

Taxpayer Rights or Civil Rights: Where do they fit into the emerging international tax order?

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A thought-provoking and insightful series of papers on taxpayer rights have just been published in the latest edition of *The Tax Lawyer*,^[1] published by the American Bar Association Section of Taxation.

These papers were presented at the inaugural International Conference on Taxpayer rights held in Washington, DC in November 2015, initiated by Nina Olson, National Taxpayer Advocate, Internal Revenue Service. The Taxpayer Advocate Service (TAS) is an independent organisation within the United States IRS. A second conference is to be held in Vienna in 2017. Although the papers centre on tax law and administration, readers will quickly recognise the universality of the issues they discuss.

While the OECD BEPS project to change the substantive rules of international taxation has attracted justifiably huge attention, less attention has been paid to the direction of travel of tax administration. The *Seoul Declaration*,^[2] by the Heads and Deputy Heads of Revenue Bodies from 35 economies, meeting under the auspices of the OECD's Forum on Tax Administration in September 2006 marked the start of increasingly authoritarian approaches to tax administration. In the United Kingdom, for example, moves towards increasingly wide information powers with limited statutory safeguards applicable to all taxpayers and all taxes, draconian penalty regimes, the tax administration's ability to dip into taxpayers' bank accounts without first seeking the court's permission, new strict liability criminal offenses where the burden of proof is on the accused, among others, all raise important constitutional and rule of law questions. If such powers are sought by other law enforcement agencies, serious questions are widely asked by civil society.

It is to the credit of the IRS that these sensitive issues can be publicly discussed and analysed on a no-holds-barred basis and to the professionalism of the TAS in their exercise of the independence given to them.

Tax exceptionalism

Professors Alice Abreu and Richard Greenstein^[3] consider tax exceptionalism. Tax exceptionalism is a distinct attitude towards tax law, that somehow tax law is deeply different from other areas of law, with the result that many of the rules and principles that apply across the legal system do not or, it is argued, should not apply to tax. The departure of tax law from other areas of law in terms of interpretation and enforcement, risks legitimacy of the tax administration in performing these functions, in their view. They observe, that taxpayers' experience of tax law is different from other areas of law. Tax law is complex and its impact pervasive and intrusive. "No other field of law is thought to be so complex or to compel so many to regularly bare their souls to the government just to be in compliance with the law. You cannot just mind your own business and stay out of the way of the tax law." They argue, however, that tax law and administration is not objectively exceptional, and that its interpretation administration and enforcement should be subject to the same standards and values that apply to other areas. Tax law, they conclude, should be accepted simply as law.

Tax collection that observes taxpayer rights

Professor Keith Fogg and Sime Jozipovic^[4] examine how tax collection can be structured to observe and preserve taxpayer rights. Difficulties, they note, arise outside the normal voluntary payment and, where tax refunds are concerned. In the collection context, they argue that the right to a fair and just tax system includes justice for all taxpayers facing collection and not only those who can afford representation. Secondly, the collection system must treat persons from whom enforcement mechanisms need to be used in a fair and just manner. Thirdly, the system must be just to taxpayers who pay their taxes without the need for enforced collection.

Bureaucratic oppression and the tax system

Professor Leslie Book^[5] analyses bureaucratic oppression and the tax system. Bureaucratic oppression, he says, occurs when an agency or its employees impose unnecessary and harmful burdens on private parties. This includes actions that are not necessarily illegal or even against agency guidelines, and includes employees following rules when doing so imposes burdens for no purpose. While the study is in the context of administration of the earned income tax credit by the IRS, the analysis is apt in a number of circumstances, particularly in the case of taxpayers lacking resources to deal with the tax administration. Insights into why agencies tend to act the way they do, such as status differences between taxpayers and administrators, "stranger relationships" which often result from the sheer amount of work of government officials that contributes to a depersonalisation of the taxpayer and institutional pathologies remind us of that more than law is in issue. Solutions suggested include judicially imposed standards of due process, the role of independent ombudspersons and management perspectives.

Making taxpayers' rights real

Amanda Bartmann,^[6] an attorney adviser to the National Taxpayer Advocate within the Taxpayer Advocate Service, considers how to make taxpayers' rights real by integrating them in the tax agency's operations. A survey conducted for the IRS Taxpayer Advocate Service in 2012 found that fewer than half of US taxpayers believed they had rights before the IRS and only 11% said they knew what those rights were. Although the US Internal Revenue Code has long contained provisions aimed at securing due process, in 2015 Congress added organising principles to formally acknowledge the fundamental taxpayers rights from which specific statutory rights in the Internal Revenue Code derived. In addition, 2016 legislation requires IRS employees to be familiar with and act in accordance with such taxpayer rights. She observes the challenge in educating taxpayers who may already be overwhelmed with large amounts of information. More interesting, however, are the proposals aimed at better recognition of taxpayer rights by the tax administration itself, primarily through education and the incorporation of taxpayer rights into decision-making. This contemplates a cultural shift in tax administration. The article contains many insights into the problems of tax administration that impinge on taxpayer rights and suggests solutions.

These papers address the issues primarily by reference to low-income taxpayers, who are clearly the most vulnerable. Readers will however instantly recognise that these issues cut across all taxpayers and that the inequality of taxpayer and tax administrator resources in the face of the coercive power of the state will, in many cases, result in misapplication of the tax law or related injustices.

The authors' analyses concentrate on tax administration in the domestic context. Increased cross-border administrative co-operation, including among states that do not share the same legal and constitutional values are likely to compound the challenges in this area.

[1] *The Tax Lawyer*, Vol 69, No 3. Spring 2016.

[2] Final Seoul Declaration, Third Meeting of the OECD Forum on Tax Administration 14-15 September 2006

[3] Alice G Abreu and Richard K Greenstein, Tax as Everylaw: Interpretation, Enforcement and the Legitimacy of the IRS, *The Tax Lawyer*, Vol 69, No 3, p 493.

[4] Keith Fogg and Sime Jozipovic, How can tax collection be structured to observe and preserve taxpayer rights: A discussion of Practices and Possibilities, *The Tax Lawyer*, Vol 69, No 3, p 513.

[5] Leslie Book, Bureaucratic oppression and the tax system, *The Tax Lawyer*, Vol 69, No 3, p 567.

[6] Amanda Bartmann, Making taxpayer rights real: Overcoming challenges to integrate taxpayer rights into a tax agency's operations. *The Tax Lawyer*, Vol 69, No 3, p 597.