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Tax Procedures in France

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Agenda

Introduction: Main features of tax litigation in France

Selected issues:

1. What powers do tax judges have during judicial proceedings in France?

2. What are the rules of evidence before the tax judge in France?

3. The specific role of commentaries on tax law issued by the tax authorities, in France.

Main features of tax litigation in France

I. Stages of tax litigation

1. Tax claims before tax administration
    - Compulsory for taxpayers before filing tax claim in court
    - Generally 2-year deadline after taxation
    - Total 2023: 2 483 271 tax claims
        - ✓ Including personal income tax: 731 671
        - ✓ Including corporate income tax: 35 156
        - ✓ Including VAT: 38 558
    - In 2018: 2 857 411 (in 2010: 3 562 011)

2. First instance administrative courts (42 courts)
    - Appeals on facts and law
    - Tax cases filed in 2023: 11 170 (down 36 % from 2018)
        - ✓ Including personal income tax: 2 785
        - ✓ Including corporate income tax: 1 207
        - ✓ Including VAT: 1 229
    - All cases filed in 2023: 257 329 (tax = 4 %)

I. Stages of tax litigation

3. Administrative courts of appeal (9 courts)
   - Appeals on facts and law
   - Tax cases filed in 2023: 2 190 (down 53 % from 2018)
     - ✓ Including personal income tax: 942
     - ✓ Including corporate income tax: 469
     - ✓ Including VAT: 347
   - All cases filed in 2023: 31 586 (tax = 7 %)

4. Conseil d'Etat (supreme administrative court)
   - Cassation: appeal on law + qualification of facts
   - First instance: annulment claims for general tax regulations and guidelines
   - Tax cases filed in 2023: 981 (down 30 % from 2018)
     - ✓ Including personal income tax: 315
     - ✓ Including corporate income tax: 160
     - ✓ Including VAT: 146
   - All cases filed in 2023: 9 574 (tax = 10 %)

II. Categories of tax claims by taxpayers

1. Specialized tax claim
   - Applies to all taxes
   - Applies to assessment and reassessment, also (but not many cases) to collection procedures. And to tax penalties
   - Sent to tax chambers (totally or partially devoted to tax)
   - Tax court has full power (and duty) to recalculate and decide the correct tax liability
   - Application of court decision by tax administration is automatic
   - System of interest payment in the tax code, automatically applied

II. Categories of tax claims by taxpayers

2. General administrative claims applied to tax (handled by tax chambers)

- Recours pour excès de pouvoir (annulment claim for ultra vires)
  - ✓ Against general tax regulations and guidelines: directly filed before the Conseil d'Etat, fast-track system often used by companies and professional groups
  - ✓ Against individual decisions: if separable from tax procedure (no overlap with specialized tax claim). Filed before first-instance court

- Claim for compensation
  - ✓ Taxpayer must prove fault by tax administration
  - ✓ Damages to be compensated: personal or financial damages separate from the amount of tax (no overlap between specialized tax claim and compensation)

The judge's pivotal role in the trial

Basic facts on how tax chambers work

Types of cases handled by the "tax" chambers:

- Tax cases: 10% to 70% of the total
- Other cases, including immigration cases, account for the remainder.

Judging panel:

- Administrative court: 3-judge panel (in about 90% of cases) or single judge (in some local tax cases)
- Administrative Court of Appeal: 3-judge panel
- Council of State: 3 to 17 judges, depending on the difficulty of the case

Individual workload / productivity (in first-instance courts & courts of appeal)

- Administrative court:
  - ✓ Judge-rapporteur: Approximately 150 to 180 cases per year
  - ✓ Advocate general: Two to three times as many
- Administrative Court of Appeal:
  - ✓ Judge-rapporteur: Approximately 120 to 150 cases per year
  - Advocate general: Two to three times as many

Key stages in the judicial process (lower courts)

Submission of the application

The application is sent to the court, not to the other party.

The president of the chamber may deal directly with the case without a hearing, by means of an "order".

A deadline is set for the other party to lodge a defense. All briefs are addressed to the court, not to the other party.

Written part of the procedure

The parties may submit as many briefs to the court as they wish.

The judge may :

- request documents from the parties,
- spontaneously raise certain types of legal arguments and ask the parties for their observations on the subject,
- close discussions between the parties.

Hearing & Delivery of judgment

If the proceedings between the parties have not been closed beforehand, they are automatically closed a few days before the hearing.

No new requests or legal arguments may be presented at the hearing.

In practice, very few questions are put to the parties at the hearing.

A procedure primarily based not on orality but on writing

New "oral investigation procedures" were created by the Code of Administrative Justice in January 2023

The tax judge's toolbox

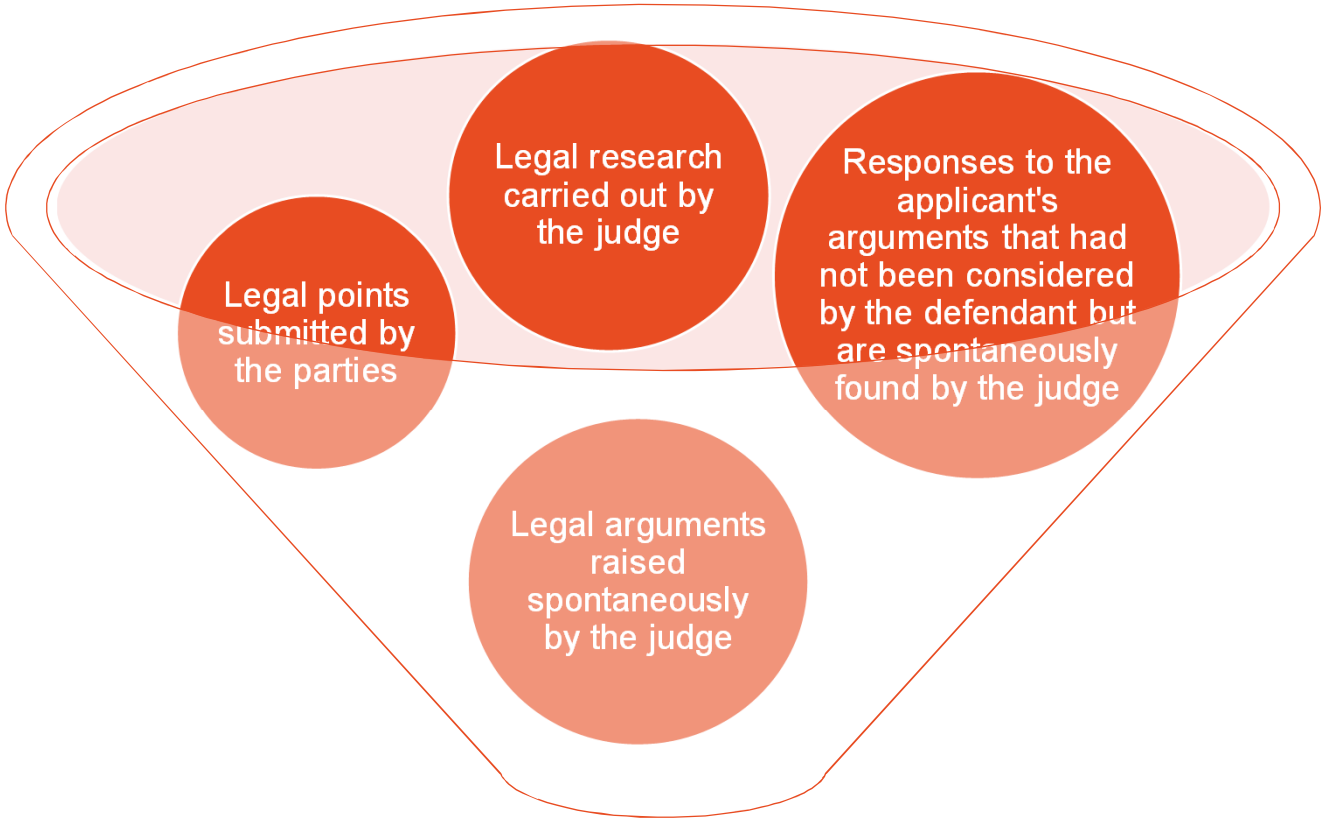
- Tools enabling the judge to control the duration of the proceedings:
  - ✓ Order closing the proceedings (with immediate or deferred effect)
  - ✓ Formal notice to produce a statement of defense

- Tools to avoid having to process applications that are no longer of interest to the applicant:
  - ✓ Letter asking the applicant to formally confirm his/her application

- Tools enabling the judge to obtain information:
  - ✓ “Measure of inquiry” designed to obtain specific documents
  - ✓ “Investigative hearing”
  - ✓ Preliminary ruling

- Tools to signal to the parties that a compromise solution may be preferable:
  - ✓ Letter proposing to the parties that the dispute be settled by means of mediation

The judge’s active role in finding the “right solution”



Solution adopted in the final judgement

Rules of evidence before the tax judge

Introduction

- Rules of evidence are of decisive importance in tax litigation.
- They are governed by specific rules, compared with general litigation.
- It is up to the judge to determine, depending on the nature of the reassessment and the course of the tax procedure followed, the rules governing the burden of proof applicable to the dispute (Council of State 5/03/1999, no. 140779, Valeri).
- In some cases, the judge applies a system of “objective proof”, when none of the parties is deemed to be right or wrong.

The burden of proof depending on the tax procedure followed

- The taxpayer bears the burden of proof, for instance :
  - when he is taxed ex officio (art. L. 193 of the code of tax procedure (LPF))
  - in the event of a lack of accounts (art. L. 192 of the LPF)
  - when he has accepted the reassessment, expressly or implicitly, or when the tax was assessed on the basis of his declarations (case law rule, codified in art. R. 194-1 of the LPF)

- FTA bears the burden of proof :
  - In principle, to show that the tax procedure was properly conducted
  - to show the bad faith or fraudulent manoeuvres that justify the penalties (art. L. 195 A of the LPF).

The burden of proof depending on the reassesment nature – the legal presumptions

- The law has laid down rules in favour of FTA, in cases where the taxpayer is presumed to wish to avoid tax, for instance :
  - a presumption of assets transfer into countries with preferential tax regimes (art. 238 A of the general tax code (CGI))
  - a presumption of indirect profit transfer outside France between dependent companies (art. 57 of the CGI)
  - a presumption of abnormality of some overhead expenses (gifts, travel expenses, entertainment expenses, etc.) (art. 39, 5 of CGI)
- The presumptions must always be rebuttable (Constitutional council, 20/01/2015, no. 2014-237 QPC, AFEP).
- In order to benefit from the presumption, FTA must first prove that the conditions for the presumption have been met.

The burden of proof depending on the reassesment nature - the rules laid down by case law

- Case law supplemented the statutory rules, basing itself on principles applicable in general litigation.
- Regardless of the tax procedure followed, the taxpayer bears the burden of proof when he is the only one able to provide evidence, for instance :
  - when he has filed his returns within the legal deadline (CE 3/12/1986, no. 41389)
  - when the existence of a loss that can be carried forward (CE 31/10/1984, no. 23117)
  - About invoices : it is up to the taxpayer to prove both the amount of the expenses that he intends to deduct and the correctness of their entry in the accounts (CE 20/06/2003, no. 232832, Sté Ets Lebreton)

The burden of proof depending on the reassesment nature - the rules laid down by case law

- The FTA bears the burden of proof when it wishes to question the scope or classification of an act or valuation made by the taxpayer, for instance :
  - the questioning of the qualification of a contract (CE 31/10/1984, no. 34379)
  - the questioning of the of the valuation of an asset (CE 28/10/1985, no. 40574)

- The FTA bears the burden of proof when it considers that a transaction is an abnormal act of management (CE 21/12/ 2018, no. 34588, Renfort Service)

The « shift in burden of proof »

- The party who bears the burden of proof must provide the first evidence in order to shift the burden on the other side, until the judge is persuaded. The judge appreciates if the other side provides significant contrary evidence and stops when the plausible arguments of one side are not usefully refuted by the other.
- For certain types of reassesment, case law has set out the steps of this « shift in burden of proof » process, for instance :

  - About invoices : the taxpayer provides this justification by producing sufficiently precise information on the nature of the expense and on the existence and value of the consideration received. If the taxpayer fulfils this obligation, it is then up to the FTA, if it believes it has grounds to do so, to provide proof that the expense in question is not deductible by nature, that it has no consideration, that it has a consideration that is of no interest to the taxpayer or that the remuneration of this consideration is excessive (CE 21/05/2007, no. 284719, Min. / Sté Sylvain Joyeux)

  - About indirect profit transfer : when FTA has initial evidence pointing to an indirect profit transfer (art. 57 of the CGI above), it can ask the taxpayer to provide the information needed to document the method used to determine the transfer prices ; if the taxpayer doesn’t comply with this request, FTA is entitled to disregard the method used by the taxpayer and apply the method it considers most appropriate for determining arm's length prices ; in this case, the taxpayer may still criticise the FTA’s method in principle or in its implementation (CE 5/07/2023, no. 464928, SA ST Dupont)

The objective proof system

- Case law tends to neutralise the burden of proof by using of an "objective" system of evidence, when none of the parties is deemed to be right or wrong.
- It is on the basis of the results of the investigation that the judge assesses whether, for instance :
  - a taxpayer falls within the scope of an exemption (CE 28/07/2000 no. 215312, SA "a2c")
  - a transaction falls within the scope of a particular tax regime (CE 18/05/1998 no. 159846, min. c/ SA Yves Saint Laurent)
  - a taxpayer falls within the scope of a bilateral tax treaty (CE 13/10/1999 no. 191191, SA Diebold Courtage)

Concluding remarks

- The rules governing evidence in tax litigation are complex.
- Simplicity could only lead to brutal and unsatisfactory solutions.
- This complexity is the price to be paid for the judge to fulfil his mission without ignoring the diversity of the situations submitted to him.

The specific role of commentaries on tax law issued by the tax authorities

I - Guarantee against changes in the interpretation of tax law by the tax authorities

1 - the purpose of the guarantee

- the tax administration comments on the tax law in its "doctrine" : instructions for the agents responsible for applying it + a way of ensuring uniform application of the law throughout the country
- exhaustive documentation in the form of a digital database (BOFIP) giving the administrative interpretation of tax law
- interpretation of the law may take other forms and be contained in other documents (e.g. answers to questions from Members of Parliament)

- long-standing idea (since the 1920s) that it would be unfair and unacceptable for the administration to pursue an adjustment based on a reading of the law other than that given in the commentaries.
- initially, a simple instruction given to tax auditors to stick to the commentaries, with no real binding force

- Creation of a genuine legislative "guarantee" in four steps (art. L.80A of the French Tax Procedures Code):
- 1959 : when the tax has been assessed by the tax authorities in accordance with the interpretation of the law given in the commentaries, it is impossible to adjust on the basis of another interpretation.
- Problem: no guarantee in the case of self-determined taxation (e.g. corporate tax or VAT)
- 1970 : first extension of the guarantee - when the taxpayer has himself applied the law as interpreted by the administration, it is impossible to adjust on the basis of another interpretation.
- 1987 : second extension of the guarantee in the event of a formal opinion given on the taxpayer's individual situation with regard to tax legislation (tax ruling)
- 2018 : latest extension - when the administration has carried out an audit and tacitly admitted "with full knowledge of the facts" the way in which the taxpayer has applied the law, no subsequent adjustment is possible.

2 – the conditions under which the guarantee is granted

- commentaries must be issued by the tax authorities (and not by another public authority)
- the guarantee applies only to substantive tax rules (as well as to tax penalties and tax collection rules) but not to tax procedural rules
- the interpretation must be contemporaneous with the application of the tax law either by the administration, or by the taxpayer : commentaries must not have been issued later, nor have been cancelled or changed in the meantime.
- the taxpayer must fulfil exactly the conditions to which the commentaries subject the benefit of the interpretation they give :

- principle of "literal" reading of commentaries, without any interpretation ("doctrine has no spirit") (*CE, 1992, n° 114926, Société Générale*)

- “guarantee” against adjustments but no normative power given to the administration equivalent to that of Parliament.

3 – the extent of the protection granted by the guarantee

- the guarantee may prevent the application of tax law (when the administrative interpretation is more favorable to the taxpayer than the law)
- the guarantee may prevent the application of a double tax treaty (in the rare cases where the application of the treaty would be unfavorable to the taxpayer) (*CE 1996, n° 120646, SA Nike*)
- can the guarantee prevent the application of EU law? Is it an expression of the European principle of legitimate expectations ? Undecided so far … (*CAA Paris 2010, n° 08PA03658, SARL "A la frégate")*
- the guarantee protects against reassessments based on abuse of law, except in the case of artificial arrangements (*CE 2020, n° 428048, Charbit*) :

- the tax authorities cannot reproach the taxpayer for having applied the commentaries in disregard of their spirit (since they have none)
- but whatever its interpretation, the law is not designed to cover artificial situations.

- the taxpayer continues to benefit from the guarantee even though the commentaries are annulled by a judge after they have been applied to his/her situation (see below) (*CE 2013 n° 353782 Monzani*)

- the legislator's choice to give priority to taxpayer protection over tax legality

II – Tax certainty arising from judicial review of administrative commentaries

- “Recours pour excès de pouvoir“ (annulment appeal for *ultra vires*) against regulations issued by the tax authorities and against individual acts when “detachable” from the tax procedure (otherwise, specific full jurisdiction appeal for tax disputes)
- Annulment appeal possible against general interpretations of tax law (commentaries), which are regarded as elements of "soft law“ (*CE 2020, n° 418142, GISTI*)
- First instance jurisdiction of the Conseil d'Etat (as well as for real regulatory acts) : only 6 to 8 months to judgment (compared with 5 to 7 years for a full tax claim).

- an appeal may be introduced when the commentaries are **contrary to the law** :

- by the taxpayer if the interpretation is unfavorable to him or her

- by a competitor if the interpretation is more favorable to the taxpayer than the law (" jealousy appeal ")

- annulment in all cases, as the administration is not competent to set rules that differ from the law

- an appeal may also be introduced if the doctrine **faithfully reproduces the tax law** : in this case, the court ensures that the tax law complies with higher standards :

- constitution (QPC submitted to the Constitutional Council)

- international law (in particular EU law)

- an easy, fast and free (no lawyer required) way to have tax law reviewed by the administrative supreme court.

- Appeals for annulment may also be introduced against individual opinions relating to the taxpayer's situation (unfavorable "rescrits")
- only when such opinions entail non-tax consequences for the taxpayer (e.g. accounting obligations). Otherwise the taxpayer must follow the path of specific tax appeal.
- Jurisdiction of courts of first instance (tribunal administratif)

THANK YOU !