“Massive” appeals

& pilot case selection

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Introduction

- Our profession : judging in litigation between, generally, 1 taxpayer against the tax administration, 1 problem, 1 or more assessments
- Subject matter here :
  - multiple appeals or a multitude of appeals
  - theoretical outline of legal conditions when “appealing”
  - practical questions regarding the management of “crowds” in a procedure with a multitude of parties
  - who actually benefits of “massive procedure” : what is main goal (for tax administration-for courts ?-for taxpayers ?)
  - organisation of courts

Introduction : as an example : Belgium

- Caveat : we are a small country, no real massive appeal procedure, no actual experience in tax cases with a mass procedure as such;
- Pro : we can use Belgian law to outline general questions, in order to introduce problem as presented in country with special procedure (Netherlands) and in countries with a massive amount of possible litigants (Canada, UK)
- Tax procedure in Belgium :
  - Appeal lodged against assessment : administrative decision after hearing;
  - Judicial appeal in civil court (of first instance)
  - Appeal against judgment possible with Court of Appeals (procedure = civil litigation procedure; adversarial & oral procedure (with pleadings), “civil” in nature);
  - Cassation possible (only on points of law)

How to “appeal” – How can cases become “massive” ? (Belgium, 1)

grouping appeals on the same matter :

- consistency and coherence required : cases can be joined
- 3rd parties can “intervene”: judgment becomes enforceable against 3rd party or “other” party; intervention can be done “willingly” or “forced”
- result : many parties in same cases
- Could this be done in tax cases : ? One assessment, one taxpayer; matter of “public order”-legality principle : how can decision in one case on one assessment become “enforceable” or “opposable” to other taxpayer-party ?
- Joined cases : matter of principle : = for all taxpayer
- Final result will differ based on actual facts of the case : different for all taxpayers

How to “appeal” – How can cases become “massive” ? (Belgium, 2)

“Massive appeals” : does not exist as a procedure in a formal way

- *Possible for (based on EU law) for consumer cases, not for tax cases.*
- *Tax Cases ? We do have cases of the same nature in our courts (massive individual appeals by individual taxpayers on the same legal questions, leading to an influx of cases all on the same matter, where pilot cases are serving as model for the outcome of the general issue).*
- *We also have an experience with cases in which before the Supreme (constitutional) court, tax legislation was found to be unconstitutional (or infringing EU law), matters than arose afterwards on the legal question whether all taxpayers in the same position were in- or excluded of relief of the tax assessment, based on the question whether they had actually filed an administrative appeal (which had remained pending in the meantime) or whether relief could be given on the basis of damages based on state liability : examples : dividend relief leading to non deductible “losses” (no carry forward, ECR 12 February 2009, Cobelfret case C/138/07); pension capital-cases for “Dutch” pension capital paid in Belgium; property vacancy tax*
- *No massive appeals procedure as such*
- *No legal system of precedents (!: apart from interpretations made by Supreme Constitutional Court, to be observed by all judges, outcome of case may still differ until time upon which decision of Court of Cassation has become final)*
- *Precedents of higher courts however authoritive in nature*

Massive character of multiple appeals by a multitude of parties : origin

- breach of tax law or fundamental principles in making assessments by tax administration, leading to all kinds of individuals making appeals;
- Grouping of taxpayers by lawyers/attorneys who find clients and incite them to litigate on same matter
- Avoidance scheme applied by tax advisors attacked by tax administration
- Tax administration selecting cases to serve as “pilots” for identical cases
- Courts selecting cases serving as pilot

Massive character of multiple appeals by a multitude of parties : issues

- How are cases managed
- Who controls what (names, identity of parties, slight difference in arguments, ...)
- How are taxpayers informed ? (non discrimination regarding actual application of tax law, publicity of problem, ...)
- What with limitation periods for appeal (for taxpayer in = situation)
- Remedies for taxpayer when exceeding limitation period
- ...

Issues addressed in this panel

- *Is there a “massive appeal procedure” in your legislation ?*
- *What are the origins of existence of a “massive appeal”*
- *Grouping of individuals of some sort of “collective action”, “class action” ?*
- *What are the conditions ? (opting out ? special procedure in particular cases ? possible in any matter ? intervention of legislator necessary ?)*
- *What is the outcome of a successful massive procedure ?*
- *How do statute of limitations (expiration period) for reclaims of tax work ? Re-opening of procedures possible ?*
- *Are all tax courts competent ? (or limited territorial exclusive competence for 1 court in jurisdiction ?)*
- *Etc. !*

Q 1

What are “Mass” (Massive or Group) Tax Appeals and can you give any examples from your country ?

Mass Tax Appeals

Greg Sinfield
First-tier Tribunal (Tax Chamber), United Kingdom

(UK) What are mass tax appeals?

- Large number of appeals
  - by different taxpayers
  - relating to the same or similar issues
  - filed at or around the same time
- May be caused by
  - Adviser promoting tax claims to large groups of taxpayers
  - HMRC challenging widely marketed tax avoidance schemes
  - Case law of general application overturning previous views
  - General failure by taxpayers to understand or apply new tax rules

(UK) Example of mass tax appeals in UK

- Tribunal received more than 34,000 VAT Mini Umbrella Company appeals in 2021/22 (usually receive 8,000 – 9,000 appeals each year) filed in bulk batches by one adviser
- Second adviser took over conduct of appeals
- October 2022 – Tribunal makes lead case directions designating 5 lead cases for hearing in January 2024 and staying all others
- January 2024 – Tribunal hears 4 lead cases (one having withdrawn)
- March 2024 – Tribunal issues decision allowing appeals in part
- May 2024 – All parties appeal to Upper Tribunal – awaiting hearing

Tax Court of Canada Experience:

(1) Promotion of tax scheme Canada wide

(2) Result – 100s sometimes 1,000 plus participate in scheme

Mass appeals
&
lead case selection

Robert Jan Koopman

Hoge Raad der Nederlanden

(NL) Outline

- What?
- Why?
- How?
- Problems
- Now What?
- Advise

(NL) What?

- 2 kinds of appeals in massive numbers:

  - authorities discover ‘information treasure’
    (Panama papers, foreign bank accounts,
    large scale audit of a profession)

  - new and unclear law

  - hype among taxpayers
    (*ultra vires*, surprise ruling by lower court,
    tax windfall)

(NL) Why?

- Every taxpayer wants a piece of the cake
- Tax authorities and courts need guidance from Hoge Raad or EU-court
- Processing and deciding objections costs time and money

Q2

How does your court/tribunal deal with these cases ?

Is there a system of “lead case procedures” (pilot cases, group procedure ? And/or Is there any “informal” lead case procedure ?

Is the case management active or robust ?

(UK) Lead case procedures

- Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 provide that the Tax Chamber may by direction:
  - under Rule 18, specify one or more cases as lead case or cases and others as related cases; and
  - under Rule 5(3)(b), treat a case as an ‘informal’ lead case.
- Rule 18 provides that the decision in the lead case is binding on related cases unless the Tribunal grants an application by the losing party in the related case party that it is not bound by the lead case.
- Informal lead case decisions are not binding on other appeals.

(UK) Rule 18 lead case procedure

- The Tribunal can direct that:
  - one or more cases proceed as a lead case or lead cases
  - related cases are stayed (paused) pending the outcome of the lead case or cases
- Lead and related cases must have common or related issues of fact or law
- Applications are normally made by HMRC and taxpayers on an agreed basis but not a requirement and Tribunal can make a rule 18 direction even if a party objects
- The purpose of rule 18 is to help the Tribunal manage its caseload quickly and efficiently

(UK) Rule 18 lead case procedure

- Direction must specify in detail the common or related issues of fact and law
- Direction may be made where the related cases have issues additional to the common or related issues
- Register of rule 18 lead cases published on Tax Chamber’s website but not up to date at the moment
- Hearing of lead case same as any other (but more people often want to be present)

(UK) Rule 18 lead case procedure

- When the lead case is determined
  - Tribunal will send the decision to the parties to the lead case(s)
  - Tribunal must also send a copy of the decision to each party to the related cases - rule 18(3)
- The lead case decision in relation to the common or related issues is binding on each party in the related cases unless a party applies for the decision not to be binding in their case - rule 18(4)
- The application under rule 18(4) must be in writing and made within 28 days of the date the Tribunal sent them a copy of the decision
- There is no right to be unbound and the Tribunal can refuse an application under rule 18(4) if there are no grounds not to apply the decision in the lead case to the related case

(UK) Rule 18 lead case procedure

- If there is no application under rule 18(4) or one is made and refused, the Tribunal must give directions under rule 18(5) in respect of the related cases providing for the disposal or further steps in those cases
- A direction under rule 18(5) dismissing a taxpayer's related case appeal normally states that the appeal is dismissed for the reasons given in the lead case decision
- A related case appellant cannot appeal against the lead case decision directly but can appeal (with permission) against a direction under rule 18(5)
- The related case appellant would not normally appeal where the appellant in the lead case appeals so the Tribunal usually extends the 56 day time limit until after it is known whether the lead case is being appealed

(UK) Rule 5(3)(b) informal lead case procedure

- By direction, the Tribunal can:
  - consolidate or hear together two or more sets of proceedings or parts of proceedings raising common issues, or treat a case as a lead case (whether in accordance with rule 18 … or otherwise)
- Appeals are often consolidated into a single case where the taxpayer is the same and they have issues and/or evidence in common – factors to be considered are set out in *Maharani Restaurant v HMCE* [1999] STC 295
- Appeals by different taxpayers are never consolidated even if the issues are the same but the Tribunal may direct that the cases should be heard together by the same Tribunal
- Cases heard together remain separate and each party has a separate right to appeal (with permission)

(UK) Rule 5(3)(b) informal lead case procedure

- The Tribunal may also treat a case as a lead case otherwise than under rule 18
- Using its general case management powers under rule 5(3), the Tribunal directs that the informal lead case proceeds to a hearing and separately stays other cases with the same or similar issues until after the decision in the informal lead case has been issued
- The other cases are not bound by the decision in the informal lead case and can ignore it and insist on a hearing
- Informal lead cases sometimes lead to delay and additional work

International Association of Tax Judges
Canada

Tax Court of Canada Solutions/Process

(3) Try to organize the appeals by:

- taxation year
- issue in common
- location by city
- represented and non-represented
- language
- Informal versus General
- counsel or agent versus self-represented
- types and year

Tax Court of Canada Solutions/Process

(4) Determine if a lead appeal(s) could dispose of the group in whole or in part

(5) Identify possible lead appeal(s) and ask the Appellants for their input on same

Tax Court of Canada Solutions/Process

(6) Once response received, timeline from all Appellants, an identification of potential lead appeals, ask for submissions on appropriateness of lead appeals – argument for and against

Tax Court of Canada Solutions/Process

(7) Determination on lead appeal(s), if any

(8) Request confirmation from Appellants if they agree to be bound by result of lead appeal. If so, must confirm in writing; if not, confirm appeal is scheduled for trial

Tax Court of Canada Solutions/Process

(9) Appellants who do not agree to be bound by lead appeal(s), have their appeal set down for trial ASAP

(10) Lead appeal(s) proceed in normal course with the relevant rules applying.

(11) Bifurcation

Q3

- Does the tax authority in your country have any specific mechanisms for dealing with multiple tax avoidance cases ?
- What are potential (or actual) problems ?

(UK) Follower notices – policy motivation

"When faced with large numbers of very similar cases, it is sometimes most efficient for HMRC to investigate 'representative cases', taking them to litigation if necessary. However, when HMRC wins a representative case in the courts, other taxpayers who have used the same or very similar schemes sometimes see little incentive to settle their cases with HMRC. When HMRC pursues litigation in a number of very similar cases the Tribunal rules allow for the cases to be heard together in certain circumstances, but this only applies to cases which have been notified to the Tribunal. To get to this stage HMRC has to investigate these cases to litigation standard and close the tax enquiry. This uses up the Tribunal's resources, places a strain on HMRC's compliance resources, often delaying the collection of the right tax."

HMRC, *Raising the stakes on tax avoidance: Summary of Responses and Draft Legislation* (2014) at [5.2]

(UK) Follower notice – outline

Follower notices were introduced by Finance Act 2014 (FA 2014). HMRC may issue P a follower notice (very broadly speaking) where:

- P is in dispute with HMRC (either enquiry or litigation)
- obtaining a tax advantage was the one of the main purposes of the arrangements; and
- HMRC is of the opinion that the principles or reasoning of an earlier judicial ruling would, if applied to the arrangements, deny the asserted advantage
- "would" is a very high threshold: *R (oao Haworth) v HMRC* [2021] UKSC 25 at [61]

- If the taxpayer does not engage in 'corrective action' within a specified period they are liable for a penalty of up to 30% of the denied advantage. An additional penalty of up to 20% can be imposed if P or P's representative is found to have acted unreasonably in bringing or conducting relevant proceedings.

Tax Court of Canada Solutions/Process

(12) Potential problems

- Who is lead counsel, if any
- Number of appellants
- Variety of locations
- Costs award against or in favour of
- Different languages
- Different levels of representation

Tax Court of Canada Solutions/Process

(13) Costs

Q4

How are futher appeals to higher courts in mass tax appeals dealt with in your country ?

How is the organisation in general ?

(UK) Further appeals

- Appeals against a decision of the First-tier Tribunal Tax Chamber go to the Upper Tribunal Tax and Chancery Chamber
- A party can only appeal on the basis that the decision contained an error of law and with permission of the First-tier Tribunal or the Upper Tribunal
- In rule 5(3)(b) informal lead cases, the other cases cannot appeal against the informal lead case decision but must take their own appeal to a hearing and try to persuade the Tribunal that the informal lead case decision was wrong or that their case should be decided differently, eg because it is factually different
- In rule 18 lead cases, a related case appellant cannot appeal against the lead case decision but can appeal against a direction made under rule 18(5) dismissing their appeal
- No equivalent to rule 18 in Upper Tribunal Rules.

(NL) How?

- Special procedural law for massive objections (‘massaal bezwaar’)
- Ministry of Finance designates a question of law
- Postponement of administrative decisions about designated question
- pilot case(s) selected by Revenue Service
- After final court decision in pilot case(s):
  - collective administrative decision for all postponed cases
  - (if necessary) individual decisions for other questions raised

Q5

- Some other points and questions ?

(UK) Mass tax appeals – practicalities and problems

- Registering and administering appeals
- Administrative, technical and judicial resources
- Although the mass tax appeals are administered as a group, the demands on the administrative resources of the Tax Chamber have been considerable
- Case management
- What about taxpayers who are unrepresented?
- Costs

(NL) Problems

- No judicial review of:
    - decision MinFin to use this procedure
    - wording of question of law by MinFin
    - Selection of pilot case(s) by Revenue Service
    - collective decision by Revenue Service
    - Individual tax reduction and refund by Revenue Service

(NL) Now What?

- Hoge Raad ruled that individual tax reduction can be challenged in court (but clumsy procedure not open for all)

- Will criticism lead to amendment of law?

- Will criticism lead to special procedure no longer being used by MinFin?

(NL) Advise

- When contemplating statutary provision for Massive Appeals:
  - Garantee neutral selection process of pilot case
  - Provide for individual access to court after final decision in pilot case.

Dear Audience, it is your turn now ☺ !
Question 1

Do massive appeals cause any specific managerial problems in the organization of your court ?

If so : which ones ?

And how are they solved ?

Question 2

- **Does one judge (or the members of 1 chamber of judges) write all decisions (all by himself) ?**
- **Or is there any help from referendaries/registrars ? How are we as judges sure that all final outgoing decisions are correct**

Question 3

- **Is the representation of parties (taxpayers) of massive appeals in your jurisdiction organized in an efficient way ?**

- How do you deal with hearings of all taxpayers ? Are your courtrooms big enough ? Does your jurisdiction organizes this otherwise ? Is there an obligation or incentive to “use” the same attorney or representative ? In other words : how is the right to contradiction (orally or in writing if written procedure) organized, and guaranteed

Question 4

Is it at all possible in your jurisdiction to render decisions on all “massive” appeals within the reasonable time-limit given their number ?

Does your government organise your court/courts in such a way that the workload of such massive appeals can be processed ?

Or does everything get stuck in some sort of chaos ?

Question 5

Does the losing party bear the cost of the procedure ?

What if the Revenue loses : 1 x reimbursement for all parties having adhered to same position, or not (100s or 1000s of reimbursements) ?

What with costs of representation ?

Conclusions

Thank you !!!