

Taxpayers' rights in cross-border tax disputes: primary and secondary legislation of the European Union

Δικαιώματα των φορολογουμένων στις διασυνοριακές φορολογικές διαφορές: πρωτογενής και παράγωγο δίκαιο της Ευρωπαϊκής Ένωσης

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1. Introduction

- ▶ *Ubi ius, ibi remedium*
- ▶ Fundamental right of persons to protection against measures that may adversely affecting his personal sphere
- ▶ Human rights, constitutional and supranational dimension
- ▶ Taxpayers are persons, but...children of a lesser God
- ▶ Protection of taxpayers' rights in purely domestic and cross-border scenarios
- ▶ Traditional vision: tax treaties as legal instruments to define the boundaries of tax sovereignty in mutual agreement
- ▶ Implications: taxpayers have no rights connected with treaties
- ▶ National procedural autonomy under European Union law subject to equivalence and effectiveness

2. The principles and EU primary law framework

- ▶ Persons as holders of rights under EU law
- ▶ Categories of rights: substantive, procedural and connected with the levying of penalties
- ▶ Supranational dimension of fundamental principle is determined by reference to EU principles and link with ECHR
- ▶ Right to an effective legal remedy and implications of right to fair trial in administrative and judicial tax procedures
- ▶ EU principles reflected in the EU Charter of Fundamental Rights (at least Arts. 8, 17, 20, 21, 41, 42, 43, 45, 47, 48, 49, 50)
- ▶ EU Charter: implementation of EU law and ECHR as minimum standard
- ▶ Interpretation by CJEU in tax matters: *Belvedere Costruzioni*, *Åkeberg Fransson*, *WebMindLicences*, etc.

European Union law requires protection of fundamental rights of taxpayers

=> Member States may not ignore their issues in cross-border situations

3. How to protect fundamental rights?

**Baker-Pistone EC Tax Review 5-6/2016:
Involvement of taxpayers in cross-border tax procedures
requires interventions in two main areas**

- 1. Cross-border exchange of tax information =>** ex ante protection (right to be informed, judicial protection and access)
and
- 2. Settlement of cross-border tax disputes =>** two-tier model with involvement of taxpayer during MAPs and a wide range of solutions for preventing and settling disputes

4. The IFA-IBFD Observatory on Taxpayers' Rights

IFA 2015 Baker-Pistone Report (based on empirical evidence from 40+ national reports with short-form questionnaire)

Non-judgmental monitoring of practice in respect of Baker-Pistone standard by balanced group involving technical experts from tax authorities, taxpayers, judges, ombudsmen, academics

- Reconciling good governance with legal remedies approaches



5. CJEU: From Sabou to the pending Berlioz case

- ▶ **Sabou (C-276/10): right to defence in cross-border mutual assistance between tax authorities under EU directive**
 - ▶ No reference to EU Charter by national Court
 - ▶ CJEU 22.10.2013: EU mutual assistance tax directive does not confer taxpayers the rights to be informed about a request for assistance, participate to formulate questions or to examine witness

5. CJEU: From Sabou to the pending Berlioz case

- ▶ **Berlioz (C-682/15 - pending): on the right to a legal remedy against request of information**
 - ▶ Luxembourg tax authorities were asked to supply precise information about recipient of dividends, such as PoEM, staff, contracts, shareholdings with names, addresses and capital owned (not supplied for not being foreseeably relevant), assets. Penalty for not supplying information
 - ▶ National Court refers question also on Article 47 (effective remedy)
 - ▶ AG Wathelet 10.1.2017: Court must be able to verify legality of penalty on the basis of brief examination concerning the foreseeable relevance
 - ▶ CJEU 16.5.2017: publication of judgment by Grand Chamber

6. COM (2016) 686 – Proposal for EU Arbitration Directive

- ▶ CJEU: acknowledges problem of juridical double taxation, but excludes solution at interpretative level (Kerckhaert-Morres/Block)
- ▶ Proposal for positive integration on double taxation through harmonization (legal basis Art. 115 TFEU)
- ▶ Implications: EU secondary law secures effective protection of rights, thus also of taxpayers
- ▶ Higher rank among sources of law as compared to tax treaties
- ▶ Directive secures effective protection of rights (Art. 1 (2)), including right to submit documents and be heard (Art. 12 (2))
- ▶ Jurisdiction of CJEU to interpret directive
 - ▶ Non-compliance can lead to infringement procedures
- ▶ Definition of double taxation
- ▶ Various measures secure effective protection against inaction of tax authorities with support by national Courts
- ▶ Full rights to notification for taxpayers during procedures



6. Overview COM (2016) 686

- ▶ Scope: all types of cross-border double taxation concerning business
- ▶ Art. 1: resolve cross-border tax disputes and the rights of taxpayers
- ▶ Art. 3 allows for submission of case to each competent authority
- ▶ Art. 5 gives legal protection against rejection of complaint
- ▶ Art. 7 involves national courts to secure speedy appointment of arbitrators
- ▶ Art. 9 includes alternative dispute resolution mechanism
- ▶ **Art. 12 acknowledges taxpayers' rights to submit relevant documents and be heard before Advisory and Alternative Dispute Resolution Commissions**
- ▶ Art. 14 protects effective enforcement of final decision
- ▶ Art. 15 (6) blocks the access to the procedure in case of tax fraud, wilful default and gross negligence
 - ▶ Not in cases of aggressive tax planning and abusive practices



6. Relationships with other legal instruments

- ▶ Art. 1: does not preclude the application of national legislation of provisions of international agreements where it is necessary to prevent tax evasion, fraud or abuse
- ▶ EU Arbitration Convention
 - ▶ Will it be repealed, or will the two co-exist?
- ▶ Arbitration under bilateral tax and non-tax treaties; MLI
 - ▶ Can they run in parallel, or can taxpayers use either at different moments?

7. Concluding remarks

- ▶ EU law requires protection of fundamental rights and gives legal remedies for it
- ▶ The protection of fundamental rights of persons, thus also of taxpayers, cannot be put under silence in the European Union
- ▶ Cross-border mutual assistance in tax matters is a tool to secure information, but must operate within the overall framework of legal standards of protection for taxpayers
- ▶ Cross-border settlement of tax disputes may not be handled by tax authorities without the involvement of taxpayers
- ▶ IFA-IBFD Observatory on the practical protection of taxpayers' rights and shift towards a transparent EU standard of protection
- ▶ **Constructive dialogue for effective protection of taxpayers' rights: good governance may be reconciled with protection of rights based on legal remedies**



Thanks for the attention!

Ευχαριστώ για την προσοχή!
Grazie per l'attenzione!

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