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Very Small General Report

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Very Small General Report

This is an exciting comparative issue of the *Bulletin*. My distinguished colleagues from abroad contributing to this special issue have many times surprised me with – to me – striking and always educative features of tax litigation in highest instance in their countries. No doubt, they will be surprised by certain features of tax litigation before my court, the *Hoge Raad der Nederlanden*, whose centenary of hearing tax cases this special issue celebrates. I greatly enjoyed studying and comparing the contributions of so many inside authors from so many countries and e-mailing with them on substantive, procedural, and policy issues as a result of my queries as editor and – sort of – general reporter, or rather, general formatter (*see below*).

Tax litigation in highest instance proves to be organized in very diverse manners without it being possible to say that one system is better than the other, as all systems function within their different national constitutional environments and different legal cultures and historical contexts. All of them show features that may at first surprise or even startle the foreign beholder, but which may after some thought also please him and even make him wish his national tax procedure had it as well. Conversely, certain features of tax litigation in highest instance abroad may kindle enthusiasm at first, until their practical drawbacks are explained by the insider working with them.

The two issues which to me seem to be the most diversely organized are access to (the highest) court and, as a result, the number of tax cases reaching the highest national courts. In some countries, there are few and low thresholds (no minimum financial interest, no representation by counsel required, no or low court fees); in others, high barriers exist. In Spain, for example, in order to access the *Tribunal Supremo*, legal persons must show a minimum financial interest of EUR 600,000. In many countries, leave to appeal is required, specific requirements apply as to legal representation and submission of legal argument, and/or high court fees apply. As a result, in Canada and the United Kingdom, amongst others, very few tax cases reach the Supreme Court. In Canada, only one or two tax cases per year obtain leave to appeal. In the most recent judicial year, the UK Supreme Court heard only six tax cases. By contrast, in France and the Netherlands, every year between 1,000 and 1,400 tax cases are decided by the highest tax courts – of which, admittedly, more than half are declared inadmissible or rejected in a summary but judicial (on merits) procedure.

To mention just a few features which were sometimes striking but in all instances very educative to me: the justices of the Swiss *Bundesgericht* need to be re-elected by

Parliament after six years, and any of the three justices in a panel of that court may require their chamber discussion to be public. The US Tax Court not only decides tax cases, but also decides on the value of information on tax evasion provided by whistleblowers, who may appeal the amount of the award granted for their information by the tax authorities. In Germany, the (federal and regional) ministries of finance may intervene or may even be invited by the *Bundesfinanzhof* to intervene and acquire party status in pending tax appeals, whereas, by contrast, in the United Kingdom the tax administration must be legally represented and must apply for leave to appeal on the same footing as the taxpayer. The Supreme Court of Canada limits written submissions by the parties to 40 pages maximum and oral arguments to one hour maximum. The Belgian Court of Cassation cannot decide a case after quashing a lower court's judgement, but must refer it back to the lower court, which is not required to follow the findings of law of the Court of Cassation. France and the Netherlands have introduced mechanisms to efficiently process appeals without prospect to be able to focus on the most significant cases. Sweden has an independent body, the *Skatterättsnämnden* (Advance Tax Rulings Board), which may directly ask the Supreme Administrative Court for a decision on a point of law.

I will end my very small “general report” here and confine myself for the rest to reproducing the format I suggested to the authors for their contributions in order to enhance comparability. The reader thus may better understand why certain issues were or were not discussed by the authors and on which aspects the authors were asked to focus and to compare. The suggested format was the following:

General idea

The general idea is a not very technical exposé, especially not going into technical tax law issues, on how highest national tax courts deal as a policy matter with the (amount of) cases submitted to them, with the fact that certain important issues may not reach them, how they interact with the other state powers, especially the legislator, and with the public, and how they deal with certain judiciary policy issues.

To help organize thought and create comparability for the readers, I suggest the following format, but I realize that it may not always be helpful, given the many differences among states. So feel free to structure your contribution in a different manner more accurate for your purposes.

All of the following issues/questions concern only the court adjudicating tax cases in highest instance (therefore purely Constitutional Courts are in principle excluded).

* Advocate-General, *Hoge Raad der Nederlanden* (Netherlands Supreme Court); professor of EU tax law, ACTL, University of Amsterdam.

Suggested format:

1. Organization/mission/task

- What is your court's main mission? Legal certainty? Legal protection? Uniform application of the law? Keeping application of possibly outdated statute law up to present day standards? Which is considered most important?
- Are you a specialized highest tax court (e.g. the German Bundesfinanzhof) or a general highest court, dealing with all kinds of cases?
- (If applicable:) relation to and coordination with other highest national courts (e.g. in France: the relationship between the Cour de Cassation and the Conseil d'État; in Germany the five Bundeshöfe) in matters of common concern/interpretation: how is uniform application of the law secured?
- If you are a general highest court, how do you coordinate within your court with the other chambers (criminal, civil, administrative, etc.)?
- Do you decide only on points of law or also on points of fact?
- Are there any advocates-general, rapporteurs publics, amici curiae or any other (independent) advisors opining before the case is being deliberated and decided? Are pending cases being discussed on a blog by the (professional) public (like the SCOTUS-blog on pending cases before the US Supreme Court)?
- Do you speak with one voice, or are dissenting and concurring opinions published separately, or is the voting ratio published (per judge or only in terms of "holds, by six votes to three,")?

2. Access/caseload control (avoiding less relevant cases)/mechanisms to attract relevant cases

- How does your court control its caseload? (e.g. leave to appeal, compulsory legal representation, court fees, simplified procedure for (manifestly) inadmissible or ill-founded applications);
- Are there mechanisms to ensure that important questions reach you and reach you timely? (e.g. preliminary questions by lower courts, class actions, accelerated procedure for massive appeals, quashing in the interest of the law (i.e. the power to quash a lower court decision which was not appealed, without influencing the rights of the parties proper), independent body – as in Sweden – formulating a question of law to be put before the highest tax court);
- To what extent do the parties define the dispute and the legal grounds relevant for deciding it? To what extent are

you at liberty (or even required) to investigate facts and to add ex officio legal grounds which have not been put forward by the parties?

3. Judicial policy issues

- What legal significance do the OECD Model and Commentary (and of which date) have for the application of specific bilateral tax treaties based on that Model (of a prior or posterior date)?
- What legal significance do (published) mutual agreements between the competent authorities, especially legislative and interpretative mutual agreements, have for the application of a bilateral treaty?
- And arbitration awards (if published)? Any thoughts on the desirability of alternative dispute settlement (instead of litigating in national courts) as promoted by OECD BEPS Action 14?
- What legal significance, if any, have judgements of the (highest) court in the other state party to the same tax treaty on the same issue?
- Stare decisis? Is precedent very important? Prospective overruling if you nevertheless change your course?
- If foreign law is relevant for deciding the case, how do you ascertain its content?
- Do you hear experts or other third parties or only the parties proper?
- Does tax accounting follow commercial accounting or international financial reporting standards (IFRS) or are they independent; do you attach weight to IFRS or commercial accounting for profit calculation issues not provided for in tax legislation?

4. Judge selection/independence/relation to the rest of the world

- How does one become a judge in your court?
- Appointed for life?
- Are political or religious preferences any issue? Or, in federal states, regional background or language?
- Gender quota?
- How could one describe the population of your court? Career judges? Formerly practicing lawyers? Former civil servants? Ex-politicians? Ex-professors?
- Do judges in your court engage in public (scientific) debate? Are they also university professors? Do they publish? Do they speak at seminars or in talk shows on TV or radio? Do they make comment in newspapers?