to fix a rate in between for various goods and services or for the retail stage of certain goods. The Council of Ministers has used this authority several times by issuing decrees. Currently, the standard VAT rate on taxable transactions is 18% and reduced rates of 1% and 8% are applied on certain goods and services enumerated in two lists issued by the Council of Ministers[13]. Between 1985 and 2008, for a period of 23 years, the delegated authority has been used by the Council of Ministers for 37 times, meaning that the VAT rate structure for at least some goods or services has been amended semi-annually. The relevant VAT Decree No. 2007/13033, issued in 2007, has been changed four times in 2008[14].

[8] Constitutional Court, E.1986/5, K.1987/7, 19.3.1987 (Official Gazette of 12.11.1987, No.19632).
[9] Constitutional Court, E. 2005/73, K.2008/59, 21.2.2008 (Official Gazette of 7.11.2008, No.27047).
[10] Kaneti, p.38; See also, Ozbudun, Ergun, Turk Anayasa Hukuku, 7th edition, Yetkin Yayinlari, Ankara, 2002, pp.182-183.
[11] The TCC characterizes the power of the Council of Ministers as a "conditional and limited" authority; Constitutional Court, E.1989/6, K.1989/42, 7.11.1989 (Official Gazette of 6.4.1990, 20484).
[12] Katma Deger Vergisi Kanunu, No.3065 (Official Gazette of 2.11.1984, No.18563).
[13] Bakanlar Kurulu Karari, No. 2007/13033 (Official Gazette of 30.12.2007, No.26742), most recently amended by Bakanlar Kurulu Karari, No. 2008/14092 (Official Gazette of 20.9.2008, No.27003).
[14] Bakanlar Kurulu Karari, No. 2008/13234, No. 2008/13426, No. 2008/13902, No. 2008/14092.

Another example can be found in the Individual Income Tax Law (ITL)[15]. The income withholding tax rate is 25%, except in the case of employment income (Article 94). However, the Council of Ministers is authorized to fix a new rate between 0% and 50% for each separate item of income (e.g. dividends, royalties, interest, agricultural income, and professional income, etc.) and to differentiate between residents and non-residents. The rates applied by the Council of Ministers for different income items vary currently between 2% and 20%[16]. Between 1986 and 2008, for a period of 22 years, the delegated authority has been used by the Council of Ministers for 22 times, meaning that the income withholding tax rate structure for at least some income items has been amended annually. The above data display the frequency of the exercise of competence by the Council of Ministers.

In Turkish constitutional jurisprudence, many tax law provisions delegating the power to increase or reduce the tax rates have been discussed by the TCC. The most important case law produced was on tax provisions authorizing the Council of Ministers to reduce the tax rates to "zero"; the issue was whether such a delegated power was in effect leading to the "revocation" of a tax which constitutionally vested only on the parliament. The TCC has not endorsed the opinion expressed in the literature[17] that reducing a tax rate to zero is in fact similar to deciding to discontinue the collection of that tax, and the actual meaning of which is the annulment of the tax itself. On the contrary, the TC has held: "The power to reduce a tax rate to zero does not mean revoking the tax, since the relevant tax itself continues to exist in the legal order and under the relevant economic conditions the Council of Ministers may re-increase that tax whenever it considers it necessary"[18]. In another case relating to the Vehicle Tax Law, the TC considered that the controversial provision regulating that the tax amounts written in the Law must be re-valued by the re-valuation rate at the end of each year, and further delegated the power to the Council of Ministers to increase the re-valuation rate announced by the Ministry of Finance by 50% or to decrease it by 20%; it authorized the Council of Ministers to re-increase twenty times further the tax amounts so revalued under the previous calculation. The TCC concluded that such a multiple power could not be acceptable in terms of the constitutional principles, since it was "uncertain" and "disproportional"[19].

In authorizing provisions of the Turkish tax legislation, the parliament has never set further conditions, such as timing or period or the acceleration of the tax burden. Therefore, the power of the executive

[15] Gelir Vergisi Kanunu, No.193 (Official Gazette of 6.1.1961, No. 10700)
[16] Bakanlar Kurulu Karari, No. 2009/14592 (Official Gazette of 3.2.2009, No.27130).
[17] Dogrusoz, Bumin, "*Vergilendirme Yetkisinin Yasama ve Yurutme Organlari Arasında Bolusumu*", Vergi Dunyasi, No.43, March 1985; Gunes, p.165. For an opposite opinion, see Cagan, Nami, "*Turk Anayasasi Acisindan Vergileme Yetkisi*", Anayasa Yargisi, Vol.1, Ankara, 1984, p.174.
[18] Constitutional Court, E.1986/5, K.1987/7, 19.3.1987 (Official Gazette of 12.11.1987, No.19632); Constitutional Court, E. 2005/73, K.2008/59, 21.2.2008 (Official Gazette of 7.11.2008, No.27047);
[19] Constitutional Court, E.2001/36, K. 2003/3, 16.1.2003 (Official Gazette of 21.11.2003, No. 25296).

organs seems to be absolute and infinite and may give rise to instantaneous daily increases. In terms of legality and legal certainty principles, such a wide margin of appreciation with the possibility of arbitrary discretion of the Council of Ministers -as has been exercised in the VAT practice by the increase VAT rates on financial leasing suddenly from 1% to 18%, or in the Special Consumption Tax practice by raising the tax rate on luxury goods from 6.7% to 20%- has always been criticized in the literature on the grounds that such an exercise might create unforeseeable results and the legality principle necessitated the empowering law to define the purpose, scope, principles (such as the maximum rate jump possibility at once) and operative period of a Decree[20]. The current understanding and the application of the power of the Council of Ministers in tax law, however, provides less certainty and fewer guarantees than the power to issue a decree having the force of law[21], since the exercise of the delegated power is never controlled by the parliament ex post, and the Decrees issued by the Council of Ministers are out of the scope of the TCC's supervision. This also creates, especially for cases of zero rate taxation, a loophole for the control whether the final rate structure set by the Council of Ministers accords with the ability-to-pay principle explicitly stated in Article 73 of the TC[22]. Nevertheless, the power exercised by the Council of Ministers is under the supervision of the Supreme Administrative Court (the Court), as has been seen in a case in which the Court repealed the Decree setting higher VAT rates for LPG than other petroleum products as a contravention of the equality principle stated in Article 10 of the TC[23].

1.1.2.2. Competence for additional duties on foreign trade (Article 167(2), TC)

Article 167 of the TC on the "Supervision of Markets and Regulation of Foreign Trade", provides that in order to regulate foreign trade for the benefit of the economy of the country, the Council of Ministers may be empowered by law to introduce or revoke additional financial impositions on imports, exports and other foreign transactions in addition to taxes and similar impositions.

The legal context for the "additional impositions on foreign trade" is separately prescribed under the Constitution, although they can easily be considered by their character to be similar to taxes or other financial impositions. The power which may be delegated by the parliament to the Council of Ministers

[20] Yalti, Billur "*Vergi Orani Dunden Bugune 18 Kat Artar mi?*", Dunya Gazetesi, 1 March 2008; Yalti, Billur, "*Son OTV Artisi Hukuksuz*", Radikal Gazetesi, 10 May 2006.
[21] See footnote 6.
[22] Yalti, Billur, "*1923'ten 2003'e "Kazandiklarimiz": "Cumhuriyet Hukuku", "Kazanamadıklarimiz": "Hukukun Cumhuriyeti", Vergi Hukukunda Geldigimiz Yere Yakin Tarihten Bakmak: Panaromik bir Calişma*", Ankara Universitesi Hukuk Fakultesi, Cumhuriyetin Kurulusundan Bugune Turk Hukukunun 80 Yillik Gelisimi Sempozyumu, A.U.Hukuk Fak.Yay. No.538, Ankara, 2003, pp.104-106.
[23] Supreme Administrative Court, 7th Section, E.2001/626, K.2002/1942, 20.5.2002 (Official website of the Supreme Administrative Court: http://www.danistay.gov.tr).

under Article 167(2) is more widely designed than the one regulated under Article 73(4); thus it covers the power to "introduce" or "annul" any financial duties. As for the subject matter, however, it is less widely regulated, thus comprising only the duties imposed on "foreign trade".

By Act 2976, the Council of Ministers is generally authorized by the parliament to regulate the kind, amount, collection, prosecution and refund procedure of the additional financial duties[24]. Regarding the indeterminate and wide context of the relevant law, and the constitutionality thereof, the TCC declared that the authority in Article 167 (2) covered the Council of Ministers' power to freely determine the kind and amount of a financial duty necessitated by the economic conditions of the country in order to counter the measures applied by other states or to take national measures to deal with economic events domestically[25]. The Council of Ministers used its authority on many occasions in order to apply various safeguarding measures on imports[26].

Act 2976, and the interpretation of the TCC thereof, was criticized in the literature, since (1) the law only repeated the wording of the Constitution, and then the power assigned to the parliament to "empower" the Council of Ministers in Article 167(2) turned out to be "meaningless"[27]; (2) additional financial duties were similar to taxes in nature and Article 167 (2) had to be interpreted under the same principles arising from Article 73 of the TC[28]; (3) the exercise of the power to introduce additional duties was continuously exempt from the supervision and control of the parliament and the TCC and such additional duties introduced by the Council of Ministers under its discretion were only covered under the limited supervision of the administrative judiciary[29]; and (4) the TCC's interpretation on Article 167 displayed a contradiction to its previous jurisprudence produced for the meaning of Article 115 or Article 124 (see below)[30].

1.1.2.3. Regulatory competence (Article 115, TC)

Under Article 115 of the TC, it is provided that "the Council of Ministers may issue regulations governing the mode of implementation of laws or designating matters ordered by law, provided that they do not conflict with existing laws and are examined by the Council of State. Regulations shall be

[24] Dis Ticaretin Duzenlenmesi Hakkinda Kanun, No.2976 (Official Gazette of 15.2.1984, No.18313).
[25] Constitutional Court, E.1984/6, K.1985/1,T.11.1.1985 (Anayasa Mahkemesi Kararlar Dergisi, No.21, Ankara, 1996, p.1).
[26] e.g., Ithalatta Korunma Onlemleri Hakkinda Karar, No. 2004/7305 (Official Gazette of 29.5.2004, No. 25476).
[27] Tan, Turgut, "*Anayasa Mahkemesi Kararlari Isiginda Yurutmenin Duzenleme Yetkisi*", Anayasa Yargisi, Vol.3, Ankara, 1986, p.213.
[28] Saban, Vergi Hukuku, p.11, Gunes, pp.176-178. For an opposite opinion, see Cagan, *Turk Anayasasi*, p.176.
[29] Duran, Lutfi, "*Anayasa Mahkemesine Gore Turkiyenin Hukuk Duzeni*", Amme Idaresi Dergisi, Vol.19, No.1, March 1986, p.16.
[30] Tan, p.212.

signed by the President of the Republic and promulgated in the same manner as laws". Accordingly, the parliament may empower the Council of Ministers; i.e. may transfer a specific authority in a law to establish rules for the implementation of a law, or for the procedural details, and the Council of Ministers may only issue a regulation within the limits of a law; thus, it may not alter or extend the scope prescribed by the law. The TCC characterizes the regulatory competence of the Council of Ministers as a "limited" and "complementary" competence, not an "autonomous" one. In its established case law, the Court declared that the Council of Ministers did not have regulatory competence if a law did not authorize it ex ante; even though a law ordered a regulation, the executive organs did not have the authority to issue any rules that might affect the subjective rights of individuals, or to go beyond what was regulated under that law[31]. However, in Turkish tax law, tax regulations have been rarely used, since the Council of Ministers has not been authorized by the parliament in the relevant tax laws, except in the Real Estate Tax Law[32].

1.1.3. Competence of the Ministry of Finance for tax rules (Article 124, TC)

The Constitution also regulates a specific delegation of power to the Ministries to issue by-laws (Article 124). Accordingly, "the Prime Minister, the ministries, and public corporate bodies may issue by-laws in order to ensure the application of laws and regulations relating to their particular fields of operation, provided that they are not contrary to these laws and regulations. The law shall designate which by-laws are to be published in the Official Gazette". The power to issue by-laws for the implementation of laws is also a limited and complementary competence similar to the authority to make regulations, as explained above.

In Turkish tax law by-laws have been rarely used by the Ministry of Finance, since the parliament has not usually authorized the Ministry to release by-laws[33]; instead it left the authority to regulate the procedural and material aspects of a tax provision in general terms without referring to any legal source or instrument, and that authority has always been implemented by general rulings. In Turkish tax law such general rulings are characterized as regulatory and have binding effect[34]. In a case regarding the power delegated by the TPL to the Ministry of Finance (Article 257 rep.) to define and introduce further obligatory documents other then those actually regulated under the TPL, of which the preparation by

[31] For example, Constitutional Court, E. 1987/16, K.1988/8, 19.4.1988 (Official Gazette of 23.8.1988, No.19908).
[32] Emlak Vergisine Matrah Olacak Vergi Degerlerinin Takdirine Iliskin Tuzuk, Bakanlar Kurulu Karari, No. 7/3995, (Official Gazette of 15.03.1972, No.14129).
[33] In Turkish tax legislation there are four by-laws regarding the ITL on agricultural income and disabled persons, and the TPL on the procedural rules for the publication of official invoices and documents and on the reconciliation procedure between the payers and the tax administration.
[34] It must be stated that the interpretive rulings of the Ministry of Finance do not have any binding effect on taxpayers.

the taxpayers is compulsory, the TCC held that the legislative organ has the right to regulate the general principles in a law and then leave the details relative to professional and administrative techniques to be regulated by the executive bodies. However, executive organs may use this regulatory power only within the framework of the law[35]. The Court has reaffirmed this interpretation in various cases, such as the power to regulate the procedural obligations with respect to cash registers[36], to introduce obligatory signature or approval of the tax returns by tax advisors[37], to regulate the procedure for the announcement of delinquent taxpayers' names in the media[38], to regulate joint and several responsibility of withholding tax agents[39], to regulate the application of the penalty on the closure of business places[40], to regulate the material and procedural aspects of investment deduction in the income taxes[41].

Beyond the interpretation of the TCC, in the light of the legality principle, the parliament is criticized in the literature for the unconstitutionality of authorizing tax provisions on the "material" aspects of a tax rule; however, the power to regulate procedural aspects of a tax provision may be delegated[42]. It must be stated that a general ruling issued by the Ministry of Finance can be brought by the taxpayers before the Supreme Administrative Court on grounds that the general ruling contradicts and goes beyond the authorizing law. In such a legal proceeding, the Supreme Administrative Court controls the general ruling as to whether (1) it relies on a legal authorizing provision; (2) it affects directly the taxpayers' rights; (3) it is applied generally throughout the country; (4) it is interpretive or regulatory in nature; and finally (5) it complies with the subject and the framework of the law.

As for the lump-sum tax amounts or exemptions and reductions regulated in tax laws, the relevant law usually refers to the revaluation rate in order to adjust taxes annually for inflation. The revaluation rate is regulated under Article 298(rep) of the TPL and based on the price increase in the production price index in October of each year as compared to the previous year's index in the same month. The rate is published by the Ministry of Finance in the Official Gazette at the end of the year. In some tax laws, however, the Council of Ministers is authorized to re-increase the final amounts so calculated by the revaluation rate within a limit. For instance, according to Article 123 (rep.) of the ITL, the lump-sum tax amounts etc. regulated under various articles of the ITL are increased annually by the re-valuation rate and the Council of Ministers is authorized to further increase or decrease such re-calculated amounts by

[35] Constitutional Court, E.1990/29, K.1991/37, 5.10.1991 (Anayasa Mahkemesi Kararlar Dergisi, No.27, Ankara 1993, p.609).
[36] Constitutional Court, E.1996/11, K.1997/4, 29.1.1997 (Official Gazette of 30.6.2001, No. 24448).
[37] Constitutional Court, E.1996/5, K.1996/26, T. 26.1.1996 (Official Gazette of 30.6.2001, No. 24448).
[38] Constitutional Court, E.1986/5, K.1987/7, 19.3.1987 (Official Gazette of 12.11.1987, No.19632).
[39] Constitutional Court, E.1986/5, K.1987/7, 19.3.1987 (Official Gazette of 12.11.1987, No.19632).
[40] Constitutional Court, E.1986/5, K.1987/7, 19.3.1987 (Official Gazette of 12.11.1987, No.19632).
[41] Constitutional Court, E.1986/5, K.1987/7, 19.3.1987 (Official Gazette of 12.11.1987, No.19632).
[42] Yalti, "*1923'ten 2003'e*", p.109.

50%. The tax base brackets designed for the progressive income tax rate are also subject to this rule. In practice, the lump-sum taxes, penalties, exemptions, reductions etc. that are spread through out the tax laws are yearly increased by the revaluation rate announced by the Ministry of Finance at the end of each year. In the view of the TCC, "the tax amounts regulated throughout the tax laws may be increased by the re-valuation rate declared by the Ministry since the background information issued by the State Statistics Institute is produced under scientific methods, and the Ministry obliged only to publish the rate, therefore there is no opportunity for arbitrary discretion"[43]. In the tax literature, it is criticized that the determination of the re-valuation rate by the Ministry of Finance is contrary to the legality principle, because the rate is indirectly determined by State Statistics Institute, which is an administrative body[44]. A contrary opinion is also expressed in the literature that the authority of the Ministry of Finance on the re-valuation rate is a cohesive authority and the administrative function of the Ministry of Finance refers only to "issuing" the rate[45].

1.2. Competence for draft tax bills

Under the TC, the Council of Ministers and deputies are empowered to introduce laws (Article 88 (1)). The constitutional authority to introduce tax laws vests in either the Council of Ministers (draft bills) or the deputies (proposals of law). According to the "Parliamentary Rules of Procedure"[46], the proposals of law introduced by the deputies have to be immediately sent to the Council of Ministers by the Presidency of the parliament for information (Article 40).

In the tax law area, the usual practice is that the drafting process of tax laws vests in the Ministry of Finance. The "Decree Having Force of Law on the Foundation and Organization of the Ministry of Finance", No. 178 authorizes the Ministry to establish tax policies of the State and to draft tax bills and other financial legislative instruments (Article 2 (h))[47]. The Tax Council, which was established in 1992, yet which was effectively organized and began its activities in 2004, is designated as a supervisory independent board entrusted with the task of conducting research activities and giving opinions to the Ministry of Finance on tax policies and implementing tax laws thereof[48]. The Tax Council, formed by the representatives both from the public and private sectors, including non-governmental organizations and academic circles, is authorized to draft or give opinions on tax laws[49]. Since 2005, the Tax Council

43 Constitutional Court, E.1996/49, K.1996/46, 11.12.1996 (Official Gazette of 2.12.2000, No.24248).
44 Saban, Vergi Hukuku, p.37; Yalti, "*1923'ten 2003'e*", p. 105.
45 Dogrusoz, Bumin, "*Yeniden Degerleme Oraninin Etkileri*", Referans Gazetesi, 6.11.2008.
46 Official Gazette of 13.4.1973, No.14506.
47 Maliye Bakanliginin Kurulus ve Gorevleri Hakkinda Kanun Hukmunde Kararname, No.178 (Official Gazette of 14.12.1983, No. 18251 (Rep.)).
48 5228 Sayili Kanun, Official Gazette of 31.7.2004, No.25539.
49 Vergi Konseyi Yonetmeligi, Official Gazette of 22.3.2005, No.25763.

has actively participated in the drafting process of tax laws, especially for the re-writing of the fundamental tax laws, such as the corporate income tax law, individual income tax law and tax procedure law.

The draft tax bills prepared by the Ministry are submitted to the Council of Ministers, since the Council is one of the constitutionally authorized organs to introduce laws before the parliament. According to the procedural rules of the parliament, draft bills or proposals on taxation presented to the Presidency of the parliament are sent directly to the related main committee, namely the Plan and Budgetary Committee, composed of deputies representing the political parties having seats in the parliament, proportional to the total number of political party groups in the General Assembly (Articles 21 and 73). The committee discusses and votes on the bill article by article. During discussions, a committee member may propose to amend a part or the entire article of the bill. Dissenting opinions may also be given in the final report (Article 22 et seq.). In the General Assembly discussions, one or more articles of the draft bill or proposal may be amended, rejected or sent back to the committee (Article 87). Furthermore, the President is authorized under the TC to promulgate laws, to return laws to the parliament to be reconsidered, or to appeal to the Constitutional Court for the annulment in part or entirety of certain provisions of laws or decrees having the force of law on the grounds that they are unconstitutional in form or in content (Article 104, TC).

In the legislative process, amendment or rejection of one or more articles of a draft tax bill before the Plan and Budgetary Committee or before the General Assembly sometimes occurs. An example for this kind of practice was the legislative process regarding the new Corporate Income Tax Law (CITL) No. 5520 dated 13 June 2006[50] which wholly revised and introduced substantial amendments to the former CITL No. 5422 dated 10 June 1949. The text of the draft bill went through some changes both in the Committee and the Grand Assembly. A recent example is Law No. 5811 dated 13 November 2008, on the inclusion of assets in the national economy which aimed to encourage legitimization of domestic and foreign capital and income by way of taxing at reduced rates such assets transferred to or capitalized in Turkey. In the draft bill, a one-off tax was applied at 2% for foreign assets and 10% for domestic assets; however, the rate for the latter assets was reduced in the Grand National Assembly to 5%[51]. The above examples from the parliamentary legislative process of tax laws were not the result, however, of the proposals introduced by the opposition parties. Although an opportunity to offer opinions or criticism

[50] Kurumlar Vergisi Kanunu, No.5520 (Official Gazette of 13.6.2006, No.26205).
[51] Bazi Varliklarin Milli Ekonomiye Kazandirilmasi Hakkinda Kanun, No.5811 (Official Gazette of 22.11.2008, No.27062).

in a pluralistic way remains in the organization of the system, this does not mean that opinions beyond the government's demands have effectively been reflected in enacted tax laws.

2. The relationship between the tax administration and the domestic tax courts

2.1. The domestic courts' control of the decisions of the tax administration

In the Turkish legal order, the TC provides that, "[r]ecourse to judicial review shall be available against all actions and acts of administration" (Article 125, TC). Under the law regulating the administrative judiciary, and remedies and procedure thereof[52], all individual tax assessments and decisions of the tax administration are subject to the judicial review of tax courts, which control whether a tax decision is in conformity with the law with respect to its subject matter, form, procedure, and competence. A taxpayer may appeal the tax office's assessment to the tax court within 30 days after notification of the assessment. A taxpayer may not challenge facts which he declared on the tax return, except for cases where a reservation has also been attached to the tax return. If the amount of taxes, penalties and charges at issue exceeds a certain limit, the tax court consists of a three-judge tribunal. Decisions of the tribunal may be appealed to the Supreme Administrative Court within 30 days of notification of the court's decision. This Court is the final stage of jurisdiction. If the amount of taxes, penalties and charges does not exceed a certain limit a single judge hears the case. This decision may be appealed to the Regional Administration Court within 30 days. The decisions of this Court may not be further appealed. In the Turkish literature, a special research project conducted in 2000 on the effectiveness of the judicial review in tax cases, displayed statistically that the litigation against the tax administration's decisions had usually been in favour of the taxpayers[53].

A taxpayer may also bring regulations, by-laws or general rulings before the Supreme Administrative Court on the grounds that such instruments are contrary to a tax law. In the Turkish literature, it has been asserted that such cases have usually finalized in favour of taxpayers; thus, the Supreme Administrative Court often cancelled general rulings of the Ministry of Finance which were regulatory in nature[54] on grounds that the power delegated to it by the law has been overridden[55]. However, in cases where a regulatory general ruling did not go beyond the empowering tax law, the lower tax courts and

[52] Danistay Kanunu, No.2575 (Official Gazette of 20.01.1982,No.17580); Bolge Idare Mahkemeleri, Idare Mahkemeleri ve Vergi Mahkemelerinin Kurulusu ve Gorevleri Hakkinda Kanun, No.2576 (Official Gazette of 20.1.1982, No.17580); Idari Yargilama Usulu Kanunu, No.2576 (Official Gazete of 20.1.1982, No. 17580).
[53] Saban, Nihal, Turk Yargi Sisteminin Etkinligi Arastirma Projesi, Vergi Yargisinin Etkinligi, TESEV, Istanbul, 2000, pp.78-79.
[54] See above.
[55] Yalti, "*1923'ten 2003'e*", p. 111.

the Supreme Administrative Court characterized the information emerging from the Ministry of Finance as a binding rule and took it into account in their judicial review[56]. On the contrary, if a general ruling was characterized as an interpretive one, the courts did not refer to the interpretation of the Ministry and directly applied a tax provision under its own interpretation[57].

2.2 The tax administration's response to the case law

Article 138 of the TC provides: "Judges shall be independent in the discharge of their duties; they shall give judgment in accordance with the Constitution, law, and their personal conviction conforming to the law. ... Legislative and executive organs and the administration shall comply with court decisions; these organs and the administration shall neither alter them in any respect, nor delay their execution". Accordingly, the Turkish tax administration is constitutionally obliged to apply the judicial decisions of the courts. In individual cases where a tax court overturns an individual tax decision, the tax administration executes the court's decision since it has binding effect. However, the administration usually applies the same tax rule in similar cases according to its own interpretation until a series of judicial decisions cancelling such administrative decisions are produced by the tax courts. When applying the law, the tax administration usually considers itself bound by the law under its own understanding. A controversial application of the penalty on infraction of the rules regulated under Article 353 of the TPL, which is applied to the non-production of invoices or similar documents, can be regarded as a good example for this approach. Although the judiciary had held that where a document or invoice did not contain minor formal obligations (such as dates or taxpayer identification numbers), this had no effect on the fact that the document "produced", the tax administration continued to apply the penalty arising from the law on many occasions[58].

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[56] See, for example, Supreme Administrative Court, 4th Section, E.2006/130, K.2006/99, 7.2.2006; e.g. Supreme Administrative Court, 4th Section, E.2004/1263, K.2005/156, 7.12.2005; Supreme Administrative Court, 7th Section, E.1986/342, K.1986/2391, 22.10.1986; Supreme Administrative Court, General Council, E.1999/51, K.2000/87, 25.2.2000 (http://www.danistay.gov.tr) .

[57] E.g. Supreme Administrative Court, 3rd Section, E.2005/1149, K.2005/1925, 20.9.2005 (http://www.danistay.gov.tr).

[58] Supreme Administrative Court, General Council, E.1995/435, K.1997/83, 24.1.1997 (in Lebib Yalkin Yayinlari, VUK Mevzuati, vol.D, No.342); Supreme Administrative Court, General Council, E.1995/434, K.1997/84, 24.1.1997 (in Lebib Yalkin Yayinlari, VUK Mevzuati, Vol. D, No.343); Supreme Administrative Court, General Council, E.1996/73, K.1997/342, 20.6.1997 (in Lebib Yalkin Yayinlari, VUK Mevzuati, Vol. D, No.349); Supreme Administrative Court, General Council, E.1996/212, K.1997/508, 28.11.1997 (in Lebib Yalkin Yayinlari, VUK Mevzuati, Vol. D, No.352); Supreme Administrative Court, 3rd Section, E.1998/4530, K.1998/4609, 16.12.1998 ((in Lebib Yalkin Yayinlari, VUK Mevzuati, Vol. D, No.340); Supreme Administrative Court, 3rd Section, E.1999/1497, K.1999/2415, 10.6.1999 ((in Lebib Yalkin Yayinlari, VUK Mevzuati, Vol. D, No.411); Supreme Administrative Court, 4th Section, E.1999/620, K.2000/4277, 23.10.2000 ((in Lebib Yalkin Yayinlari, VUK Mevzuati, Vol. D, No.413); Supreme Administrative Court, 3rd Section, E.1999/257, K.2000/3903, 28.11.2000 ((in Lebib Yalkin Yayinlari, VUK Mevzuati, Vol. D, No.419);

The Ministry of Finance sometimes initiates the parliamentary process when the outcome of the supreme courts' decisions turns out to be jurisprudence. For this practice, we may give as an example the controversial application of tax liability of legal representatives with their own assets for the company's tax debts (Article 10, TPL). Although the judiciary has decided on so many occasions that tax debts arising under the responsibility of the predecessor cannot be recovered from a successor tax representative[59], by a recent amendment to the law joint and several responsibility has been explicitly introduced[60]. A similar practice is also seen with regard to the responsibility of tax representatives regulated under different laws, i.e. Article 10 of the TPL and Article 35 rep. of the Procedural Law on Public Receivables[61]; the former regulates a limited responsibility of a tax representative necessitating several conditions to be fulfilled, and the latter a wider and easier way to collect a company's debts from a representative. The judiciary held that Article 10 was a special rule (*lex specialis)* for tax debts, whereas Article 35 rep. was a general provision (*lex generali*) for public debts other than taxes, and as long as Article 10 was explicitly or implicitly not repealed, the latter article could not be applied to tax cases[62]. However, a recent amendment has introduced a provision stating that Article 10 would not prevent the application of Article 35 rep[63].

Although Article 153 of the TC provides that "the decisions of the Constitutional Court shall be published immediately in the Official Gazette, and shall be binding on the legislative, executive, and judicial organs, on the administrative authorities, and on persons and corporate bodies", experience has shown that the Ministry of Finance may try to reach the same effect of an annulled law in the taxation area. For example, Law No. 4837[64], introducing a one-off additional motor vehicle tax in 2003 with the rationale to counter the effects of public deficits, was cancelled by the TCC on grounds that the burden arising from public deficits had to be distributed in a general manner over the public as a whole; however, the relevant law, contrary to the equality, generality and the ability-to-pay principles, discriminated against the people who owned a car, and did not burden other taxpayers with respect to other taxes, such as taxes on individual income or corporate income, and extraordinary conditions arising from a lack of economic stability could not be considered as a reasonable justification for such a

[59] E.g. Supreme Administrative Court, 9th Section, E.1997/469, K.1998/1348, 25.3.1998 (in Lebib Yalkin Yayinlari, VUK Mevzuati, Vol. D, No.402); Supreme Administrative Court, 9th Section, E.1997/1732, K.1998/1367, 25.3.1998 ((in Lebib Yalkin Yayinlari, VUK Mevzuati, Vol. D, No.403); Supreme Administrative Court, 3rd Section, E.1999/4600, K.2000/3832, 22.11.200 ((in Lebib Yalkin Yayinlari, VUK Mevzuati, Vol.D, No.416);
[60] 5766 Sayili Kanun (Official Gazette of 6.6.2008, No.26898(Rep.)).
[61] Amme Alacaklarinin Tahsil Usulu Hakkinda Kanun, No.6183, Official Journal of 28.7.1953, No.8469.
[62] E.g. Supreme Administrative Court, 4th Section, E.2001/2547, K.2001/3219,27.6.2001 (in Lebib Yalkin Yayinlari, VUK Mevzuati, Vol.D, No.425); Supreme Administrative Court, General Council, E.2001/218, K.2001/379, 26.10.2001; Supreme Administrative Court, General Council, E.2001/79, K.2001/208, 18.5.2001; Supreme Administrative Court, General Council, E.2000/261, K.2001/31, 26.01.2001 (http://www.danistay.gov.tr) .
[63] 5766 Sayili Kanun (Official Gazette of 6.6.2008, No.26898(Rep.)).
[64] Official Gazette of 11.4.2003, No.25076.

differentiation[65]. Law No. 4962[66], which was introduced upon cancellation but prior to the publication of the TCC's decision on Law 4837 in the Official Gazette, regulating again a one-off additional motor vehicle tax with minor changes, was also annulled by the TCC on the same grounds[67]. The Ministry of Finance, however, decided to change the system related to, and to increase the amount of, motor vehicle tax[68] in 2004, the final effect of which was the collection of the same amount aimed at by the additional taxes.

3. The relationship between different legal sources (legal pluralism)

3.1. The position of the state organs with respect to international treaties

Article 90 of the TC regulates the ratification of international treaties and their legal nature and effect. Accordingly, "the ratification of treaties concluded with foreign states and international organizations on behalf of the Republic of Turkey, shall be subject to adoption by the Turkish Grand National Assembly by a law approving the ratification" (Article 90(1)). Under Article 104 of the Constitution, the President is empowered to ratify and promulgate international treaties. According to Law No. 244 on international agreements[69], treaties approved by the parliament are ratified by the Council of Ministers and the President. International conventions, such as the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)[70], agreements such as the Association Agreement between Turkey and the European Communities[71], and seventy tax treaties concluded by Turkey with several countries around the world are subject to the legal framework set by Article 90.

Turkey's tax treaties generally follow the provisions of the OECD Model Convention. Deviations concern especially withholding taxes and capital gains. The basic motive for concluding a tax treaty with a foreign country may be different at specific instances; however, the general aim is to create a new investment environment or to promote the conditions of an existing investment relationship with a State by eliminating double taxation that may occur for taxpayers as a result of paying taxes in both the State of residence and the State of source. The explanatory memorandums of tax treaties generally state

65 Constitutional Court, E. 2003/48, K. 2003/7623, 23.7.2003 (Official Gazette of 11.9.2004, No. 25580).
66 Official Gazette of 7.8.2003, No.25192.
67 Constitutional Court, E. 2003/73, K. 2003/86, 7.10.2003 (Official Gazette of 20.12.2005, No. 26029).
68 5035 Sayili Kanun (Official Gazette of 2.1.2004, No. 25334 (Rep.)).
69 244 Sayili Kanun (Official Gazette of 11.6.1963, No.11425).
70 6366 Sayili Kanun (Official Gazette of 19.3.1954, No.8662).
71 397 Sayili Kanun (Official Gazette of 12.2.1964, No.11631); Bakanlar Kurulu Karari, No.6/3820 (Official Gazette of 17.11.1964, No.11858).

that tax conditions must be foreseeable for taxpayers of both contracting States[72]. The parliament always gives its consent to such treaties prepared by the Ministry of Foreign Relations and submitted by the Council of Ministers.

For the application of tax treaties, the Ministry of Finance has twice released explanatory general rulings[73] and an explanatory booklet[74]. Furthermore, advance rulings issued by the Ministry on double tax treaties are also published on the official website of the Ministry. Although limited in number, they are considered to be sources of useful information on the application of tax treaties. A certificate of residence is required for the application of a tax treaty.

With respect to the jurisprudence on tax treaties, it must be stated that the case law on tax treaties is very limited. In such rare cases, the Supreme Administrative Court has interpreted whether a treaty provision attributes the taxing right to Turkey[75], or whether a reduced treaty rate has to be applied instead of the domestic rate[76] and it has applied such treaty provisions when the conditions are met in specific cases. On the other hand, with respect to customs union provisions, the Association Agreement between Turkey and the European Communities has also been applied in a very limited number of cases before the Supreme Administrative Court[77].

3.2. The hierarchy of different legal sources under the Constitution

3.2.1. International human rights conventions

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[72] See, for example, "*Turkiye Cumhuriyeti Hukumeti ile Tayland Krallıgı Hukumeti Arasinda Gelir Uzerinden Alinan Vergilerde Cifte Vergilendirmeyi Onleme ve Vergi Kacakciligina Engel Olma Anlasması ile Eki Protokolun Onaylanmasinin Uygun Bulunduguna Dair Kanun Tasarisi ve Disisleri Komisyonu Raporu"*, No. 1/696, Donem: 22, Yasama Yili : 2, S. Sayisi : 420 (http://www.tbmm.gov.tr/sirasayi/donem22/yil01/ss420m.htm) .

[73] Cifte Vergilendirmeyi Onleme Anlasmalari Genel Tebligi, No.1 (Official Gazette of 15.5.1996, No. 22637); Cifte Vergilendirmeyi Onleme Anlasmalari Genel Tebligi, No.2 (Official Gazette of 14.3.1998, No. 23286).

[74] Cifte Vergilendirmeyi Onleme Anlasmalari Cercevesinde Vergilendirme Esaslari; http://www.gib.gov.tr/index.php?id=1055.

[75] "Article 3 of the protocol of the tax treaty between Turkey and China empowers Turkey to apply branch tax on profits of a permanent establishment. ...", Supreme Administrative Court, 3rd Section, E. 2005/ 3264, K. 2006/2899, 14.11.2006 (http://www.danistay.gov.tr). "The article 22(1)(b) of the treaty between Turkey and Cyprus prevents Turkey to apply corporate income tax on dividends received from Cyprus. …", Supreme Administrative Court, 4th Section, E.2000/3101, K.2001/4120, 6.11.2001 (http://www.danistay.gov.tr).

[76] "The treaty between Turkey and Belgium prevents Turkey from applying income withholding tax on income from leasing of aircrafts, since the income must be characterized as business income. ...", Supreme Administrative Court, 4th Section, E.2000/4141, K. 2001/4613, 28.11.2001 (http://www.danistay.gov.tr). "The 10% income withholding tax applied on royalties according to Article 10 of the treaty between Turkey and United Kingdom includes also the funds calculated on income taxes, since such funds must be characterized as "Turkish taxes" with regard to Article 2 of the treaty. …", Supreme Administrative Court, 4th Section, E.2001/2866, K.2002 / 2208, 23/05/2002 ; Supreme Administrative Court, 4th Section, E.2000/1965, K.2001/2088, 16.5.2001 (Database: http://www.hukukturk.com).

[77] Supreme Administrative Court, 7th Section, E. 2001/4650, K. 2005/1507, 30.6.2005; Supreme Administrative Court, 7th Section, E.1997/3991,K. 1998/680, 25.2.1998 (http://www.danistay.gov.tr).

In the Turkish legal system, Article 90(5) of the TC provides that the treaties enacted with other countries are regarded as laws, but their unconstitutionality cannot be asserted before the Constitutional Court. The most recent amendment to the Constitution[78] introduced a provision, according to which in situations where domestic legislation conflicts with international treaties regarding human rights, international treaties prevail[79]. Thus, the human rights conventions hierarchically supersede domestic laws; however, such treaties are not treated on the same level as the Constitution or above it[80].

Under the procedural rules of the parliament[81], the parliamentary committees are under the obligation in the first instance to review whether draft bills and proposals are in conformity with the TC. In cases where a committee considers that a draft bill or a proposal conflicts with the Constitution, it is obliged to produce a reasoned memorandum and reject the draft bill or the proposal as a whole without negotiating its provisions (Article 38). In the view of the author of this report, however, under the combined effect of Article 90 and several articles conferring on the State organs a duty in special cases not to violate the obligations arising from international law (Articles 15 and 16 and 42, etc.), the parliament is obliged during its legislative process to take into account the international human rights treaties, which upon ratification are integrated in the national legal order and have binding effect[82].

Nevertheless, in cases where a domestic tax law released by the parliament conflicts with the ECHR, whether the duty to determine the inconsistency between the "law" and the "Convention" vests in the TCC is a controversial question, because according to Article 148 of the TC, the TCC has the power to examine the constitutionality, in respect of both form and substance, of laws, decrees having the force of law, and the procedural rules of the parliament. Thus, the TCC would not deal with such a conflict between the domestic law and another type of "law", namely the ECHR, since under the legislation regulating the Court's function; it is not its duty to examine the consistency of laws[83] or to abolish a domestic law in terms of an international human rights convention[84]. Consequently, the relevant amendment on Article 90 (5) would not cause any difference as this has always been the constitutional

[78] Official Gazette of 22.5.2004, No.25469.
[79] Article 90(5) of the TC: "International agreements duly put into effect bear the force of law. No appeal to the Constitutional Court shall be made with regard to these agreements, on the grounds that they are unconstitutional. In the case of a conflict between international agreements in the area of fundamental rights and freedoms duly put into effect and the domestic laws due to differences in provisions on the same matter, the provisions of international agreements shall prevail".
[80] Yalti, Billur, Vergi Yukumlusunun Haklari, Beta, Istanbul, 2006, p.28 et seq.
[81] See footnote 45.
[82] Yalti, Billur, Uluslararasi Vergi Anlasmalari, Beta, Istanbul, 1995, pp.79-80.
[83] The TCC has previously expressed this view in so many instances, although they were not tax cases. See, for example, Constitutional Court, E.1966/9, K. 1968/25, 19.6.1968 (Official Gazette of 29.1.1970, No. 13412); Constitutional Court, E. 1969/37, K.1971/8, 21.1.1971 (Official Gazette of 31.8.1971, No.13942)
[84] Yalti, Vergi Yukumlusunun Haklari, pp.28-29.

jurisprudence, i.e. the TCC would only examine the consistency of a law with the constitution itself; however, in interpreting the provisions of the TC it might refer to the ECHR, and the case law of the European Court of Human Rights (ECtHR), as an ancillary and supportive source[85]; this has occurred only once in tax cases. In the relevant case[86] on the travel ban applied to taxpayers who owed the Treasury un-paid tax debts above a certain amount, the TCC interpreted the constitutional freedom of movement and establishment (Article 23, TC) referring explicitly to the Reiner judgment of the ECtHR[87] and cancelled the law as disproportional[88].

In the light of the literal meaning of Article 90(5), one may argue that, in tax cases, the determination of the inconsistency of a tax law and the ECHR vests primarily in the lower tax courts, or regional administrative courts, or the Supreme Administrative Court, wherever the hearing is held. Since the ECHR has superiority over a conflicting national tax law, this would lead to the necessity for a lower tax court or the higher courts, to neglect a national tax rule and apply the relevant provision of the ECHR; meaning that the administrative courts would cancel an administrative tax decision relating to an individual taxpayer on grounds that the tax decision conflicts with the ECHR. However, this outcome may also give rise to various controversial and problematic discussions, including whether such a judicial decision intrinsically refers to a determination of a constitutional conflict between the national tax law and the TC; whether the administrative court would find itself competent to determine such a constitutional problem, or, on the contrary, would regard its duty and function as only to examine the consistency between decisions of the tax administration and national laws[89]. In the view of the author of this report, the supervision of the legal consistency of an administrative tax decision by the judiciary also includes an evaluation of consistency with the ECHR, and Article 90 (5) of the TC requires the administrative judges to "pierce the legal-veil"[90], otherwise the rule in Article 90(5) would be meaningless. However, keeping in mind that the Supreme Administrative Court has so far directly

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85 Yalti, Vergi Yukumlusunun Haklari, pp.28-29.

86 Constitutional Court, E.2007/4, K.2007/81, 18.10.2007 (Official Gazette of 8.12.2007, No. 26724). It must be stated that prior to the TCC's decision, the relevant national provision was criticized in the tax literature under the standards set in the Reiner case. See, Yalti, Billur, "*Vergi Borcu Nedeniyle Yurtdisina Çikis Yasagi: ABD Yuksek Mahkemesinin Lipper Kararindan IHAM'in Riener Kararina: Hukuk Standartlari*", Barolar Birliği Dergisi, No. 66, September/October 2006.

87 European Court of Human Rights, Riener v. Bulgaria, No. 46343/99, 23.5.006 (Hudoc Database: http://cmiskp.echr.coe.int).

88 The case on the taxpayer's right to remain silent appears to be opposite to the one where the TCC held the imprisonment penalty applied to taxpayers who did not submit their documents and books to the tax auditors (Art.359, TPL) constitutional without referring to the jurisprudence of the ECtHR (e.g. JB v. Switzerland, No. 31827/96, 3.8.2001 final) although the lower referring court asserted that there has been a conflict between the TPL and the ECHR (Constitutional Court, E.2004/31, K.2007/11, 31.1.2007(Official Gazette of 18.5.2007, No. 26526). For a previous criticism of Article 359 of the TPL under the standards set out by the ECtHR, See Yalti, Billur, "*Vergi Hukukunda Susma Hakki: VUK, 359(a)(2)'nin Anayasaya Aykiriligi Sorunu*", Vergi Dunyasi, No. 285, May 2005.

89 Yalti, Vergi Yukumlusunun Haklari, p.35 et seq.

90 Azrak,Ulku, "*Idari Yargida Anayasaya Uygunluk Sorunu*", Anayasa Yargisi, No.9, Ankara, 1992, pp.323-324.

applied the international human rights conventions only in a few non-tax cases[91], the courts may not explicitly neglect a national tax law and only interpret it in conformity with the Constitution and the ECHR as a supportive instrument; this was the case in the tax jurisprudence of the Supreme Administrative Court referring to the right to a fair trial regulated both under Article 36 of the TC and Article 6 of the ECHR[92]. In cases where the conflict between the law and the ECHR is clear and obvious, the lower courts may only refer the case to the TCC, as was done in the case concerning taxpayer's right to remain silent[93].

Finally, the wording of Article 90(5) of the TC contains the term "disputes", which refers only to the judicial process; thus, it does not confer any duty to the tax administration to measure the consistency of a national tax law and the ECHR[94].

3.2.2 Treaties

Under the current constitutional system, superiority is attributed only to human rights treaties; thus, ordinary treaties are treated on the same footing as national laws. Prior the constitutional amendment on the superiority of human rights treaties, the TCC held that international treaties can be overridden by a subsequent domestic law. According to the Court, any conflict between domestic law and an international treaty could be solved under the principles established as *"lex posterior derogate legi priori"* and *"lex specialis derogat legi generali"*[95]. Against this legal background and the terminological meaning of the constitutional amendments, the judiciary may be expected to come to a conclusion that the ordinary treaties –such as tax treaties- do not supersede the domestic law. However, in the opinion of the author of this report, overriding a treaty which has created international obligations as such is not acceptable in the light of the *pacta sund servanda* principle[96] arising from Article 26 of the Vienna Convention on the Law of Treaties (1969)[97]. Although the parliament's practice on tax treaties does not contain any controversial or conflicting national legislation affecting tax treaties, in theory it might be asserted that in cases of conflict between domestic tax rules and a tax treaty, the treaty has to be construed as *lex specialis*. Further, there is room for another interpretation, i.e. a tax treaty may be construed as a source not only limiting the taxing power of the States but also conferring rights on taxpayers; thus affecting

[91] See Erkut, Celal, Kamu Kudreti Ayricaliklari ve Tutuk Adalet Anlayisi, Yenilik Basımevi, Istanbul, 2004, p.181 et seq.
[92] e.g. Supreme Administrative Court, 7th Section, E.2003/1463, K.2004/3651, 30.12.2004 (in Lebib Yalkin Yayinlari, KDV Mevzuati, Vol.B, No.152).
[93] See footnote 87.
[94] Yalti, Vergi Yukumlusunun Haklari, p.24.
[95] Constitutional Court, E.1996/55, K.1997/33, 27.2.1997 (Official Gazette of 24.3.2001, No. 24352)
[96] Yalti, Uluslararasi Vergi Anlasmalari, pp.84-85.
[97] United Nations, Treaty Series, vol. 1155, p. 331. Turkey has not participated in the Vienna Convention, however, the principles regulated under it may be considered customary international law and so have legal effect.

their property rights; independent from its title, it may be characterized as a treaty relating to human rights having superiority over domestic law. In the jurisprudence of the Supreme Administrative Court no conflict cases between a national law and a tax treaty as such have been heard so far.

3.3. Legal remedies for effective protection

In the Turkish constitutional review system, either the parliamentarians[98] or the lower courts may apply to the TCC for the annulment of a law. Thus, taxpayers do not have the right to apply individually and directly to that court. Article 152 of the TC, however, regulates the claim of the unconstitutionality of a law before other courts; i.e. taxpayers may claim the unconstitutionality of a tax law which is applicable in the relevant case. Accordingly, "[i]f a court which is trying a case, finds that the law or the decree having the force of law to be applied is unconstitutional, or if it is convinced of the seriousness of a claim of unconstitutionality submitted by one of the parties, it shall postpone the consideration of the case until the Constitutional Court decides on the issue. If the court is not convinced of the seriousness of the claim of unconstitutionality, such a claim together with the main judgment shall be decided upon by the competent authority of appeal". In the Turkish literature, it has always been criticized that the constitutional complaint procedure has not been recognized to individuals, and such an individual access, comprising both the opportunity of challenging a legal provision and a remedy against the violation of constitutional rights by administrative acts must be granted for better protection of individual rights[99].

On the other hand, since Turkey has recognized by Decree No. 87/11439 the right of individual petition to the ECtHR[100], individuals claiming to be the victim of a violation by Turkey of rights set forth in the ECHR or a protocol thereto, may also apply to the ECtHR after all domestic remedies have been exhausted. In theory, Turkish taxpayers have the opportunity to apply to the ECtHR in cases where they think that a tax law or an administrative decision thereof has infringed rights arising from the Convention. However, at least to the knowledge of the author of this report, the two tax cases that

[98] Article 150 of the TC provides: The President of the Republic, parliamentary groups of the party in power and of the main opposition party and a minimum of one-fifth of the total number of members of the Turkish Grand National Assembly shall have the right to apply for annulment action to the Constitutional Court, based on the assertion of the unconstitutionality of laws in form and in substance, of decrees having the force of law, of Rules of Procedure of the Turkish Grand National Assembly or of specific articles or provisions thereof.

[99] In tax law area see, for example, Saban, Nihal, "*Turk Vergi Sisteminin Uluslararasi Boyutlari-Yorum*" - Turkiye III. Vergi Kongresi, 23-24 Mayis 1996, Istanbul Yuksek Ticaret ve Marmara Universitesi Iktisadi Idari Bilimler Fakultesi Mezunlar Dernegi Yayini, p.98; Yalti, Billur, "*Vergi Adaleti Kavraminda Soyuttan Somuta: AYM Kararlarini Esitlik, Ozgurluk ve Sosyal Devlet Kavramlari ile Okumak*", Vergi Sorunları Dergisi, No. 119, August 1998).

[100] Official Gazette of 21.4.1987, No.19438.

have so far been brought before the ECHR by Turkish taxpayers were found by the Court to be inadmissible[101].

In the Turkish legal order[102], the judicial remedies granted to a taxpayer are organized within the administrative judiciary; i.e. there are no independent and separate tax courts. However, there are specialized subordinate tax courts within the administrative judicial organization (see above). In theory, the judicial remedies accessible for a taxpayer cover not only the protection of rights granted by domestic law, but also those rights arising from treaties. As for the tax treaties, a taxpayer may practically discuss and demand his/her rights granted in a tax treaty to be applied in a tax case; however, in cases of rights arising from the ECHR, such effectiveness is controversial due to the uncertainty over the hierarchical position of the convention and the legal order regarding the duties of lower courts, as mentioned above.

Finally, under Article 116 of the TPL, substantial errors may be corrected by the tax office. In cases where a claim is lodged within 30 days and the tax office rejects the request for correction, the case may be brought before the tax court or before the Ministry of Finance. If the Ministry also rejects the claim, the matter may be brought before the tax court as a judicial conflict. Since this administrative remedy is limited to "errors" and is not applied in cases of interpretive disputes arising from a specific tax law which may only be brought before a tax court, it is hard to characterize it as an effective remedy for the application of a tax treaty or a convention from which legal interpretive conflicts usually arise.

[101] Zekeriya Kurtça v. Turkey, Application No. 24834/94, 15 May 1996 ; Özgür Akgöçmen v. Turkey, Application no. 43840/02, 4th Section, 3 June 2008 (http://cmiskp.echr.coe.int) .

[102] Danistay Kanunu, No.2575 (Official Gazette of 20.01.1982,No.17580); Bolge Idare Mahkemeleri, Idare Mahkemeleri ve Vergi Mahkemelerinin Kurulusu ve Gorevleri Hakkinda Kanun, No.2576 (Official Gazette of 20.1.1982, No.17580); Idari Yargilama Usulu Kanunu, No.2577 (Official Gazette of 20.1.1982, No. 17580).

United Kingdom: Separation of Powers in Tax Law (Sandra Eden)

Preliminary remarks on the constitutional arrangements in the UK

The UK famously is said to have no written constitution, which is not entirely rue, although it is certainly not written down all in one place. To a large degree the institutions of power are governed by conventions which are binding principles or rules derived from practice rather than law. This makes the constitution extremely flexible, but sometime contradictory and it can be difficult to describe the precise relationship between different institutions.

The UK is a parliamentary democracy in which representatives are elected to Parliament, which is the body empowered to make legislation. However, the act of governing the people takes place through the second arm of the state, the executive, made up of Departments, usually headed by Ministers selected from members of the political party with a parliamentary majority, and largely staffed by civil servants (non-party political government employees). The government is ultimately responsible to Parliament. The judiciary is the third arm of the government, made up of independent appointed judges.

The primary characteristics of the UK constitution are, under the orthodox view, the rule of law, the separation of powers and parliamentary sovereignty.

The rule of law and the separation of powers are concepts deeply embedded in European political culture. These are not concepts which have fixed meaning: at one extreme the rule of law is the concept that law should not only be made according to a particular political process but that the laws themselves embody values such as fairness, non-retrospectivity, stability, accessibility, the right to be heard and equality before the law. Legitimacy is achieved by reference to a set of widely accepted set of values rather than by simply the parentage of the law. The narrow of view of the rule of law is that power should not be exercised without legal authority and all are equal before the law. The rule of law is a constitutional idea rather than a rule with certain content.

The principle of the separation of powers seeks to combat tyranny by dividing functions of government between groups with different interests so that each provides checks and balances on the other. The three branches of governement, Parliament, the executive and the judiciary, in practice have some overlaps, for example ministers (who run different departments of the executive) are drawn from elected members of Parliament. Another example of overlap, now removed, was the practice of appointing the most senior judges in the UK to the second chamber of Parliament, the House of Lords. In 2009 the judicial function of the House of Lords was replaced by the Supreme Court, staffed by independently appointed judges.[1]

The role of Parliament is usually to discuss, approve, amend or reject proposals for legislation which come from the executive, rather than independently to promote policy. The function of the executive is to implement policy and the role of the judiciary is to ensure that the executive keep within their legal powers and to interpret the law rather than leave the executive to determine this meaning for itself.

In classical constitutional theory, the UK Parliament has unlimited lawmaking power and laws made by Parliament cannot be challenged by any other body. Law is what the Queen in Parliament enacts. In the words of Dicey, the leading British constitutional lawyer of the nineteenth century,

"The principle of parliamentary sovereignty means neither more nor less than this: namely, that Parliament thus defined has, under the English constitution, the right to make or unmake any law whatever; and, further, that no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament."[2]

The source of parliamentary sovereignty has been a matter of protracted academic debate. It is regarded by some as deriving from the common law: "Parliament is sovereign because the judges acknowledge its legal and political supremacy."[3] Certainly, if the judiciary had not adopted a self-denying ordinance in its approach to the application of statutes, the constitution of the UK might have developed very differently. This positivist approach to law has a number of practical implications. First, Parliament can never bind a future parliament, or be bound by its predecessors. Second, there are no constitutional limits on the subject matter of legislation. This means that there can be no review of legislation by the courts on the basis of judicial review by reference to "higher" constitutional principles. Third, each Act of Parliament is of equal ranking, irrespective of whether it concerns the regulation of caravan sites or membership of the European Union.

[1] Technically, the judges who were formerly Law Lords and were transferred to the Supreme Court are still members of the House of Lords, although they have no voting rights.
[2] A. Dicey, *An Introduction to the Study of the Constitution* (1885) p. 39.
[3] W. Wade, "The Basis of Legal Sovereignty" (1955) *Camb. L.J.* 172.

This classical account of parliamentary sovereignty must be subject to revision in the light of the UK's accession to the European Union and the coming into effect of the Human Rights Act 1998, but one of its most important manifestations is that the courts regard themselves as having no power to strike down a statute because of its failure to have regard to some fundamental rights protected by a written constitution. Unlike the US or Germany, the UK has no constitutional court.

Tax law is simply part of UK law as any other piece of legislation and has no special constitutional status. The parliamentary process for enacting tax law is more or less the same as for any other law,[4] there are no special tax courts, (apart from the tribunals which hear first level appeals), no special rules for applying tax law and the tax authorities are subject to exactly the same control by the courts as any other public body.

Tax may only be imposed by Parliament and not by judges or by Royal Prerogative. This derives from the constitutional crisis in the 17th century, provoked in part by the assertion by the Stuart monarchs of the Crown's prerogative to tax. This crisis led to the Bill of Rights 1689 in terms of which the Crown's power to raise taxation was made subject to parliamentary approval.

The UK is a unitary state made up of three jurisdictions: England and Wales, Northern Ireland and Scotland. Over the last ten years, devolution of legislative and executive powers has taken place from the UK Government to Wales, Northern Ireland and Scotland. However, responsibility for central taxation remains in the hands of central government, except that under the Scotland Act 1998, the Scottish Parliament has limited competency to raise or lower the basic rate of income tax by up to 3%. It has not used this power to date. Responsibility for local taxation is more devolved, but over 90% of tax in the UK is raised by central government.

1. Relationship between the Parliament and the tax authorities: the influence of the tax authorities on tax legislation

[4] Since 1911, the second chamber, the House of Lords, does not take part in the process of passing legislation in relation to taxes by virtue of the Parliament Act 1911 and parliamentary convention. A limited degree of House of Lords involvement has been possible since 2003, when a sub-committee of the House of Lords was set up to scrutinize the Finance Bill, limited to a consideration of technical aspects rather than policy. The lack of House of Lords involvement in tax legislation has been cited as a contributory factor to the defects therein.

Almost all direct taxes are contained in primary legislation, i.e. Acts of Parliament and will go through the procedures described below. Subordinate legislation[5] (regulations in the form of statutory instruments), is used regularly in the context of the indirect taxes and tax credits. Subordinate legislation is not subject to parliamentary scrutiny, although it may require approval by resolution of both Houses of Parliament, and its legality can only be challenged through the courts on limited grounds.[6]

There are two main relevant government departments concerned with taxation in the UK, the Treasury and Her Majesty's Revenue and Customs (HMRC). The Treasury is one of the most powerful government departments, headed by the Chancellor of the Exchequer, effectively the finance minister. It is responsible for formulating and implementation economic and financial policy and is in practice the sole instigator of tax legislation. HMRC is a non-ministerial department with responsibility for the collection and management of most forms of taxation.[7]

Prior to the implementation of the proposals of the O'Donnell Review undertaken in 2004,[8] the division of responsibilities for tax policy between HMRC and the Treasury was blurred. The Review concluded that any coherence in tax policy in the UK was despite the then organizational structure rather than because of it, and it proposed that the Treasury be responsible for overall tax policy with HMRC taking a more limited role, largely limited to identifying areas of avoidance or problems in the smooth application of the tax laws. This proposal was implemented in 2005.
Whether or not this separation of policy from the delivery arm of the tax authorities has led to better policy making is subject to debate. In evidence to the House of Commons Select Committee on Economic Affairs in 2008, whilst those from the Treasury regarded the present position as satisfactory, private sector witnesses were highly critical.[9] Included in the list of problems identified by a former adviser to Gordon Brown on tax policy were remoteness from practical application of the tax system, a lack of evidence based policy making and a lack of post-implementation review of the success of policy changes.[10]

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[5] Also known as delegated legislation, as the authority to make regulations is delegated to ministers by Parliament. This authority is given only by primary legislation (there is no inherent power).
[6] For example, ultra vires, uncertainty, unreasonableness, conflict with EC law.
[7] Established under the Commissioners for Revenue and Customs Act 2005.
[8] The Review of the Revenue Departments, 1994. Available at http://www.hm-treasury.gov.uk/bud_bud04_odonnell_index.htm
[9] HL Select Committee on Economic Affairs, 2nd report of Session (2007-08) The Finance Bill 2008 Vol II available at http://www.publications.parliament.uk/pa/ld200708/ldselect/ldeconaf/117/11702.htm#evidence.
[10] C Wales, "The making of tax policy in the post-O'Donnell world: can the HMT-HMRC "policy partnership" meet the challenge?" [2009] BTR 245.

There is a constitutional principle in the UK that income and corporation tax have to be re-imposed annually, so each year there is at least one Finance Bill. Occasionally there are two. This means that, unusually for a government department, the Treasury has guaranteed access to Parliamentary time each year.

The strength of the political party in office under the Westminster model of government means that tax policy is to an unusual extent within the control of that party. In practice, it is possible for any government to consult on proposed changes at three main stages– in the formulation of broad policy, on detailed proposals and on draft legislation. Formal consultation at the first stage in the UK is almost unknown in the tax area, although it is inevitable that informal discussions take place. Formal consultation, if it is going to take place at all, is normally only issued at an advanced stage, after policy has been determined, and is thus normally restricted to technical implementation rather than informing policy development. In recent years, in accordance with the UK policy guidelines on consultation[11] there has been much more consultation on detailed proposals although there is no legal obligation to consult.[12] Less commonly, draft legislation is circulated prior to publication as a bill. Despite the increase in consultation, there have been examples in recent finance bills where significant changes were introduced without adequate consultation. The recent changes to the taxation of non-domiciliaries have been described as "an object lesson in how not to legislate. True, draft clauses were produced for consultation but these were riddled with errors and conceptually unsound in many places. Amendments were made, often with the help of outside professionals, but the legislation was far from constituting a coherent code when the Finance Bill was published. Substantial and essential amendments were still being produced at a late stage, leaving insufficient time for adequate scrutiny both in and outside Parliament."[13] Once policy emerges from the Treasury in the form of a draft bill, there is little scope for further development during the parliamentary stages.

The Finance Bill is introduced into the House of Commons by the Chancellor of the Exchequer and the main debate, since 1967, takes place before a "standing committee" rather than being debated in front of the whole House of Commons. The opposition is allowed to choose some clauses to be debated in the whole House, which will be the more controversial clauses from a policy aspect.

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[11] The UK Government has a Code of Practice on Consultation available at http://www.berr.gov.uk/files/file47158.pdf and the specific practice in the tax context is as http://www.hmrc.gov.uk/large-business/consultation-framework.pdf.

[12] The House of Lords Select Committee, referred to in note 11, was critical of the consultation process on certain of the aspects of the 2007-08 Finance Bill.

[13] "Making taxes simpler" a report of a working party chaired by Lord Howe of Aberavon. Available at http://www.tax-news.com/asp/res/makingtaxessimpler.pdf.

Standing committees are made up of members of parliament drawn from the political parties in proportion with their respective strengths in the House of Commons. Standing committees on Finance Bills typically meet about ten times in relation to each Bill.

The clauses (individual sections) of the Bill are in theory debated one by one, although in practice it is only possible for a limited number to be considered in detail. Amendments can be suggested, both from the Government side (who might have had a chance to reconsider draft legislation following the reaction of professional bodies and others to the Finance Bill) and from the Opposition, and it is the clauses to which amendments have been proposed which are likely to have most attention.

Proposals for amendments of the Bill are then voted upon, although the chances of an Opposition amendment being successful is extremely limited as the members of the standing committee tend to vote on party lines. However, on occasion the Government side will undertake to reconsider a contentious aspect and may subsequently move for its own amendment to take into account the opposition's objections.

Once the Committee stage has been concluded, the Bill is given a final reading in the House of Commons at which there is an opportunity to vote the Bill into legislation. Further amendments may be moved at this stage, but again it is unlikely that opposition amendments will be successful.

So, in summary, once policy has been decided, is highly likely that it will be implemented without serious challenge.

Parliamentary scrutiny of tax legislation is almost universally regarded as inadequate in the UK. There are a number of reasons for this

- the nature of the subject matter (often extraordinarily complex);
- the Parliamentary timetable (unless the Act of Parliament follows the Budget within about four months, any Budgetary resolutions fall); and
- the exclusion of the House of Lords from the debates.

A report on the process of making of tax legislation in 1993 concluded that,

"the present system, which allows so much tax legislation to reach the statute book in the form in which it does, reflects in part the lack of balance in the process: the absence at any stage in the process of any institution that is entitled to demand and to receive an explanation of the policy and of whether

the complexity it involves is justified. Parliament may be an imperfect instrument with which to fulfil this function.[14]

More recently, the following, taken from a 2008 report to the Mirrlees Review, provides a critical summary:

"in the UK the processes of analysis, negotiation, and marketing take place much more within the Executive Branch than in the legislature, or indeed in politicians' campaigns for election. The Executive has extensive agenda power, and Government proposals are rarely subject to significant amendment, let alone veto. The centralisation of revenues, lack of information and expertise in Parliament, rarity of coalition bargaining, and absence of any powers of initiative and referendum reinforces the familiar executive dominance of British politics."[15]

The professional bodies are also critical of current procedures. For example, there have been calls from the Chartered Institute of Taxation (the professional body of tax advisers) for a tax law commission to be set up to assist in the promulgation of and the scrutiny of tax legislation[16] and the body representing chartered accountants in England and Wales, has called for more consultation.[17] Many more examples of criticisms by the professional bodies could be found.

2. The meaning of legal indeterminacy in tax matters

Tax legislation in the UK is in many parts extremely detailed, which is part of the reason for its extraordinary length and complexity.[18] However, reference is still made to indeterminate concepts, for example "trade" or "income". On the whole, however, the UK would be regarded as having a rule-based rather than principle-based approach to legislation.

The debate about drafting techniques in the UK has taken place largely in the context of tax avoidance. Traditionally, the courts' approach to the construction of legislation was literal: an approach possibly encouraged by a detailed drafting style, although an alternative explanation is that the legislature, in the

[14] IFS *Making Tax Law* at http://www.ifs.org.uk/comms/budd03.pdf.
[15] Alt, Preston and Sibieta, The Political Economy of Taxation, draft report to the Mirrlees Review, at http://www.ifs.org.uk/mirrleesreview/reports/political_economy.pdf .
[16] CIOT, at http://www.tax.org.uk/attach.pl/6752/7908/Tax%20Law%20Briefing%20Mar08%20FINAL.pdf.
[17] ICAEW at http://www.parliament.uk/documents/upload/ICAEW2.pdf.
[18] According to the Wall Street Journal, the UK has the second longest tax legislation in the world, with India taking pole position. This is a result not only of the detailed approach, however, as the "rewrite" (putting the legislation into clearer English) has also had an effect on the length.

knowledge of the court's the literal approach, supplied the detail itself.[19] Over the last 25 or so years however, a more purposive approach by the judiciary has been evident in the construction of tax statutes, not just in the tax avoidance area. This has not yet been reflected to any significant degree in any corresponding change in the style of UK legislation.

There are many in the UK and elsewhere who have argued for more principle-based drafting, generally suggesting a hierarchy of stated principles through which more detailed rules underneath can be interpreted.[20] However, more recently, the notion of principle-based drafting has spread to the Treasury and HMRC who are considering it in relation to avoidance legislation in the large business sector.[21] This is of course a long way from re-evaluating the approach in tax legislation generally.

Turning to the role of the judges in tax law, as noted earlier, under the doctrine of parliamentary sovereignty, what "the Queen in Parliament enacts is law".[22] It is a fundamental common law tradition that the judges will uphold legislation enacted by Parliament.[23]
The UK judiciary have been critical of legislation on a variety of grounds, complexity being the most common. Indeed, there have been in the past occasions when the judiciary has not applied legislation on the basis that it is incomprehensible: in the words of Lord Simonds in the House of Lords in 1946,

"Yet I can come to no other conclusion than that the language of the Section fails to achieve its apparent purpose, and I must decline to insert words or phrases which might succeed where the draftsman failed."[24]

However, indeterminacy is a different matter from complexity or mis-drafting, and in such cases the courts will regard it as their task to supply the necessary content.

More recently, the theory of the sovereignty of the UK Parliament has been placed under limitations through membership of the European Union and the entry into force of the Human Rights Act, each

[19] Avery Jones "Tax Law: Rules or Principles?" [1996] BTR 580.
[20] E.g. Tax Law Review Committee *Final Report on Tax Legislation*, 1996 at http://www.ifs.org.uk/comms/comm55.pdf; Drummond "A purposive approach to the drafting of tax legislation" [2006] BTR 669; Avery Jones "Tax Law: Rules of Principles" [1996] BTR 580, Freedman, "Defining Taxpayer Responsibility: In Support of a General Anti-Avoidance Principle," [2004] BTR 332-357; Picciotto "Constructing compliance, game-playing tax law and the regulatory state" (2007) Law and Policy, 29 p. 11.
[21] HMRC, *Principles-based approach to financial products avoidance* [2007].at http://www.hmtreasury.gov.uk/d/pbr08_financialproducts_802.pdf.
[22] Barnet, *Consitutional and Administrative Law* (6th ed) p. 155.
[23] Dicey, *Introduction to the study of law of the constitution* (1885), HLA Hart, *The concept of law* (1961). See further Eden "A tax on all blue-eyed persons" in Greggi (ed) *Bridging the Sea* (forthcoming).
[24] *IR C v Ayrshire Employers Mutual Assurance Association* (1946) 27 TC 331.

of which afford a basis of challenge to domestic legislation. So far, however, these limitations have not been called upon in the name of indeterminacy.

So, in sum, it seems most unlikely that the UK courts would deny the effect of legislation through indeterminacy.

3. The consequences of legal indeterminacy in tax matters

The final word in a case of legal indeterminacy lies with the courts. Obviously in a legal system with a strong tradition of *stare decisis*, previous court decisions are very important in the interpretation of terms used in legislation and lower courts are bound by the decisions of higher courts.

HMRC makes available to the public a considerable amount of its internal practice guidance available and frequently publishes statements as to how it interprets legislation. These statements are not binding on taxpayers, who can challenge them in court if they disagree with HMRC's interpretation, but they provide extremely useful guidance for the taxpayers. The extent to which such *general* guidelines issued by HMRC are binding on HMRC is perhaps not entirely settled but it seems unlikely that they are.[25] Authoritative decisions on indeterminacy can only be made by courts or subsequent legislation.

In the context of direct tax, there is no general statutory obligation on the tax authorities to give rulings, although in certain areas, usually where there is some kind of anti-avoidance motive test attached to a relief or benefit in the legislation, the taxpayer has a statutory right to call for a ruling.[26] However, HMRC is prepared give non-statutory clearances to business taxpayers where there is "demonstrable material uncertainty about the tax consequences of transactions affecting their business."[27] It will not advise on tax avoidance schemes. In relation to non-business taxpayers, non-statutory clearances will only be given by HMRC in limited categories.[28]

[25] *R (on the application of Gaines Cooper) v HMRC* [not yet reported – 28 October 2008]. This dispute continues to rumble on in the UK courts.
[26] See the list at http://www.hmrc.gov.uk/cap/statutory-clearances.pdf.
[27] HMRC website http://www.hmrc.gov.uk/cap/links-dec07.htm.
[28] HMRC website Code of Practice 10 at http://www.hmrc.gov.uk/pdfs/cop10.htm. These are
- the interpretation of legislation passed in the last four Finance Acts
- the application of double taxation agreements
- whether someone is employed or self-employed
- Statements of Practice and extra-statutory concessions
- other areas concerning matters of major public interest in an industry or in the financial sector.

Both statutory and non-statutory clearances are binding on HMRC in response to a specific request by a taxpayer who has made full disclosure, on the basis of the administrative law doctrine of legitimate expectation.[29] If it turns out that the advice is wrong in law, the clearance will be withdrawn, although not with retrospective effect.

4. Relationship between the tax administration and the domestic tax courts

The UK courts, where requested to do so by the taxpayer, control application of the law.
They do not take into account rulings and binding information emerging from the tax administration in making decisions on the substantive law, although HMRC might be held to such statements in appropriate circumstances under the administrative law doctrine of legitimate expectation, noted earlier.

HMRC applies the law as it understands it, whether this understanding derives from legislation or decisions of domestic courts or the ECJ. It has often sought to change the effect of a domestic court's decision for the future through legislation, but until it is so changed, it respects the decision. There may be areas at the margins where HMRC can be criticized for taking a slightly biased interpretation of a judgment, but disregard of the law by HMRC is not viewed as a major issue in the UK.

Formally, the courts and HMRC are entirely independent. Inevitably, there is some degree of overlap. For example, past the first appeal stage, it is often HMRC who chooses to litigate further. As a "repeat player" with significant resources, it is able to litigate strategically to try to get decisions which are favourable to itself. This means that the courts' agenda is to an extent chosen by HMRC, although it is not the case that the courts are influenced by the outcome HMRC desires and there is no sense of undue bias in favour of the tax authorities at the expense of the taxpayer.

HMRC is legally bound by a decision of the court unless and until the decision is overturned on appeal. Permission is required for appeal to the Supreme Court, the highest court in the UK, and is only granted where the point is sufficiently difficult or important.

As part of its overall litigation strategy, in the event that it loses a case, HMRC can and sometimes does pursue litigation in similar cases in order to achieve a more favourable result, but the extent to which it is able to do this successfully is limited by the doctrine of *stare decisis*. Alternatively, different arguments

[29] E.g. *R v IRC ex parte Matrix Securities Ltd* [1994] BTC 85.

could be made in order to tackle similar situations, but this would not strictly be described as circumvention.

5. Relationship between different legal sources: legal pluralism

Section 2 of the European Communities Act 1972 provides for the recognition of all directly enforceable Community law "passed and to be passed". There is a tension in the UK between the doctrine of parliamentary sovereignty (which includes the principle that no parliament can bind a subsequent parliament) and the latter part of this section ("to be passed") and this tension was to an extent resolved by the judicial invention of a fiction - that each piece of legislation is deemed to contain a provision which states that the UK legislation is without prejudice to EU legislation.[30] Technically, the UK Parliament could expressly exclude EU legislation, but it is unlikely in the extreme to do so.

Turning to the implementation of EC law in the UK by the domestic courts, if domestic legislation infringes directly enforceable Community rights, it is a fundamental principle of both EC and UK law that the national court is obliged to disapply that law and it is treated as being void. However, the courts are required as far as possible to give an interpretation to domestic legislation as far as possible to give effect to EC law, under the principle of conformity, sometimes referred to as the *Marleasing* principle.[31] The extent to which the courts can adopt a strained construction of domestic legislation is a matter for domestic law rather than EC law.

A summary of the current approach of the UK courts towards the construction of domestic legislation against the background of EC law was recently approved by the Court of Appeal in the following terms,

> "(a) It is not constrained by conventional rules of construction:
>
> (b) It does not require ambiguity in the legislative language;
>
> (c) It is not an exercise in semantics or linguistics;
>
> (d) It permits departure from the strict and literal application of the words which the legislature has elected to use;
>
> (e) It permits the implication of words necessary to comply with Community law obligations;

[30] *R v Secretary of State v Factortame (No 2)* [1990] 3 WLR 818.
[31] Case C-106/89 *Marleasing SA v La Comercial Internacional de Alimentacion SA* [1990] ECR I-4135.

and

(f) The precise form of the words to be implied does not matter." [32]

On the other hand, regard should be had to the borderline between interpretation and amendment of domestic legislation (the latter being impermissible) and, further, an "interpretation should not be adopted which is inconsistent with a fundamental or cardinal feature of the legislation" or which would "give rise to important practical repercussions which the court is not equipped to evaluate."[33]

When one turns to the application of the EC law in UK tax cases, one finds a significant, although not surprising, distinction between cases concerning direct tax and those where the issue relates to VAT.

Direct tax cases which concern principles of EC law generally arise from the articles of the EU Treaty on the fundamental freedoms. These freedoms are extremely broad, do not specifically relate to tax and the related ECJ jurisprudence has been largely impenetrable. It is extremely difficult to judge whether a domestic provision is or is not in breach of the freedoms except to the extent that it is identical or almost identical to a provision already considered by the ECJ. It would have been a brave man who would have bet on the result of the cross-border loss relief case of *Marks and Spencer plc v Halsey*.[34] Against this uncertainty, if it does not appear that domestic legislation is in breach of EC law, there is no room for the application of the *Marleasing* principle, or for the court declaring the UK legislation to be void. Another reason why the impact of EC law is limited in direct taxation is that the Treaty freedoms are only available in a cross border situation when the freedoms are being exercised. There is very little place for EC law in direct tax in a domestic situation and so the number of cases is limited.

In direct tax cases, the courts have been extremely slow to declare a provision of UK domestic legislation void or even to interpret UK legislation using the *Marleasing* principle "on the way up" so to speak, ie, before the matter has been considered by the ECJ.[35] If a point of EC law is raised, except where a similar issue has previously been considered by the ECJ, the courts are more likely to refer the issue to the ECJ for a ruling under Article 234 of the EC Treaty in a direct tax case rather than decide it themselves. The *Marleasing* case has only rarely been cited by taxpayers and, when it is, it tends to be in the senior courts, which then make a referral to the ECJ.

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[32] *Vodafone 2 v Revenue and Customs Commissioners* [2008] EWCA (Civ) 446 at [37].
[33] Ibid at [38].
[34] Case C-446/03 *Marks and Spencer plc v Halsey* [2005] ECR, I-10837.
[35] See *Philips Electronics UK Ltd v HMRC* (2009) TC 00176 for what is believed to be the first direct tax case to apply EC law without prior reference to the ECJ.

The direct tax cases which have concerned the interpretation of UK tax law in the light of EC law have therefore tended to be "one the way down" – ie after a decision of the ECJ, when the dispute has been remitted back to the domestic courts. Because the courts are only obliged to interpret national law in conformity with EC law so far as possible, the UK courts, possibility unwilling to relinquish the tradition of parliamentary sovereignty, have appeared reluctant to insert words into legislation which were not there.[36]

When one turns to consider the impact of the VAT Directive, the position is rather different. Because now the courts are applying UK legislation against the background of a EC Directive, with reasonably detailed rules, and a tax operating under fairly clear economic objectives, EU principles pervade the application of the tax, whether the case under consideration involves cross-border or only national issues. The important question as to whether in an entirely domestic situation the taxpayer could call upon the EU principles of fiscal neutrality and equal treatment in the operation of the UK VAT legislation has only been recently settled in the case referred to the ECJ by the House of Lords in *Marks and Spencer*[37] where it was held that EU principles did indeed apply in a domestic case.

In VAT cases there are several examples of the courts applying EC law without the case being referred to the ECJ.[38] It is accepted that the economic principles on which VAT were based should be drawn on in interpretation. So the avoidance of non-taxation, the avoidance of double taxation and the prevention of the distortion of competition are all 'core principles' of the VAT system, which will aid interpretation of domestic VAT legislation. Economic principles are not the same as principles based on fairness or legal certainty for example, and of course can be used both as a sword by the tax authorities as well as a shield for the taxpayer. Indeed, in *IDT Card Services*,[39] the principle of non-taxation was found to subject the taxpayer to VAT obligations in the absence of the express words of Parliament.

Turning now to the legislature, again there is a distinction between direct and indirect taxation. In general, the UK has effectively implemented the VAT Directive. In contrast, although much has changed in the domestic tax system in response to EC law over the last twenty or so years, there are several areas of UK legislation relating to direct taxation which might still be regarded as vulnerable to

[36] *Fleming (t/a Bodycraft) and Conde Nast Publications Ltd v HMRC* [2008] UKHL 2.
[37] Case C-309/06 *Marks and Spencer v RCC*, [2008] All ER (D) 137 (Apr). This was the claim by Marks and Spencer for the recovery of VAT which had been wrongly accounted for on sales of teacakes (which should have been zero-rated) following wrongful advice from HMRC.
[38] Eg *HMRC v IDT Card Services Ireland Ltd* [2006] EWCA Civ 29, *HMRC v Arachchige* [2009] EWHC 1077, *FJ Chalke Ltd and another v HMRC* [2009] EWHC 592.
[39] Ibid.

challenge. Sometimes the UK has moved early, sensing the winds of change,[40] but on other occasions it has waited until a challenge is successfully made and change has become inevitable. Indeed, sometimes even the changes made in response to an ECJ decision have been judged inadequate: for example the Commission have recently formally requested the UK to properly implement cross border relief as the provisions which were supposed to implement the *Marks and Spencer* decision makes it virtually impossible for taxpayers to benefit from the relief.[41]

The conclusion of the impact of EC law is that although there is no doubt that from a substantive perspective, direct taxpayers, both residents and non-residents, are in a far better position to engage in cross border transactions than they were, say twenty years ago, neither the UK courts nor the UK legislature have been particularly pro-active in protecting the rights given under the EC Treaty.

Turning to international tax treaties,[42] these are entered into under a residual function of the Royal prerogative. The UK is a dualist state and treaties are only effective once they have been incorporated directly into UK law. First, a double taxation treaty must be contained in a statutory instrument (or "Order in Council"). However, that is not the end of the story as the Income and Corporation Taxes Act 1988 s. 788 then provides for the treaty to override domestic legislation "in so far" as the treaty provides for a range of matters specified in s. 788, such as giving relief from tax, conferring the right to tax credits and so on. It was held in the Court of Appeal that non-discrimination was not within the scope of s.788 and thus, although part of the double taxation agreement, the non-discrimination clause did not have effect in UK law.[43] There are other cases where the judge has striven to give an interpretation of s. 788 which *would* give effect to a treaty, on the basis that to deny its effect would be to put the UK in breach of its international obligations.[44] The position must be regarded as uncertain.

Under the doctrine of parliamentary sovereignty, discussed earlier, parliament cannot bind itself as to the future and section 788 provides for a treaty to override existing legislation. To the extent that a treaty is overridden by clear and express language in subsequent legislation, the courts will not give effect to the treaty.

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[40] The dismantling of the imputation system and the removal of ACT can be cited as an example here, although this did not prevent a significant amount of litigation.
[41] IP/08/1365, 18 September 2008.
[42] The UK does apply international customary law without incorporation into legislation, but tax law would not fall within the scope of international customary law.
[43] *Boake Allen Ltd v HMRC* [2006] EWCA Civ 25. This case was decided on different grounds in the House of Lords at [2007] UKHL 25, although two judges, Mance and Neuberger LJJ, expressed the view that the relief under the treaty in question could not be extended to ACT, by virtue of s 788.
[44] Eg *UBS AG v HMRC* [2007] EWCA Civ 119. The issue was deliberately left undecided in *Bricom Holdings v IRC* [1997] STC 1179.

Directly effective EC law will also override UK treaties incorporated into UK law in accordance with EC law.[45]

The courts will *apply* secondary UK legislation (which normally fills in the flesh of the bare bones of legislation) but they will also consider the legality of such legislation under domestic law, which they do not do in relation to primary legislation.

If one was to describe the hierarchy of legal sources in the UK, in descending order, it would be

1) directly applicable EC law,
2) double taxation treaties,
3) domestic primary legislation,
4) domestic secondary legislation.

[45] E.g. 307/97 *St Gobain* [1999] ECR I-6161.

United States: Separation of Powers in Tax Law (William B. Barker) *

Preliminary remarks on separation of powers in American constitutional law

Though the Constitution of the United States never uses the words separation of powers, the concept is implicit in the American form of constitutional government. The aim of separation of powers is derived from one of the oldest principles of American constitutional law, that is that all legitimate power is derived from the people and governmental power must be checked in order to protect the citizens' freedoms.[760]

Ultimately, the goal of the framers of the US Constitution was to protect citizens from governmental tyranny while at the same time permitting government to accomplish its tasks. These ends would be ensured by a governmental structure of separated and divided powers that would combine to accomplish the policies of the state and at the same time would check each other to protect the citizen from oppression.

There are two distinct ways that these divisions operate in the United States. The first is that, since the United States is a nation with divided sovereignty, governmental power is exercised by both the national government and the several states which, as a matter of historical importance, joined together to establish a sovereign nation while at the same time retained their own unique sovereignty. In America, power is divided between national and state governments, and even today, the US is still concerned with the boundaries of national and state power.[761]

Second, the US Constitution separates and divides powers within the national government among the legislative, executive, and judicial branches. The purpose of this scheme was clear. As James Madison, one of the principle architects of the US Constitution, remarked, "No political truth is certainly of greater intrinsic value, . . . The accumulation of all powers, legislative, executive, and judiciary, in the

* I would like to express special thanks to Victor T. Thuronyi, who provided helpful comments and critical insights in the preparation of this paper.

760 *See generally*, LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW, Vol. I, 6 (3rd ed., 2000).

761 *See* Alden v. Maine, 527 U.S. 706 (1999), which held that Congress could not suspend the sovereign immunity of state governments and subject state governments to suit under the Fair Labor Standards Act, a national law.

same hands' . . . may justly be pronounced the very definition of tyranny."[762] The constitutional design conceptualizes the exercise of governmental power as resulting from the cooperation of the three branches of government. This cooperation is accomplished through the combination of distinct elements of power and authority. Each branch of government is dependent on the others for the full realization of government policies. Each branch of government is designed as independent so that each branch can accomplish its task to check the other branches to prevent them from overstepping their lawful authority. The result is interdependence and independence juxtaposed in tension.

The efficacy of separation of powers relies in part on the premise that the national government is a government of delegated powers. As a consequence of the Constitutional pattern of split sovereignty between national government and state, there are conditions on the exercise of that authority by the national government. The efficacy of separation of powers also depends in part on the structured division of powers within the national government. Each branch of government exercises a type of supreme authority within its sphere. Each branch formally exercises a different kind of power, that is, legislative, executive or judicial. Protection of the citizen depends on the limits imposed on each branch of government.

Legislative, executive and judicial functions are abstractions that are not defined in the US Constitution. At times, the US Constitution appears to blur the distinctions among these powers. For example, two arguably legislative powers are assigned to the President, the power to veto legislation,[763] and the power of the President to make treaties with the advice and consent of the US Senate.[764] In addition, the US Senate arguably exercises executive power where the appointment of ambassadors, judges, and officers of the US must be approved by the US Senate.[765] The result is that branches of government are separate whereas at the same time certain powers are shared.[766] Justice Stevens suggested a reason for this practical outcome: "[O]ne reason that the exercise of legislative, executive and judicial powers cannot be categorically distributed among three mutually exclusive branches of government is that governmental power cannot always be readily characterized with only one of those three labels. On the contrary, . . . a particular function. . . will often take on the function of the office to which it is assigned."[767]

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[762] THE FEDERALIST, No. 47, at 239 (Lawrence Goldman, ed., Oxford Univ. Press).
[763] U.S. CONST. Art. I, § 7.
[764] *Id.*, Art. II, § 2(1).
[765] *Id.*, Art. II, § 2(2).
[766] *See generally* TRIBE, at 11.
[767] Bowsher v. Synar, 478 U.S. 714, 749 (Stevens, J., concurring).

The result is a "blend of powers"[768] exercised by separate branches of government. Maintaining the integrity of this constitutional structure was ultimately left to the judicial branch.[769] According to the view of Alexander Hamilton, without judicial supervision, "all of the reservations of particular rights and privileges would amount to nothing."[770] Hamilton's view was that the judiciary could be trusted in this task because it "will always be the least dangerous to the political rights of the Constitution."[771]

The power of the Judiciary to determine the constitutional validity of acts of government is today a well-established feature of American constitutionalism. Policing the exercised powers as applied to the divided sovereignty of national and state governments was recognized by the US Supreme Court in *Martin v. Hunter's Lessee*,[772] where the Court asserts its power to review the actions of the states for constitutional validity.[773] The power of the federal courts to ultimately determine the parameters of the sovereignty of state governments is based on the principle contained in the Preamble to the US Constitution where it was the people, not the states that established the federal government and the union.[774] As James Madison remarked, "the people are 'the only legitimate fountain of power."[775] The thought is that the people, by establishing the Constitution and the nation, implicitly conferred on the courts the authority to determine the limits of and protect state power.

The more controversial power asserted by the courts was that of judicial review of the acts of the coordinate branches of the national government.[776] In *Marbury v. Madison*, the Court asserted its right to review the constitutional validity of the acts of the other branches of the national government.[777] The authority of the courts over the interpretation of the Constitution is still a fundamental principle of American constitutionalism today.

Under the US system of divided sovereignty, both the national government and the fifty state governments have the power to tax. State governments are competent to legislate on tax matters both with regard to matters that involve their territories (classic source taxation) and with regard to matters that involve their residents. The focus of this work, however, which is but a part of a larger consideration of separation of powers in many countries, is on the making and administration of the tax laws and, thus, focuses on issues that arise at the level of the national government. Thus, this work

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768 THE FEDERALIST, No. 47, at 332 (Madison) (L. Goldman, ed.).
769 *See generally*, TRIBE, at 118.
770 THE FEDERALIST, No. 78, at 381 (Hamilton) (L. Goldman, ed.).
771 *Id.* at 380.
772 14 U.S. (1 Wheat.) 304 (1816).
773 *Id.* at 344-45.
774 U.S. CONST., Preamble.
775 THE FEDERALIST No. 49, at 250 (Madison).
776 *See generally*, TRIBE, at 14.
777 Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

deals with separation of powers affecting taxation within the national government and not with issues of state taxation or federalism.

1. The influence of the tax authorities on tax legislation

The United States Constitution confers governmental powers on three branches of government, the legislature or Congress, which is composed of the House of Representatives and the Senate, the President (or Executive Branch), and the courts. Much of the work of the Executive Branch is presently carried out by administrative agencies. Tax laws are administered by the Department of the Treasury, which is supervised by the Secretary of the Treasury. Most of this responsibility has been delegated to the Internal Revenue Service, a branch of the Department of the Treasury, which is led by the Commissioner of Internal Revenue.

In keeping with the fundamental notion of separation of powers, lawmaking lies with the legislature. The United States Constitution vests all legislative powers in Congress.[778] The Constitution specifically empowers Congress to lay and collect Taxes, Duties, Imports and Excises.[779] The Sixteenth Amendment to the Constitution grants Congress the power to impose an income tax.[780]

Though the Constitutional structure clearly places all legislative power in Congress, government under the Constitution is a collaborative endeavor. The Executive department and tax administration is informally involved in legislation. Thus, Presidents often propose tax legislation. Both President Clinton and President Bush proposed several major tax plans to Congress. President Obama has posted his Administration's tax plan on the White House website.[781] Tax legislation proposed by the Executive Branch normally originates with the Secretary of the Treasury whose principal advisor is the Assistant Secretary for Tax Policy. The Assistant Secretary heads up the Office of Tax Legislative Counsel.[782]

It should be noted, however, that what is typically proposed is not a draft law which is then presented to Congress, but rather a policy proposal, which, of course, can contain considerable detail. The drafting work is actually done by the House Legislative Counsel and the Senate Legislative Counsel.

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[778] U.S. CONST. Art. I, § 1.
[779] *Id.*, § 8.
[780] U.S. CONST., 16th Amend.
[781] http://www.whitehouse.gov/infocus/taxes/.
[782] *See* MICHAEL I. SALTZMAN, IRS PRACTICE AND PROCEDURE, ¶ 1.02(1) (2nd ed. Warren Gorham & Lamont).

It is quite common for the Executive to propose legislation to Congress. However, the Executive is not the only source for tax legislation. Members of Congress are also a major source for proposals. Where proposals are presented by the President or the Department of the Treasury, Congress will always review them. There is no automatic acceptance, however. The usual practice is for Congress to draft a bill, to hold its own hearings, and to subject the proposal to substantial analysis, debate, and revision before submitting a bill to the floor of Congress for voting.

It is obviously difficult to quantify how much influence the Executive has in the tax legislative process. Certainly, the President has considerable influence in setting the legislative agenda. Moreover, as with all legislation, the President of the United States may veto tax legislation, which veto may only be overruled and the legislation made law by a vote of a supermajority (two-thirds) of each house (House and Senate).[783]

The US Congress, however, is quite independent of the Executive Branch of government. Each House has standing committees on tax legislation, the House Ways and Means and the Senate Finance Committee. A third committee, the Joint Committee on Taxation, is essentially a formal committee with a professional staff that provides support to both houses. These three committees are well-staffed and bear the major role in developing tax legislation. Therefore, though Congress often seeks the views of tax administrators as part of the legislative process, Congress is not dependent on the tax administration for tax expertise.

2. The effect of legal indeterminacy in tax matters

2.1. General

A principal concern of the project of this comparative study was the problem of whether tax legislation was often vague, thus leaving a large margin for administrative and judicial discretion, or, to the contrary, whether tax legislation was detailed and meticulous in defining the subject and object of taxation. The choice of legislative drafting style reflects a profound difference in outlook between a traditional preference for literal as opposed to purposeful interpretation of tax statutes. Where literal interpretation prevails, as it has traditionally in tax both in common law and civil law jurisdictions, the legislator typically reacts by trying to accomplish its purpose through very precise and detailed

[783] U.S. CONST. Art. I, § 7.

drafting.[784] Often, detailed drafting reflects an inherent legislative distrust of judicial discretion.[785] Purposeful interpretation, however, is more suitable for statutes that utilize concepts, standards, and principles. Though the United States has reflected both traditions in its legislation, it has been a world leader in its use of concepts and its development of those concepts analogically.[786]

The first income tax act passed after the adoption of the Sixteenth Amendment was a model of simplicity.[787] The entire act was less than 16 pages and the substantive provisions that imposed the tax were only two pages in length. The initial law relied primarily on concepts, standards and principles rather than rules.[788] This necessarily imposed on the administration and the courts the obligation to develop the tax law over the years.[789] For example, the Code today provides that "gross income means all income from whatever source derived."[790] As recently as 1955, the US Supreme Court refused to limit the statutory concept of income by a precise definition, where Congress had not chosen to do so.[791] Thus, it was through a process of developing a legal methodology of tax and providing content to the tax code undertaken by the courts in the context of particular taxpayer disputes, instigated by the administration's elaboration of the legislative scheme as it sought to enforce the tax code, that led to the development of many of the most important principles of income taxation in the United States.[792]

However, as time passed, US tax legislation has become more detailed and thus more rule oriented. Though detailed rules present a plethora of interpretive issues for courts and administrators leading to considerable administrative guidance and litigation, their interpretation generally lacks the global impact that the interpretation of concepts and standards have.

Though the incredible volume of legislative rules indicate quite strongly that the power of Congress and the rule-based approach to tax law dominates current legislative drafting style, there are still significant areas of the tax law which depend on broad judicial and administrative discretion. Some involve anti-avoidance principles developed by the courts like assignment of income, substance over form, sham,

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784 *See generally* William B. Barker, *Expanding the Study of Comparative Tax Law to Promote Democratic Policy: The Example of the Move to Capital Gains Taxation in Post-Apartheid South Africa*, 109 PENN ST. L. REV. 703, 724-25 (2005).
785 *Id.*
786 *See* William B. Barker, *Statutory Interpretation, Comparative Law and Economic Theory: Discovering the Grund of Income Taxation*, 40 SAN DIEGO L. REV. 821, 832-65 (2003).
787 Act of Oct. 3, 1913, ch. 16, § II(B), 38 Stat. 114, 167.
788 *See, e.g.,* Victor Thuronyi, *The Concept of Income*, 46 TAX. L. REV. 45 (1990).
789 Richard Haig criticized the income tax's lack of a definition of income as follows: "Viewed from the vantage point of the present, the federal income tax law of 1913 seems an incredibly naïve document. Today it seems astonishing that so many fundamental issues should have been so slightly considered or so blithely ignored. The law contained no precise and comprehensive description of the tax base." Rittaig, *Forward to* MAGILL, TAXABLE INCOME at iii (1936).
790 Internal Revenue Code of 1986 [hereinafter IRC] § 61.
791 Commissioner v. Glenshaw Glass, 348 U.S. 426 (1955).
792 *See* William B. Barker, *supra* note 27, at 832-65.

and economic substance. Others are open-ended legislative provisions, like the US transfer pricing provision[793] and the accounting provision that requires that a taxpayer's method of accounting must "clearly reflect income."[794] These statutory provisions grant considerable discretion to the administration.[795] Administrative discretion is always subject to review by the courts, however.[796] The literature in the United States on administrative and judicial discretion is voluminous.[797]

2.2. The constitutional role of the courts in taxation

The United States Constitution establishes the judicial power of the courts[798] which extends to "all cases [and controversies] in Law and Equity, arising under the Constitution, and the laws and treaties of the United States."[799] All legislation must comply with the requirements of the Constitution. Early in the history of the United States, the US Supreme Court in *Marbury v. Madison* concluded that "An act of Congress repugnant to the constitution cannot become a law."[800] In that case the Court established the principle that the question of the constitutionality of legislation is properly subject to judicial review. Consequently, courts of the United States may determine the constitutionality of legislation within the confines of cases and controversies and make final determinations resolving the parties' dispute.

Decisions invalidating federal income tax legislation are extremely rare in the United States. Although there were cases in the past,[801] such an outcome would be very surprising today.[802] In cases of taxes

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793 IRC § 482.

794 *Id.*, § 446(b).

795 Recently, there has been a movement to codify the economic substance requirement in order to make it more effective in preventing tax abuse. This is a controversial measure which has not yet been enacted. *See*, for example, Tax Relief Act of 2005, S. 2020, § 511.

796 For example, the Secretary's authority under IRC § 446(b) is subject to the abuse of discretion standard of review. The Administrative Procedure Act, 5 U.S.C. § 706(2)(A).

797 *See, e.g.,* Lawrence Zelenak, *Thinking About Nonliteral Interpretation of the Internal Revenue Code*, 64 N.C. L. REV. 623 (1986); Deborah A. Geier, *Interpreting Tax Legislation: The Role of Purpose*, 2 FLA. TAX REV. 492 (1995). For a thorough account of American administrative law principles and separation of powers, see KENNETH C. DAVIS AND RICHARD J. PIERCE, ADMINISTRATIVE LAW TREATISE, Ch. 2 (3rd ed. 1994). For a critical account of excessive delegation of powers to administrative agencies, see *A Symposium on Administrative Law: "The Uneasy Constitutional Status of the Administrative Agencies," April 4, 1986, Part I, Delegation of Powers to Administrative Agencies: Principle Paper: Two Roads to Serfdom, Liberalism, Conservatism and Administrative Power*, 30 AM. U. L. REV. 295 (1987).

798 U.S. CONST., Art. III, § 1.

799 *Id.*, Art. III, § 2.

800 5 U.S. (1 Cranch) 137, 138 (1803).

801 The most famous case was Pollock v. Farmer's Loan and Trust Co., 157 U.S. 429, *modified*, 158 U.S. 601 (1895), which invalidated the income tax. A more recent case was *Eisner v. Macomber*, which declared Congresses' inclusion of stock dividends (in kind) in income was unconstitutional because it defined income beyond the scope of the Sixteenth Amendment. 252 U.S. 189 (1920). The Court's reasoning has been significantly eroded by later cases. *See Commissioner v. Glenshaw Glass*, *supra* note 32.

802 In Murphy v. Commissioner, 460 F.3d 79 (D.C. Cir. 2006), the court of appeals initially held that the statute could not tax damages received by an employee from her employer under a whistleblower statute because such damages were not income within the meaning of the Sixteenth Amendment. The court later vacated and reversed this decision. 493 F.3d 170 (D.C. Cir. 2007).

other than income taxes, the Constitution is more restrictive, however.[803] By contrast, federal courts routinely rule that state taxes are unconstitutional usually on grounds that they violate principles of federalism.

The court system in the United States that has jurisdiction over tax matters is both complicated and diverse, and is based on historical accident rather than logic. Briefly summarizing this structure here will aid in one's understanding some of the issues below. There are three courts of original jurisdiction in tax matters, the United States District Courts, which are courts of general jurisdiction spread across the United States; the Court of Federal Claims, which is a national court of limited jurisdiction, that has jurisdiction over claims mainly for money damages brought against the United States government; and the Tax Court, a national court whose jurisdiction is solely limited to tax cases. The primary distinction between the jurisdiction of the Tax Court and the District and Federal Claims Courts in taxation is that the Tax Court's jurisdiction extends to tax deficiencies[804] (where the taxpayer has not paid) and the District and Claims Courts' jurisdiction extends to tax refund suits (where the taxpayer asserts an overpayment of tax and seeks a refund).[805] Appeals from decisions of the Tax Court and District Courts go to one of the twelve regional Courts of Appeals; decisions of the Federal Claims Court are appealed to the Federal Circuit Court of Appeals.

2.3. Constitutional requirements and legal indeterminacy in taxation

In general, all legislation is subject to the Due Process Clause of the Constitution.[806] An act will not be enforced if it is so unclear as to be arbitrary. In other areas, this is referred to as the void for vagueness doctrine.[807] This requirement was described by the Tenth Circuit Court of Appeals as follows: "A taxing statute must describe with some certainty the ... object to be taxed, and in the typical situation it is construed against the government."[808] Research has not disclosed any case that has struck down an income tax statute for vagueness. In practice, courts use legislative history, regulations, administrative guidance, judicial decisions, or general principles of statutory construction to give meaning to statutes which on their face may appear to be vague.

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[803] *See* United States v. United States Shoe Corp., 523 U.S. 360 (1998) (Harbor Tax was a tax, not a user fee, which was in an amount disproportionate to the benefit conferred and thus violated the Export Clause of the Constitution).
[804] IRC § 7442.
[805] *See, e.g., id.*, IR C § 7422.

[806] U.S. CONST., Vth Amend., ("No person shall. . . be deprived of property without due process of law. . .").
[807] *See, e.g.*, Colautti v. Franklin, 439 U.S. 379 (1979).
[808] United States v. Community TV, Inc., 327 F.2d 797, 800 (1964).

2.4. The role of the courts and the tax administration in the interpretation of tax statutes

Decisions of the courts in tax matters are final. Thus, the courts have the final word regarding the interpretation of tax statutes with respect to the case before them. In other words, the decision is final with respect to the parties and the dispute before the court. As to future cases, a court's interpretation of the tax law only serves as precedent, and precedent only binds inferior courts whose decisions must be appealed to that forum. Courts, however, only rarely overrule their own precedents. Only the decisions of the US Supreme Court constitute binding precedent for all courts in the United States.

A decision of the Supreme Court which determines the validity of tax law tested by the Constitution binds all branches of government as to future cases and cannot be changed by Congress. It can, however, be overruled by the Supreme Court itself.[809]

2.5. The role of the tax administration in determining the meaning of tax statutes

The Internal Revenue Code of 1986 (as amended), which deals with federal taxes (individual and corporate income taxation, estate and gift taxation, excises, Social Security tax, and others) is unquestionably a complex and complicated legislative scheme. It is composed of thousands of sections covering hundreds of pages of text. Since the US tax system relies on the principles of self-assessment and voluntary compliance, guidance to taxpayers is essential. Guidance to taxpayers on the meaning of tax legislation is supplied through voluminous case decisions and administrative pronouncements. This guidance includes six volumes of Treasury Regulations, Internal Revenue Service Revenue Rulings published in over 100 volumes, and other types of published materials, including specific advice to individual taxpayers published as Private Letter Rulings. In many cases, understanding the way tax legislation applies to individual circumstances is determined by administrative or judicial work product.

The various administrative rulings differ in the way they control tax outcomes. Regulations are promulgated by the Department of the Treasury. Under the Administrative Procedure Act, these Rules are "an agency statement of general or particular applicability and future effect designed to implement, interpret or prescribe law or policy. . . ."[810] In the US, a Revenue Ruling is a statement of law or policy adopted by the IRS that, much like a court case, gives advice on the application of the law to a

[809] *See* James v. United States, 366 U.S. 213 (1961) (prior interpretation that embezzlement gains were not income within the meaning of the 16th Amendment was overruled).
[810] 5 U.S.C. § 551(4).

particular set of facts. Regulations and Rulings are accorded different status as sources of law by US courts.

There are two kinds of regulations, legislative or substantive regulations, and interpretive regulations. Legislative regulations are those that are promulgated under a specific statute whereby Congress makes a specific delegation of rulemaking authority. Legislative regulations are said to have the force and effect of legislation.[811] For example, Section 1501 of the Code[812] grants to an affiliated group of companies the privilege of filing a consolidated income tax return in very general terms. Section 1502 grants to the Secretary of the Treasury vast rulemaking authority to determine the manner in which affiliated corporations comply. Thus, the consolidated return regulations are, essentially, the consolidated income tax return laws.

A particular broad delegation of legislative power was considered in the case of *Skinner v. Mid-American Pipeline Co.*[813] There, Congress had authorized the Secretary of the Department of Transportation to calculate and impose a tax on the operation of pipelines based on volume-miles, miles, revenues, or an appropriate combination thereof. The Supreme Court unanimously upheld the delegation of Congress' taxing power, finding that the taxing power was no different than any other legislative power.

All regulations are subject to judicial control, however. Legislative regulations have been invalidated when they conflict with the statute[814] because that would exceed the agency's delegated power.[815]

The second category of regulations is known as interpretive regulations. These regulations are promulgated under the general authority of Section 7805(a) to "prescribe all needful rules and regulations for the enforcement of" internal revenue laws.[816] Their purpose is to give guidance to taxpayers by explaining the meaning of legislative provisions. Interpretive regulations are not always binding on the courts, but they must be followed if they present a reasonable interpretation of the statute. It is the administration's prerogative, not the court's, to choose among reasonable

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[811] Union Elect. Co. v. United States, 305 F.2d 850, 854 (Ct. Cl. 1962).
[812] IRC § 1501.
[813] 490 U.S. 212 (1989).
[814] City of Tucson v. Commissioner, 820 F.2d 1283 (D.C. Cir. 1987).
[815] American Standard Inc. v. United States, 602 F.2d 256 (Ct. Cl. 1979) (consolidated return regulation unreasonable and invalid because it "changed the conceptual base upon which Congress permitted the Sec. 922 deduction and defeats the congressional purpose that WHTC's products and services are competitively priced in Western Hemisphere trade.")

[816] IRC § 7805(a).

interpretations. An interpretation is not reasonable, however, unless it is in harmony with the statute's purpose.[817]

Revenue rulings are the IRS's interpretation of the revenue laws. Traditionally, they have not been considered to be binding on taxpayers or the courts.[818] Practically speaking, however, they are generally followed by Service personnel in the administrative stage.

There is a growing trend among courts of appeal to allow some deference to revenue rulings.[819] Though the Supreme Court has declined to determine whether revenue rulings are generally entitled to deference, it did conclude that where the rulings represent the IRS's longstanding interpretation of the tax code and such statutes are not amended or substantially reenacted, the rulings "are deemed to have received congressional approval and have the effect of law."[820]

Though taxpayers may generally rely on the regulations and rulings of the Treasury and IRS,[821] the government is not always bound by its own pronouncements. Treasury Regulations are binding unless they have been revoked, or unless they are not a valid interpretation of the statute. Revenue rulings can usually be repudiated by the Service. In general, the courts will not bind the government where the administration's pronouncements reflect mistaken law.[822]

Taxpayers have full access to courts to resolve their tax liability. The court's decisions in tax cases control the application of the tax law in regard to the taxpayer's liability. In this sense, the courts control the application of the tax laws. As noted above, the courts, however, are bound by legislative regulations, which have the force of law, as long as the administration's actions are in accordance with the enabling statute. Interpretive regulations are entitled to great weight. They are followed by the courts as long as they adopt a reasonable interpretation of the legislation (even though the court, if free to do so, would adopt another interpretation). Revenue rulings traditionally were viewed as notice of the litigating position of the Internal Revenue Service and were accorded no weight. The trend is

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817 United States v. South Texas Lumber Co., 333 U.S. 496 (1948).

818 Stubbs, Overbeck & Assocs. v. United States, 445 F.2d 1142, 1146-47 (5th Cir. 1971) (a revenue ruling "is merely the opinion of a lawyer in the agency. . . .").

819 *See* Benjamin J. Cohen & Catherine A. Harrington, *Is the Internal Revenue Service Bound by its Own Regulations and Rulings*, 51 TAX LAWYER, 675, 687 n.73 (cases cited therein).

820 United States v. Cleveland Indians Baseball Co., 532 U.S. 200, 212 (2001).

821 Treas. Reg. §§ 601, 601(d)(2)((v)(e).

822 Manhattan General Equipment Co. v. Commissioner, 297 U.S. 129 (1936) (general rule that the government may revoke retroactively erroneous regulations and rulings). *See also* Dixon v. United States, 381 U.S. 68, 75 (1965), (the government may correct a mistake of law even where the taxpayer has acted in reliance on the government's interpretation).

growing among US Courts of Appeal to accord deference to revenue rulings. Courts in general, however, always give serious consideration to administrative materials.

The Tax Administration also takes into account the courts' case law when applying the tax law. In the United States, much of what the tax law is today is the result of the interpretations made by courts in implementing the tax law.[823] Administrative authorities take court cases into account all the time in applying the law. As outlined in more detail below, however, administrative authorities are not generally bound by court decisions as to the future interpretation of the law. In cases of disagreement, the IRS has a procedure for notifying the public and administrative personnel as to its position as to the validity or applicability of court cases.[824]

2.6. The principle of reciprocal observation of the interpretation of tax law by the tax administration and domestic courts

Though not all tax controversies are litigated, it is natural and expected in the United States for unresolved tax controversies to be litigated. For this reason, courts in the United States are significant players in controlling the substance of tax law as administratively practiced. Juxtaposed to this is the role of the administration that makes the initial determination as to a taxpayer's liability and is directly involved in setting the agenda for the courts.

In many countries, the principle of reciprocal observation applies to tax matters. In the US, however, one does not speak of a principle of reciprocal observation. That, of course, does not mean that the principle does not operate in the tax world. The concept, however, conveys the concept of two systems that are operatively closed but cognitively open to the other. Though it would be inaccurate to conclude that the court system is closed to the administration, since the administration is always a necessary player in the judicial process, it would be accurate to conclude that courts and administration are structurally coupled, allowing for simultaneous reciprocal observation between them. Thus, law and enforcement, courts and administration, interrelate in a way that reflects this dynamic interchange. The United States Supreme Court once summarized the relationship among the three Branches of government by relating that the Constitution created a governmental structure that "imposes on the Branches a degree of overlapping responsibility, a duty of interdependence, as well as independence."[825]

[823] *See* Part III, *supra*.
[824] See Part V(B), *infra*.
[825] Mistretta v. United States, 488 U.S. 361, 381 (1989).

2.7. The legal effect of court decisions

First, it must be recognized that once a court decision is final, it resolves the tax controversy between the parties and both the government and taxpayer are bound. As to the question of whether the Service is bound to follow the court's interpretation of the tax law in other cases, the answer is that if the interpretation is made by the US Supreme Court, the administration is bound. Otherwise, the administration is not bound by the court's determination and is free to relitigate the issue in any forum.[826] Even where the decision is that of the Supreme Court, the administration may relitigate the issue with the objective of seeking a redetermination by the Supreme Court.[827] In addition, the Service may also litigate the question of the scope and meaning of a Supreme Court interpretation of tax law.

In regard to lower court determinations, the Service often relitigates the same issues in other forums. Taxpayers, moreover, do likewise. It is also not uncommon for subsequent courts to disagree with the interpretations reached in earlier decisions. This is an expected part of the US system which is looked upon by most in the US as an appropriate way to allow for the best development of the tax law through consideration in multiple forums. One ground for review by the US Supreme Court (by writ of certiorari) is a conflict between or among circuit courts of appeal. The Supreme Court is not required, however, to grant certiorari. Consequently, as tax law develops through a process of continuous consideration and reconsideration by the administration and the courts, it can be interpreted and applied differently in different parts of the country. Though these cases are not common, they are significant enough to be a defining element in the enforcement and interpretation of US tax law.

2.8. The status and relationship between the different sources of tax law

The US Constitution provides that the Constitution, the laws of the United States, and treaties made under the authority of the United States, shall be the supreme law of the land.[828] Article II, Section 2 empowers the President, with the advice and consent of the Senate (providing two-thirds of those present concur), to make treaties.[829] The US Constitution is the law upon which all others are based, and all laws or treaties inconsistent with the Constitution are invalid.[830] "An act of Congress, repugnant

[826] The Supreme Court has not ruled on this agency practice. For an excellent article generally treating this subject, see Estreicher and Revesz, *Nonacquiescence by Federal Agencies*, 98 YALE L.J. 679 (1989).
[827] *See* James v. United States*, supra*, note 50, where the administration successfully advanced the argument that embezzled gain was income contrary to the Supreme Court's prior decision that it was not.

[828] U.S. CONST., Art. III, § 3.
[829] *Id.* Art. II, § 2.
[830] *Marbury v. Madison, supra* note 18.

to the constitution, cannot become a law."[831] An interpretation by the US Supreme Court as to the constitutional validity of an act of Congress or treaty is binding on all courts and Congress. Only the Supreme Court can overrule its own interpretation as to the Constitution. Though this hierarchy of legal sources was established solely by one branch of government—the courts—it is an established principle of the US concept of the rule of law and the principle of separation of powers.

Among acts of Congress and treaties, the general principle is whichever is more recent will be controlling if there is a conflict between them.[832] However, if both treaty and congressional law can be understood to both apply, both will apply.[833] Although treaty override is possible in the US, it is not favored. Courts will interpret a statute as overriding a treaty only if there is a fairly clear Congressional intention to do so.

Taxpayers have full access to different legal remedies that assure the effective protection of their rights granted by tax treaties and domestic law. As noted above, the Constitution, legislation, and treaties are the "supreme law of the land."[834] The Constitution also provides that the judicial power shall extend to all cases arising under the Constitution, the laws and treaties of the United States.[835] Rights afforded by the Constitution, legislation or treaties are enforceable in the context of a judicial proceeding involving the proper tax liability of a taxpayer. As outlined in more detail in Part III(A), a taxpayer may bring a tax claim in three courts of original jurisdiction: the district courts, the tax court, and the federal claims court. Both the taxpayer and the administration have the right to appeal an adverse decision to the appropriate court of appeals. Unless a tax case involves an adverse determination of the constitutional validity of law, review by the Supreme Court of lower court decisions can only be obtained by application for a writ of certiorari, the grant of which is a matter of complete discretion with the Supreme Court.

3. The relationship between Congress and the tax authorities

3.1. Can Congress control the actions of the tax authorities?

Congress controls the actions of the Department of the Treasury and the Internal Revenue Service in various ways. Congress, through legislation, grants to an agency the power to act. Congress always has the power to change the authority upon which an agency acts; Congress can also override a specific

831 *Id.* at 138.
832 Ward v. Race Horse, 163 U.S. 504, 511 (1896).
833 *Id.*
834 U.S. CONST., Art. III, § 3.
835 *Id.*, Art. III, § 2.

agency decision.[836] Moreover, pursuant to Congress' power over appropriations,[837] Congress can limit an agency's funds and can even deny money for a particular agency program.[838] In addition, Congress must consent to the appointment by the President of the Secretary of the Treasury, the Commissioner of Internal Revenue and the Assistant Secretary of the Treasury for Tax Policy.

Congress also performs its oversight function of tax administration through the Congress' Joint Committee on Internal Revenue Taxation.[839] This committee exercises considerable authority over IRS actions and procedures. The Committee reviews all compromised tax refunds over USD 200,000,[840] has the power to examine tax returns, and can subpoena witnesses.[841]

3.2. An overview of the legislative process

As pointed out in Part I, the Executive Branch is a source of significant input affecting tax legislation. Though Congress usually accepts a presidential plan for consideration, this does not guarantee its eventual adoption. Tax bills go through a rigorous process of consideration by the committees of both houses. These include the House Ways and Means Committee, the Senate Finance Committee, and the Joint Committee on Taxation. To say that the bills are usually improved by this process is a matter of opinion; to say that they are often changed is true as a matter of fact.

Congressional committees control the nature of the legislation presented to the House and Senate for final vote. Once legislation is presented, the process formally begins in the House Committee. If approved, the bill is then sent to the floor of the House for a vote, if approved by the House it is sent to the Senate Committee, then to the floor of the Senate for a vote. At this point, the two versions are sent to a conference committee to reconcile the differences. There can be considerable debate by members of Congress at these various stages. Debate and the possibility of offering amendments are usually more extensive in the Senate, due to the difference in procedural rules in each chamber.

As outlined above, the Congressional Committees on taxation have large professional staffs to aid the members of those Committees in considering tax legislation. Members of these Committees tend to develop a certain expertise over time. Since the members of Congress are confronted with an enormous variety of issues, they must necessarily rely on their staffs for expertise in tax matters. Since

836 *See* MICHAEL I. SALTZMAN, IRS PRACTICE AND PROCEDURE at I-26.
837 U.S. CONST., Art. I, § 9.
838 *See* Pub. L. No. 96-74, §§ 614, 615, 93 Stat. 576 (1979), where Congress mandated to the IRS that no portion of any appropriation be used to enforce rules dealing with the tax exempt status of segregated schools.
839 IRC §§ 8001-8005.
840 IRC § 6015(b).
841 IRC § 8021.

taxation in America is an issue of enormous political importance, tax bills receive considerable attention from members of Congress.

3.3. The law in practice: interpretation and gap filling by tax administrators and courts

The concept of gap filling, or prolongation of statutes, though not unknown in American jurisprudence, is one which is typically considered to go beyond the mandate of the courts which instead is to implement the legislation that Congress enacted. The effect of this viewpoint must be examined, however, in light of two important aspects of American tax law.

First, the initial income tax act was very brief (less than 16 pages in total and less than two pages of substantive provisions) and it relied on concepts, standards and principles. The history of income taxation was dominated for many years by courts developing these concepts. Though US tax legislation has become more technical and more rule-based over the years, the expansive judicial role is still a factor in the interpretation of tax laws. Second, it is not misleading that the Americans called their tax law the Internal Revenue *Code*. The Code is viewed not simply as a digest of tax laws, but as an integrated whole. Thus, in interpreting individual provisions one must view their place in the whole of tax law assuming, unless there were an indication otherwise, that Congress intended a meaning consistent with the object of other provisions. When resolving ambiguous legislation, judicial interpretation is designed to implement the policy that Congress has adopted. Resolving ambiguity, however, may require choices among policies.

Second, as outlined in Part III(D), Congress has delegated considerable rulemaking power to the tax authorities. Clearly, legislative regulations, which have the force and effect of law as long as they are not inconsistent with the statute, are a broad grant of legislative power to administrators authorizing agency policymaking. Thus, there is broad power conferred on tax administrators to implement broad congressional policies with more particularized rules. This is gap filling and policymaking by administrative regulation.[842]

Interpretive regulations and other rulings may have a similar, if not as dramatic, effect. Where Congress has unambiguously expressed itself, the agency, as well as the courts, must give expression to

[842] The Supreme Court stated, "The power of an administrative agency to administer a congressionally created. . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress." Chevron v. National Resources Defense Council, 467 U.S. 837, 843 (1984).

that intent.[843] Where, however, legislation is ambiguous, or silent as to the precise question at issue, tax authorities may supply a reasonable answer.

4. The relationship between Congress and the courts

4.1. The role of the courts in determining the scope of legislation

As set forth above, taxpayers have free access to several different courts to settle their tax controversies. Since courts make final determinations in tax controversies, one might say that in this way courts "control" legislation.

The courts' role, however, is not to control legislation but to apply it to the facts before it. That is, its job is to implement the congressional design ex post. In doing so, courts interpret the legislation, and in that way courts determine legislation's scope and effect. Congress can always overrule a court's legal determination as it applies to other taxpayers, unless that determination is that Congress lacks the constitutional power to act in that fashion.

In order to carry out these tasks, the courts must have a certain amount of independence from Congress and the Executives. Two of the courts of original jurisdiction are the Tax Court and the Court of Federal Claims.[844] These are known as Article I courts (Article I of the US Constitution) or legislatively authorized courts. Judges on these courts are appointed by the President[845] for a period of 15 years[846] with the salary of district court judges.[847] They can only be removed for cause.[848] All appeals in tax matters are to the courts of appeal which, like the district courts, are Article III courts, authorized by the Constitution, where judges enjoy lifetime appointments with no possibility of pay decreases.[849] Article III judges may be impeached by Congress and, thus, removed for cause.[850]

4.2. The role of judicial decisions in the administration of the tax laws

[843] See i*d.*

[844] IRC § 7441 (establishes the Tax Court pursuant to Article I of the Constitution). The Court of Federal Claims follows the same pattern. *See* 28 U.S.C. § 1346.
[845] IRC § 7443(b).
[846] IRC § 7443(e).
[847] IRC § 7443(c).
[848] IRC § 7443(f).
[849] IRC § 7482.
[850] The Constitution provides that judges "shall hold their Offices during good behavior." U.S. Const., Art. III, §1.

When it comes to the litigation of tax cases, the US has a somewhat unique set-up due to the fact that two separate agencies litigate tax controversies. In the case of tax court proceedings, the administration is represented by an attorney in the Office of Chief Council of the IRS. In the case of all other tax litigation, that is refund litigation before district courts and Court of Federal Claims, and all appeals from the three courts to the courts of appeal (12 circuits and the Court of Appeals for the Federal Circuit), the United States is represented by attorneys from the US Department of Justice.[851]

The tax authorities accept many decisions of the lower courts. Where they conclude the decision is in error, they consider the wisdom of an appeal. The procedure begins with the IRS's recommendation. The procedure the Service utilizes when evaluating whether to recommend an appeal to an adverse decision is contained within the Internal Revenue Manual (IRM).[852] When an adverse decision is issued against the Service, there are six guidelines which the IRS follows. First, and paramount to the inquiry of pursuing an appeal, is the legal correctness of the court decision.[853] The IRM dictates that attorneys should read the opinions of the court with an open mind and if persuaded by the court's rationale, the attorney should consider alternative measures such as acquiescence in the court's decision and a change in the IRS's position.[854]

Second, the attorney is to consider the "administrative importance" by evaluating the number of taxpayers to be affected by appeal and the adverse decision's impact on revenue.[855] Third, the attorney should consider the quality of the record and whether such record is amenable to an appeal by the Service. Fourth, the attorney is to be equitable and perhaps not appeal when public sympathies are with the taxpayer instead of the Service. Fifth, the attorney is to consider the pecuniary benefit that the government would obtain if the adverse decision were reversed. Lastly, due consideration is to be given to any alternative method for collecting funds.

Both the decision to appeal and the prosecution of the appeal are handled by attorneys in the Tax Division of the Department of Justice (DOJ). This includes decisions of the Tax Court where IRS attorneys represent the government, and decisions of the US district courts and US Court of Federal Claims where Justice Department attorneys represent the government. The Department of Justice has

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[851] The Tax Division of the U.S. Department of Justice is divided into sections: the District Court Sections which handle litigation before the District Courts, the Federal Claims Court Section, which handles cases before the Court of Federal Claims, the Appellate Section, which handles all appeals, and the Criminal Sections which handles criminal trials and appeals. The Appellate Section has the authority to determine whether the government will take an appeal from an adverse tax decision to the Court of Appeals.

[852] IRM § 36.2.1.1.2 (8/11/2004).

[853] IRM § 36.2.1.1 (8/11/2004)

[854] *Id.*

[855] *Id.*

the authority to determine in what manner cases should be prosecuted, defended, compromised, or appealed when the government is a party.[856] Further, when deciding whether to appeal, the Justice Department considers the IRS's recommendation which addresses the likely effects on policy and administration if the government decides not to appeal.

Nevertheless, although the Service may conclude that an appeal will achieve the optimal result, it is still left to the discretion of the Tax Division whether or not to initiate the appeal. In some cases, the Department of Justice does not follow the recommendation of the IRS. The Solicitor General's Office, a section of the Department of Justice, decides on applications for writ of certiorari or appeal to the Supreme Court. Thus, there is a practical division of powers within the administration of the tax laws between the IRS which carries out the day-to-day activities of tax administration and the Department of Justice which ultimately controls the effectuation of tax policy before the courts.

Alternatively, in lieu of an appeal, the Service may instead issue an Action on Decision (AOD).[857] An AOD is issued as a result of the IRS's policy to inform the public and IRS personnel as to whether the IRS will follow an adverse holding of a court. While the procedure was first designed only to express the IRS's views on tax court cases, the procedure is now used by the IRS to review adverse holdings of the tax court, district courts, federal claims court and the courts of appeals.[858] Though AODs are available to the public, the public may not rely on them as precedent.[859]

The guidance contained in an AOD is based on three different recommendations the Service takes with respect to the adverse decision: *acquiescence, nonacquiescence,* and *acquiescence in result only*. *Acquiescence* means that the Service accepts the holding of the adverse decision and will follow the decision when the controlling facts are the same, but the Service will not express approval or disapproval with the rationale the court employed.[860] *Acquiescence in result only* signifies that the Service accepts the holding of the adverse decision and will follow the decision where controlling facts are similar, but at the same time indicates disagreement or concern with some or all of the reasoning used by the court.[861] *Nonacquiescence* signifies that the Service does not agree with the decision and will not follow it in future cases. Further, if the adverse decision is issued by an appellate court the Service will respect the precedential effect in that jurisdiction, but such decision will not be followed nationally.[862]

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[856] Executive Order 6166 (June 10, 1933). *See also* IRM § 36.1.1.4 (8/11/2004)
[857] 1999-2 C.B. 314, 1999 IRB 1585.
[858] *Id.*
[859] *Id.*
[860] *Id.*
[861] *Id.*
[862] *Id.*

A humorous example of this process involved the interplay between the IRS and Tax Court in *Jenkins v. Commissioner*.[863] There, the taxpayer, a noted country singer, opened a chain of burger stands. To obtain capital, the taxpayer convinced seventy-five of his country music friends to invest in the chain. When the endeavor failed, the taxpayer reimbursed his friends for their losses even though he was not legally required to do so. The taxpayer argued that such expenditures were deductible under § 162 as they were necessary for his career as a country singer as to not do so would harm his reputation and, ultimately, his business as a singer. Conversely, the Service argued that such payments by the taxpayer were not deductible under § 162 as there was no legal obligation to make the payments and the expenditures were merely gratuitous. The Tax Court sided with the taxpayer and closed its opinion with a poem as follows:

> 14. We close with the following "Ode to Conway Twitty:"
>
> Twitty Burger went belly up
> But Conway remained true
> He repaid his investors, one and all
> It was the moral thing to do
>
> His fans would not have liked it
> It could have hurt his fame
> Had any investors sued him
> Like Merle Haggard or Sonny James
>
> When it was time to file taxes
> Conway thought what he would do
> Was deduct those payments as a business expense
> Under section one-sixty-two.
>
> In order to allow these deductions
> Goes the argument of the Commissioner
> The payments must be ordinary and necessary
> To a business of the petitioner.
>
> Had Conway not repaid the investors

[863] T.C. Memo 1983-667.

His career would have been under cloud,
Under the unique facts of this case
Held: The deductions are allowed.[864]

The Service in reply issued the following AOD:

Harold Jenkins and Conway Twitty
They are both the same
But one was born
The other achieved fame.
The man is talented
And has many a friend
They opened a restaurant
His name he did lend.
They are two different things
Making burgers and song
The business went sour
It didn't take long.
He repaid his friends
Why did he act
Was it business or friendship
Which is fact?
Business the court held
It's deductible they feel
We disagree with the answer
But let's not appeal.[865]

Thus, the tax administration has several choices when confronted with a decision that it perceives is wrong on the law and potentially harmful. As noted above, the administration is not bound to follow the interpretation of the law by any court other than that of the Supreme Court. Even in cases decided by the Supreme Court, the administration can litigate the scope and impact of the decision in lower courts, and can also seek a redetermination of the earlier ruling through a subsequent case. The tax

[864] *Id.*
[865] A.O.D. 1984-022 (March 23, 1984).

authorities, have, in some cases, used anti-avoidance rules, both statutorily and judicially created, to relitigate and overrule precedents that have been around for some time.[866]
Additionally, a court of the United States is not bound by the precedents of other courts unless appeal of its decisions lies in that other court. Thus, the tax authorities may choose to litigate the same issues in other forums in order to obtain a favorable decision. Taxpayers do the same. In this way, the tax law has developed in America through consideration by different courts of the application of the legislation to various fact scenarios. Since there are many different forums including thirteen courts of appeal, this allows for the development of tax law through a vast diversity of opinion. Rather than being considered a handicap, this system has been supported enthusiastically by both the tax administration and by the taxpaying public.[867]

The one thing the tax authorities cannot do is to try "to hide" adverse decisions by not publishing the decision with the result that neither the Internal Revenue Service nor the taxpayers know of these decisions. The courts, not the tax authorities, control whether or not their own decisions are published. Even where courts choose not to publish their decisions, private commercial publishers publish them instead. One way or another, practically all tax decisions are published.

In addition, the Executive Branch can try to influence the Legislature to change the law. The tax administration, of course, always has the option of applying to Congress for corrective legislation. Congress is constantly amending the Code to address problems arising in the tax law. Often, these amendments are the direct result of a disagreement Congress has with the holdings in tax cases often brought to Congress' attention by the tax authorities.

5. Statistics on tax cases

Unfortunately, there is no direct statistical data which analyzes the percentages of adverse decisions which the government appeals. There is some empirical data on the number of cases handled by the Tax Division of the Department of Justice, however. According to the Tax Division, 80% of their

[866] *See, e.g.*, Frank Lyon Co. v. United States, 435 U.S. 561 (1978); Newman v. Commissioner, 902 F.2d 159 (2nd Cir. 1990).

[867] Proposals have been made in the past supporting the creation of a national tax court of appeals. As part of the proposal to create the US Court of Appeals for the Federal Circuit (which has tax jurisdiction over appeals from the Federal Claims Court), it was initially proposed that this court be granted exclusive tax jurisdiction. This part of the proposal was dropped from the final bill. For different views of the merits of a national court of tax appeals, *see, e.g.,* Edwin N. Griswold, *The Need for a Court of Tax Appeals*, 57 HARV. L. REV. 1153 (1944); William D. Popkin, *Why A Court of Tax Appeals is So Elusive*, 47 Tax Notes 1101 (1990).

pending civil caseload is defending suits, that is suits brought by taxpayers against the government.[868] The civil trial sections have approximately 7,000 cases pending at any one time, with about 4,000 new cases received each year.[869] This figure only includes cases brought before the district courts and the Court of Federal Claims. About 770 civil appeals are in process at any one time, with 500 new ones received annually.[870] This figure includes appeals from all of the trial courts, the District Courts, the Court of Federal Claims and the Tax Court. In 2006, for example, the success rate of the department was 96% in the civil trial sections, 97% in appeals brought by taxpayers from decisions in favor of the government, and 78% in appeals brought by the government from adverse decisions in the Tax Court, Court of Federal Claims and the District Courts.[871] The Department of Justice's success in litigated cases should be considered, however, in light of the practice whereby approximately two-thirds of cases brought by taxpayers are settled.[872]

There is hardly any data concerning Tax Court cases. The major reason for this is that the Tax Court is not required to keep records, statistical or otherwise, in the same manner as an Article III court. Indeed, there is academic commentary that the way in which the Tax Court conducts its business is so opaque that it is fundamentally unfair in our system of government.[873]

The information that we do have about the Service and the Tax Court is very general. The IRS provides data as to the caseload of the Chief Counsel.[874] While the data provides numbers for amount of Tax Court cases received, closed, and pending during the given period it does not provide information of how many of such cases were tried, settled, or otherwise. The data also includes cases that are handled by the Small Claims division which are not subject to appeal. Data also generally indicates the amount of income involved in cases during the period of the report.[875]

6. Conclusion

[868] Congressional Submission for the Tax Division for Fiscal Year 2008 Performance Budget, p. 4, found at http://www.usdoj.gov/jmd/2008justification/pdf/13_tax.pdf.
[869] *Id.*
[870] *Id.*, at 5.
[871] *Id.*
[872] Information derived from the author's former experience as an attorney with the US Department of Justice.
[873] See "Instant Replay, Weak Teams, and Disputed Calls: An Empirical Study of Alleged Tax Court Bias," James Edward Maule, 66 Tenn. L. Rev. 351 (1999); "Tax Appeal: A proposal to Make the United States Tax Court More Judicial," Leandra Lederman, 85 Wash. U. L. Rev. 1195 (2008).
[874] Internal Revenue Service Data Book (2007) found at http://www.irs.gov/pub/irs-soi/07databk.pdf. The data book is available for previous years as well. The numbers for 2007 are: 29,063 cases received, 26,064 disposed, and 29,472 pending.

[875] *Id.* The numbers indicate that approximately USD 7 billion was involved in decided cases over the course of one year.

The concept of separation of powers has played an important role in US Constitutional law for over two hundred years. Formally, the Constitution created a government structure of limited and divided powers assigned to three independent branches of government. Practically, US Constitutional law recognizes that powers are shared by interdependent branches that are all necessary to carry out the policies of the national government. The promulgation, administration and enforcement of the tax law reflects this cooperation among branches within a dynamic framework of deference to and check on the authority of the other branches.

Part II

TABLES

Confirmation of the answers given in the national reports[1] [2]

[1] The detailed answers (the major part) are cut and paste from Part II of the national reports and the authors are thus the national reporters for each country. Some of the answers in the tables correspond to my interpretation of some of the authors' answers and most of them were confirmed by the authors.

[2]I included in Part II of this book, answers of more four reporters than the ones published in the Part I; The Brazilian reporter was Marco António del Greco; the Finnish reporter was Marjanna Helminen; the German reporter was Heike Jochum; and the Israeli reporter was Yoseph M. Edrey.

1. Relationship between the parliament and the tax authorities: the influence of the tax authorities on tax legislation

1.1. Does your parliament control tax authorities in an efficient way?

Yes	No
7	13
AT; CA; DEN; GR; IS; RU (indirectly); SW	BR; FIN; FR; GER; IT; JAP; NL; POL; PT; UK; SER; SP; TU

BE: In Belgium, the parliament is competent to control the tax administration by questioning the Minister of Finance about his course of policy in plenary meetings or in the parliamentary Committee of Finances. This happens frequently, as can be derived from the frequency of written questions (from members of parliament) and answers (of the Minister of Finance) in plenary meetings: during the 51st Session (2003-2007), the Minister of Finance had to answer about 770 questions.[3] Although not every question could be answered, the quantity shows that the Belgian parliament controls the tax administration by questioning the Minister of Finance.

Moreover, the Committee of Finances and Budget orally questioned the Minister of Finance 103 times during the same period, and put 1741 oral questions.[4] Furthermore, this Committee had 268 public meetings in this period. Finally, the Committee of Finances and Budget dealt with 37 draft tax bills at the initiative of the parliament and with 165 draft tax bills at the government's initiative.[5]

JAP: No. The Japanese parliament may not control the secondary statutory instruments and the administrative rulings. However, the author proposes that parliament should control and scrutinize the secondary statutory instruments and administrative rulings.

[3] Bulletins of written answers and questions, www.dekamer.be.
[4] Belgian House of Representatives, Statistics of the parliamentary activities, 3 May 2007, *Parl. St.* Kamer 2006-2007, No. 51, 007/001, 29 and 31.
[5] Belgian House of Representatives, Statistics of the parliamentary activities, 3 May 2007, *Parl. St.* Kamer 2006-2007, No. 51, 007/001, 24.

RU: The parliament does not exercise any direct control over the Federal Tax Service. However, it controls the RF government on the whole which is accountable to the parliament. The RF government and courts in their turn control tax authorities.

US: See the report itself.

1.2. Do tax authorities influence tax legislation to a major degree?

Yes	No
22	0
AT; BE; BR; CA; DEN; FIN; FR; GER; GR; IS; IT; JAP; NL; POL; PT; RU (indirectly); SER; SP; SW; TU; UK; US	

BE: During the period 2003-2007 the government drafted 89 tax bills, while there were 143 proposals on the initiative of the House of Representatives. No specific data are available to give an idea which proposals in taxation have been passed. But in general (regarding the bicameral procedure), it can be seen that 86 of the 1244 draft bills at initiative of the parliament were enacted in this period and became law, whereas almost all of the proposals on the government's initiative became law.[6] Consequently, the answer to the question is positive.

GER: To answer the question of whether the government has legislative competence in tax matters, it is necessary to differentiate between various kinds of tax law provisions. The German tax law system contains different types of tax rules. First, there are legal tax rules announced by the (in most cases Federal) parliament. Second, there are legal regulations adopted by the government on behalf of the parliament. And third there are administrative regulations that are aimed at structuring and standardizing the application of tax law by the tax administration in practice. Although the German government has no competence with regard to legal tax rules in a narrow sense, the government has great influence on tax matters due to the power of announcing

[6] Belgian House of Representatives, Statistics of the parliamentary activities, 3 May 2007, *Parl. St.* Kamer 2006-2007, No. 51, 007/001, 22-23.

legal regulations and administrative regulations supplementing the tax rules given by the parliament.

RU: The parliament does not exercise any direct control over the Federal Tax Service. However, it controls the RF government on the whole which is accountable to the parliament. The RF government and courts in their turn control tax authorities.

1.3. Does your parliament

a) usually accept the bills provided by the tax authorities (understood as government bills)?

Yes	No
20	2
AT; BE; BR; CA; DEN; FIN; FR; GR; IS; IT; JAP; NL; POL; PT; RU; SER; SP; SW; TU; UK	GER; US

GE: The government drafts tax bill proposals and presents them to parliament. The draft bills provided by the tax authorities are discussed by the parliament in detail and often they are changed substantially.

JAP: As set out above in the Japanese report, government bills are the most common way that the legislative procedure in the field of tax law is started. Sometimes tax bill drafts are submitted by members of parliament to the parliament. The tax authorities *stricto sensu* may not provide the draft bills. However, an official of the tax authorities explains them to parliament, when the government (i.e. the cabinet) needs assistance in doing this. Furthermore, government bills, before discussed by the parliament in a plenary meeting, are subject to discussion within a meeting of the Financial Standing Committee of the parliament.

b) refuse the bills provided by tax authorities?

No	Almost never	Sometimes	Often
3	2	16	0

FR; SER; UK;	NL; SW	AT; BE; BR; CA; DEN; FIN; GER; GR; IS; IT; POL; PT; RU; SP; TU; US	

DEN: Mostly tax law bills are accepted by the parliament as the government has assured a parliamentary majority before the bills are introduced. Sometimes tax law bills are rejected by the parliament due to discovery of flaws or unexpected consequences of the bill. In many of these cases the government reintroduces the bill after revising it.

JAP: The Ministry prepares the drafts and therefore has great influence on the government bills. The Tax Administration strict sensu, respectively the Ministry of Finance, is not authorized to submit bills to parliament at all. Only the Cabinet may do this via 'government bills' (I.1.2.).

SW: It depends on whether or not the government has the majority in the parliament.

c) improve the bills provided by tax authorities?

Never	Sometimes	Often
0	16	5
	AT; BR; CA; FIN; FR; GER; IS; IT; JAP; NL; RU; SER; SP; SW; TU; UK	DEN; GR; POL; PT; US

JAP: parliament has sometimes improved the bills provided by the Cabinet, but only to a limited extent. During the discussion of a draft bill within the Financial Committee of the parliament, in a few cases, marginal changes are made.

SW: "In earlier times, when the parliamentary majority was more unstable, the committees had more influence on legislation".

1.4 Is your parliament able to discuss the bills thoroughly?

Yes	No
16	5
AT; BR; CA; DEN; FIN; GR; IS; IT; JAP; POL; RU; SER; SP; SW; TU; US	FR; GER; NL; PT; UK

Most reporters who answered yes are referring to the financial committees within the parliament and not to the parliament in plenary session.

See the answers from BE: above 1.1 and 1.2.

JAP: Yes. A distinction has to be made between the discussions in the plenum of the parliament and the discussions within the Financial Standing Committee. The parliament itself is not able to discuss the bills thoroughly, the Financial Committee (consisting of a couple of Members of parliament) rather is. The Committee may make suggestions for modifications and submits a report to parliament.

1.5 Is there sufficient knowledge of tax issues in parliament?

Yes	No
6	14
BR; DEN; FR; IT; JAP; US	AT; CA; FIN; GER; IS; NL; POL; PT; RU; SER; SP; SW; TU; UK

Most reporters who answered yes are referring to the financial committees within the parliament and not to the parliament in plenary session.

BE: It is not a requirement, and neither is it a fact that representatives in the plenary assembly of the parliament have sufficient knowledge of tax law.

But those representatives who are more familiar with tax matters or who are gradually specializing in it become members of the parliamentary committee for finances. These committees may also request the assistance of external specialists and obtain advice in the preparation of the legislative work, organize seminars and hearings, and request the presence of the competent Minister.

CA: No, but the Standing Committee on Finance conducts a detailed, informed study and reports to parliament.

DEN: In particular, the Fiscal Affairs Committee proposes amendments to the original bill.

GR: It depends.

JAP: Yes, some experts of the Financial Standing Committee have knowledge of tax matters since they act as lobbyists. The members of parliament are able to understand the effects which come along with a certain tax bill. However, they do not have the ability to draft comprehensive tax bills by themselves.

POL: Please note, however, that the parliament may use external experts in the course of its legislative work.

RU: No, not by all members. Only some members of special parliamentary committees usually have knowledge of tax law.

1.6. Are tax rules often so vague that tax authorities have to fill the gaps themselves by administrative regulations?

Never	Sometimes	Often	Mere function of application of the law/ancillary rules
2	6	12	1
GR; RU	BR; POL; PT; SER; SP; US;	AT; DEN; FIN; FR; GER; IS; IT; JAP; NL; SW; TU; UK	BE

CA: No. Canada's tax law is very detailed and technical, and is supplemented with even more specific regulations. Canada does not recognize administrative interpretations as binding. The tax authorities do publish their interpretations and assessing practices, but these are not binding on either the authorities or the taxpayer.

JAP: Yes, often. The tax authorities often enact (non-binding) rulings to fill the gaps of indeterminacy. Generally speaking, the secondary statutory instruments and then administrative rulings are often enacted. However, they do not completely fill in the gaps of indeterminacy.

1.7. Do tax authorities have the competence to typify and fill in the legal gaps without control by the parliament?

Never	Sometimes	Often
7	4	10
BE ; CA; GR; POL; RU; SP; TU	FIN; FR; IT; US	AT; BR; DEN; GER; JAP; NL; PT; SER; SW; UK

BE: Delegation of essential elements is only possible in exceptional circumstances and always on the condition of control by the parliament.

IS: Never by regulation; very often by "tax directives" aimed for the use of the tax administration itself.

JAP: Their statements (for instance, administrative rulings) are usually clear and helpful. They do not have legal "competence" in the sense of being able to bind the taxpayer, though.

Moreover, the parliament has no opportunity to control the secondary statutory instruments (for instance, regulations of Finance Minister) which are enacted to typify and fill in the legal gaps in the tax law. Furthermore, the parliament has no opportunity to control the administrative rulings.

NL: Formally not, but in fact parliament is hardly able to effectively control the tax authorities, as it lacks time and expertise. Occasionally, they are informed by organizations of taxpayers,

2. Relationship between the parliament and the domestic tax courts

2.1. Are there independent (tax) courts in your country entitled to control legislation?

Yes	No
	0
Independent (tax) courts seem to exist in all reported countries, and in many of them, this function is exercised by the constitutional court (but see RU and SER, UK).	

RU: There are no special tax courts in the Russian Federation; however, judges of the state arbitration courts usually specialize in particular categories of cases (e.g. tax cases) and, to some extent, the same can be seen in other courts. In principle, courts have sufficient powers to control legislation.

UK: The courts interpret and apply legislation (using EC and ECHR principles where appropriate) - they have no power to depart from legislation unless it is in breach of directly applicable EC law. The UK has specialised tax tribunals which hear lower level cases.

2.2. If "yes", do they control tax legislation:

Ex ante	Ex post
2	21
FR; JAP	AT; BE; BR; CA; DEN; FIN; GER; GR; IS; IT; JAP; NL; POL; PT; RU; SER; SP; SW; TU; UK; US

Control is in most cases ex post, but in some cases, constitutional courts can exercise an ex-ante control.

BE: It should be remarked that the Legislative Section of the Belgian Council of State, which is not part of the judicial power, controls (tax) legislation ex ante, see Belgian report, I, 1.3.2.

POL: The administrative courts are not entitled to control tax legislation. However, in the course of dealing with a particular case, they may refer questions to the Constitutional Tribunal whenever they have doubts concerning compatibility of a legal provision with the Constitution. The administrative courts are competent to control tax acts of local self-government units. Some administrative courts adopt the view according to which they are entitled to refuse to apply a provision of an executive regulation contrary to the Constitution or to an act of parliament. Such a judgment is binding exclusively in a particular case as opposed to the judgment of the Constitutional Tribunal, which is binding *erga omnes*.

UK: See the comment to II. 2.1

2.3. Are courts competent to clarify whether a specific written tax rule is compatible with constitutional standards?

In the cases of a positive answer, the effects are limited to the process.

Yes	No	The constitutional court only
15	2	5
BE; BR; CA; DEN; FIN; GER; GR; IS; JAP; NL; PT; RU; SER; SW; US	FR; IT	AT; BE; POL; SP; TU

BE: Yes. On the one hand, Belgium has a Constitutional Court that is competent to control the tax law's compatibility with a series of constitutional fundamental rights as well as with other constitutional rules. In particular, the Constitutional Court may control the compatibility of tax laws, decrees and ordinances with the constitutional principle of legality for taxation set forth in Articles 170 and 172, second indent of the Belgian Constitution as well as the principle of equality

(Article 172 Belgian Constitution). However, the Court is only obliged to control upon request. Taxpayers with a certain interest may request the Constitutional Court to declare a specific tax law null and void. Domestic courts are principally obliged to ask the Constitutional Court a prejudicial question about the constitutionality of tax legislation if such a question has been raised before the domestic court. The Constitutional Court is not part of the judicial power, but functions independently.

On the other hand, if by 'tax legislation' Royal or Ministerial Decrees are also meant (see II. 1.1, Articles 105 and 108 Belgian Constitution), two observations should be made.
Firstly, all independent domestic courts only apply such general (or provincial or local) tax decisions and regulations provided that they are in accordance with the law (Article 159 Belgian Constitution and Article 259, first indent, 32° Code of Civil Procedure). This article implies the independent judicial review of the legality of the executive power. The judge is not only obliged to control the compatibility of regulatory decrees and regulations with the internal law, but he must control the compatibility with the Belgian Constitution and international treaties or EC law with direct effect as well.
Secondly, the Section Administrative Disputes (Bestuursgeschillen) of the Belgian Council of State makes decisions as an administrative court by means of judgments (Article 160, second indent Belgian Constitution). This Council may control, among other things, the constitutionality of general (or provincial or local) (but not individual) tax decisions and regulations and nullify them. The Council of State is not part of the judicial power, but functions independently.

POL: The administrative courts are not entitled to control constitutionality of tax legislation. However, they may refer questions to the Constitutional Tribunal whenever they have doubts concerning compatibility of a legal provision with the Constitution in the course of a particular case (see also II: 2.1.).

UK: Not applicable.

2.4. If a high court is convinced that a specific tax law violates constitutional standards, is the court in this case allowed to ignore the law?

Yes	No	Has to interrupt proceedings and to

		file for a constitutional review by the constitutional court
12	5	5
BR; CA; DEN; FIN; GR; IS; JAP; NL; PT; SW; UK; US	FR; GER; POL; SER; TU	AT; BE; IT; SP; RU

BE: If the Belgian Constitutional Court nullifies a specific tax law on the grounds of unconstitutionality, its decision applies *erga omnes*. Consequently, this specific tax law no longer exists in the Belgian legal system. The Constitutional Court, however, has the possibility of modulating the effect *ratione temporis* of that decision.

If the Constitutional Court, when answering a prejudicial question of a domestic court, is convinced that a specific tax law violates constitutional rules, only the parties to the case are bound by this judgment. Here, only the domestic court that put the prejudicial question is obliged to ignore the specific tax law. Because the law is still part of the Belgian legal system, others (tax administration, taxpayers, courts) are allowed to apply the specific tax law – until the parliament has modified or removed the law.

DEN: Yes, but it has never happened.

POL: Views on this matter differ. The majority view seems to be that administrative courts should ignore an unconstitutional rule having previously obtained the opinion of the Constitutional Tribunal on the matter in question. The minority view is that administrative courts can (and should) ignore provisions they believe to be unconstitutional even if they have not referred any questions to the Constitutional Tribunal. The minority view only applies to executive regulations - it does not apply to parliamentary acts, even if they are believed to be unconstitutional.

RU: If a certain tax law violates constitutional standards, the RF Constitutional Court has to recognize it as unconstitutional and thereby nullify its effect throughout the whole RF territory.

If state arbitration courts or courts of general jurisdiction dealing with a particular case think that the federal law (statute) which is due to be applied in this case, violates the RF Constitution they have to suspend the case and forward a request to the RF Constitutional Court. A taxpayer is also entitled to forward such a request (complaint) if his/her rights are violated by an unconstitutional, in his\her opinion, law in the framework of a particular case.

However, state arbitration courts and courts of general jurisdiction cannot ignore (before a positive RF Constitutional Court decision) a federal law subject to be applied. They can ignore a normative act of a lower legal level (e.g. ruling of the government, order of the Ministry of Finance, etc.) in a similar situation.

TU: Allowed to ignore a law, however, on grounds that it conflicts with the ECHR.

UK: It may in the case of law contrary to directly effectively EU law. In a situation in which an individual's human rights under the Human Rights Act are breached, if the court cannot construe the domestic legislation so as to give effect to the rights, the court may make a declaration of incompatibility. It cannot override legislation.

3. Relationship between the tax administration and the domestic tax courts

3.1. Are there independent (tax) courts in your country that are obliged to control your tax administration?

Yes	No
21	
AT; BE; BR; CA; DEN; FIN; FR; GER; GR; IS; IT; JAP; NL; POL; PT; RU; SP; SW; TU; UK; US	

RU: Independent courts have to control the tax administration usually at taxpayers' request. Besides, when collecting tax debts from an individual (a natural person), or when collecting substantial tax fines from any taxpayer and in some other cases, courts exercise preliminary

judicial control, that is to say, a tax body will have to address a court in order to make a collection (Article 48 of the RF Tax Code).

SER: There are no specialized tax courts in Serbia obliged to control the tax authority. This function is performed by the Supreme Court.

UK: Prior to the reform of the whole tribunal system in the UK in 2009, any complaint about the way in which the tax authorities operated (as opposed to points of legal dispute) could only be heard under the general courts' common law jurisdiction of judicial review. From 2009, tribunals, which include tax tribunals, have a judicial review function.

3.2. Are your domestic courts bound to administrative orders/rulings, which are issued by tax authorities?

Yes	No	Sometimes
0	21	1
	AT; BE; BR; CA; DEN; FIN; FR; GER; GR; IS; IT; JAP; NL; POL; PT; RU; SER; SP; SW; TU; UK	US

FR: No (save Article L80 A and B LPF).

GER: Basically no.

If "no", do the courts follow them in fact?

Never	Rarely	Sometimes	Often	Very often	Taxpayers' expectations based on *contra legem* rulings are

					not taken into account
2	1	10	8	0	1
AT; UK	SP	CA; FR; GR; IS; JAP; POL; RU; SER; TU; US	BR; DEN; FIN; GER; IT; NL; PT; SW		BE

JAP: They used to follow them until around 2001. However, the courts nowadays do not follow them without legal grounds. The judges of the courts currently have better knowledge of tax laws because of Japan's tax law education. Additionally, tax accountants (i.e. Steuerberater) may appear before the courts in order to assist the taxpayer and barrister at law on tax matters. Their appearance before the courts is significant for the taxpayer in accordance with the statistics. Judges are able to better understand the issues explained by tax accountants than by barristers. Furthermore, tax accountants help the lawyer to prepare the documents which are filed with the court. Consequently, it is not necessary for the judges to follow the administrative statements without sufficient knowledge.

3.3. Are first-instance court decisions on a tax case normally accepted by the tax administration (i.e. do they not try to appeal against the decision)?

No	Sometimes	Often	Very often
4	10	6	2
BR; GR; JAP; TU	CA; FIN; FR; GER; IT; PT; RU; SP (rarely); SW; US	BE; DEN; NL; IS; POL; UK	AT; SER

Statistics available:

AT: In 2007 taxpayers "won" 1,759 cases before the Independent Financial Senate. Only in 51 cases was an appeal to the Administrative (High) Court made by the tax administration (first instance); this is only 2.9 % of all cases "lost" by the tax administration.[7]

DE: Supposedly often, though it is difficult to answer the question with certainty as a reform of the Danish court system has changed the first-instance court from the High Courts (landsretterne) to the City Courts (byretten) from 1 January 2007.

At the time of the final revision of the report (November 2009), it can be confirmed that the first-instance city courts often accept the case as presented by the tax administration. Statistics show that 317 cases from the National Danish Tax Tribunal were brought before the city courts in 2007. In 2008 the number of cases brought before the city courts was 351. The city courts upheld the tax administration's rulings in more than 70 % of the cases. It has not been possible to establish how many of the city court judgments were appealed to the high courts.

JAP: Recently taxpayers have "won" fewer than 10% of the cases before the Financial Tribunal. The tax administration may not, as a rule, appeal to the first-instance court. It may appeal to the second-instance high court when it has lost in the first instance court. Taxpayers "won" fewer than 14% of cases before the first-instance court, and less 10% of cases before the high court.

Table 1

[7] See Annual Report of the UFS (Independent Financial Senate), http://ufs.bmf.gv.at/Aktuelles/UFSTtigkeitsbericht/TB2007.pdf (15.6.2009).

Disposition of requests for reinvestigation						1
Type	Number of the requests for reinvestigation	Growth rate	Number of already disposed	Number of claim accepted	Percentage	2 3
	Case	%	Case	Case	%	4
FY2001	4860	−14.0	5,071	756	14.9	5
2002	5119	5.3	4809	774	16.1	6
2003	5573	8.9	5615	817	14.6	7
2004	4272	−23.3	4516	610	13.5	8
2005	4501	5.4	4549	618	13.6	9
2006	4301	−4.4	4027	411	10.2	10
A	B	C	D	E	F	

The number of the requests of first instance of adminstrative remedy (i.e. reinvestigation, Einspruch) in FY 2006 is 4,301, which is 200 less(rate of inncrease:4.4%) than the previous fiscal year (4,501).
Out of 5,478 cases necessary to dispose including 1,177 cases carried over from the previous year, 4,027 cases are already disposed. From the viewpoint of disposition type, the number of cases where a part or all of claims of demurrers were accepted is 44 (for the previous fiscal year, 618), which accounts for 10.2% (13.6%) of all cases (see Table 1)

Source: National Tax Agency, The 132th National Tax Agency Annual Statistics Report FY 2006, May 2008 Tokyo, p26

Table 2

Disposition of requests for the Financial Tribunal, i.e. reconsideration						1
Type	Number of the requests for reconsideration		Number of already disposed	Number of claim accepted		2
		Growth rate			Percentage	3
	Case	%	Case	Case	%	4
FY2001	2910	−14.5	3,294	459	13.9	5
2002	2823	−3.0	3403	500	14.7	6
2003	3447	22.1	3721	818	22	7
2004	3087	−10.4	3382	493	14.6	8
2005	2963	−4.0	3167	470	14.8	9
2006	2504	−15.5	2945	361	12.3	10
A	B	C	D	E	F	
The number of the requests of second instance remedy (i.e. the Financial Tribunal, reconsideration) in FY 2006 is 2,504, which is 459 less (rate of increase: −15.5%) than the previous fiscal year (4,501). Out of 4,739 cases necessary to dispose including 2,235 cases carried over from the previous year, 2,945 cases are already disposed. From the viewpoint of disposition type, the number of cases where a part or all of claims of demurrers were accepted is 361 (for the previous fiscal year, 470), which accounts for 12.3% (14.8%) of all cases (seeTable 2)						
Source: National Tax Agency, The 132th National Tax Agency Annuala Statistics Report FY 2006, May 2008 Tokyo, p 26						

Table 3

Disposition of litigation cases (government as defendant)						1
Type	Number of filed litigation cases		Number of finished litigataion cases	Number of decisions in favor of plaintiffs		2
		Growth rate			Percentage	3
	Case	%	Case	Case	%	4
FY2001	400	3.1	404	33	8.2	5
2002	380	−5.0	346	33	9.6	6
2003	492	29.5	473	53	11.2	7
2004	552	12.2	478	57	11.9	8
2005	394	−28.6	559	52	9.3	9
2006	401	1.8	447	80	17.9	10
A	B	C	D	E	F	
The number of the litigation cases (government as defendant) in FY 2006 is 401, which is 7 more(rate of increase: 1.8%)than the previous fiscal year (394). From the viewpoint of disposition type, the number of finisfed cases where the decisions were in favor of plaintiffs partly or fully is 80 (for the previous fiscal year, 52), which accounts for 17.9% (9.3%) of all cases (seeTable 3)						
Source: National Tax Agency, The 132th National Tax Agency Annuala Statistics Report FY 2006, May 2008 Tokyo, p26						

Table 4

Disposition of requests for the Financial Tribunal, i.e. reconsideration						1
Type	Number of the requests for reconsideration		Number of already disposed	Number of claim accepted		2
		Growth rate			Percentage	3
	Case	%	Case	Case	%	4
FY2001	2910	−14.5	3,294	459	13.9	5
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2005	2963	−4.0	3167	470	14.8	9
2006	2504	−15.5	2945	361	12.3	10
A	B	C	D	E	F	
The number of the requests of second instance remedy (i.e. the Financial Tribunal, reconsideration) in FY 2006 is 2,504, which is 459 less (rate of increase: −15.5%) than the previous fiscal year (4,501). Out of 4,739 cases necessary to dispose including 2,235 cases carried over from the previous year, 2,945 cases are already disposed. From the viewpoint of disposition type, the number of cases where a part or all of claims of demurrers were accepted is 361 (for the previous fiscal year, 470), which accounts for 12.3% (14.8%) of all cases (seeTable 2)						
Source: National Tax Agency, The 132th National Tax Agency Annuala Statistics Report FY 2006, May 2008 Tokyo, p 26						

Table 5

Disposition of litigation cases (government as defendant)						1
Type	Number of filed litigation cases	Growth rate	Number of finished litigataion cases	Number of decisions in favor of plaintiffs	Percentage	2
						3
	Case	%	Case	Case	%	4
FY2001	400	3.1	404	33	8.2	5
2002	380	−5.0	346	33	9.6	6
2003	492	29.5	473	53	11.2	7
2004	552	12.2	478	57	11.9	8
2005	394	−28.6	559	52	9.3	9
2006	401	1.8	447	80	17.9	10
A	B	C	D	E	F	
The number of the litigation cases (government as defendant) in FY 2006 is 401, which is 7 more(rate of increase: 1.8%) than the previous fiscal year (394). From the viewpoint of disposition type, the number of finisfed cases where the decisions were in favor of plaintiffs partly or fully is 80 (for the previous fiscal year, 52), which accounts for 17.9% (9.3%) of all cases (seeTable 3)						
Source: National Tax Agency, The 132th National Tax Agency Annuala Statistics Report FY 2006, May 2008 Tokyo, p26						

POL: An analysis of the judgments of the Supreme Administrative Court available in the CBOSA database (i.e. database of judgments of administrative courts) shows that complaints against the judgments of regional administrative courts are lodged by taxpayers more frequently than by the tax authorities. For instance, 75% of complaints with which the Supreme Administrative Court dealt with in March of 2007 were lodged by taxpayers, while only 25% were by the tax authorities (only taxes falling within the competence of heads of tax offices and directors of tax chambers were taken into account; thus, the statistics do not apply to excise duties, local taxies and, to a certain extent, to value added taxation). In 2007 regional administrative courts dealt with 11 815 complaints against the decisions of the directors of tax chambers. Around 28 % of the complaints (3 382) were decided in favour of taxable persons. Thus, one may note that tax

authorities and taxpayers lodge a similar proportion of complaints against unfavourable judgments.

RU: They are usually accepted when a decision is at least partly in favour of the tax administration. According to internal regulations, the tax authorities have to use all remedies (appeal or (and) cassation complaint) if the position of the tax administration is not supported).

SER: Due to the fact that tax cases in Serbia are settled before the Supreme Court, the tax authority has legal remedies if a particular case is settled unsatisfactorily in only very limited situations.

3.4. Is a final judicial decision on a single tax case followed by the tax administration not only in this case but also in all other similar cases?

No	Sometimes	Often	very often	always
0	9	2	10	3
	BR; GER; GR; PT; RU; SER; SP; TU; US	FR; POL	AT; BE; CA; DEN; FIN; IT; JAP; NL; SW; UK	IS; CA + JAP (in stare decisis cases)

CA: The common law system of stare decisis means that lower courts must follow higher courts' rulings unless the case can be distinguished. The tax authorities are bound by rulings of the courts, but may seek to refine the ruling in a first case by bringing a similar case, hoping to distinguish it from the first case.

JAP: The final judicial decision binds the parties of that case generally[8].
In practice, the tax administration follows it in all other similar cases because of doctrine of *stare decisis* in the case of a Supreme Court decision. If the decision is not a Supreme Court decision, the tax administration follows a favourable decision in all other similar cases.

3.5. How does the tax administration react when it is convinced that the final judicial decision is wrong or not "acceptable" because, e.g., it is too expensive for the public budget?

[8] Sonobe, Itsuo, Administrative Law Decisions of the Supreme Court, in:Sugai/Sonobe, foot noot 6,pp.121-136.

a) Does it accept the (from their point of view) wrong decision?

Never	Sometimes	Often	Very often	Always
2	8	2	7	2
GER; RU	IT; NL; PT; POL; SER; SP; UK; US	AT; FR	BE; BR; CA; DEN; FIN; JAP; SW	GR; TU

CA: The tax administration would propose to the Department of Finance that it introduces a legislative amendment that would assure the tax administration's preferred interpretation or tax result would apply in future cases. Where a ruling does not accord with government policy, the Department of Finance may move very quickly to introduce amendments to prevent undue advantage being taken of an unanticipated ruling. Occasionally the tax authorities (CRA) will indicate that it does "not accept" a ruling without appealing it, or considers that it should be confined to the specific facts of the case. This is simply an indication of an intention to challenge in the future, but does not bind the taxpayer or a future court.

GR: It is binding.

IS: As long as the final court's decision is not affected by a new law – always.

JAP: Sometimes amendments are proposed.

RU: Almost never or only if all possibilities for bringing a complain were completely used.

b) Does it try in another similar case to convince the court to decide in a different way?

Never	Sometimes	Often	Very often
0	7	5	9
	AT; BE; DEN; FIN; FR; SW; UK	CA; GER; POL; SER; US	BR; GR; IT; JAP; NL; PT; RU; SP; TU

IS: Often, to slightly similar cases. Never in identical or very similar cases.

JAP: By amending regulations.

c) Does it try to influence the parliament to change the law?

Never	Sometimes	Often	Very often
0	5	10	7
	DEN; POL; RU; SW; UK	AT; CA; FIN; FR; GR; IS; PT; SER; TU; US	BE; BR; GER; IT; JAP; NL; SP

DE: The Tax Ministry will often react if a tax law judgment is considered unacceptable by bringing the matter to the Minister of Taxation's attention. This has led to new legislation; for instance, regarding the transfer pricing regulation in the Tax Assessment Act sec. 2 that was a direct consequence of the Supreme Court's judgments as rendered in TfS 1996, 642 H and TfS 1998, 238 H.

d) Does it make sure that the tax authorities will not follow this decision in similar cases?

Never	Sometimes	Often	Very often
4	9	3	1
DEN; FIN; TU; UK	AT; BR; FR; GER; IT; NL; POL; SER; SP	JAP; PT;US	RU

CA: Not sure how to apply this; the tax authorities are the CRA, the equivalent of the US IRS.

IS: Never, if the decision is of the Supreme Court. In rare cases when the decision is of a district court and there was no appeal it will do it in order to bring the issue up for the Supreme Court's final decision.

SW: Not applicable.

e) Does it try "to hide" such a decision, e.g., not publishing the decision with the result that the tax authorities does not know this decision?

Never	Hardly often	Sometimes	Often	Very often
13	1	4	0	0
AT; BR; CA; FIN; GER; IS; JAP; POL; RU; SER; SP; UK; US	NL	DE; FR; IT; PT		

BE: On the basis of a simple query on the website www.fisconet.be of the Belgian Service of Federal Finances, it can be seen that not every final judicial decision is published.

For example, in 2007 the Belgian Supreme Court pronounced 104 decisions in tax matters.[9] The website of the tax administration yields 18 results after a search for final decisions of the Supreme Court in 2007: this amounts to 17% published decisions. Fortunately, all decisions are published at the site of the Supreme Court (www.cass.be).
The same exercise for the decisions of the Belgian Constitutional Court brings us to 30% (7 of 23) published decisions on the site of the tax administration. Again, all decisions are published on the website of the Constitutional Court (www.arbitrage.be).

This small investigation is merely an observation. It is difficult to assert that the tax administration consciously wants 'to hide' (from its point of view) 'wrong' decisions. The intention or motivation of the tax administration is unknown. However, in our opinion, the tax administration should warn the users of the website that the list of final judicial decisions is far from complete.

CA: Judicial decisions are published by the courts and cannot be hidden. The decisions of the CRA, which is the Canadian equivalent of the IRS, are always subject to judicial appeal.

DE: Sometimes such a decision is perhaps not given the most obvious place or only mentioned en passant in the Tax Assessment Guides that many tax advisors and the tax administration often use. This is well known among tax advisors and acknowledged in tax law theory and

[9] Annual Report Supreme Court 2007, 235.

consequently the person applying the tax legislation cannot depend solely on the interpretation in the Tax Assessment Guides. In the introduction to the Tax Assessment Guides the tax administration points out that the guides represent the tax administration's interpretation of tax legislation. This interpretation includes the use or omission of (relevant) judgments in the Tax Assessment Guides.

FR: No official statistics are available. But the observation of case law and the reading of the case reviews give a good indication of it.

GR: It is forbidden by the Constitution.

NL: This is hardly possible in the Netherlands because many tax decisions are published on the internet by the courts and in tax journals.

POL: Hiding a court judgment seems to be hardly possible as all judgments are (or at least should be) published on the website of the Supreme Administrative Court.

SW: Not applicable.

TU: No information available.

UK: Judgments are published independently of HMRC.

List of Authors (Part I)

William B. Barker is a professor of law at Penn State Dickinson School of Law. He has been a visiting professor at the London School of Economics and Political Science (standing appointment 2003-2006), the universities of Cape Town, Free State, Witwatersrand, New South Wales, Vienna, Oxford, Trinity College (Dublin), and Latvia (Riga Graduate School of Law). He has received several awards to support teaching and research including three Fulbright Scholar awards, an Atax Research Fellowship (UNSW), and a Senior Associate Research Fellowship (IALS, London). Previously, he served as a law clerk to the Honorable Marion Bennett of the US Court of Appeals for the Federal Circuit and was an attorney with the Tax Division of the US Department of Justice where he was responsible for many international tax cases.

Emmanuel de Crouy-Chanel is Professor of Public Law at the Picardie Jules Verne University and member of the Centre d'études des politiques fiscales et financières publiques of the Paris I Panthéon Sorbonne University.

Ana Paula Dourado is a Professor of Tax Law and European Tax Law at the University of Lisbon (www.ideff.pt). She has been a visiting Professor at the University of Leiden (International Tax Centre), Univ. of Florida (2010), Global Law School, Catholic Univ. Lisbon (programme directors, Weiler/Maduro) (2010). She has drafted and negotiated the tax reforms in Portuguese speaking countries as an expert at the legal department of the International Monetary Fund (2003-2009). She was a Member of the Centre for Tax Studies at the Ministry of Finance and a delegate for Portugal in working groups for direct tax harmonization at the European Community and in the working group for tax avoidance and evasion at the OECD. Founding member of the GREIT (www.greit-tax.eu). She co-edited "the Acte Clair in Direct Tax Matters" (IBFD) and published several articles, book chapters in European tax law; correspondent for EC Tax Law, H&I, and several other tax law journals; Member of the editorial board of Intertax, Rev. de Finanças Públicas e Direito Financeiro and the Academic Committee of the EATLP.

M. Luisa Esteve Pardo has a Ph. D. in Law (1997), Universitat de Barcelona (Spain). She is presently: Associate professor of Tax Law in the Law Faculty, Universitat de Girona (Spain) (*Profesora titular de Universidad*) Main research interests: taxation of trusts, local taxes, tranfer pricing. Main publications (selection): Books: *Impuesto sobre Sociedades en la Unión Europea*, Valencia, 1996; *Fiscalidad de las operaciones vinculadas y distribuciones encubiertas de beneficios,* Valencia1996 - Book sections: Los problemas tributarios de la recepción del *trust* en el derecho español, *Libro-Homenaje a César Albiñana*, Madrid, 2008; Implicaciones financieras del desarrollo de la segunda fase del Pacto Local, *La descentralización de competencias autonómicas en la ciudad de Madrid. Nuevas oportunidades para la gestión desconcentrada*, Barcelona, 2009 - Articles: „La Directiva sobre el ahorro ¿Contiene medidas contrarias a la libre circulación de capitales?", Noticias de la Unión Europea, nº 254, pp. 11-34, 2006; Presupuestos objetivos de aplicación del régimen de subcapitalización, Revista de Contabilidad y Tributación, No. 216, pp. 3-20, 2001.

Prof. Lorenzo del Federico is Professor of Tax Law at the University of Chieti – Pescara; he graduated with honours in Law at the University of Bologna – Italy in 983. He has been a member of various research groups on tax law and a speaker at the EATLP congres in Caserta on the topic "The notion of tax and different types of taxes". He is a member of the scientific

commitee of the following reviews: Giurisprudenza delle imposte, La Finanza Locale, Rivista di diritto tributario, Diritto e Pratica Tributaria Internazionale, Rivista di diritto tributario internazionale and co- director of the review "Giustizia Tributaria".

Hans Gribnau is senior lecturer at the University of Tilburg and professor of tax law at the University of Leiden. He teaches methodology of tax law and procedural tax law. His current research interests lie in the quality of tax regulation, the instrumental use of tax law, governance and fiscal ethics. His latest publications include 'Assessing Corporate Tax Reform: Incomplete Information and Conflicting Interests' (with Henk Vording), 'Soft Law and Taxation: EU and International Aspects' and 'Soft Law and Taxation: The Case of The Netherlands' and 'Constitutional limits to taxation in a democratic state: The Dutch experience' (with Richard Happé).

Prof. MMag. Dr Johannes Heinrich teaches Austrian and International Tax Law at the Alpen-Adria-Universität Klagenfurt and the Karl-Franzens-Universität Graz. His research focus is in the area of business taxation and International and European Tax Law.

Dr Gordana Ilić-Popov is full professor of the Public Finance and Tax Law at the Belgrade University, Faculty of Law, Serbia. She is a member of the International Institute of Public Finance (IIPF), a member of the International Fiscal Association (IFA), as well as a member of the European Association of Tax Law Professors (EATLP). She is author or co-author of 11 books and more than 150 articles in national and international scientific journals.

Dr Konosuke Kimura is Professor of Law at the Graduate School, Nihon University in Tokyo and a former professor of law at Keio University. He graduated from Faculty of Law at Keio University in Tokyo. Moreover, he had studied tax law at Institute for tax law, Cologne University and Queens College, Cambridge University as well as Harvard Law School.

Dr Krzysztof Lasiński-Sulecki conducts research in the fields of tax law and customs law as an employee of Nicholas Copernicus University in Toruń, Poland. He has prepared more than 100 publications concerning tax and customs laws (*inter alia* in European Taxation, International VAT Monitor, Intertax and Common Market Law Review). Since 2008 he has been Polish correspondent of IBFD's International VAT Monitor. He also works as a tax adviser. Previously he was appointed as an expert on international tax law by the lower house of Polish parliament (*Sejm*).

Alexandre Maitrot de la Motte is Professor of Public Law at the Paris 12 University, where he is in charge of the Masters Degree in Taxation programme. He is a specialist in European taxation and regularly publishes in the Revue de Droit Fiscal.

Dr Wojciech Morawski conducts research in the fields of tax law and customs law as an employee of Nicholas Copernicus University in Toruń, Poland. He has prepared more than 100 publications (*inter alia* in European Taxation and Common Market Law Review). He also works as a legal counsel. Previously he was appointed as an expert on international tax law by the lower house of Polish parliament (*Sejm*).

Jacob Graff Nielsen Associate professor of tax law at the Faculty of Law, University of Copenhagen. In 2003 Jacob Graff Nielsen obtained a PhD degree on basis of a thesis concerning the importance and effect of rule of law in connection with Danish taxation. Currently, he is Head of Research at the faculty.

Martha O'Brien holds an LL.B. from the University of Victoria (1984) and an LL.M. in EC Law from the Institut d'Etudes Européenes, Université Libre de Bruxelles (1992). She practised law in Vancouver, British Columbia from 1985-1990 (civil litigation) and from 1992-2000 (Canadian and international tax law) before her appointment as an assistant professor in the Faculty of Law, University of Victoria in 2000. She teaches the basic tax course, and two advanced tax courses (corporate tax and international tax), as well as EU Law and corporate law. She has published numerous articles in leading Canadian and European journals.

Prof. Dr Bruno Peeters is Ordinary Professor in Tax Law at the Faculty of Law of the University of Antwerp, where he is Director of the Master of Tax Law. As Visiting Professor he also teaches at the Faculty of Law of the University of Bologna. He is member of the Scientific Committee of the International Fiscal Association's Belgian branch and member of the board of editors of EC Tax Review. He is the author of various books and articles on tax issues.

Heinz-Juergen Pezzer was born in 1950; 1978 Scientific Assistant at the University of Cologne (Prof. Dr. Klaus Tipke); 1979 Judge at the Fiscal Court of Duesseldorf; 1981-1985 Scientific Assistant at the Federal Constitution Court, Karlsruhe; 1986 Doctor of Law; 1991 Judge (2009 Presiding Judge) at the Federal Fiscal High Court, Munich; 2003 Honorary Professor at the University of Osnabrueck.

Mag. Irina Prinz studied law at the Karl-Franzens-Universität Graz and now works there as a university assistant in the Tax Law Department.

Prof. M. Sentsova (Karasseva) is a professor at and the head of the financial law department of the Faculty of law of the Voronezh State University. She is the author of six books and about 120 articles in the tax and financial law area. She has published in Russia, Poland, Ukraine, Belarus, Switzerland, Netherlands, Lithuania, Slovakia, the USA and Kazakhstan.

Dr Eleni Theocharopoulou (PhD. University of Paris II, France) is University Assistant Professor of Tax Law at the Faculty of Law of Democritus University in Greece and Attorney at Law. She has published various studies concerning tax law of which the most important are: (1) La fiscalité de la propriété littéraire et artistique (PhD, University of Paris II), ed.. LGDJ 2002 (Paris), 331 pages, (in French), (2) Taxation of Income derived from E-Commerce, ed. Ant. N. Sakkoulas 2007 (Athens), 410 pages (in Greek).

Dr Elly van de Velde is a member of the Faculty of Law at the University of Antwerp. As a Research Assistant of the Research Foundation-Flanders, she wrote a dissertation about 'agreements' with the tax administration, their limits, legal characterization and legal

consequences. She is author of various publications. As of 1 September 2009, she works as a lawyer at Greenille Lawyers.

Prof. Dr Danil V. Vinnitskiy is Head of the Department of tax and financial law, the Urals State Academy of Law (Ekaterinburg, Russia). Member of the European Association of Tax Law Professors and of the Presidium of the International Association of Financial Law (which brings scholars from CIS countries together). Author of more than 160 publications, including 11 monographs and 7 textbooks on tax and financial law (including those prepared with co-authors). Acted as an editor of collections of works on topical issues of financial and tax law. General editor of the Russian Yearbook of International Tax Law. Member of scientific councils of a number of the RF state bodies; acted as an expert of the RF Constitutional Court.