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Report of the Proceedings of the Sixth Assembly of the International Association of Tax Judges Held on 4 and 5 September 2015

This report summarizes the proceedings of the Sixth Assembly of the International Association of Tax Judges, held in Lucerne, Switzerland on 4 and 5 September 2015.

1. Introduction

The Sixth Assembly of the International Association of Tax Judges (IATJ) was held in Lucerne, Switzerland on 4 and 5 September 2015. The proceedings took place at the premises of the University of Lucerne. The Assembly was attended by 60 judges from 21 countries from all over the world. The opening of the Assembly was performed by Chief Justice Eugene P. Rossiter, President of the IATJ, and Judge Michael Beusch, host of the 2015 event. Mr Porus Kaka, President of the International Fiscal Association (IFA), addressed the Assembly as a guest speaker regarding the activities undertaken by IFA and their potential relevance to the members of the IATJ.

The Assembly was divided into the following seven substantive sessions, followed by a presentation on an "exotic topic":

(1) recent general case law (*see* section 2.1.);
(2) recent VAT case law (*see* section 2.2.);
(3) the wording of court decisions (*see* section 3.);
(4) tax procedures in Switzerland (*see* section 4.);
(5) information derived cross border (*see* section 5.);
(6) ethical requirements (*see* section 6.);
(7) the application of foreign law (*see* section 7.); and
(8) exotic topic (*see* section 8.)

The first four sessions took place on the first day of the Assembly, with the remaining three and the presentation on the exotic topic being held on the second day. The plenary discussions in the various sessions featured a total of 31 speakers.

2. Sessions on Recent Tax Case Law

2.1. Session on recent general case law

2.1.1. Opening comments

The opening session was chaired by Justice Randall Bocock of the Tax Court of Canada (TCC) and former Judge Willem F.G. Wijnen of the Court of Appeal of 's-Hertogenbosch *(Gerechtshof 's-Hertogenbosch*, GRH), the Netherlands. Other speakers were Justice Jennifer Davies of the Federal Court of Australia (FCA), Justice Emilie Bokdam-Tognetti of the *Conseil d'État* (Supreme Administrative Court, CE), France, Justice Per Classon of the *Högsta förvaltningsdomstolen* (Supreme Administrative Court, HF), Sweden, and Justice Thomas Stadelmann of the *Bundesgericht/Tribunal fédéral* (Federal Supreme Court, BG/TF), Switzerland.

2.1.2. Canada

Justice Randall Bocock reported on the case of *Guindon* (2015),[1] which concerned large third-party penalties under the Income Tax Act (Canada) (ITA(C)), decided by the Supreme Court of Canada (SCC) in July 2015: In this case the appellant argued that penalties imposed under section 163(2) of the ITA(C) were criminal ones and that she was, therefore, entitled to the procedural safeguards of section 11 of the Canadian Charter of Rights and Freedoms.

In particular, the SCC stated that a provision can be regarded as giving rise to a criminal offence if it: (1) involves a criminal proceeding by its very nature; or (2) imposes a penalty that is a true penal consequence. With regard to the latter, the SCC held that monetary sanctions are true penal consequences only when the purpose of effect is punitive. However, the magnitude of the sanction is not determinative and the amount must, rather, be in proportion to that required for regulatory purposes. Within the scope of the ITA(C), the magnitude of penalties is linked to the objectives of the IAA(C). The amount accords to a formula without regard to criminal sentencing principles and no stigma is attached to the violator's acts.

2.1.3. Sweden

Justice Per Classon addressed the question on how to comply with the Swedish tax law provision on short selling. Under Swedish tax law, in general, the lending of fungible goods, such as company shares, is regarded as transferring the ownership of the goods to the borrower. Consequently, lending shares to someone is viewed as selling the shares and the lender is liable to tax on any capital gain realized. However, in order to facilitate short selling, a special provision[2] was introduced into the Swedish *Inkomstskattelag* (Income Tax Law, IL) in the early 1990s. Under this provision, the lending of shares with the purpose of short selling is not regarded as selling the shares. As a result, the

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1. CA: SCC, 31 July 2015, *Guindon v. The Queen*, 2015 SCC 41, Tax Treaty Case Law IBFD.
2. SE: *Inkomstskattelag* (Income Tax Law, IL), art. 9, chap. 44.

lender is not liable to tax on any capital gain realized in this context.

In May 2015, the Swedish HF had to decide on the question of how it should be determined that the purpose of the loan is to use the shares for short selling.[3] In this respect, the HF stated that, in order to comply with the special provision, it has to be clear that the explicit purpose of the share lending is short selling. Consequently, the HF accepted that the special provision could apply, even if a lender could not demonstrate that the shares had been used for short selling. However, it was established that a mere possibility for the borrower to use the shares for short selling does not meet the requirements in the special provision. In conclusion, under Swedish tax law, the parties involved in lending shares transactions for the purpose of short selling must ensure that there is a clear documentation stating the explicit purpose of the lending to be able to apply the special provision.

2.1.4. Switzerland

Justice Thomas Stadelmann presented two cases decided by the Swiss BG/TF regarding Swiss withholding tax.[4] One case concerned a total-return-swap construction and the other a construction with an index future.

According to the BG/TF, two Danish banks were rightfully denied the refund of withholding tax on dividends derived from Swiss shares held only short term. It was stated that, not being the beneficial owners of the shares, the two banks could not benefit from the Denmark-Switzerland Income and Capital Tax Treaty (1973),[5] which prescribes a 0% withholding tax in respect of dividends. The BG/TF established that beneficial ownership is negated if the recipient of the dividends cannot retain the income generated, as the recipient is legally or economically required to pass the income onto to a third party.

2.1.5. Australia

Justice Jennifer Davies presented a case revealing divergent tax perspectives of Australia and the United States. A limited partnership formed in the Cayman Islands in 2003, with more than 97% of the contributed capital held by residents of the United States, held around 12% of the membership interests in St Barbara Mines, an Australian gold mining enterprise. In 2008, the limited partnership disposed of all its shares in St Barbara Mines, thereby resulting in a gain of around AUD 57.6 million. The Australian Commissioner of Taxation considered that the disposal gave rise to a taxable capital gain in the hands of the limited partnership.

The subsequent litigation resulted in the following issues raised before the FCA – Full Court (FCAFC).[6] First, whether the provisions in the Australian tax law imposing a liability on the limited partnership were inconsistent with the provisions of the Australia-United States Income Tax Treaty (1982)[7] and, second, whether the shares in St Barbara Mines were "taxable Australian property", and, therefore, whether the gain on disposal was subject to Australian income tax.

The FCAFC stated that there is an inconsistency between US tax law and Australian tax law with regard to the tax treatment of limited partnerships. The United States attributes to the partners the liability for any tax payable on a gain realized by the limited partnership, whereas Australia attributes the liability for any tax payable to the limited partnership. Consequently, the FCAFC held that, as Australian law imposes tax on the limited partnership, which was neither a resident of Australia nor of the United States, the Australia-United States Income Tax Treaty (1982) could not apply to modify that outcome. It is also permissible to have regard to the Commentaries on the OECD Model[8] to assist in ascertaining the meaning of the provisions of the tax treaty. However, the OECD Commentaries in relation to the mismatch between the treatment of partnerships between Australia and the United States do not modify the application of the tax treaty. In addition, the fact that the United States treats the limited partnership as "fiscally transparent" does not detract from the fact that Australian tax law taxes certain partnerships as if they were companies.

2.1.6. France

Justice Emilie Bokdam-Tognetti illustrated the potential area of conflict between tax treaties and national law as well as between tax credit and deductibility in reporting on the case of *Société Céline* (2014).[9] The Céline company collected licensing fees in Japan and Italy, which were subject to withholding tax in these two countries. Under the France-Italy Income and Capital Tax Treaty (1989)[10] and the France-Japan Income Tax Treaty (1995),[11] there is no deduction of Italian and Japanese taxes. However, the tax credit is chargeable against French tax.

3. SE: HF, 19 May 2015, Nr. 3773-14.
4. CH: BG/TF, 5 May 2015, 2C_364/2012 / 2C_377/2012, Tax Treaty Case Law IBFD and CH: BG/TF, 5 May 2015, 2C_895/2012.
5. *Convention between the Swiss Confederation and the Kingdom of Denmark for the Avoidance of Double Taxation with Respect to Taxes on Income and on Capital* (unofficial translation) (23 Nov. 1973) (as amended through 1997), Treaties IBFD.
6. AU: FCAFC, 3 Apr. 2014, *Resource Capital Fund III LP v. Commissioner of Taxation*, [2013] FCA 363, Tax Treaty Case Law IBFD.
7. *Convention between the Government of the United States of America and the Government of Australia for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income* (6 Aug. 1982) (as amended through 2001), Treaties IBFD.
8. *OECD Model Tax Convention on Income and on Capital: Commentaries* (26 July 2014), Models IBFD.
9. FR: CE, 12 Mar. 2014, Case 362528, 12, *Société Céline*, Tax Treaty Case Law IBFD.
10. *Convention between the Government of the French Republic and the Government of the Italian Republic for the Avoidance of Double Taxation with Respect to Taxes on Income and on Capital and for the Prevention of Fiscal Evasion and Fraud (with a Protocol and Exchange of Letters)* (unofficial translation) (5 Oct. 1989), Treaties IBFD.
11. *Convention between the French Republic and the Government of Japan for the Avoidance of Double Taxation and the Prevention of Tax Evasion and Fraud with Respect to Taxes on Income (Together with an Exchange of Letters)* (unofficial translation) (3 Mar. 1995) (as amended through 2007), Treaties IBFD.

The issue in the case in question was that the company was loss-making. The CE had to decide on the possibility of a tax treaty impeding deduction of the tax paid abroad, even in the case of a company that could not use the treaty credit tax because of its loss-making situation. In this respect, the CE stated that, when allocation does not work, deduction does not take over if a tax treaty precludes it. This is subject to the condition that the treaty provisions are clear. As both the relevant tax treaties expressly preclude deduction without reserving the case of loss-making companies, the Céline company lost its case.

2.2. Session on recent VAT case law

2.2.1. Opening comments

The session was chaired by Justice Friederike Grube of the *Bundesfinanzhof* (Federal Tax Court, BFH), Germany. Other speakers included Justice Outi Siimes of the *Korkein hallinto-oikeus* (Supreme Administrative Court, KHO), Finland, and Justice Dagmara Dominik-Oginska of the *Wojewódzki sąd administracyjny* (Voivodeship Administrative Court, WSA), Wroclaw, Poland.

2.2.2. Poland

Justice Dagmara Dominik-Oginska referred to a case concerning The Military Housing Agency (MHA) in Warsaw. The MHA, as a taxpayer, issued separate invoices for the rental fee at the standard rate of VAT, on the one hand, and the supply of electricity, heating and water as well as refuse collection at a reduced rate of VAT, on the other. The Minister of Finance did not agree with this accounting method and stated that the provision of utilities and refuse collection were part of a whole constituting a single supply, i.e. "rental services".

After being asked for a preliminary ruling concerning the interpretation of articles 14, 15 and 24 of Council Directive 2006/112/EC of 28 November 2006 on the common system of VAT (the VAT Directive (2006/112),[12] as amended by Council Directive 2009/162/EU of 22 December 2009),[13] the Court of Justice of the European Union (ECJ) noted that the VAT Directive (2006/112) must be interpreted as meaning that the letting of immovable property and the provision of electricity, heating and water as well as refuse collection accompanying that letting should, in principle, be regarded as constituting several distinct and independent supplies that must be assessed separately for VAT purposes.[14] This is so, unless the elements of the transaction, including the economic reason for concluding the contract, are so closely linked that they form, objectively, a single, indivisible economic supply, which it would be artificial to split. The ECJ noted that it is for the national court to make the necessary assessments taking into account all of the circumstances of the letting and the accompanying supplies and, in particular, the content of the agreement.

2.2.3. Finland

Justice Outi Siimes discussed recent case law on digital books. In *K Oy* (Case C-219/13),[15] the ECJ had held that the first subparagraph of article 98(2) of and point 6 of Annex III of the VAT Directive (2006/112), as amended by Council Directive 2009/47/EC of 5 May 2009,[16] must be interpreted as not precluding national legislation according to which books published in paper form are subject to a reduced rate of VAT, whereas books published on other physical media, such as CDs, CD-ROMs and USB-keys, are not. This is so provided that the principle of fiscal neutrality inherent in the common system of VAT is complied with, which is for the referring court to ascertain.

As a result, the KHO decided that books published in paper form and books published on other physical media are not comparable with regard to similar characteristics and use such that the principle of fiscal neutrality inherent in the common system of VAT would require equal VAT treatment. Consequently, the reduced VAT rate does not apply to books published in physical media other than paper.

Judge Siimes also referred to the decisions of the ECJ in *Commission v. France* (Case C-479/13)[17] and *Commission v. Luxembourg* (Case C-502/13)[18] concerning digital and electronic books. *Commission v. France* and *Commission v. Luxembourg* are, in the opinion Judge Siimes, more important than *K Oy*. In *Commission v. France* and *Commission v. Luxembourg*, the ECJ made it clear that, under current EU legislation, a reduced VAT rate does not apply to digital books, which are deemed to be services within the meaning of the second subparagraph of article 98(2) of the VAT Directive (2006/112). The ECJ did not accept the argument that point 6 of Annex III to the VAT Directive (2006/112) must be interpreted as including the supply of electronic books, as this would otherwise disregard the objective of that provision, as digital books are no longer physically delivered to the customer. It was in this context that the ECJ referred to *K Oy*, which concerned books published in physical media other than paper, such as CDs, CD-ROMs and USB keys.

2.2.4. Germany

Justice Friederike Grube referred to the decision of the ECJ in *Schoenimport Italmoda* (Case C-131/13),[19] which dealt with the problem of VAT fraud in the European

12. Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, OJ L 347 (2006), EU Law IBFD [hereinafter: the VAT Directive 2006/112].
13. Council Directive 2009/162/EU of 22 December 2009 amending various provisions of Directive 2006/112/EC on the common system of value added tax, OJ L10 (2010), EU Law IBFD.
14. PL: ECJ, 16 Apr. 2015, Case C-42/14, *Minister Finansów v. Wojskowa Agencja Mieszkaniowa w Warszawie*, ECJ Case Law IBFD.
15. FI: ECJ, 11 Sept. 2014, Case C-219/13, *K Oy v. Veronsaajien oikeudenvalvontayksikkö, Valtiovarainministeriö*, ECJ Case Law IBFD.
16. Council Directive 2009/47/EC of 5 May 2009 amending Directive 2006/112/EC as regards reduced rates of value added tax, OJ L 116 (2009), EU Law IBFD.
17. FR: ECJ, 5 Mar. 2015, Case C-479/13, *European Commission v. French Republic*, ECJ Case Law IBFD.
18. LU: ECJ, 5 Mar. 2015, Case C-502/13, *European Commission v. Grand-Duchy of Luxembourg*, ECJ Case Law IBFD.
19. NL: ECJ, 18 Dec. 2014, Case C-131/13, *Staatssecretaris van Financiën v. Schoenimport "Italmoda" Mariano Previti vof and Turbu.com BV, Turbu.com Mobile Phone's BV v. Staatssecretaris van Financiën*, ECJ Case Law IBFD.

Union. Italmoda, which is a taxable person established in the Netherlands, acquired computer hardware in the Netherlands as well as in Germany. It then supplied the hardware to customers subject to VAT in Italy and applied the exemption in respect of an intra-Community supply. The taxable persons in Italy did not pay VAT to the tax authorities.

The Dutch tax authorities argued that Italmoda had knowingly participated in fraudulent activity designed to evade VAT in Italy. They therefore denied Italmoda the exemption in respect of the intra-Community supplies effected in the Netherlands, the right to deduct input tax and the right to a refund of VAT paid in respect of the goods originating in another Member State of the European Union.

In the course of the subsequent litigation, the ECJ was asked for a preliminary ruling, which resulted in the previously noted judgement. According to the ECJ, the Sixth Council Directive 77/388/EEC of 17 May 1977 (the Sixth VAT Directive (77/388)),[20] as amended by Council Directive 95/7/EC of 10 April 1995,[21] must be interpreted as meaning that it is for the national authorities and courts to refuse a taxable person, in the context of an intra-Community supply, the benefit of the rights to deduction of, exemption from or refund of VAT, even in the absence of provisions of national law providing for such a refusal. This is so if it can be established in the light of objective factors that that taxable person knew, or should have known that, as a result of the transaction being relied on as a basis for the right concerned, it was participating in evasion of VAT committed in the context of a chain of supplies.

The ECJ also stated that the Sixth VAT Directive (77/388) must be interpreted as meaning that a taxable person who knew, or should have known that, as a result of the transaction being relied on as a basis for rights to deduction of, exemption from or refund of VAT, that person was participating in evasion of VAT committed in the context of a chain of supplies, may be refused the benefit of those rights. This applies notwithstanding the fact that the evasion was carried out in a Member State other than that in which the benefit of those rights has been sought and that the taxable person had, in the latter Member State, complied with the formal requirements in national legislation for the purpose of benefiting from those rights.

Justice Grube noted that this decision is the consequence of the ECJ's jurisdiction to date and noted the jurisdiction of the German BFH. This states that the right to deduct input VAT may be refused if the taxable person knew or should have known that it participated in turnover that was involved in tax evasion. Tax courts of first instance must, therefore, establish the relevant facts with regard to such knowledge.

20. Sixth Council Directive of 17 May 1977 on the harmonization of the laws of the Member States relating to turnover taxes – Common system of value added tax: uniform basis of assessment, EU Law IBFD.
21. Council Directive 95/7/EC of 10 April 1995 amending Directive 77/388/EEC and introducing new simplification measures with regard to value added tax – scope of certain exemptions and practical arrangements for implementing them, OJ L 102 (1995), EU Law IBFD.

3. Session on Wording of Court Decisions

3.1. Introductory remarks

This session was chaired by Justice Philippe Martin, Vice President of the CE, France. Other speakers included Justice Maarten Feteris, President of the *Hoge Raad* (Supreme Court, HR), the Netherlands, and Judge Malcolm Gammie, First-tier Tribunal (Tax Chamber) (FTT), the United Kingdom.

3.2. The substance of the session

In his introduction, Justice Philippe Martin noted that, despite major differences between jurisdictions, due to legislation and/or court practice, there are common issues in the matter of the wording of court decisions. For instance, it can be assumed that every court considers the tension between wording preferences and productivity goals in one way or another. In this context, the comparative analysis of judicial drafting techniques can be useful in answering the question of what the functions of a court decision are and how these are met. Some of the primary questions addressed in this session included:

- should decisions be self-sufficient?
- should they be a sober legal statement or provide a comprehensive discussion of issues?
- should a decision follow a straight line between a starting point, for example the applicable law, and the result of the case?
- is there a duty to describe the whole judicial procedure? and
- should style be standardized, detached and dry or more personal?

With regard to the function and structure of court decisions, Justice Maarten Feteris stated that, in his opinion, court decisions, which are intended to inform the parties of the decision and the reasoning of the court, legal professionals of the legal criteria adopted and the general public of the work of the court, should, in general, be self-sufficient. However, references to easily accessible documents may be acceptable or even desirable for reasons of efficiency. For instance, Dutch practice encompasses actions to the effect that the courts should refer to previous court decisions on legal questions, especially decisions of the HR and ECJ and the European Court of Human Rights (ECtHR), without repeating the grounds on which the earlier decision was based.

With regard to the question as to whether the decision should be a sober legal statement or should provide a comprehensive discussion of issues, Justice Feteris stated that there is a tendency in the HR to provide more extensive reasons for its legal interpretation. Giving such reasons can make the decision more convincing and may also provide greater clarity as to the way in which the HR would decide in a comparable legal situation. The lower courts in the Netherlands also frequently give ample reasons for their legal interpretation if this is subject to dispute. These courts thereby justify their decisions to the parties and to the public, and their reasoning can provide inspiration to a higher court if the decision is challenged in appeal.

With regard to the style and wording of Dutch court decisions, Justice Feteris indicated that the HR tries to formulate decisions in tax cases as clearly as possible. In order to avoid the use of very long sentences, the "considering that" style was given up many decades ago. Foreign and Latin words, and technical terms, are also only used with restraint.

Judge Malcolm Gammie agreed that, in general, a decision should be self-sufficient, thereby meaning that it should not require the reader to have access to other documents for it to be intelligible. With regard to the FTT, which is a court of first instance), the decisions may be in short form, thereby giving no detail beyond the outcome of the appeal, summary or full, but a party always has the right to demand a full decision. There is a "style guide" and each level seeks to achieve uniform headings, paragraph numbering, statutory and case references and the like, but, ultimately, each author of a decision is free to produce a decision in the manner best suited to the case, the issues and the parties.

According to Judge Gammie, every decision has the following two basic functions: (1) to record; and (2) to communicate. The four essential elements are as follows: (1) the issues; (2) the facts; (3) the law; and (4) the conclusions. Of most importance to Judge Gammie is that the decision provides a clear conclusion and explains clearly and concisely to the losing party, in terms that they can understand, why the decision has gone against them.

4. Session on Tax Procedures in Switzerland

4.1. Introductory remarks

The session was chaired by Judge Michael Beusch of the *Bundesverwaltungsgericht/Tribunal administratif fédéral* (Federal Administrative Court, BVGer/TAF), Switzerland. The speakers were Judge Patrick Müller of the *Kantonsgericht Luzern* (Cantonal Court of Lucerne, Kger), Switzerland, and Justice Thomas Stadelmann of the BG/TF.

4.2. The substance of the session

Judge Patrick Müller explained the basic principles of tax collection in Switzerland. Taxes are levied at the following three constitutional levels: (1) federal; (2) cantonal; and (3) municipal.

With regard to federal taxes, the Swiss Federal Constitution defines the taxes that may be levied by the federal government. The cantons are free to define their own tax systems and tax within the margin permitted by the Federal Constitution and the Swiss *Bundesgesetz über die Harmonisierung der direkten Steuern der Kantone und Gemeinden* (Federal Tax Harmonization Law, StHG). As a result, tax regulations and burdens can vary widely from one canton to another. Taxation at the communal level is based on the cantonal tax legislation, but the communes themselves set their own rates of tax.

Having provided an overview of what taxes fall within the competence of which constitutional level, Judge Müller then addressed the course of tax proceedings regarding direct taxes. In this context, he referred to the burden of proof, the obligation to investigate, on the part of the tax authorities, and the duty to cooperate, on the part of taxpayers and third parties. The presentation concluded with remarks concerning the legal proceedings concerning direct taxes by the example of the canton of Lucerne.

Justice Thomas Stadelmann outlined the functions of the Swiss BG/TF. Specifically, the BG/TF is considered to be the "Guardian of the Constitution", thereby assuring unity of law, developing consistent case law and granting judicial protection as a court of last resort. The BG/TF consists of 38 full-time and 19 part-time judges, and approximately 130 judicial clerks. With regard to the latter, Justice Stadelmann explained that, in Switzerland, judicial clerks not only provide assistance to the judge researching issues before the court, but they are also involved in the instruction of the cases and in the decision as they have an advisory vote. In addition, judicial clerks write the judgements while working under the supervision of a judge. Justice Stadelmann continued by referring to the tax proceedings regarding direct and indirect taxes, and some peculiarities of Swiss tax court procedures. Finally, Justice Stadelmann discussed the election of tax judges in Switzerland and the political implications.

5. Session on Information Derived Cross Border

5.1. Introductory remarks

The session was chaired by Justice Bernard Peeters of the Court of Appeals Antwerp, Belgium (*Hof van Beroep Antwerpen/Cour d'Appel Anvers*, HvB/C.A.). He was joined by speakers Justice Anette Kugelmueller-Pugh of the BFH, Germany, Justice Ed A.G. van der Ouderaa of the *GerechtshofAmsterdam* (Court of Appeal of Amsterdam, GRA), the Netherlands, Justice Gerald Rip of the Tax Court of Canada (TCC), Canada, Justice Thomas Stadelmann of the BG/TF, Switzerland, and Justice Anthony D.J. Gafoor of the Tax Appeal Board (TAB), Trinidad and Tobago.

5.2. The substance of the session

Justice Anette Kugelmueller-Pugh discussed the German approach to cross-border information in tax matters. After remarking on the general obligation of taxpayers to deliver information, she referred to section 90, paragraph 2 phrase 3 of the German *Abgabeordnung* (General Tax Code, AO), in particular the provision added as of 1 January 2009 with the purpose of countering tax evasion. Under this provision, the taxpayer has to affirm under oath that the provided information is correct and must also authorize the German tax authorities to request information from the relevant foreign bank held in the name of the taxpayer if there are objective indications that the taxpayer has business relationships with financial institutions in tax havens.

Having noted the common means to acquire information from abroad, national provisions, EU law and tax treaties, Justice Kugelmueller-Pugh also addressed the issue of unlawfully obtained information and, in this context, the purchase of data CDs containing information regarding the bank data of German taxpayers by German govern-

ment officials. While no jurisprudence of this issue has, as yet, been delivered by the German federal courts regarding the question of whether the officials purchasing such data committed a criminal offence in doing so, there have been decisions given by both the constitutional and criminal courts of the German *Länder* concerning the use of such data as a means of proof in the criminal trial. To date, the general opinion is still that there is no prohibition on the use by the authorities of this type of information.

An issue referred to by Justice Ed A.G. van der Ouderaa was the hearing of witnesses who were resident abroad. In this respect, he noted a Dutch case, which had been decided in 2008,[22] in which it was held that Regulation (EC) No. 1206/2001 on the cooperation between courts of the Member States in the taking of evidence in civil or commercial matters[23] could not be used in disputes between a taxpayer and the tax authorities. Justice Van der Ouderaa stated that, although there may not be frequent need to use such a regulation in tax disputes, it is difficult to understand why a regulation that provides for cooperation between courts of different Member States could not also be adopted in tax cases. This is especially so, as such regulations already exist in respect of civil and commercial matters and in respect of criminal cases. According to Justice Van der Ouderaa, it is very possible that the intensifying of international exchanges of information in respect of the levy of taxes would increase the need for a regulation, such as Regulation (EC) No. 1206/2001.

Justice Van der Ouderaa also addressed the dilemma that can arise when a taxpayer could incriminate himself by complying with the duty to provide the information requested by the tax authorities, but would risk an adverse decision by a court and aggravation in respect of the burden of proof as a sanction for not complying if the right to remain silent were relied on. As Justice Van der Ouderaa noted, the Dutch HR has resolved this problem by the exclusion of evidence. Essentially, this approach still requires a taxpayer to respond to the questions of the tax authorities. However, such a response may not be used as evidence in respect of any (administrative) penalty imposed. Both the infliction of the penalty and the assessment are usually included in a single procedure. In this context, Justice Gerald Rip stated that, in Canada, the criminal proceedings take place before the proceedings regarding any assessment of the tax.

Justice Bernard Peters provided insight into the Belgian tax procedure in noting the duty of taxpayers to cooperate with the tax authorities, but also the general principle that the investigation rights of the tax authorities should be "interpreted restrictively". Although a taxpayer has a right to remain silent according to article 6 of the European Convention on Human Rights (ECHR), the scope of this right is currently still being disputed in Belgian case law. Some courts take the view that, if the tax authorities can demonstrate an indication of tax evasion and indicate the possibility of a fine of 50% of any tax due, a taxpayer can invoke this right. However, other courts have stated that a taxpayer cannot invoke the right to remain silent until it becomes clear that the tax authorities are going to lodge criminal charges.

Justice Peters also addressed the issue of unlawfully obtained information, especially evidence used in a very recent important development concerning Belgian tax law with regard to the ruling of the Belgian *Cour de Cassation/Hof van Cassatie* (Supreme Court, Cass.), which had been decided in 2015.[24] In this case, the Cass. confirmed the ruling of the court of lower instance and held that taxation law does not include a general stipulation that prohibits the use of unlawful evidence to establish a tax liability. Consequently, according to the Cass., it is only necessary to test the case in question against the principles of sound administration and the right to a fair trial. As a result, the exclusion of evidence is valid in the following three circumstances: (1) in the case of a breach of a prescribed legal stipulation under penalty or nullity; (2) in the case of a flagrant contravention of what should be regarded as the tax authorities operating appropriately; and (3) in the case that the right to a fair trial is impeded.

Justice Thomas Stadelmann presented a short overview on some special topics from a Swiss perspective. In particular, he considered the concept of "foreseeably relevant information", in the dealing with professional secrets, notably banking secrecy, and the obligation to disclosure, especially in the light of the principle of *nemo tenetur* and the theory of the "fruit of the poisonous tree". He then raised the question of whether it is necessary to state that information cannot be foreseeably relevant if it is requested for use in criminal proceedings with regard to tax matters and is obtained from the taxpayer by compulsion.

Justice Anthony D.J. Gafoor reported that several jurisdictions that are part of the Caribbean community (CARICOM) are moving towards information transparency with regard to tax matters. Many of these jurisdictions have an agreement in substance to comply with the US Foreign Account Tax Compliance Act (FATCA). Specifically, in the decision in *MH Investments and JA Investments* (2013),[25] the Cayman Islands Grand Court (GC) overturned a decision of the Cayman Islands Tax Information Authority (CITIA) to provide documents in response to several requests from the Australian Tax Office (ATO). Consequently, the court ordered: (1) the CITIA to revoke its consent to the use of information obtained in respect of the two Cayman entities; (2) the return of all documents; and (3) the seeking of an assurance that the ATO would not use the documents in court proceedings against the Cayman entities nor share the information with any other jurisdiction. In this regard, the GC relied on section 4 of the Confidential Relationships (Preservation) Law (CRPL), which:

22. NL: *Gerechtshof Amsterdam*, 19 Nov. 2009, 07/00248 ECLI:NL:GHAMS:2009:BK 8478.
23. Regulation (EC) No. 1206/2001, on the cooperation between courts of the Member States in the taking of evidence in civil or commercial matters, OJ L 1741 (2001).
24. BE: Cass., 22 May 2015, Nr. F.13.0077-N.
25. KY: GC, 13 Sept. 2013, *MH Investments and JA Investments v. Cayman Islands Tax Information Authority*, Case No. G391/2012, Tax Treaty Case Law IBFD.

> requires an application be made to the courts whenever confidential information is to be given in guidance in, or in connection with, any proceeding being tried, inquired into or determined by any court, tribunal or other authority within or without the [Cayman] Islands.

The disapplication of section 4 of the CRPL by section 19 of the Tax Information Authority Law (TIAL) did not apply in this case, as the Australia-Cayman Islands Exchange of Information Treaty (2010)[26] states that any information exchanged must be treated as confidential by the recipient.

6. Session on Ethical Requirements

6.1. Introductory remarks

The session was chaired by Justice Manuel Hallivis Pelayo, President of the Federal Tax and Administrative Law Court (*Tribunal Federal de Justicia Fiscal y Administrativa*, TFJFA), Mexico. Other speakers included Judge Klaus-Dieter Drüen *Finanzgericht Düsseldorf* (Tax Court Düsseldorf, FGD), Germany, Justice Vineet Kothari of the Rajasthan High Court (RHC), India, Justice Wouter van Nispen tot Sevenaer of the GRH, the Netherlands, and Justice Massimo Scuffi, Supreme Court (Tax Division) (*Corte Suprema di Cassazione* (*Sezione Tributaria*), CTC) and President of the Court of Aosta (*Commissione Tributaria Provinciale d'Aosta*, CTP), Italy.

6.2. The substance of the session

With regard to the virtues and qualities that a judge should have, Justice Manuel Hallivis Pelayo considered impartiality to be the most important. In his presentation, he noted that Mexican Federal Courts have enacted Codes of Judicial Ethics and Codes of Conduct that are mandatory for all judges. Judges in Mexico are full-time governmental officers whose only other activities can be academic ones, such as teaching or publishing.

The additional activities of judges is an issue that was also addressed by Justice Wouter van Nispen tot Sevenaer. With regard to the secondary activities of (regular) judges in the Netherlands, a Code of Conduct applies, which contains recommendations, but not rules. The general recommendation is to prevent loss of trust in the judiciary. Specific recommendations in this respect include: (1) no cases in which the judge is and/or was involved in another capacity, i.e. "avoid any discussion"; (2) no commercial activities; (3) only outside working hours; and (4) declare all activities (public register).

As far as substitute judges who also work as lawyers are concerned, there are also guidelines. These include: (1) not being active in the same district, as a judge or a lawyer; (2) a maximum of one judge in a three-judge panel; (3) not acting as chair and not acting as the sole judge; (4) not being involved when the judge's office has an interest in the outcome of the case; and (5) not being involved if the judge has publicly expressed a point of view that is relevant to a case.

Justice Massimo Scuffi discussed the Italian tax judiciary and the role of part-time judges: The Italian tax courts of first and second instance have exclusive competence on the merits of tax disputes and are composed of both ordinary legal judges and lay technical judges. The latter are representatives of legal professions, i.e. mainly qualified accountants and lawyers, and other professions, such as engineers, surveyors, etc. Justice Scuffi noted that both the ordinary judges and the lay judges are part-time judges in the sense that they are career magistrates who practice at civil, criminal and administrative courts at the same time, and professionals or practitioners devoting part of their time outside of a private employment or office in deciding tax disputes. Justice Scuffi also noted that Italian tax judges must be distinguished from the full-time salaried judges, as these judges receive a monthly fixed fee and a variable one relating to the number of cases decided. Tax judges are subjected to the disciplinary rules if they do not observe the duties of a "good judge", i.e. independence, impartiality, correctness, sensitivity to the public interest, diligence and working hard.

An important requirement for the tax judges is the removal from situations of incompatibility. This may arise when a judge, the spouse or relatives undertake legal assistance or perform tax consulting activities where the judicial functions are exercised. In such a case, the law states that the judge must request a transfer to another court located in a different region or province that is not contiguous with that of the original one. Failure to comply with this ethical rule constitutes a disciplinary offense.

Justice Vineet Kothari reported that there is no codified statutory law for Judicial Ethics in India. However, the Indian Supreme Court (ISC) has adopted a Charter, entitled "Restatement of Values of Judicial Life" (RVJL), which was ratified and adopted by the Indian Judiciary in the Chief Justices Conferences of 1999. The RVJL is the basis for the Judicial Standards and Accountability Bill (JASB), which, at the time of the writing of this report, was pending before the Indian Parliament.

According to the RVJL, judges should adopt a certain degree of aloofness, as should they be conscious that they are in the public view. Section 3 of the JSAB would prohibit a judge from having any close association or social interaction with individual members of the Bar, particularly with those who practice in the same court. It is also stated that a judge should not enter into public debate or express views in public regarding political matters. The same applies to matters that are pending or are likely to arise for judicial determination. In addition, judges should not give any interviews to the media in relation to their judgements. Justice Kothari continued by noting that, apart from these restrictions, no regulations had, to date, been made regarding the use of social networks, such as Facebook or Twitter. Obviously, a conservative and balanced approach to social media by judges is expected and desirable.

26. *Agreement between the Government of Australia and the Government of the Cayman Islands on the Exchange of Information with Respect to Taxes* art. 8 (30 Mar. 2010), Treaties IBFD.

7. Session on Application of Foreign Law

7.1. Introductory remarks

The session was chaired by Counselor João Bianco of the *Conselho Administrativo de Recursos Fiscais* (Administrative Council of Tax Appeals, CARF), Brazil. Other speakers included Justice Emmanuelle Cortot-Boucher of the CE, France, Justice Peter J. Panuthos of the Tax Court (TC), United States, Justice Marshall Rothstein of the SCC, and Judge M. Stefan Wilk of the *Finanzgericht Köln* (Tax Court of Cologne, FGK), Germany.

7.2. The substance of the session

In the first round of the session, the panellists discussed the legal framework regulating the application of foreign law in general. In Brazil, foreign civil law can be applied by the judge, provided that the party proves its existence and validity. French courts may apply foreign private law subject to the condition that it does not go against public order in France. If foreign law applies, it is for the judge to determine what its scope is. In this respect, the burden of proof does not rest with the parties. If the judge feels that he or she cannot reach a proper understanding of the foreign law in question, French law must be applied. However, foreign public law must not be applied when there is a risk that it would affect the sovereignty of the state, i.e. nationality law, criminal law and tax law. According to section 293 of the German *Bürgerliches Gesetzbuch* (Civil Code, BGB) in conjunction with section 155 of the German AO, the laws applicable in another state must be proven only insofar as the court is not aware of them. In Canada, foreign law must be specifically pleaded and proved to the satisfaction of the court, typically by way of a qualified expert. In absence of evidence of foreign law or when foreign law is insufficiently proven, foreign law is presumed to be the same as Canadian law.

In the second round, the question was raised of whether the application of foreign law is a matter of fact or a matter of law. In Germany, this is dealt with as a matter of fact. It is the same in Canada, as it must be proven by witnesses. However, it is considered a question of fact "of a peculiar kind", as what is involved is a question of law. In contrast, in the United States and in France, the court's determination of foreign law is treated as a ruling on a question of law.

In addition, the panellists addressed the question of whether there is a legal framework regulating the application of foreign tax law. In this context, they discussed case law on this subject.

8. Exotic Topic

In her presentation, Justice Salome Zimmermann, President of the Tax Section of the Swiss BVGer/TAF, demonstrated that even a tax judge can come across some funny questions when at work. For instance, when, in the context of customs duties, having to decide whether a piece of clothing should be classified as "swimwear for men" or as "shorts for women". Or whether a "sofa for dogs" should be classified as "sofa" or as "cushion". A truly unconventional event took place when a court had to decide whether a specific alcoholic beverage tasted sweet enough to be classified as an "alcopop", which is subject to increased taxation in Switzerland. Was the court to rely on official documents? Information provided by the parties? Information or testimony provided by third parties? Expert opinions? Or the sensory perception by members of the court? The court decided on the latter, which resulted in a well-documented tasting of the beverage in question.

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