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Abstract

Hungary is in the process of modernising its legal and tax system. Where countries are undergoing such periods of transition it is of particular importance to develop taxpayers' rights and obligations. This article examines these rights and obligations, with particular reference to the procedures relating to the gathering of fiscal information, tax assessment and the enforcement of fiscal obligations. The article focuses on the Taxation Order Act and recent guiding court decisions in its review of the effective law and its implementation in the area of tax administration.

Keywords

taxpayers rights, South Africa, tax, taxation order act

TAXPAYER RIGHTS AND OBLIGATIONS: THE HUNGARIAN EXPERIENCE



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Hungary is in the process of modernising its legal and tax system. Where countries are undergoing such periods of transition it is of particular importance to develop taxpayers' rights and obligations. This article examines these rights and obligations, with particular reference to the procedures relating to the gathering of fiscal information, tax assessment and the enforcement of fiscal obligations. The article focuses on the Taxation Order Act and recent guiding court decisions in its review of the effective law and its implementation in the area of tax administration.

I INTRODUCTION

A Methodology

At first glance, the statement that it is good to pay taxes seems surprising. However, one can agree with this statement, provided that not only the fiscal burden arising from the obligation to pay taxes is taken into consideration, but also the maxim of certainty as drafted by Adam Smith.¹ People pay taxes because of the obligation to do so. It is still better to pay taxes than tributes. The distinction between taxes and tributes was widely experienced in post-communist countries where the state enterprises, as the main constituents of the national economy, were actually not subject to taxes but profit remittances that the government obtained by coercion from time to time.

¹ *An Inquiry in the Nature and Causes of the Wealth of Nations* in Salter DR, Kerr JLB and Easson A, *Cases and Materials on Revenue Law* (1990 Sweet and Maxwell) 1.

probably be brought in terms of the constitutional right to equality before the law and to procedurally fair administrative action.⁴¹

Conclusion

Prior to South Africa's first democratic elections in 1994, taxpayers' rights were scarcely on the agenda. Since those elections, and as part of the move to inculcate a "culture of rights" amongst the citizenry, there has been recognition of the need to establish some kind of charter of taxpayers' rights, although the exact form that such a charter will take is not yet clear. But the major impetus for legally enforceable taxpayers' rights will come from the interim (and later, the final) Constitution.

⁴¹ See *Jeeva v Receiver of Revenue, Port Elizabeth* 1995 (2) SA 433 (SECLD) at 444F.

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of proof has been cast onto the accused. The challenge has been mounted under s 25(3) of the interim Constitution which entrenches the right to a fair trial, including the presumption of innocence. Prior to the Bill of Rights, statutory incursions into the presumption of innocence were legion, many of them taking the form of a reverse onus of proof. In a series of cases, the Constitutional Court has held such provisions to be in conflict with the Bill of Rights.³⁶ For example, the Criminal Procedure Act³⁷ provides that when an offence has been committed for which any corporate body is liable to prosecution, any director or servant of the corporate body is guilty of an offence, unless he or she proves that he or she did not take part in the commission of the offence and could not have prevented it. In *S v Eckert*³⁸ the court accepted, but did not have to decide, that this provision is probably unconstitutional.

The South African Income Tax Act contains a general provision that, in any objection to an income tax assessment, the onus of proving the assessment wrong rests on the taxpayer.³⁹ The standard of proof is the civil standard, namely a balance of probabilities. The Income Tax Act contains other provisions which place the onus of proof on the taxpayer in specific situations. Most notably, the general anti-avoidance provision of the Act stipulates that, if a transaction has the effect of avoiding tax, the taxpayer is presumed to have entered into it for the purpose of avoiding tax, unless he or she proves the contrary. (Proof of such a purpose is a prerequisite for the implementation of the anti-avoidance powers of the Commissioner, as laid down in the section.) The constitutionality of such reverse onus provisions in the realm of income tax has not yet come under challenge.

Such a constitutional challenge could not be brought under the provisions of the Bill of Rights which guarantee the right to a fair trial and the presumption of innocence, as these provisions are applicable only to criminal proceedings.⁴⁰ The challenge will

³⁶ For a compendium of the decisions on this issue, see Mosikatsana, (1996) 12 SAJHR 125.

³⁷ Act 51 of 1977.

³⁸ 1996 (2) BCLR 208 (SE).

³⁹ Income Tax Act, s 82.

⁴⁰ *Park-Ross v The Director, Office for Serious Economic Offences* 1995 (2) BCLR 198 (C) at 210I.

- (a) lawful administrative action where any of his or her rights or interests is affected or threatened;
- (b) procedurally fair administrative action ...;
- (c) be furnished with reasons in writing for administrative action which affects any of his or her rights or interests ...

Internationally, the constitutional entrenchment of the right to administrative justice is a rarity. The likely impact of s 24 is a matter of intense debate in South Africa. It is, however, clear that, subject only to the general limitation clause in the Constitution, the section blocks any legislative ouster of judicial review of administrative action.

The common law of South Africa has always recognised the judicial reviewability of administrative decisions, but only on the narrow ground that the person in question had exercised a discretionary power *mala fide* or without properly applying his mind to the matter. The provisions of the Bill of Rights, quoted above, are far broader than these common law principles.³⁴ However, the removal from the Income Tax Act of almost all the provisions which gave the Commissioner a non-appealable discretionary power has greatly reduced the area within which review will be a significant remedy. Almost all challenges to the exercise of the Commissioner's powers can now take place in terms of the provisions of the Income Tax Act relating to appeal, as opposed to review, or by way of a constitutional review.

In litigation with a taxpayer, the revenue authorities frequently invoke the secrecy provisions of the Income Tax Act to avoid the disclosure of documents or information. The courts have always had a discretion to order the revenue authorities to disclose information, despite those secrecy provisions.³⁵ The administrative justice and equality clauses of the interim Constitution will now take the issue out of the realm of pure judicial discretion and make it justiciable in terms of the Constitution.

Reverse onus

In the criminal law context, there have already been constitutional challenges in South Africa to statutory provisions in which the onus

³⁴ For an analysis of s 24 see de Ville, "The Right to Administrative Justice: an Examination of Section 24 of the Interim Constitution" (1995) 2 SAJHR 264.

³⁵ *Jeeva v Receiver of Revenue, Port Elizabeth* 1995 (2) SA 433 (SECLD) at 458C.

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Accordingly, the court held³⁰ that, applying the criteria laid down in *R v Oakes*, the objective of the Serious Economic Offences Act was sufficiently important to justify limiting the constitutionally-protected right to privacy, but that the search and seizure provisions in their present form were in conflict with the Constitution.³¹

There are differences in the respective objectives of the Serious Economic Offences Act and the Income Tax Act. The decision in *Park-Ross* was concerned only with the former, and it should not be assumed that an inquiry into the constitutionality of the search and seizure provisions of the latter Act will run in the same tracks to precisely the same conclusion. In particular, the application of the proportionality test mandated by the decision in *R v Oakes* may lead to a different result. Liability for income tax is a form of civil liability incurred by the taxpayer toward the State, and it may be that a court would hold that prospective civil liability justifies a less radical incursion into rights and freedoms than an attempt to garner evidence for a criminal prosecution. On the other hand, tax evasion is also a crime, and the search and seizure provisions might be justified in terms of the inquiry into a prospective criminal prosecution for common law fraud or statutory tax evasion, rather than merely a tax-collection measure.

The approach of the court in *Park-Ross* is consistent with decisions on the interpretation of the Fourth Amendment of the Constitution of the USA, which refers to the right not to be subjected to "unreasonable searches and seizures". Although the Fourth Amendment does not explicitly require the prior issue of a warrant, the courts of the United States have consistently held that, to be "reasonable", searches of a home must, unless done with consent or in exigent circumstances, be done pursuant to a warrant,³² and that a neutral person must decide whether to issue a warrant.³³

The right to lawful and fair administrative action

Section 24 of South Africa's interim Constitution provides that:

Every person shall have the right to -

³⁰ Ibid at 217D.

³¹ Ibid at 222E.

³² See *Steagold v United States* 451 US 204 (1981) at 211.

³³ *Johnson v United States* 333 US 10 at 13.

whether the search and seizure provisions of the Act impaired the right of privacy no more than was necessary to achieve the objective of the Act. On this issue, the court looked for guidance to the Canadian decision in *Hunter v Southam*²⁵ which held that, to be "reasonable", there must have been a prior authorisation of the search and seizure, usually in the form of a warrant, by an impartial and independent person who was bound to act judicially in so doing. The court noted²⁶ that the need for judicial authorisation is also recognised in the United States, and indeed also in South Africa in terms of the Criminal Procedure Act no 51 of 1977, which requires search and seizures of property to be authorised by a magistrate or justice of the peace on information given under oath.

Applying these principles to the facts before it, the court in *Park-Ross* held that the search and seizure provisions in the Serious Economic Offences Act were unconstitutional on the grounds that there had been no prior authorisation of the search by an impartial arbiter.²⁷ The director of the Office for Serious Economic Offences, said the court, could not fulfil that role, and it would accord with the spirit of the Constitution if the necessary prior authorisation were obtained from a magistrate or judge in chambers on the basis of an application which, at the very least, set out under oath the suspicion giving rise to the inquiry and the need for a search and seizure. The court held, further,²⁸ that the provision of the Serious Economic Offences Act which authorised the copying of any book or document found on the premises and the requesting of an explanation regarding entries therein was unconstitutional, because it did not exclude the use of evidence so obtained from use in any subsequent criminal proceedings.

The decision in *Park-Ross* held that:²⁹

it must ... be accepted that for the purpose of the preservation of law and order and the proper investigation and combating of crime, as well as for the protection of society and the rights of the members of that society, searches may have to occur at times and be permissible even if privacy is affected thereby. It must also be accepted that pursuant to a permissible search, property including documents and books, of the person whose premises are searched, may be seized and removed.

²⁵ (1985) 14 SCC (3d) 97 SCC.

²⁶ Above n 20 at 219B.

²⁷ Ibid at 220D.

²⁸ Ibid at 221A.

²⁹ Ibid at 216E.

The facts of *Park-Ross* were that, in the course of an investigation into alleged irregularities involving a tender for a government contract, the police, acting in terms of powers of search and seizure in the Investigation of Serious Economic Offences Act, raided the premises of a certain company and the house of one of its directors and seized and removed certain documents. The company and the director challenged the constitutionality of the provisions of the statute in terms of which the search and seizure had taken place.

The court had no difficulty in holding²¹ that the search and seizure provisions of the Act in question violated the right to privacy in the Constitution. The question then became whether the violation of that right was permissible in terms of the general limitation clause in the Constitution.

In earlier cases, the South African courts²² had looked for guidance in the interpretation of the general limitation clause to the Canadian decision in *R v Oakes*,²³ which concerned a similarly-worded provision in the Canadian Charter of Rights and Freedoms. That decision held that, to establish that a limit on a constitutionally-guaranteed right or freedom is reasonable and demonstrably justified in a free and democratic society, two central criteria had to be satisfied. First, the objective had to be of sufficient importance to warrant overriding the protected right or freedom; second, the means chosen had to be reasonable and demonstrably justified. The latter element, said the court in *Oakes*, involves a proportionality test requiring the interests of society to be balanced against the interests of individuals and groups. The proportionality test, said the court, has three elements: first, the measures adopted must not be unfair, arbitrary or irrational; second they should impair the right or freedom as little as possible; third, there must be a proportionality between the effect of the measures which infringe the right or freedom and the objective of the measures.

Applying these tests, the court in *Park Ross* held²⁴ that the objective of the Act which authorised the search and seizure in issue was sufficiently important to justify limiting the constitutionally-protected right of privacy. The court then turned its attention to

²¹ Ibid at 214F.

²² *In Qozeleni v The Minister of Law and Order* 1994 (1) BCLR 75 (E); *Phala v The Minister of Safety and Security* 1994 (2) BCLR 89 (W).

²³ (1986) 26 DLR (4th) 200.

²⁴ Above n 20 at 217D.

The right to privacy

South Africa's interim Constitution provides that:

Every person shall have the right to his or her personal privacy, which shall include the right not to be subject to searches of his or her person, home or property, the seizure of private possessions or the violation of private communications.

The draconian provisions of the Income Tax Act in relation to the right of revenue officials to search premises and seize documents have not been amended in anticipation of a constitutional challenge in terms of this provision. The Income Tax Act provides in this regard that:¹⁹

any officer engaged in carrying out the provisions of this Act who has ... been authorised by the Commissioner in writing may ... without previous notice, at any time during the day, enter any premises whatever and on such premises search for any money, books, records, accounts or documents [and] in carrying out such search, open ... any article in which he suspects any money, books, accounts, records or documents to be contained [and] seize any such books records, accounts or documents as in his opinion may afford evidence which may be material in assessing the liability of any person for any tax.

This provision is bound to come under constitutional challenge. If, as seems to be the case, it is a clear infringement of the constitutional right to privacy, the question will be whether it is legitimised by the general limitation clause which, as is noted above, permits the rights protected by the Bill of Rights to be limited by a law of general application, to the extent that it is "reasonable and justifiable in an open and democratic society based on freedom and equality".

An indication of how the courts may resolve the interplay between the constitutional right to privacy and the general limitation clause in relation to a search and seizure operation under statutory authority appears from the decision in *DA Park-Ross v The Director, Office for the Investigation of Serious Economic Offences*.²⁰ It involved the constitutionality of search and seizure provisions in the Investigation of Serious Economic Offences Act, which are similar to the search and seizure provisions in the Income Tax Act.

¹⁹ Income Tax Act no 58 of 1962, s 74(3).

²⁰ 1995 (2) SA 198 (C).

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The interim Constitution provides¹⁶ that:

Every person shall have the right of access to all information held by the state or any of its organs at any level of government in so far as such information is required for the exercise or protection of any of his or her rights.

Though narrowly formulated, this provision will be significant in the relationship between the South African taxpayer and revenue authorities in matters of income tax. In South Africa, these authorities are clearly organs of the state. The courts have already recognised that the "exercise or protection" of rights in terms of this clause is not confined to the context of litigation and that the "right" should be broadly defined.¹⁷

A number of aspects of this provision were examined in *Jeeva v Receiver of Revenue, Port Elizabeth*,¹⁸ including its inter-relationship with the general limitation clause and with professional privilege. In this case two companies had been placed in liquidation, and the joint liquidators, at the instigation of the Receiver of Revenue, applied for and were granted leave to hold a commission of inquiry into the affairs of the companies in terms of the Companies Act. Some of the erstwhile directors of and shareholders in the companies, who were to be interrogated at the inquiry, brought an urgent application to court for an order that the Receiver of Revenue give them access to all information in his possession relating to the two companies, except such as was covered by professional privilege. The Receiver admitted that he was in possession of information relevant to the interrogation of the applicants, but argued, *inter alia*, that the information was covered by the secrecy provisions of the Income Tax Act, and that non-disclosure was justified by the general limitation clause in the interim Constitution. In a lengthy and detailed judgment, the court held that the applicants were entitled, in terms of the equality clause and the administrative justice clause in the Constitution, to access to all relevant information in the possession of the Receiver, apart from that covered by legal professional privilege. Such privilege, said the court, was a reasonable and justifiable limit on those constitutional rights in terms of the general limitation clause.

¹⁶ Section 23.

¹⁷ *Ozeleni v Minister of Law and Order* 1994 (3) SA 625E at 642F-G.

¹⁸ 1995 (2) SA 433 (SECLD).

The equality clause, quoted above, has already been invoked in South Africa by a taxpayer engaged in civil litigation with the revenue authorities, in conjunction with the access to information clause and the administrative justice clause, discussed below, in order to compel those authorities to divulge information in their possession which was relevant to the exercise or protection of his rights.¹⁵

The right of access to information

The period from 1950-1990 was marked by a culture of state secrecy in South Africa. In the sphere of income tax, this mindset was epitomised by the secrecy surrounding the in-house manual of practice compiled by the revenue authorities as a guide to its assessors in the processing of income tax returns. Although this manual did not have the force of law, it would have oiled the wheels of the system if income tax practitioners had known its contents and been able to ensure that their clients' returns fell within its guidelines. But the manual remained strictly embargoed. When leakage made its contents generally known, it was revealed to be, not an Aladdin's treasure trove, but an ill-written, poorly organised, hotchpotch of trite, dubious and largely out-of-date information which was gathering dust on the shelves of assessors who had long since ceased to pay any attention to it.

The task of updating and rewriting this manual has now been contracted out, and it will apparently be published. One of the items of interest to practitioners will be its references to unreported decisions of the income tax Special Court which have decided points of principle in favour of the revenue authorities. Hitherto the Commissioner has been wont to keep the existence of these decisions hidden in income tax litigation and to spring them on the taxpayer at the hearing.

South Africa has, as yet, no general legislation regarding access to information, although there is mounting public pressure for such legislation from private citizens, environmental groups, civic associations, trade unions, business groups and others. Hence the provisions of the interim Constitution in this regard are of a pioneering nature.

¹⁵ *Jeeva v Receiver of Revenue, Port Elizabeth* 1995 (2) SA 433 (SECLD).

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Therefore, South Africa's Income Tax Act,¹¹ like all other legislation, is now vulnerable to constitutional challenge, but all of its provisions remain in force unless and until repealed or amended by Parliament or declared unconstitutional by the Constitutional Court. The impact of the Bill of Rights in matters of income tax is likely to be greatest in relation to the following constitutionally-protected rights:

- the right to equality;
- the right to privacy;
- the right of access to information;
- the right to administrative justice;
- the right to property.

The interim Constitution provides¹² that, in interpreting the Bill of Rights, a court "shall" have regard to public international law and "may" have regard to comparable foreign case law. To date the judgments of the Constitutional Court have shown a readiness to embark on a wide-ranging search of international parallels in search of guidance, coupled with a determination to interpret the Constitution in harmony with the principles of the South African legal system, and to be circumspect in following foreign precedents.¹³

The right to equality

Section 8(1) of the interim Constitution provides that:

Every person shall have the right to equality before the law and to equal protection of the law.

The Income Tax Act has already been amended to excise all racial and gender bias. Such inequalities and biases as remain, for example, differential tax rates and personal rebates linked to marital status and age, will presumably be defended, if challenged, in terms of the general limitation clause in the Constitution. In Canada, a compulsory retirement age, which *prima facie* infringed the constitutional right to equality and non-discrimination, has been held to be constitutionally justified in terms of that country's similarly-worded general limitation clause.¹⁴

¹¹ Act 58 of 1962, as amended.

¹² In s 35(1).

¹³ *Fose v Minister of Safety and Security* 1996 (2) BCLR 232 (W) at 237H.

¹⁴ *McKinney v The University of Guelph* (1991) 76 DLR (4th) 545 (SCC).

into law. In the context of the gross violations of human rights by the South African government during the 1950's through the 1980's, the oppressive aspects of the Income Tax Act seemed inconsequential and were naturally not the focal point of pressures for reform. Nevertheless, they included:

- provisions with a gender and racial bias;
- non-appealable discretionary decisions vested in the Commissioner;
- provisions which placed the onus of proof on the taxpayer;
- draconian search and seizure provisions;
- a general imbalance of power between the taxpayer and the revenue authorities in relation to time limits for objecting to assessment and limitations on the grounds of appeal.

The interim 1993 Constitution and the Bill of Rights

In 1993, South Africa enacted an interim Constitution which came into force on 27 April 1994 as the product of a multi-party negotiating process and which will remain in place until supplanted by a final Constitution. The post-script to the interim Constitution records that it aspires to be an "historic bridge between the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence".

Chapter 3 of the 1993 interim Constitution entrenches 25 fundamental rights. None of these rights is absolute because all are subject to s 33(1) (usually called "the general limitation clause"). This clause is similar to that in the Canadian Charter of Rights and provides that the constitutionally-protected rights,

may be limited by a law of general application, provided that such limitation shall be permissible only to the extent that it is reasonable and justifiable in an open and democratic society based on freedom and equality and shall not negate the essential content of the right in question.

Hence, any statutory provision which infringes a constitutionally-entrenched right must be examined by the court to see whether the infringement can be justified in terms of this general limitation clause. The onus of proving that a limit on a constitutionally-guaranteed right or freedom is justified under the general limitation clause rests on the party seeking to uphold the limitation.¹⁰

¹⁰ *Park-Ross v The Director, Office for Serious Economic Offences* 1995 (2) BCLR 198 (C) at 215A.

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rendered is inherently "income", irrespective of whether there was a legal obligation to pay.

An example of insufficient judicial recognition of legal distinctions is the decision of the Appellate Division in *Elandsheuwel Farming (Pty) Ltd v SBI*.⁷ This involved a familiar scenario in which property speculators acquire a controlling shareholding in a company which invests in fixed property and holds it as a capital asset. They procure the company to sell its property holdings at a profit and then argue that the company is not taxable on those profits because they are of a capital nature. (As is noted above, South Africa does not have a capital gains tax.). There are various routes which a court can follow in this kind of factual situation, that lead to the conclusion that the company is indeed taxable. But the undesirable route and the one to be avoided (but the one which the court regrettably adopted in *Elandsheuwel*), is that which plays down the separate legal personality of the company and blurs the distinction between what the company owns (in this case, the fixed property in question) and what the shareholders own (shares in the company). Reading this decision, it is difficult to avoid the conclusion that the court failed to heed the sage warning of Lord Normand in *Lord Vestey's Executors v IRC*⁸ that, "Tax avoidance is an evil, but it would be the beginning of much greater evils if the courts were to stretch the language of the statute in order to subject to taxation people of whom they disapproved". I have suggested elsewhere that there was, in fact, a straightforward way in which the court could have thwarted this particular tax avoidance scheme.⁹ Even if this was not so, it would have been better for the court to let the smart alecs in question escape tax rather than to skew accepted legal principles so as to stretch the tax net in order to reach them and, in so doing, introduce uncertainty into the whole property development industry as regards the taxability of fixed property transactions.

Prior to the constitutional Bill of Rights

Prior to the enactment of South Africa's new interim Constitution in 1993, South African constitutional law was cast in the Westminster mould of parliamentary supremacy in which the courts had no power to review and strike down legislation. Under this constitutional dispensation, the full panoply of apartheid legislation was passed

⁷ 1978 (1) SA 101 (A), 39 SATC 163.

⁸ [1949] 1 All ER 1108.

⁹ See comment by Williams, (1991) THRHR 826.

of it whilst working their way up through the ranks of practising barristers.

As was noted above, the South African Income Tax Act is less lengthy and complex than many of its overseas counterparts. It consists of a mere 112 sections and a few schedules, making it a single, slim volume. In only a few areas, such as fringe benefits, does the Act attempt to lay down a comprehensive body of rules. For the rest, the Act usually lays down broad general principles. This is not necessarily the mark of a naive or ineffective income tax system. It is impossible to overcome the ambiguity of language, and attempts to create a detailed jigsaw of statutory provisions often create tax-avoidance opportunities in the gaps where pieces of the jigsaw fail to mesh exactly. Nor does a detailed statutory code necessarily make for greater certainty from the viewpoint of the taxpayer, because of the difficulty and uncertainty in the interpretation of complex legislation. But where the taxing statute merely lays down general principles, a great responsibility falls on the judiciary to interpret those provisions in a way that is sensible and pragmatic. One of the great difficulties for the courts is to strike the proper balance between excessive legalism (which results in tax being avoided or imposed on the basis of technical legal distinctions) and insufficient legalism (where tax is avoided or imposed as a result of non-adherence to established legal distinctions). In my opinion, the South African courts have, on significant occasions, failed to strike the proper balance, and the pendulum has swung between excessive legalism in some early decisions to insufficient legalism in some recent decisions.

Let me give an example of each extreme. In *Commissioner of Inland Revenue v Lunnon*⁶ a company passed a resolution to award the taxpayer, one of its retired directors, a substantial lump sum, *ex gratia*, "for services rendered" to the company during its early years when directors' fees were not commensurate with the work involved. The Appellate Division held that the amount paid to the director did not have the quality of "income" in his hands, and hence was not taxable. The court said that the company had no legal obligation to make the payment, and therefore it was "a gift pure and simple". In other words, the court adopted a blinkered view which paid regard only to the legal rights and obligations of the director and the company respectively, instead of taking a broader perspective and holding that - in terms of economic concepts - any reward for services

⁶ 1924 AD 94, 1 SATC 7.

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law. The South African judiciary has made a distinguished and scholarly contribution to the application and adaptation of the rules of Roman and Roman-Dutch law to a modern society. Regrettably, the judicial contribution to the development of income tax law has been less impressive. Most judges have sought solutions to the income tax cases that come before them in the *ipsissima verba* of the Income Tax Act, with the result that much of the case law tends to mirror the deficiencies of the Act. When this approach has led to a patently unfair result, judges have been excessively ready to take refuge in the old saw that the remedy lies in an amendment to the Act, instead of searching for a creative interpretation of the Act that would lead to an equitable result.

Particularly regrettable have been dicta in some early decisions of the Appellate Division (the highest court in the hierarchy). They became a mantra in later decisions, that the principles of accountancy and good business practice are irrelevant to the determination of disputes between taxpayers and the revenue authorities, and that the court must base its decision solely on the words of the Income Tax Act. The result has been that income tax law in South Africa cut itself off from the accumulated wisdom of other disciplines, and the courts have, on occasion, reached decisions which were completely at odds with established accountancy principles and commercial reality. This approach has also resulted in a considerable divergence between a person's "taxable income" (being the net amount of incomings minus outgoings and allowances on which income tax is calculated) and "profit" in the accounting sense. Amongst other detrimental consequences of this approach is the duplication of effort and the additional expense imposed on the business community in having both to produce a set of financial statements and to calculate "taxable income" for inclusion in the income tax return. Logically, these two determinations ought for the most part to coincide, but they do not because of the aforementioned divergence. In Australia, as early as 1938,⁵ the courts observed that, "the tendency of judicial decision has been to place increasing reliance upon the conceptions of business and the principles and practice of commercial accountancy". In South Africa, it has taken more than 50 years for the obvious merits of this approach to begin gaining acceptance. One of the reasons for the reluctance of the South African courts to take cognizance of accounting principles and practice has no doubt been that most judges have no academic grounding in accountancy and have gained little practical knowledge

⁵ *In COT (SA) v Executor, Trustee and Agency Co of South Australia Ltd (Carden's case)* (1938) 63 CLR 108 (Full High Court of Australia).

South Africa will, therefore, provide an interesting before-and-after case study of the impact of a constitutionally entrenched bill of rights on the rights of taxpayers. To date, only a few cases relevant to taxpayers have been decided by the courts in terms of the interim Constitution and a mature appraisal will have to wait for at least a few years. However, the courts have already observed, in connection with the attitude of the revenue authorities in South Africa prior to the interim Constitution, that "the practices of the past are entirely inconsistent with modern values of openness and accountability in a democratically oriented administration".⁴

Before looking at the impact of the Bill of Rights, I would like to give a bird's-eye view of income tax in South Africa, with particular reference to the element of *certainty* from the perspective of the taxpayer.

Overview of income tax in South Africa

It is trite that taxpayers should know with reasonable certainty whether, in terms of the applicable law, they are or are not liable for income tax, or will or will not be so liable if they adopt a contemplated course of action. In South Africa, as in many other tax jurisdictions, such certainty is an ideal that is often far removed from reality. Around the world, taxing statutes are notorious for their incomprehensibility and South Africa is no exception. Indeed, in South Africa many key concepts and principles are completely absent from the Income Tax Act, and are expressed only in judicial decisions of the domestic courts and courts of other countries, particularly the United Kingdom and Australia.

The common law (in the sense of the national law) of South Africa is seventeenth century Roman-Dutch law, being the law which the first European settlers are regarded as having introduced to the country. Although it is the basis of the law in only a few other countries around the world, Roman-Dutch law is an admirable system. Its great strength is its bedrock of general principles. South African law is therefore not the "wilderness of single instances" that characterises much of English law, but has a consistency and an underlay of logical general principles which allow most legal problems to be solved by the application of those principles. The South African legal system is, for the most part, uncodified, and the Income Tax Act is far from being an encyclopaedic exposition of the

⁴ *Jeeva v Receiver of Revenue, Port Elizabeth* 1995 (2) SA 433 (SECLD) at 441G.

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the century since its beginnings, deviated from its Australian counterpart in significant respects, of which the following are amongst the most striking. First, the current South African Income Tax Act is nothing like as lengthy or complex as the Australian statute. Second, as a general rule with only a few minor statutory exceptions, South Africa imposes income tax only on income which has its source within South Africa. Third, South Africa has not introduced a capital gains tax. The result is that gains of a capital nature in South Africa are tax-free, except where the Income Tax Act artificially deems specific gains of a capital nature to be of a revenue nature and hence taxable.

South Africa's first democratic general election in 1994 resulted in more than a change of government. The previous decades had been marked by increasing isolation from the international community - politically, economically, culturally, and in every other way. South Africa was also isolated from new ideas and values that were gaining acceptance in other parts of the world, and this isolation was evident in its income tax system. Thus, for example, the Income Tax Act implicitly assumed a male breadwinner and head of the family. A wife's income was aggregated with that of her husband, and special rules and rates of tax applied to married women. The Act was replete with provisions which gave the Commissioner for Inland Revenue (the senior government official charged with the implementation of the Income Tax Act) the power to make discretionary decisions on important matters, against which the taxpayer had no right of appeal. The previous government had been opposed in principle to a general "bill of rights" for its citizenry, and the notion of a taxpayers' charter of rights was unheard of.

As the world knows, South Africa has, since 1990, undergone a peaceful revolution. A new interim Constitution has been enacted which includes a bill of rights, certain clauses of which are relevant to taxpayers. The draft of the final Constitution, incorporating an amended bill of rights, is (at the time of writing) being scrutinised by the Constitutional Court for compliance with certain predetermined constitutional principles.

It has been said that the interim Constitution is a bridge away from "a culture of authority" toward "a culture of justification - a culture in which every exercise of power is expected to be justified".³

³ Mureinik, (1994) 10 SAJHR 31 at 32.

TAXPAYERS' RIGHTS IN SOUTH AFRICA

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The democratisation of South Africa resulted in the enactment of a new interim Constitution in 1993, which incorporated a Bill of Rights setting out certain constitutionally entrenched rights. Provisions of the Income Tax Act which flout the Bill of Rights can now be declared invalid by the courts. Several provisions of the Bill of Rights are of great importance for taxpayers. A general charter of rights for taxpayers may well be laid down in South Africa in the reasonably near future. However, the cutting edge of legally enforceable taxpayers' rights will undoubtedly reside in the constitutional Bill of Rights.

Introduction

This article discusses aspects of taxpayers' rights in South Africa in relation to income tax.

The first Income Tax Act in South Africa¹ was closely modelled on the income tax legislation of the state of New South Wales in Australia.² The income tax systems of South Africa and Australia are still broadly similar in fundamental structure and concepts and in the procedure for the assessment of taxpayers to income tax, including objections and appeals against assessments. As in the Australian model, most income tax disputes in South Africa are first adjudicated by a tribunal, known in South Africa as the Special Court for hearing income tax appeals ("the Special Court"). It is presided over by a supreme court judge assisted by an accountant and a representative from the commercial community. Appeals lie to the superior courts. However, the South African Income Tax Act has, in

¹ The (Cape) Additional Taxation Act No 36 of 1904.

² The Income Tax Assessment 1895 (NSW).

In contrast to this arbitrary approach, taxes must be based on solid legal foundations. It is then not possible for the authorities to require more taxes or to claim them earlier than is prescribed by law. In any tax system one of the greatest benefits for taxpayers is where the tax laws are binding not only on taxpayers but also on the tax authorities. The rule of law in the taxation field and the provision of extensive taxpayer rights depend upon a well-established order of tax administration.

It is in the public interest to improve tax administration. In recent years the OECD has published several reports aimed at expediting harmonisation in the field of tax administration, with particular reference to the development of a national tax system and administrative assistance in international tax matters.² Forming a system of tax administration that is based upon the broad application of self assessment and which is therefore fraught with the risk of non-compliance is an intricate matter. It is taxpayers and not revenue authorities who must be recognised to be in the best position to assess their own tax liability and emerging tax administration systems can only be built upon the positive motivation of taxpayers.³ Yet the rights exercised and obligations incurred by taxpayers emanate from the system itself. The development of an appropriate tax administration is particularly difficult in countries like Hungary that are in a process of transition.⁴ The nations of Central and Eastern Europe have similar problems in fashioning their tax systems to comply with international standards.⁵

This article focuses on the Hungarian position.⁶ Taxpayer rights and obligations are examined in the context of the procedures relating to the gathering of fiscal information, tax assessment and the enforcement of fiscal obligation. As an introduction the article outlines the historical background and the rationale for the law governing tax administration. Discussion of the relevant law

² OECD, *Taxpayers' Rights and Obligations* (1990 OECD), *Tax Information Exchange between OECD Member Countries* (1994 OECD).

³ James S and Wallschutzky G, "The Shape of Future Tax Administration" (1995) 49 *Bulletin for International Fiscal Documentation* 217.

⁴ Hungary has been associated with the European Union since 1994 and joined the OECD in mid-1996.

⁵ Bolderson S and Huiskes T, "Meeting Tax Obligations in Central and Eastern Europe" (1994) 48 *Bulletin for International Fiscal Documentation* 12. See also Hussey WM and Lubick DC, *Basic World Tax Code and Commentary* (1996 Tax Analysts).

⁶ For a Review on the Hungarian substantive tax laws, see Kesti J (ed), *European Tax Handbook* (1995 IBFD) 209-222.

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concentrates on the Taxation Order Act, but with reference to related laws and recent guiding court decisions.

B Historical background

Until the end of the 1980s the Hungarian legal and tax system was developed within the dictates of a centrally-planned economy. The central state budget and the state owned enterprises were the main components of the national economy. State enterprises were the main producers of the gross domestic product and were subject to the income centralisation of the state budget. In contrast to some other centrally-managed economies, like those in the Soviet Union or the GDR where government receipts were basically gathered by means of profit remittances enforced upon state enterprises, in Hungary, at least as a matter of law, public revenues were collected as taxes even from state enterprises.

However, tax administration did not attract much attention. Since state enterprises were in fact seen as the extension of the state administration to the sphere of the national economy, it was not seen as important to establish the revenue law relationship between a state enterprise and the state budget on the basis of rigorously shaped laws. Because of the lack of freedom of ownership and entrepreneurship, conflicting interests between taxpayers and tax authorities were not acknowledged. In this context, the government did not rely on the rule of law.

Tax reforms started in 1988, prior to the change in the political system in 1989. In the final stages of the centrally-planned economy in Hungary, the main idea behind the reforms was to preserve the dominance of state ownership, but simultaneously to develop an efficient market economy. In the reform process state enterprises were expected to be the main actors in a market economy by simulating market-oriented economic behaviour. The government made efforts to create the appropriate financial and fiscal environment for a market economy. The monolithic banking system was replaced in 1987 by the so-called two-tier banking system, in which commercial banks operated independently from the central bank and competed with each other. Tax reform started with the introduction of value added taxation, comprehensive individual income taxation and an entrepreneurial profit tax. Substantive tax law reform was complemented at the end of 1990 by the adoption of the Taxation Order Act XCI of 1990, which has been amended several times.

II THE RATIONALE FOR THE TAX ADMINISTRATION LAW IN HUNGARY

A Taxation order and tax administration law

The Taxation Order Act covers both tax administration and the legal order governing taxation. It is similar to the German "Abgabenordnung" Act (AO v 16.3.76 mehrf ge'nd) that inspired the Hungarian legislation. The Taxation Order Act includes the procedural taxation law and is also a guide to the substantive taxation law. However, the Hungarian law is not as sophisticated as its German counterpart. In contrast to the German law, it does not provide a comprehensive and systematic description of the elements of tax liability, including what is meant by such terms as taxpayers, the tax base, tax rates and tax reliefs. Instead, although it goes beyond the scope of tax administration, the Taxation Order Act sets out the principles that are to govern the individual tax laws.

The Taxation Order Act does not represent a comprehensive statement of the law governing taxation order and administration. It covers tax administration procedure, including tax collection, but it does not comprise an independent system of tax administration and collection. Instead, for tax administration procedure it relies on the Public Administration Act I of 1981 (as amended) and for tax collection it relies on the Judicial Execution Act LIII of 1994. The Public Administration Act provides for the clarification of facts relevant to public administration law, the procedure for the adoption of public administration resolutions, appeals against public administration decisions, and for the enforcement of obligations imposed on taxpayers. The Judicial Execution Act provides the legal basis for the initiation of judicial enforcement procedures and for judicial enforcement of obligations imposed on taxpayers, such as the enforcement of a tax claim against a taxpayer's bank account and the seizure of a taxpayer's property.

In Hungarian law, the tax administration has two aspects, the organisation of the revenue authority and tax law procedure. The former includes the revenue authority's internal organisation. The latter covers the functions of the revenue authorities in relation to taxpayers while accepting tax returns, assessing tax liability by way of tax audit or enforcing tax claims. In the process of a tax audit, tax authorities are expected to clarify individual tax liability, which might include initiating a tax investigation for public prosecution. Tax authorities may impose tax interest and penalties. However, in Hungary the law governing tax administration does not extend to

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crimes committed in tax matters. The general procedural rights and obligations of taxpayers regulated by the Taxation Order Act are complemented by the special procedural rights and obligations of taxpayers as stipulated in individual tax laws.

B Scope of the Taxation Order Act

The scope of the Taxation Order Act can be broadly defined in terms of subject matter, time and the taxpayers to whom it applies. The Act is applicable to tax administration but is not applicable to the collection of social security contributions; the enforcement of state monopolies or the collection of taxes relating to them (s 3(4) Taxation Order Act). In international tax matters, tax authorities must rely on the bilateral Hungarian tax treaties on capital and income. Hungary has not concluded any treaty on international assistance in tax matters. The Taxation Order Act is applicable to cases of tax administration where a final decision of public administration has not yet been made and also to rights and obligations that have been developed before the date of the entry into force of the Act. However, this retroactive effect only applies to the extent that the retroactive application of the law is not of disadvantage to taxpayers (s 101).

Broadly, the Taxation Order Act is applicable to Hungarian resident taxpayers and to foreigners, provided that the latter hold property, have obtained income or have undertaken transactions that trigger Hungarian fiscal liability (s 2). Customs-free zones are treated as Hungarian territory for the purposes of tax administration law. Taxpayers and tax authorities are both subject to tax administration procedure under the Act. A taxpayer (s 5) is defined as a person who has procedural and substantive tax obligations. Taxpayers are not only obliged to pay taxes. They are also bound by obligations under the tax administration procedure. For instance, they are obliged to inform tax authorities of their tax liability, and to make tax returns. There are persons, such as heirs, donees and sureties who bear secondary tax liability. While they have to assume the liability for the payment of tax, they are not subject to procedural obligations.

There are four types of tax authority in Hungary:

- the central tax authority, called APEH (the full Hungarian name is Tax, Fiscal and Audit Office);
- the revenue authorities of local governments;
- authorities in charge of collecting the duties on property acquisition and on the procedure before public authorities; and

- commissioners of customs and excise duties (s 6).

Tax authorities' duties are to assess and register tax liability, collect taxes or conduct an audit if necessary and enforce tax claims. Tax authorities manage not only taxes payable but also government subsidies claimable.

C Principles guiding tax administration

The legal order of taxation governing both substantive and procedural matters is subject to the following guiding principles:

- substance prevails over form;
- rights must be exercised in accordance with their social purpose;
- when tax authorities have a discretion, they must act with regard to the purpose of their authorisation and remain within the legal order;
- tax authorities are obliged to provide taxpayers with the information necessary to fulfil any legal requirements in tax matters;
- taxpayers are obliged to co-operate with tax authorities;
- tax authorities are bound by principles of fairness;
- if certain conditions are met taxpayers must be granted remission of tax payment or easier payment terms; and
- discrimination is prohibited (s 1 Taxation Order Act).

Several aspects of these principles need to be highlighted. The principle of substance over form (s 1(7)) provides the legal basis for tax authorities to attack tax avoidance, although, individual tax laws contain their own special anti-avoidance rules.⁷ To date, s 1(7) of the Taxation Order Act has been interpreted restrictively by the courts. Its meaning has been confined to sham contracts. As a consequence, there is no legal basis for combating taxpayers' actions that lack a real business purpose.

An example of substance over form arises in relation to the classification of finance leases. In practice in Hungary it is possible to challenge a finance lease contract on the grounds that it is in fact financed by the lessee, where the lessee pays a major part of the fee for

⁷ See s 4(3)(e) of Act LXXXVI of 1991 (as amended) on Corporate Tax and s 1(4) of Act CXVII of 1995 on Personal Income Tax.

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the lease in advance; or because the life of the contract is too short. The lease is challenged on the basis that it is only used as a cloak to conceal a sales contract.⁸ In such cases, the lease contract can be reclassified as a sales contract. As a consequence, the lessee may not claim a deduction for the lease fee but only for depreciation.

An example of the lack of real business purpose would be where a lessor enters into a finance lease contract to obtain a tax concession that is available to taxpayers launching capital projects. Earlier corporate tax laws defined a capital project qualifying for tax concessions so broadly that not only manufacturing companies but almost any taxpayer could qualify. As a consequence, finance companies could capitalise on the concessions simply by purchasing assets and then leasing them out for use in capital projects. The finance companies structured finance leases to qualify as capital projects purely to obtain a tax concession and they clearly lacked any real business purpose. However, there was no legal basis for combating taxpayer abuse of the concessions. Although the tax concessions relating to capital projects no longer exist, tax authorities still do not have the legal mechanisms to combat comprehensively taxpayer abuses of the system where taxpayers lack any real business purpose.

Any form of tax-avoidance can be challenged using the principle that rights must be exercised in accordance with their social purpose. This tax law principle is also found in the Civil Code.⁹ The civil law principles are comprehensive enough to counter the abuse of law in general. However, as it has emerged in the practice of the courts, they are not specific enough for application to particular cases of tax avoidance. The Civil Code principle protecting the law from abuse is complemented by the principle of estoppel. No-one can rely on conduct in bad faith to obtain benefits (s 4(4) Civil Code). Although this is a civil law principle, it can apply to tax avoidance to the extent that a taxpayer should not be allowed to rely on an action resulting in the obtaining of a tax concession, unless the action proves that the

⁸ For the former, see court ruling No PKKB 6 P 62.996/1991/4 Fov Biro sag 58 Kf 33.081/1992/3; Case No 1, (1993) 41 Biro sagi Hatarozatok. For the latter, see court ruling No Hajdu-Bihar Megyei Biro sag 2 Pf 21.084/1992/2 in Case No 8 (1993) 41 Biro sagi Hatarozatok. The principle of substance over form was challenged before the Constitutional Court. However, the Court has declared that this legal provision does not encroach on the freedom of contract or the rule of law. See the resolution of the Constitutional Court No 724/B/1994 AB.

⁹ Section 4(1) of Act IV of 1959 (as amended). As a counterpart to this provision, s 5 prohibits the abuse of law.

taxpayer's purpose was not to obtain the tax concession. The argument using s 4(4) of the Civil Code has not yet been used by the tax authorities in the courts.

The principle that the law may not be abused is closely related to the principle of co-operation with tax authorities. This principle of co-operation was enacted on the assumption that the relationship between taxpayers and tax authorities is not a zero sum game. The relationship cannot be interpreted to mean that the less tax a taxpayer pays, the worse off another taxpayer will be; or the more tax a taxpayer pays, the better off the Treasury will be. In economic growth terms there is good reason to believe that although taxpayers may pay higher taxes based on a high pre-tax income, they will not be worse off. Both taxpayers and tax authorities can benefit from a well-established tax system; so it is of common interest for them to co-operate with each other. The obligation of taxpayers to co-operate with tax authorities does not, of course, extend to confession to tax crimes.¹⁰

The principle that the law may not be abused is closely connected with not only the principle of co-operation with tax authorities, but also the principle of fairness that is binding on tax authorities. In Hungary, fairness cannot be separate from statutory law. Tax authorities must consider the principle of fairness while exercising discretionary rights. Examples of the application of this principle are found in the mitigation by the tax authorities of sanctions such as late payment interest (s 67(3) Taxation Order Act), self-audit interest (s 70(6)), penalties for underpayment of tax (s 73), or administrative tax penalties (s 74(14)).¹¹

¹⁰ The principle of co-operation includes the obligation upon tax authorities to provide taxpayers with the information necessary to assess their tax liability. In one case the taxpayer claimed compensation for damages arising from false information given by a representative of the tax authority. The court recognised that such a claim could be justified in principle, but in the specific case the court did not find the taxpayer's claim was well-established. See Legf Bir Pf I 21 287/1992 in Case No 425 (1993) 41 *Birosagi Hatarozatok*.

¹¹ The prohibition of discrimination is a guiding principle that broadly protects foreigners. As non-discrimination rules have not yet been developed in the law governing tax administration, this subject is not discussed in this article.

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III GENERAL INFORMATION GATHERING TO ASSESS TAX LIABILITY

Information gathering by tax authorities to assess tax liability gives rise to taxpayer obligations in the following areas:

- entry on a fiscal register and the provision of tax information (ss 11-16 of Taxation Order Act);
- submission of tax returns (ss 20-24);
- keeping of documents and required declarations (ss 33-37);
- submission of tax forms (s 96); and
- fiscal secrecy and publication of tax deficiencies (ss 45-48).

Major aspects of these issues will be discussed below.

A Fiscal registration, tax information, tax returns, fiscal declarations

A taxpayer must be entered on to a fiscal register on commencing business activities, either by showing a licence issued by the public administration, where such a licence is required, or by informing the tax authorities within 15 days of the commencement of activities where a licence is not required. Partnerships and corporations must show their deeds of association or their articles for fiscal registration.¹² Much information must be given to tax authorities, including the details of all business bank accounts; the name, address and tax identification number of each owner of the business where identification is required, and the names, addresses and tax identification numbers of any related parties (as defined in the

¹² The obligation to enter one's name on a fiscal register must be distinguished from the obligation to pay tax. In one case, in confirming the taxpayer's argument, the court stated that the taxpayer's obligation to register for the entrepreneurial profit tax was not the same as the obligation to pay the tax in question. The taxpayer was a non-profit organisation. It argued that it was entitled to the exemption from the local tax on buildings as it had simply registered for the entrepreneurial profit tax and that it was not obliged to pay the tax because it did not derive profits that were subject to tax. According to the tax authority, the fact that the taxpayer registered for the profit tax was enough to establish the exclusion from the exemption from the local tax on buildings. The court made it clear that the substantive and procedural obligations relating to the entrepreneurial profit tax had to be distinguished from each other. So registration for the profit tax was not sufficient to establish the exclusion from the exemption from the local tax on buildings (Legf Bir Kfv 125 509/1993 in case No 449 (1994) 42 Birozagi Hatarozatok).

Corporate Tax Act). Taxpayers must also inform tax authorities of changes in the information within 15 days.

Taxpayers who determine their tax by self assessment must file their tax returns themselves. Payers required to withhold tax on income paid must also file a return providing details of tax withheld. An annex to the Taxation Order Act sets out the due dates and tax return lodgment requirements. Individuals are not obliged to file an individual income tax return if income is derived only from a pension or from employment where the employer is required to withhold the appropriate amount of tax.

All taxpayers, including those subject to withholding tax, must keep appropriate records to identify their tax liability. These records must be preserved for five years from the establishment of any tax liability giving rise to rights and obligations that the tax authorities have the right to enforce. Tax authorities may require taxpayers to make declarations concerning any data relevant to a tax liability. The liability can be that of a taxpayer or of a commercial associate of a taxpayer. Such declarations are limited to data either registered by taxpayers or which they are otherwise expected to know. However, under the Taxation Order Act, any person can be required by the tax authorities to provide information concerning another person's tax liability where the person was or is in a contractual relationship with that other person, unless the provision of such information would be self-incriminating. Originally, taxpayers were obliged by the Act to make a property declaration. However, this provision was found to be unconstitutional by the Constitutional Court and was repealed.¹³ The Court held that it was not constitutional for taxpayers to have to give information concerning their tax liability, unless the specific purpose for which the information was required was defined by law. In the absence of a specific purpose, the obligation to make a general property declaration was against the right of privacy, as set out in s 59 of the Constitution (Act XX of 1949, as amended), and also violated the principle of the rule of law (s 2(1) of Constitution).

B Data management, fiscal secrecy

Tax authorities are obliged to treat data relating to taxpayers as confidential. They are allowed to use records kept by other authorities only for the purposes of identification of individual taxpayers and to assist in determining their tax liability. Those obliged to provide data to tax authorities include: payers; employers;

¹³ No 21/1993 (2.IV) AB resolution.

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financial institutions; organs of social security; and public authorities issuing permits. Fiscal secrecy applies to any facts, data, resolutions or legal documents relating to taxation. The meaning of fiscal secrecy is drafted very broadly in Hungary. It would be reasonable to make the concept of fiscal secrecy more specific, for example, by providing criteria against which an authority could assess whether any fact is covered by the secrecy provisions.

Anyone with access to secret data in the tax administration process is obliged to keep it secret. They may not disclose, use or publish secret fiscal information without justification. The use of secret fiscal information is not justified unless:

- it promotes the determination of tax liability;
- it is authorised under the law; or
- those who are affected give their consent to its use.

Competent tax authorities are entitled, *inter alia*, to provide information to courts and other tax authorities for the purpose of specifying tax liability; to organs of social security to identify liability for social security contributions; to an authority conducting a public prosecution in respect of fiscal crimes; and to the finance minister in relation to the minister's supervisory role over taxation matters.

Problems can arise where the protection of secret information is jeopardised in public hearings before the courts. In Hungarian law there are no provisions to solve this conflict. Similarly, a conflict can develop between fiscal and banking secrecy. Under the negotiations for Hungary's accession to the OECD, the banking secrecy rules have recently been amended in Act LXIX of 1991 (as amended) on Credit Institutions. The scope of credit institutions' obligations to keep information relevant to their clients confidential has been narrowed to improve the efficiency of tax collection. At the request of tax authorities, under the new law credit institutions must deliver information concerning accounts they keep for clients, where the information will help initiate a tax audit or assist tax authorities with tax collection (s 46A(2)(k) of Act on Credit Institutions). Where Hungarian tax authorities are required to comply with requests for information by foreign tax authorities in relation to foreign tax liabilities, banking secrecy is also suspended (s 46A(3) of Act on Credit Institutions).

The tax authorities are not required to inform taxpayers that they have provided information about them under the Taxation Order Act. As there is no prohibition on doing so, tax authorities may distribute

information, provided that they remain within the procedures set out by law. Where taxpayers deceive the public by making false statements relating to their tax liability and it could affect public trust in the tax authorities, the tax authorities may, with the permission of the finance minister, publicly deny such statements. Before publishing a denial a tax authority must inform the affected taxpayer of its decision. Four times each year, tax authorities may publish a list of taxpayers with unpaid tax. The list includes individuals owing taxes of over 10 million Hfl and other taxpayers owing taxes of over 100 million Hfl. The tax owing must have been determined by a final decision of a tax authority that has not been challenged before the courts.¹⁴ The list can include the name and address of each taxpayer, the amount of tax owing and details of any tax penalties. The tax authorities may also publish the name and particulars, if any, of those taxpayers who have not entered into a fiscal register or those taxpayers whose registration has been cancelled.

There are no provisions in the Taxation Order Act covering administrative co-operation with foreign tax authorities. However, the Hungarian tax authorities are bound by the articles on the exchange of information and mutual assistance in Hungarian bilateral income tax treaties. The 1988 OECD/Council of Europe agreement on mutual assistance in fiscal matters entered into force in 1995. Hungary joined the OECD in 1996 and is expected to accede to this multilateral convention.

IV ASSESSMENT

The assessment of tax liability is covered by the major provisions of the Taxation Order Act as follows:

- self-audit (ss 42-44);
- tax audit, simplified audit, approximation of taxes, supplementary tax returns, lump-sum tax (ss 51-66);
- investigation in tax matters: check of personal identity, arrest, check of rooms and vehicles, seizure, sequestration (ss 51, 57A, 59, 74A, 74B);
- general rules on the procedure of tax administration (ss 75-77);
- appeal (ss 84-86); and
- costs of procedure (s 98).

¹⁴ At the time of writing, 150 Hungarian florins are equal to about US\$1.

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The most important aspects of each of these areas is now considered.

A Self-audit, tax audit, simplified audit

Current commercial accounting practice does not allow for the re-opening of earlier tax years. In cases where corrections are required for accounting purposes, it is only the current year's balance sheet that is affected under Act XVIII of 1991 (as amended) on Accounting. However, corporate tax law treats such changes differently. In contrast to the commercial accounting rules, there is a unique opportunity in tax law to rectify an earlier year's tax return under a self-audit. Self-audit is allowed prior to the commencement of a tax audit initiated by tax authorities and within the five-year time limit on tax claims. Self-audit applies where there is a correction to the base tax and the resulting tax payable or to the state subsidy that can be claimed. The taxpayer reports the corrected tax liability and pays the tax due, together with any self-audit interest, if it is required by law. Interest is payable at the annual basic rate prescribed by the Bank of Issue for the period commencing on the day following the last day for filing of the tax return and ending on the date of filing for self-audit.¹⁵

A tax audit is initiated to review whether a taxpayer has complied with the obligations relating to tax payment and tax administration. The tax audit is not a tax administration procedure as set out in Chapter VIII, ss 75-95, of the Taxation Order Act. This does not mean that it would not be regulated by law. It only means that it is not regulated as an independent formal procedure. Tax administration procedure is defined in the Act as a formal course of action taken by tax authorities to establish the taxpayers' rights and obligations in a specific case. Although the tax audit itself is not subject to a formal procedure, at the completion of a tax audit a tax authority may initiate a formal procedure to enforce tax obligations.

As a tax audit is not a formal tax administration procedure, a tax authority does not have to initiate an audit with a formal decision.¹⁶ This means that the decision to commence a tax audit is discretionary. During the audit, the tax authorities must clarify facts relevant to any tax liability. The clarification can be through the use of documents, experts' opinions, objects, witnesses, examination on the spot, test purchase or test manufacturing, or local inventory. A tax authority is

¹⁵ The basic rate per annum prescribed by the Bank of Issue at the end of 1995 was 27%.

¹⁶ It would be reasonable here to follow the German example in Hungary that the tax audit may only commence based on an independent resolution of a public authority (s 196 AO).

obliged to disclose all the facts establishing tax liability, irrespective of whether they are beneficial or not to taxpayers. During the audit, the tax authority may seek information concerning the affected taxpayer, the taxpayer's associates, or any third party connected with the taxpayer's tax liability.¹⁷

An audit is required where an individual ceases to be a taxpayer, or where a non-individual terminates registration as a taxpayer. The finance minister may also order a tax audit. Taxpayers must be informed of the initiation of a tax audit, unless they are expected to conceal facts relevant to their tax liability by destroying or forging books or other documents. Subsequent to an audit, an expert appointed to safeguard the interests of the affected taxpayer is allowed to make notes on the tax audit statements. The audit must be carried out at a time and place which do not harass the taxpayer's business activities. At the end of an audit, the tax authority establishes the taxpayer's liability based on the relevant information and provides details of the liability to the taxpayer for comment.

Once a tax audit has ended the tax authority may require the taxpayer to self-audit where there are small amounts of tax owing and provided that the taxpayer has acted in good faith. The tax authority may also commence the public administration proceedings described above, or approach other authorities or public bodies where it lacks competence.

During a tax audit a taxpayer is entitled to verify the identity of the tax auditors and the legality of the tax audit. Taxpayers are also allowed to see documents drafted during the audit. At a taxpayer's

¹⁷ In a case decided against a taxpayer the court confirmed that, during a tax audit, the tax authority was entitled to require information not only concerning the facts of that taxpayer's tax liability, but also relating to a third party's tax liability, provided that it was necessary to extend the investigation to a third party's tax matters (Legf Bir Kfv 125 897/1993 in Case No 373 (1995) 43 *Birosagi Hatarozatok*). In another case the court found that the tax authority's approach to a taxpayer's liability was unjustified where certain expenses of the taxpayer were denied. The tax authority alleged that the expenses were simply a fee for services arbitrarily charged by another company closely related to the taxpayer. The court found that, had the tax authority taken into consideration not only the taxpayer's records but also the accounts of the related company, the real nature of the transaction between the parties would have been clear and the expenses claimed by the taxpayer could have been justified. Finding for the taxpayer, the court concluded that the tax authority had to consider in their entirety not only the facts establishing the taxpayer's obligations, but also those constituting the taxpayer's rights (Legf Bir Kfv I 25.317/1994 in Case No 372 (1995) 43 *Birosagi Hatarozatok*).

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request, a final audit meeting must be organised where both the taxpayer and a representative appointed to safeguard the taxpayer's interests may participate.

A simplified form of audit allows a tax authority to base a review of compliance with self-assessment requirements on a tax return and other available documents. The taxpayer must be notified at the commencement of a simplified audit and of the results of review up close. Where a tax return does not comply with the relevant laws, the tax authority will draft proceedings with the warning that, if no satisfactory comment is made, public administration procedures will commence.

B Approximation of taxes, supplementary tax returns, lump-sum tax

Where taxpayers fail to enter their names on the fiscal register, or are found on a tax audit to have incorrect tax returns, the revenue commissioners may estimate the relevant tax liability. This can be a breach of the principle of the rule of law, if the usual methods and basis for calculation of liability are not used. The law requires that tax liability should be ascertainable in advance, based on exact terms defined by law. However, approximation can be justified where there is insufficient evidence of tax liability. Although it is not explicitly regulated in Hungarian law, estimating taxable income is obviously an issue of the quantity of tax and not the quality or type of income. This means that it is permissible to estimate the amount of taxable income where none has yet been calculated. But tax authorities may not use approximation to reclassify income. Before estimating tax liability, tax authorities must prove that the tax liability cannot be determined in any other way. In making an estimate, tax authorities may rely on a comparison between the taxpayer and other taxpayers carrying on similar activities under similar circumstances. Where an estimate is made, the burden of proof shifts to the taxpayer, who has to prove that any estimate is incorrect.¹⁸

Where necessary, revenue commissioners not only estimate tax liability but, where taxpayers fail to inform the tax authorities that they have commenced taxable activities and their tax liability can only

¹⁸ This taxpayer obligation is complemented in Germany by the so-called Schmiergeld-Paragraph (s 160 AO), according to which the taxpayer must prove that expenses claimed do not lack real business purpose. This provision is a kind of anti-avoidance law enacted in the tax administration legislation that could serve as a model for the development of the Hungarian legislation on tax administration.

be determined by approximation, do so in terms of a lump-sum tax. The tax is determined assuming activities have been carried on for twelve months and based on similar activities carried on by other taxpayers under similar circumstances. There are doubts as to the constitutionality of estimating tax liability and, in particular, where estimation is used to determine a lump-sum tax. As the approximation of tax liability and the determination of tax liability as a lump-sum tax are part of the tax audit process, they may be challenged. At the close of a tax audit a tax administration procedure may commence. It is the formal decision made by the tax authority during this process that may be challenged: first before a higher tax authority and then before the courts.

In connection with the approximation of tax liability, the tax authorities invite certain taxpayers to make a supplementary tax return. The invitation is to those taxpayers whose income does not reach the threshold for their profession or taxable activity as defined by the fiscal authorities, taking into account the national minimum wage, the characteristics of particular regions and the profession or taxable activity in question. Under the Taxation Order Act, the finance minister must annually issue guidelines defining those taxpayers subject to a supplementary tax return. In the supplementary return taxpayers have to justify their income based on their expenditure, investments, and the resources from which their income is derived. Where there is insufficient justification, the revenue commissioners define the taxable income using estimates based on a comparison with taxpayers carrying on similar activities under similar circumstances at the time of tax audit. Clearly, the taxpayers targeted by these provisions are those whose income on their tax return does not equate to the incomes expected from their profession or taxable activities. For fiscal policy reasons, it is arguable that suspicious or abnormal tax returns should be challenged. However, the rule on supplementary tax returns is dubious, for constitutional reasons. The Constitutional Court finding (discussed above) that a property declaration is prohibited in the absence of precisely-drafted policy reasons arguably could be extended to supplementary returns. It could be said that an assumption by the tax authorities that certain tax returns are incorrect is not sufficiently specific to permit an added burden to be placed on taxpayers in the form of a supplementary tax return.

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C Tax investigations

Tax investigations take various forms, including checking a taxpayer's personal identity, making an arrest, checking rooms and vehicles, or through seizure or sequestration. During an investigation the tax authorities can request clarification of a person's identity, on the suspicion that the person carries on unreported taxable activities or takes part in the management of such activities. If a person refuses to reveal her or his identity, the tax authority may call upon the police to make an arrest. The arrest must be approved by the public prosecutor.

If it is likely that the taxpayer is concealing documents providing evidence of her or his tax liability, the tax authority may search the taxpayer's premises and vehicles. Any evidence may be seized. The taxpayer must be invited to be present for the search, but the taxpayer's presence is not necessary. Where the taxpayer is not present, the tax authority must conduct the search in the presence of two witnesses. An on-the-spot examination ends when details of proceedings are drawn up. They are delivered promptly to the taxpayer. The taxpayer or her or his representative may comment upon them. On-the-spot examinations may only commence following a formal resolution made by a competent tax authority. The taxpayer may challenge this resolution, or the measures taken during an examination, before a higher level of the tax authority within 8 days of the delivery of the resolution. The higher tax authority is obliged to arrive at a decision within 15 days. The challenge to the resolution of the lower tax authority before the higher tax authority does not prevent the lower tax authority from executing the examination.

During a tax audit, seizure and sequestration measures may also apply. Seizure applies to a taxpayer's tools of trade, manufacturing equipment or trading stock and provides a means of securing the enforcement of the obligation to pay an administrative penalty. The tax authority can meet its claim for the penalty based on the financial value of the property seized, provided that the taxpayer has not paid the penalty within 15 days of the notification of the penalty resolution. A tax authority penalty can be up to 100,000 Hfl in the first instance, and up to 200,000 Hfl in the second instance, for failure to make an entry onto a tax register. The tax authority must notify a taxpayer of a penalty resolution immediately. Seizure and execution may be carried out without regard to appeal. Where a taxpayer has, on the same premises, failed to invoice services at least four times within two years, the taxpayer may be punished with both an administrative penalty and the closure of those premises for three days. A failure to

invoice for a fifth time extends the closure to five days. On the sixth and subsequent failures the closure is for ten days. The administrative penalty in this instance is subject to the same conditions in respect of notification, search and seizure as the penalty for failure to make an entry on a tax register.

D Tax administration procedures and appeals

The characteristics of tax administration procedure that are significantly different from those in the courts include:

- limited recognition of the conflicting interests of parties taking part;
- the prevalence of expediency over lawfulness; and
- uncertainty as to the legal character of a final decision under this process.

Each of these characteristics is discussed briefly.

Conflict between tax authorities and taxpayers gives rise to disputes and yet a major feature of tax administration procedure is a one-sided approach refusing to recognise that disputes exist. The focus of tax administration procedure is that a tax authority is expected to enforce a public claim rather than to provide an impartial forum for arbitration. A conflict resolution function providing reasoned decisions is only found in the higher level tax authorities.

Another important feature of tax administration procedure is that tax authorities are expected to focus on expediency in their application of the law. This is particularly relevant in relation to future actions. For example, during a tax audit a tax authority is expected to take into account not just the law, but also the means of improving efficiency in tax collection in current and later cases. Courts, on the other hand, ignore expediency and concentrate on the interpretation of the law and its application to the relevant facts. It is only through precedents that courts can influence future actions.

A third characteristic of tax administration procedure is that an appeal to the courts from a public administration decision is not, in law, an appeal in relation to a decision that is *res iudicata*. Nonetheless higher level public administration decisions bear many of the characteristics of a decision *res iudicata*. In Hungary, a decision of a higher level tax authority is final unless it is challenged in the courts. Such a decision is also complete in that it is executable. However, the taxpayer can request the court to suspend execution while the matter is under

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discussion. It is at the court's discretion whether to meet a request for suspension. In practice, the courts often approve suspension of execution until a final decision is made. Given this ambiguity in administrative decision-making, it is reasonable that certainty (the German legal doctrine "Bestandskraft"), but not definitive legal force is attributable to decisions made in public administration procedure.

In Hungarian law, internal appeals fall within the tax administration procedure. This is because the appeal against the decision of a lower level tax authority must be heard by a higher level tax authority. If a taxpayer is not satisfied with the results of an administrative review, there is recourse to a judicial body. There are no separate tax courts in Hungary and appeals are heard before general courts. There are no tax tribunals or fora for arbitration in tax matters. It is also not possible to use compromise between the tax authorities and taxpayers in tax matters. However, agreement may be reached between the parties where advance rulings that are binding on the parties, are issued at a taxpayer's request. This is discussed further below.

V ENFORCEMENT

Enforcement of tax payment obligations encompasses the following issues:

- taxation by self-assessment, imposition or deduction (ss 17-19 of Taxation Order Act);
- tax imposition based on an immediate, subsequent or extraordinary audit (ss 78-80);
- advance rulings (s 80A);
- arrangement for tax payment (ss 27-32);
- interest and penalties (ss 67-74);
- tax payment relief (ss 81-82); and
- tax collection, cancellation of tax liability, time limits (ss 4-95).

A Taxation by self-assessment, imposition or deduction

Under Hungarian law, taxation is usually imposed through:

- self-assessment - the normal form of taxation;
- the imposition of tax by tax authorities based on tax returns. For example, VAT levies on imports and duties on property acquisitions are both based on fiscal returns; or

- withholding of tax by deduction. For instance, there is a withholding tax on dividends and on a fee for independent personal services based on a civil law contract.

The imposition of tax can be based not only on tax returns, but also on immediate, subsequent or extraordinary audits. An immediate audit can be initiated in cases where it is also possible to make an estimate of the tax liability. This is the case where a taxpayer has not entered her or his name on a tax register, or where the entry is made but false information has been given as to tax liability. Using an immediate audit, the tax authority can commence the tax administration procedure, determine the tax payable, and charge the penalty on the tax shortfall together with the late payment interest. As discussed above, these fiscal charges can be complemented by an administrative penalty and the seizure of property to secure the tax claim.

Taxes may also be imposed pursuant to a subsequent audit. As discussed above, subsequent to the findings of a tax audit, the tax authority commences a tax administration procedure and comes to a formal resolution on the imposition of tax. A new tax audit in the same case may only be initiated within one year from when the resolution on the determination of tax liability entered into force, or within one year from the end of audit, provided that the tax audit procedure ended without the commencement of a tax administration procedure. This time limit does not apply where a court has found a crime of tax fraud or has ordered a new tax administration procedure. Sometimes tax liability is determined by a resolution made during an extraordinary audit, as in the case of the death or the emigration of an individual taxpayer.

B Advance rulings

Hungarian law permits tax assessment in certain circumstances based on advance rulings. Increasingly, in legal and fiscal areas of practice, there are no ready-made answers as to how the substantive law applies to transactions between different parties. Presumably, the legislature does not intend to provide such answers, as fiscal tribunals may rely on tax compromises between taxpayers and the revenue commissioners in the form of advance rulings.¹⁹ Although rulings

¹⁹ For country practices on advance rulings see, in particular, "Ruling Practice: A European Survey and Comparison" (1995) 35 *European Taxation* 2; Betten R, "Netherlands: News on Rulings Practice" (1993) 33 *European Taxation* 5; Huiskes T, "Rulings Policy Revised" (1995) 35 *European Taxation* 7; and

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only have binding force on the parties in specific cases, they can serve as a starting point for later decisions. With the development of rulings, problems that cannot be solved at the level of substantive law have been moved into the sphere of procedural law, where the conflicting interests of the fiscal authority and the taxpaying community can be settled on an individual case basis.

In characterising the practice of providing advance rulings in a country, the following questions are relevant:

- Is there a statutory basis for rulings?
- Is a fiscal authority obliged to issue a ruling upon request or is it discretionary?
- To whom is a ruling addressed?
- Is a ruling binding only on tax authorities or on the courts as well?
- What is the deadline for tax authorities to provide rulings?
- Are there charges for requesting a ruling?
- Is a taxpayer entitled to appeal against a ruling?
- Are rulings made public?

It is also important to know the scope of the application of advance rulings. There are two major areas where rulings are used. Taxpayers may file for a ruling to interpret the law in special cases, or they can request an exception to the law to the extent that the revenue commissioners substitute a lump-sum tax for the regular tax. In the latter case, often a deemed assessable income is used to assess the tax.

The practice of issuing advance rulings is a Netherlands' tradition. However, in the Netherlands a lump-sum tax cannot be substituted for regular tax. Taxpayers may invoke advance rulings in Germany, as well. However, in contrast to the Netherlands, a lump-sum tax cannot be substituted for regular tax. Hungary has been influenced by the German practice.²⁰ In Hungary, the right to file for an advance ruling has only been in place from 1996 (s 80A Taxation Order Act). According to the new law, at the taxpayer's request the Finance Ministry must assess any tax liability by specifying the taxable income and the tax payable based upon the facts as presented by the taxpayer. Since rulings have no retrospective effect, they may not be used for any kind of tax amnesty. A Hungarian ruling is binding on the revenue commissioners (but not on the courts) in the specific case to

Sawyer AJ, "New Zealand: A Proposed Binding Rulings Regime" (1994) 48 IBFD Bulletin 11.

²⁰ For the German "verbindliche Zusage" see ss 204 207 AO.

which the ruling relates, provided the facts have not altered. There is no special deadline for the Ministry to give a ruling, as the general 30 day deadline applicable to a public administration procedure is effective.

A charge is payable for a ruling. It is 1% of the value of the tax liability to be assessed, but not less than 250,000 Hfl and not more than 5,000,000 Hfl. If the tax liability to be assessed cannot be defined, the charge is 250,000 Hfl. Where the facts provided are insufficient to allow assessment of the tax liability, or there is good reason to suspect that the facts provided conceal other contracts or actions, an advance ruling request will be refused. Any charges already paid will be returned. The law is silent on the question of appeal. As the procedure followed by the Finance Ministry is a public administration procedure, a taxpayer has a right of recourse to the courts. Presumably, taxpayers will not approach the courts as they may rely on the rulings as being binding on the tax authorities. A ruling issued must not be published in Hungary.

C Tax payment arrangements, fiscal charges, tax payment concessions, tax collection, cancellation of tax liability, time limits

Tax based on self-assessment is payable on the due date set out in an annexure to the Taxation Order Act. Tax determined by a resolution of a tax authority must be paid within 15 days from the day when the resolution enters into force. Taxpayers are also required to make advance payments of tax. Any costs incurred in recovering tax are met by the tax authorities. Interest is payable by both taxpayers on late payments of tax and the tax authorities on late refunds. Taxpayers without bank accounts must remit the tax due or pay by postal order. Taxpayers with bank accounts must pay their tax through their accounts.

Each taxpayer has an individual tax account kept by the competent tax authority. The account shows the taxpayer's tax liability at any given time. Tax authorities must notify taxpayers of the balance of their accounts, including any late payment interest charges, no later than 31 August for non-corporate taxpayers and 31 October for corporate taxpayers. (The tax year is from 1 January to 31 December.) If a taxpayer does not pay any late payment interest charge on time, the interest will form part of the outstanding tax liability. As a consequence, the new amount of late payment interest will be calculated based on the principal increased by the earlier late payment interest.

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Fiscal charges in Hungarian law can be divided into two major groups. There are charges that do not depend on negligence for their application. They have been designed to promote reparation rather than as a means of punishment. They include self-audit interest and late payment interest. From a theoretical perspective, they are based on strict liability. However, the law is not consistent, as both kinds of interest can be reduced by the tax authorities where there is no negligence. Self-audit interest was discussed above and the calculation of the late payment interest is very similar. It is payable on the outstanding tax and applies from the first day that payment of the tax is due until the date of payment. Whereas self-audit interest is payable at the basic rate prescribed by the Bank of Issue, the rate of late payment interest is calculable at 200% of the basic rate of the Bank of Issue.

Charges not based on strict liability are the tax penalty and the administrative penalty. As they aim to penalise certain conduct, they depend on negligence and are reduced in exceptional cases where negligence is lacking. The tax penalty is 50% of the unpaid tax. The administrative penalty is applicable to a wide range of cases set out in the Taxation Order Act. In general, it must be levied when a taxpayer violates procedural obligations relating to tax administration. Similar to the tax penalty, the administrative penalty is usually determined as a percentage of the relevant tax liability. An example was discussed above in relation to the making of an estimate of taxable income where a taxpayer had failed to make an entry on the fiscal register or provided false tax information.

The burden of taxation may be eased where taxpayers are granted postponement, are allowed to make payment by instalments or have their tax liability reduced. On request, taxpayers can be granted postponement or be permitted to make payment by instalments, provided that they act in good faith and their financial difficulties seem to be temporary. The relief is at the tax authority's discretion. Individual taxpayers may be granted the same relief based on family or social circumstances. As a rule, tax relief is given subject to the payment of late payment interest on the amount outstanding, although this interest, too, may be reduced by the tax authority. In exceptional cases, the tax liability, including interest and penalties, may be reduced by tax authorities for equity reasons. For non-individual taxpayers, interest and penalties may be reduced, but the principal amount of tax payable may not.

There is no independent legal regulation of a tax lien in Hungary. The only option is to secure tax claims by surety. The collection of taxes is only in minor part regulated by the Taxation Order Act. The procedure governing tax collection is found in the Judicial Execution Act. Accordingly, the Judicial Execution Act is applicable, unless the Taxation Order Act provides otherwise. The tax authority may give a notice to a taxpayer to pay but is not obliged to issue a separate notice. Also, a tax authority is not required to make a new resolution in respect of the collection of tax. A taxpayer may object to the tax authority's actions within 8 days of the day on which the taxpayer became aware that the tax authority violated the law by its actions or by its failure to act. A complaint made against the act of collection must be examined by the higher tax authority within 15 days. A tax authority must first try to enforce a tax claim, in the case of businesses with bank accounts, by making a prompt collection order, in the case of individuals, by requiring deductions from payments being made to them. If this fails then the authority may seize a taxpayer's property. However, a tax authority must first seek the collection of tax based on the seizure of movable property. Only if that fails and the tax liability exceeds 100,000 Hfl may immovable property be seized. Collection of tax can be suspended if there are preliminary legal questions for discussion, or if the taxpayer is granted the payment relief.

When tax authorities fail to collect tax, they must cancel the tax claim. However, if the tax claim is expected to be enforceable within a five-year time limit, the tax collection process must recommence. The time limit on both assessment and collection of tax is five years. For assessment it begins on the day following the last day of the year in which a taxpayer was required to inform the tax authorities of her or his tax liability or to file a tax return. The time limit for assessment is suspended when a resolution of a tax authority in relation to an assessment is being reviewed by the courts. The time limit for collection begins on the day following the last day of the year in which the tax payable was due and is extended by the time during which tax is actually being collected. The time limits for both tax assessment and tax collection are interrupted by a self audit and are suspended for any period of suspension of tax collection or while the taxpayer is given tax relief.

Tax collection costs are incurred by the taxpayer. However, a major rule of tax administration is that the costs of assessment and enforcement of tax, including tax administration procedure, are incurred by the state or the local government authorised with taxation power, unless the taxpayer acts in bad faith. The tax authority decides

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costs by formal resolutions. Taxpayers incur their own costs relating to tax administration.

VI CONCLUSION

Taxpayers' rights and obligations in Hungary are comprehensively regulated by the Taxation Order Act. However, there is no Ombudsman responsible for tax matters. There are no independent legal documents on taxpayer rights, like the US Taxpayer Bill of Rights, set out in the Technical and Miscellaneous Revenue Act of 1988. Nor is there a legal instrument in Hungary like the Taxpayer's Charter issued by the UK Inland Revenue in 1986.

In a country in transition like Hungary, it is interesting to review the real opportunities for taxpayers to exercise their rights and the rights and duties of the tax authorities to enforce fiscal claims. The implementation of the law is made difficult by a relatively low or inconsistent level of professionalism in the officials of the tax authorities and the courts engaged in tax matters. Although Hungary is not expected to give up the continental tradition of jurisprudence with a legal system based on statute, it is anticipated that, in the tax area, at least, Hungary will develop case law so that a specific decision can be a basis for reference in later cases. This kind of assistance is of particular significance in fiscal matters where there are rapid changes and the reaction to new challenges to the tax law is often associated with an expectation that complex anti-avoidance legislation should be drafted.