Greetings from the Executive and Board of the IATJ.

Dear Colleagues:

Greetings from the Executive of the IATJ. We have just finished a very successful 7th Assembly of the IATJ in Madrid, Spain. We had the largest attendance I believe we have ever had at an Assembly. The attendees found the program to be very interesting. Everyone had an opportunity to socialize, meet and greet, and people were excited about coming back to the 8th Assembly to be held in Helsinki, Finland.

The Program Committee is meeting in the near future to discuss possible topics for the 8th Assembly. If you have any topic which you would like to see in the program, please contact Wim Wijnen at W.Wijnen@ibfd.org and he will have the Committee consider the topic. If your suggestion does not get added to the program for the 8th Assembly, it will possibly be considered for a future Assembly.

Thank you for your continued support of the IATJ. Your membership is valuable. If you have any ideas or suggestions for particular projects for the IATJ to undertake, please let me know at your convenience.

In the meantime, watch the website for further developments of the IATJ, in particular the details with respect to the 8th Assembly in Helsinki, Finland. Attached is an article by Judge Wim Wijnen presented recently at the 80th Anniversary Celebration of the Tribunal Federal de Justicia Administrativa in Mexico. I am sure you will find it interesting.

Thank you in advance.
E.P. Rossiter
President

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No Taxation without Litigation
How Tax Courts Survive This Adage[1]

Wim Wijnen

1. Preface

This article refers to court cases, more specifically to the number of court cases and the mechanisms that keep the number of cases directly or indirectly under control. To date, no comparative research has been undertaken in this field. For this article, information is used that is readily available in recent international literature on litigation in tax matters. The countries that are taken as an example have been selected in such a way that judicial systems of common and civil law jurisdictions, as well as developed and developing countries are represented from the various regions of the world. This article does not claim to be the last word on this topic. The only intention is to sketch a more general picture. Actually, it is simply a journey through countries where apparent similarities can hide a chasm of difference whereas apparent differences, on closer examination, fade to insignificance.

2. A Late Offspring

There are many definitions of the concept of "taxation", but the most concise formulation is undoubtedly that stated by Ferdinand Grapperhaus in his Tax Tales from the Second Millennium, namely "an individual sacrifice for a collective goal".[2] Formulated as such, the meaning is so broad that it covers the contributions to a collective goal from the very beginning of human society to the advanced tax systems that are in existence today. Such individual sacrifices have never had a voluntary nature. Also in primitive societies, tribe members were under such strong social and moral pressure to contribute to the collective objectives that it is hardly conceivable that they could have backed out of their obligations. Over time, these objectives became extremely varied and difficult to survey, and, consequently, the compulsory aspect of taxation has gradually become stronger. However, legal protection of citizens who are subject to taxation is a relatively new phenomenon.

In the 17th and 18th century, the French king had managed to gain absolute control over taxation based on the line of reasoning that the monarch had ultimate ownership of all goods of his subjects. In 1710, when a new tax was drafted, the French government asked the Sorbonne, the University of Paris, for advice as to whether this new tax was permissible under constitutional law. The recommendation was that all his subject's goods were the property of the king and, that if the king were to take something from one

[1] This article was written as a contribution to the commemorative book on the occasion of the celebration of the 80th Anniversary of the Federal Tax Court of Mexico and the 20th Anniversary of the Iberoamerican Association of Administrative and Tax Courts in August 2016.
[2] F.B.J. Grapperhaus, *Tax Tales From The Second Millennium* (IBFD 1998), at 1.

of them, he would effectively be taking something which was already his.[3] It is clear that such system is not an ideal climate for the development of any form of taxpayer protection. However, there were contemporaries who had quite the opposite views on the matter.

One such person was the English philosopher and political thinker John Locke. In his opinion, the state was there to protect the property of citizens. In the absence of permission, the state was not allowed to take away a single penny from a citizen and, in particular, never in the entirely arbitrary way that was allowed in France. In order to make clear that the restriction on disposing of the property of citizens also applied to an absolutist governed state, Locke posited military service as an example. A commander may give orders to his soldiers that may lead to their death on the battlefield, but he is not allowed to take even one penny from their wallet; a general may sentence a deserter to death, but he is not allowed to appropriate even one cent from him.[4] It is clear that this is the beginning of the Enlightenment. The right to dispute claims by the government is built on these fundamental thoughts.

The French revolution accelerated this process. The principles of generality and equality of taxes were included in most constitutions in Europe, the United States and elsewhere. Tax laws could no longer be introduced without parliamentary consent, and taxes could no longer be imposed on taxpayers without the possibility for the taxpayer to lodge a complaint. In this context, it could be said that the adage "no taxation without representation" found its compliment in the adage "no taxation without litigation". Although it would literarily perfectly rhyme as well, the formulation could make it seem as though litigation were a desirable consequence of taxation. Nevertheless, in essence it refers to the same fundamental rights in democratic systems.

Over time, litigation of tax matters became a popular sport in quite a number of countries. However, there are no general statistics available that offer comparable insights into the number of tax cases in relation to the number of judges and taxpayers on a per country basis. The most recent information in this regard can be found in a special comparative issue of the Bulletin for International Taxation in January/February 2016 celebrating 100 years of tax litigation before the Dutch Supreme Court (*Hoge Raad der Nederlanden*) published by the International Bureau of Fiscal Documentation under the title, The Last Word in Tax Disputes. The 12 contributions to that publication prove that litigation of tax matters is unmistakably a well-developed field of law in those countries, although the number of cases differs considerably.

3. Tax Cases in Numbers

There is a direct correlation between the number of tax cases in a country and the number of inhabitants or, better, the number of taxpayers. The number of taxpayers as a

[3] Grapperhaus, *supra* n. 2, at 70 et seq.

[4] Grapperhaus, *supra* n. 2, at 72 and 73.

percentage of the number of inhabitants is in developed countries usually higher than in developing countries. Also, the procedural appeal systems that differ considerably between the countries have a direct effect on the number of cases. For example while systems grant access to the courts for each tax assessment, there are systems in which such access is limited. In following discussion, a brief overview is presented of the number of cases in 2014 in selected countries from various regions of the world, representing developed and developing countries, as well as common law and civil law jurisdictions. As the number of taxpayers in these countries was not readily available, the total number of inhabitants is taken as the point of departure. The number of cases gives only an indication. Some numbers represent the new cases that are filed, whereas the numbers of other countries represent the cases that are annually handled by the courts. Some numbers reflect the overall situation per year, whereas others are more precise. It is also not clear whether these numbers include disputes that give rise to additional assessments for several years and, therefore, to numerous appeals, despite the fact that, for all the relevant years and appeals, the disputes are identical. Therefore, these numbers are not placed in table format, as that would suggest that they refer to a comparable background.

In Australia with a population of 24 million, in 2014 there were 1,798 first instance appeals heard by the Administrative Appeals Tribunals, and 251 second instance appeals were heard by the Federal Courts by the 48 judges of these courts. From 2005 to 2014, the highest court, the High Court, heard 43 tax appeals, which is, on average, approximately four per year.[5]

In Canada, with a population of 36 million, between 4,000 and 5,000 new proceedings are filed by taxpayers with the Tax Court each year, of which approximately 1,000 are heard by the 24 tax judges of this court. The other 3,000 to 4,000 cases that are commenced each year are settled, withdrawn or heard in following years. Approximately 100 to 200 Tax Court decisions are appealed to the Federal Court of Appeal each year. Applications for leave to appeal from a Federal Court decision may then be taken to the Supreme Court of Canada. On average, the Supreme Court has granted leave for only one or two such applications each year.[6]

In France, with a population of 64 million, each year approximately 20,000 cases are filed with tribunals of first instance, namely the Administrative Courts; approximately 4,000 cases per year are appealed to the Administrative Courts of Appeal; and approximately 1,400 cases are appealed to the Supreme Administrative Court (*Conseil d'État*).[7]

In Germany, with a population of 80 million, in 2014 there were approximately 47,000 cases filed and dealt with by the tax courts of first instance. Of the 2,373 appeals to the

[5] G.T. Pagone, *Tax Litigation in the Federal Court of Australia*, Bull. Intl. Taxn. (Jan./Feb. 2016), at 8.

[6] M. Rothstein, *An Overview of the Supreme Court of Canada*, Bull. Intl. Taxn. (Jan./Feb. 2016), at 23.

[7] Ph. Martin, *The French Supreme Administrative Court*, Bull. Intl. Taxn., (Jan./Feb. 2016), at 26.

supreme tax court (the Federal Tax Court), 784 were dealt with and 1,589 appeals were rejected. There are approximately 600 tax judges in the Tax Courts and 60 in the Federal Tax Court.[8]

In India, with a population of 1.2 billion, each year approximately 40,000 first instance, direct tax cases are filed with Income Tax Appellate Tribunals (ITAT) which can be handled by the approximately 100 judges who sit on these tribunals. There are still approximately 90,000 cases pending, but this number decreases by 5,000 cases per year. Furthermore, there are approximately 60,000 indirect tax cases before the first instance Custom Excise and Service Tax Appellate Tribunal (CESTAT). Approximately 30,000 ITAT cases and 14,000 CESTAT cases are on appeal with the High Courts. There are approximately 5,500 direct tax cases and 3,000 indirect tax cases on appeal with the Supreme Court. The tax litigation journey, from the objection stage to the Supreme Court, can take 12 years, if not more.

In Indonesia, with a population of 237 million, there is only one tax court of first instance, which is located in Jakarta. There are 50 full time judges associated with the court, all of whom have a general tax background. The Tax Court receives approximately 14,000 new cases per year, of which approximately 5,000 can be handled per year. Annually, approximately 1,000 Tax Court decisions are appealed to the Supreme Court. Apart from a single member, Supreme Court judges do not have a tax background.[9]

In Italy, with a population of 60 million, each year approximately 150,000 new proceedings are filed. Before the courts of first and second instance, 580,000 tax cases are pending. The staffing plan for 2015 includes 4668 judges, while the number of judges in service is currently 3253. In 2014, 10,000 cases were registered on the docket of the Supreme Court. The Supreme Court can handle 7,000 to 8,000 cases per year. There are approximately 29,000 tax cases pending before the Supreme Court.[10]

In Mexico, with a population of 120 million, in 2014 there were 165,161 cases filed before the tribunal of first instance (the Federal Tax and Administrative Court), and 24,248 on appeal to the Collegiate Court and the Supreme Court. The Federal Tax Court consists of 153 full time judges.

In the Netherlands, with a population of 17 million, each year approximately 25,000 cases are filed with the District Courts (first instance), 4,000 cases on appeal with the four Courts of Appeal and 1,000 with the Supreme Court.[11] These cases are handled by 111 full time tax judges, namely 50 with the District Courts, 50 with the Courts of Appeal

[8] R. Mellinghoff, *The German Fiscal Court: An Overview*, Bull. Intl. Taxn. (Jan./Feb. 2016), at 38.

[9] E. Dewanda, *Judicial System of Indonesia*, 66 Bull. Intl. Taxn. 10 (2012).

[10] M. Scuffi, *Tax Litigation before the Italian Supreme Court of Cassation: an Overview*, Bull. Intl. Taxn. (Jan./Feb. 2016), at 42.

[11] P. Wattel, *Tax Litigation in Last Instance in the Netherlands: The Tax Chamber of the Supreme Court*, Bull. Intl. Taxn. (Jan./Feb. 2016), at 45 et seq.

and 11 with the Supreme Court. The lower courts make use of specialist part-time judges. The number of cases in which part-time judges are involved is limited. Generally, the entire process – from the moment of lodging an objection with the tax inspector to a decision by the Supreme Court – takes three to three and a half years.
In the United Kingdom, with a population of 63 million, the First Tier Tribunal issues approximately 6,000 decisions per year. Appeal is possible, with permission, to the Upper Tribunal. Since its establishment, the Upper Tribunal hears, with permission, on average, 60 appeals from the First Tier Tribunal per year. From the Upper Tribunal, an appeal lies, with permission, to the three appeals courts, which heard in 2014 some 20 tax appeals. In the judicial year to 31 March 2015, the Supreme Court heard only six cases.[12]

In the United States, with a population of 324 million, the Tax Court that operates as a trial court handles approximately 30,000 cases par year. Taxpayers have the ability to appeal the decisions of the Tax Court to the applicable federal Circuit Court and then, if accepted, to the Supreme Court. Approximately 1,500 cases decided by the Tax Court are appealed and only one or two of these federal tax cases are heard in appeal by the Supreme Court each year.[13]

4. General Remarks

Without a doubt, these numbers are shaped by a myriad of local and legal factors. Only the highlights of these are considered below.

4.1. Common law vs. civil law jurisdictions

In Australia, Canada and the United States (all common law jurisdictions), the number of tax cases filed before tribunals of first instance is significantly lower than in France, Germany, Italy and the Netherlands (all civil law jurisdictions). With a total population of these common law jurisdictions of 447 million, in all there are approximately 42,000 tax cases, compared to approximately 246,000 tax cases per year in the civil law jurisdictions (which have a total population of 221 million). Although having less than half the population, civil law jurisdictions have six times more tax cases than common law jurisdictions. It is true that the number of cases in Italy distorts the picture because, even by the standards of civil countries, the number of cases is extremely high. However, even if Italy were to have the same number of cases as France, i.e. 26,000 (and bearing in mind that the population of France is more or less of the same), the number of cases in these civil law jurisdictions would have outnumbered the common law jurisdictions more than three times.

It is not to be expected that the duration of proceedings, from the moment of lodging an objection with the tax authorities to a decision by the supreme court, would be a major reason for the lower number of cases in common law jurisdictions. In Italy, which has –

[12] M. Gammie, *Tax Appeals in the UK Supreme Court*, Bull. Intl. Taxn. (Jan./Feb. 2016), at 70 et seq.

[13] K. Fogg, *The United States Tax Court: A Court for All Parties*, Bull. Intl. Taxn. (Jan./Feb. 2016), at 75 et seq.

proportionally – by far the most new cases per year, the entire process typically takes more than ten years. In general, the time needed in common law jurisdictions does not deviate so much from that in civil law jurisdictions that this can be seen as a reason for these lower numbers. Also, the familiarity with tax proceedings cannot be a reason. It cannot be said that taxpayers in civil law jurisdictions are so much more familiar with tax procedures than taxpayers in common law jurisdictions. Also, it is not to be expected that taxpayers in these common law jurisdictions refrain from taking their case to court because of the uncertainty of the outcome of the proceeding. These uncertainties seem not to be greater than in civil law jurisdictions. Therefore, these factors cannot explain why there are so many more tax proceedings in civil law jurisdictions.

The real reasons should be sought in the procedural differences between common and civil law systems that have a direct or indirect impact on the costs of the proceeding. Of course, court fees could play a role, but there are more fundamental reasons why, in common law jurisdictions, proceedings are more costly than in civil law jurisdictions. In civil law jurisdictions, tax proceedings are based on an exchange of written documents between the parties, followed by a hearing. At the start of the hearing, the court is fully informed about the facts and the arguments of the parties. Therefore, the hearings in civil law proceedings are quite short. Courts are not bound by the submissions of the parties. If needed, they play an active role in ascertaining the facts and the law during the hearing. Parties that appear in court without counsel are therefore in a way protected by the court.

In the Netherlands, parties typically attend the hearings, which in general do not take more time than 20 to 30 minutes. In France, counsel usually decline the right to speak at the final hearing. The hearing is mostly devoted to listening to the opinion of the commissaire de gouvernement (which can be compared with the advocate-general before the Dutch Supreme Court and the European Court of Justice).[14]

In Italy, a public hearing occurs only upon specific request by one of the parties.[15] This is different in common law systems, where the proceedings are primarily oral with witness testimony. The court relies entirely on the factual and legal arguments of the parties put forward at the hearing, although the court may take an active role in questioning the counsel on the arguments of law. Courts do nothing in the way of investigating the merits of the case before that. Essentially, there is a "day in court", which may well exceed one day, when all the facts and arguments are considered.[16] As tax cases are often complex and quite technical, parties cannot take the risk of going to court without being adequately represented. The costs associated with tax proceedings in common law jurisdictions are therefore considerably higher than those in civil law jurisdictions. This financial burden prevents parties from litigating cases involving a lower financial interest. This seems to be the main reason why the numbers in common law jurisdictions are so much lower.

[14] Martin, *supra* n. 9, at 82.

[15] L. Favi, *Courts and Tax Treaty Law* (IBFD 2007), at 281.

[16] J.F. Avery Jones, *Courts and Tax Treaty Law* (IBFD 2007), at 32.

There are other factors that may have an impact on the number of cases, such as the allocation of the burden of proof between the parties. In common law jurisdictions, the burden of proof with regard to facts is almost always borne by the taxpayer, as in tax matters all the facts begin in the hands of the taxpayer. In civil law jurisdictions, the burden of proof is normally borne by the party alleging a fact, as that party is in the better position to prove it. In this regard, a taxpayer's position in common law systems is relatively weaker, but it does not seem that this contributes that much to the lower number of tax cases.

4.2. Common law jurisdictions

The number of tax cases in common law jurisdictions is not that different. In Australia, with a population that is a bit below that of Canada, the relation between population and tax cases is 24 million to 2,000; in Canada, 36 million to approximately 4,500 cases per year; in the United Kingdom, with a population of approximately twice that of Canada, 63 million to 6,000; and in the United States, with a population of approximately ten times that of Canada, 324 million to 30,000. There are differences but never more than by a factor 1.5.

4.3. Civil law jurisdictions

In the selected civil law jurisdictions, the number of tax cases differs considerably. The Netherlands, with a population of 17 million, has 26,000 first instance tax cases per year. As France, with a population of 64 million, has 20,000 cases, the Netherlands, proportionally, has five times more cases than France; as Germany, with a population of 80 million, has 50,000 cases, the Netherlands, proportionally, has approximately 2.5 times more cases than Germany. Only Italy, with 150,000 cases, has proportionally more cases than the Netherlands. If the Netherlands were to have, like Italy, a population of 60 million, the Netherlands, proportionally, would have approximately 90,000 cases.

4.4. India, Indonesia and Mexico

In India, with a population of 1.2 billion, not more than 100,000 new direct and indirect tax cases are lodged per year, while in Indonesia, with a population of 237 million, not more than 14,000 cases are filed. It seems evident that this has to do with the proportionally low number of taxpayers in these countries. In respect of Indonesia, the geographic situation also seems to play a role, as does the fact that there is only a tax court (in Jakarta).

The situation in Mexico is just the other way around. With a population of 120 million, 165,000 new tax cases are filed per year – which is proportionally more than any of the other countries considered in this article, except Italy. It is striking that all of these cases can be dealt with by the relatively limited number of 153 Federal Tax Court judges. In Italy, nearly the same number of cases, i.e. 150,000, has to be dealt with each year by 3253 judges of the two lower instances.

4.5. Numbers in context

Regardless of how interesting these numbers of tax cases in themselves might be, for a correct view of the matter they should be seen in the context of the total number of assessments and tax payments. In all countries, numerous assessments are imposed each year for all kinds of taxes on individuals and companies. From this perspective, the conclusion can only be that the number of cases that is ultimately litigated is amazingly low. Nevertheless, in most countries the maximum capacity of the judiciary is reached. Clear examples are countries such as Italy and Indonesia, where the number of pending cases steadily increases each year. In all countries, there are procedural rules that contain a whole arsenal of mechanisms to guarantee the efficiency of the system by keeping the number of cases under control. The question here concerns where are the limits of doing so. In general, it is not considered appropriate for the state, which imposes the tax, to make it procedurally difficult or expensive for citizens to challenge tax assessments in court. Just with a view to this principle, a new law was recently introduced in Spain to remove the condition that appeal to the Supreme Court be available only if the amount of tax at issue exceeds EUR 600,000.[17] On the other hand, so-called open-door systems (with little or no threshold) are presently more vulnerable than ever. Through the Internet and social media, taxpayers can be mobilized in a very short period of time. The capacity of the judiciary can be easily overwhelmed through complaints in respect of the same issue by numerous taxpayers at the same time. Specific measures are needed to meet these challenges.

5. Caseload Control Mechanisms

5.1. A catch-22

Countries are facing the dilemma that, on the one hand, each citizen should have the unlimited right and possibility to object and appeal against any tax imposed, and the impossibility, on the other hand, of fully meeting this requirement due to budgetary constraints. Therefore, as the capacity of the judiciary in most countries is limited, they need specific rules to keep the caseload under control by limiting the inflow of cases through prior permission to appeal, by simplifying the proceedings or by measures that have a direct or indirect impact on the costs of proceedings (e.g. court fees and mandated representation by counsel). The balance is different for each country, and is laid down in laws and internal regulations of the judiciary. For purposes of this article, only the key issues will be discussed on the basis of some more or less randomly chosen examples.

5.2. Court fees

Court fees, which are imposed in a wide variety of forms, are a popular instrument for exerting influence over the inflow of tax cases. In general, these fees discourage only

[17] M.C. Garzón Herrero & L. López-Yuste Padial, *Tax Litigation before the Spanish Supreme Court*, Bull. Intl. Taxn. (Jan./Feb. 2016), at 52.

those appeals involving relatively small financial interests, whereby the fees for courts of first instance are often lower than for courts of higher instance. In the Netherlands, court fees range from EUR 123 for the District Courts (courts of first instance) to EUR 497 for the Supreme Court. Also, the fees for individuals and companies differ. In the Netherlands and many other countries, lower fees apply to individuals while higher fees apply to companies. In Spain, individuals are exempt from court fees.
In certain countries, court fees are based on the amount of tax at issue. In Spain, the fee for Supreme Court cases is a percentage of the tax claim. In Belgium, with a view to restricting the inflow of cases, a law was recently introduced that allows the charging of a higher fee for Supreme Court cases that involve a tax claim of more than EUR 250,000.[18] Also, the time at which the fee is charged may differ. In the Netherlands, court fees must be paid before the commencement of the proceeding. If the fee is not paid, the case is not admissible. In Italy, Supreme Court fees are charged once a case has been decided. They are compensated if the question under consideration contributes to the development of the law or if the Court changes the course of its established jurisprudence.

To a great extent, these differences seem to be inspired by the desire to formulate a barrier against frivolous litigation of small financial interests on the one hand, and the awareness that a restriction of the possibility to submit a genuine case for litigation violates taxpayer rights on the other hand.

5.3. Representation

The costs of representation can be a determinant factor in deciding whether to submit a case for litigation. As a general rule, if the taxpayer loses, the taxpayer must bear its own costs. However, if the taxpayer wins, in many countries (including the Netherlands), a request for reimbursement of representation costs can be made to the tax authorities. However, in most countries, the awarded reimbursement covers only a fraction of the actual representation costs. Therefore, an educated guess of the win/loss probability is a not negligible factor in deciding whether a case should be submitted for litigation.

In many civil and common law jurisdictions, taxpayers may represent themselves and are not obliged to engage professionals to act on their behalf before courts of first (factual) instance, nor before courts of second (factual and/or legal) instance, if any. However, the complexity of tax systems often prompts taxpayers to make use of tax lawyers, tax advisors and/or accountants. This is true to an even greater extent in common law jurisdictions such as the United Kingdom, where proceedings are primarily oral and the judges rely, in principle, on the factual and legal arguments of the parties (*see* section 4.1.). Therefore, although generally not obligatory, representation in tax proceedings before courts of lower instance is a common phenomenon.

However, in almost all countries, it is required to have representation before the supreme court, as the discussion is limited to the legal aspects of the case. As generally only attorneys who are qualified to appear before the highest courts may represent taxpayers in

[18] BE: Law of 10 April 2014, J.T. 6601, at 333 (2015).

such cases, representation costs are so high that they can effectively prevent taxpayers from lodging appeals before the supreme court. This raises the question as to how compulsory representation should be seen in light of taxpayer rights. As long as the taxpayer is free to choose whether to hire a lawyer, the question is less intriguing. However, it is different when representation is compulsory. In Germany, under constitutional law, legal costs cannot prevent a taxpayer from seeking legal protection. If the taxpayer cannot afford to pay these costs, the taxpayer is entitled to an appropriate compensation.[19]

In summary, in tax matters, representation – whether or not compulsory – has an indirect effect on the number of cases that is submitted for litigation.

5.4. Leave-to-appeal systems

A number of countries use leave-to-appeal as an means of keeping the number of cases under control by monitoring them at the front door, so to speak. In some systems, the permission is in the hands of the lower court that decided the case, while in other systems, it is in the hands of the higher court to which the appeal is addressed.

As a general rule, leave to appeal does not exist in courts of first instance. It is limited to courts of higher instance the competence of which depends on an error of law and not on the findings of fact. A good example is seen the United Kingdom. Every stage of appeal above the court of first factual instance (i.e. the First Tier Tribunal) requires permission. For appeals (only legal) to the Upper Tribunal, permission is granted by the First Tier tribunal; from there to the Appeal Courts (only legal) by the Upper Tribunal, whereby it must be shown that the appeal would raise some important point of principle or practice, or some other compelling reason for the Appeal Court to hear the appeal. For permission to appeal to the Supreme Court, it must be shown that there is an arguable point of law which is of general public significance.[20] In Canada permission is needed only for appeal to the Supreme Court. No permission is needed for appeal from the Tax Court (factual) to the Federal Court (only legal). The Federal Court will not interfere with findings of fact unless the lower court made a blatant or overriding error. For appeal to the High Court in Australia, special leave is needed satisfying the High Court that the case involves a question of law that is of public significance.[21]

However, leave-to-appeal systems do not exist only in common law jurisdictions. For example for decisions of the tax court of first instance (*Finanzgericht*) in Germany, permission is needed from the Tax Court, or from the Federal Tax Court (*Bundesfinanzhof*) following a complaint by the taxpayer against the Tax Court's refusal to grant leave. Permission is granted only if the legal matter has fundamental significance; a decision of the Federal Tax Court is required for the development of the

[19] Mellinghoff, *supra* n. 11, at 34.

[20] M. Gammie, *Tax Appeals in the UK Supreme Court*, Bull. Intl. Taxn. (Jan./Feb. 2016), at 72.

[21] G.T. Pagone, *Tax Litigation in the Federal Court of Australia*, Bull. Intl. Taxn. (Jan./Feb. 2016), at 8.

law or to ensure uniformity of case law; or a procedural defect has been claimed and substantiated which can form the basis of the contested judgement.[22]

The judicial systems in many other countries, such as France, Italy, the Netherlands, Spain and Switzerland, do not provide preventive filters or prerequisite conditions for access to appellate and supreme courts. As leave-to-appeal systems do not apply to the inflow of cases before courts of first instance, they keep the appeal system in check only as regards courts of higher instance.

5.5. Efficiency measures

5.5.1. Simplified procedures

In all countries, tax appeals must meet a number of procedural requirements. As a rule, an appeal is not admissible if the statute of limitations is not observed, the court fees are not paid or no clear written grounds are submitted together with the appeal or within the prescribed period. Furthermore, technically admissible appeals are mainly dealt with in a simplified and summary procedure if they do not merit further deliberation as a result of a manifest substantive lack of prospect of success. This applies, in principle, to courts of all instances in all countries in one way or another. However, if leave to appeal is required, these cases are kept outside the threshold, with the effect that the number of appeals in these instances is lower (*see* section 3.).

In countries with open-door appeal systems, such as France and the Netherlands, only a limited number of appeals are subject to full treatment. For example of the 1,400 appeals received by the French Supreme Administrative Court in 2014, only 532 (38%) were fully examined and deliberated.[23] In the Netherlands, the situation is not much different. In 2014, the Supreme Court decided exactly 1,000 cases: 120 appeals were not admissible (12%); 160 appeals were technically admissible but were rejected in a simplified procedure with a summary assessment because of manifest substantive lack of prospect of success (16%); 405 appeals were fully deliberated but rejected with simplified reasoning that the appeal did not reveal any reasons for quashing the judgement of the lower court nor raised issues regarding the unity or development of the law (40%); and 320 appeals received full treatment (32%), of which 144 resulted in a quashing of the lower court's decision (14.4%).

Notably, the percentages of appeals that received full treatment (i.e. 38% in France and 32% in the Netherlands) were quite similar.[24] Even more notably, these percentages are fully in line with the percentage of appeals dealt with by the German Federal Tax Court. Of the 2,373 appeals, leave was granted (and, therefore, full treatment was given) to 784 appeals, which is 33%. This shows that as regards the number of fully examined and deliberated cases, there is not much difference between open-door and leave-to-appeal

[22] Mellinghoff, *supra* n. 11, at 34.

[23] Martin, *supra* n. 9, at 26.

[24] Wattel, *supra* n. 9, at 47.

systems. In comparing the number of appeals in both systems, the not-granted appeals in leave-to-appeal systems should be included or the appeals rejected with a simplified procedure in open-door systems should be ignored. These cases are taken into consideration in both systems with a shorter and simpler procedure. The numbers mentioned under section 3. are therefore, in this regard, not entirely comparable.

5.5.2. Case management and coordination

With a view to limited capacity, there is much to achieve through efficient management and case coordination. To keep the workload under control, courts have developed a kaleidoscopic variety of procedural rules. Apart from a number of common features, these rules often differ significantly from one country to the next. A general and structured inventory is yet not available. As it is impossible to paint a complete picture here of the various possibilities, only some characteristic and noteworthy examples are mentioned in an effort to indicate which types of instruments courts have at their disposal and use in daily practice.

It may be efficient to assign a case to a judge with special knowledge in the field of law under which the taxpayer's case falls. This is the practice, for example, of the Swiss Federal Supreme Court, where the president assigns a case to an individual judge. For reasons of impartiality, however, the composition of the panel (apart from the president) is determined by a computer program within parameters set by the president. These parameters relate, among other things, to the question as to whether there should be a mixed gender panel and/or a panellist who is a specialist in the particular field of law. The president may override the composition of the computer-generated panel, but there must be good reasons for doing so, and these justifications must be documented.[25]

The workload may be reduced by a reduction of the number of judges on the court. Since 1997, in the Belgian Court of Cassation, a case may be submitted to a chamber of three judges, instead of five, under certain conditions. This measure eliminated the backlog of proceedings before this Court.[26]

The time needed for hearings may be reduced by restricting the written arguments and oral submissions. This is the case for the proceedings before the Canadian Supreme Court, where each party is entitled to file a written argument of not more than 40 pages and make an oral submission for not more than one hour.[27]

Information about other similar procedures can be relevant. There is a quite elaborate system in Australia, where parties are required to complete a pro forma questionnaire seeking details of related tax matters that may be pending in other proceedings before the

[25] T. Stadelmann, *Tax Litigation before the Swiss Supreme Court*, Bull. Intl. Taxn. (Jan./Feb. 2016), at 69.

[26] M. Ghyselen & B. Peeters, *The Court of Cassation as the Supreme Body of the Judiciary in Belgium*, Bull. Intl. Taxn. (Jan./Feb. 2016), at 14 and 15.

[27] Rothstein, *supra* n. 6, at 21.

Federal Court or before the Tribunal. The pro forma questionnaire also asks the parties to identify whether the proceeding is a *test case* and, if so, the number of other taxpayers affected by the proceeding or the amount of revenue that may be affected by the result of the test case and, in any event, whether the application should be expedited for any reason. Furthermore, tax cases are managed by the Federal Court nationally. They are overseen and managed by a national coordinating judge and a registry coordinating judge in each of the Federal Court's registries throughout Australia. The registry coordinating judges survey and examine all tax cases on their respective registries from time to time, and liaise with each other and with the national coordinating judge to ensure that like cases are heard together; that common issues, wherever they arise, are heard together or sequentially; that information is disseminated (where appropriate) universally and uniformity to all judges after hearing tax cases; and that the work of the Federal Court is undertaken efficiently and expeditiously.[28]

The time needed for the drafting of decisions can be shortened by standardization, structuring and, to the extent that the pertinent case allows, simplification. Also, the drafting of decisions can be left, to a lesser or greater extent, to law clerks in order to assist the judges. Switzerland is but one example. Given the increasing workload of the Swiss Federal Supreme Court, the court clerks are tasked with drafting the decisions in many cases. They are also involved, in an advisory capacity, in the preparatory stages of proceedings and during deliberations. The court clerks draft the final text of rulings based on the remarks made by the members of the chamber. Currently, 132 court clerks (i.e. three and a half per judge on average) assist the Court.[29]

In summary, through an efficient use of the capacity of courts and streamlining of proceedings, the time needed from lodging an objection with the tax authorities to a final decision by supreme court, can be significantly shortened.

5.5.3. Exclusion of judicial instances

Appeals usually involve a journey of many years through the courts of various instances before they ultimately culminate in a decision by the supreme court. In many countries, the parties must wait for up to ten years (if not longer) before they have an answer on the legal question that they initially submitted to the court of first instance. However, in this rapidly changing world, even the 3-year period in the Netherlands is by far not good enough. Under the influence of news reports and the mobilization of taxpayers through social media, the number of appeals can increase exponentially within a short period of time. To meet these challenges, courts in various countries have developed procedural mechanisms outside the regular litigation process to (i) allow for a faster response to legal questions before supreme courts and (ii) avoid a total meltdown of their capacity. A welcome side-effect is that they simultaneously reduce the workload of the courts of

[28] Pagone, *supra* n. 8, at 10.

[29] Stadelmann, *supra* n. 25, at 68.

lower instance. The two main instruments are (i) prorogation and (ii) preliminary questions posed by lower courts to the supreme court.

5.5.3.2. Leapfrog appeal to the supreme court

In various countries, in tax litigation there is also the possibility to appeal directly from the court of first instance to the supreme court what is called, in classical terms, a *prorogatio* or appeal *per saltum*, which is translated in modern prosaic language as a "leapfrog appeal". This special procedure in which the appellate level is skipped, is available only if both parties agree (which, indeed, they often do) and if solely legal questions (i.e. no questions of fact) are at issue. The advantage for the taxpayer is that the taxpayer obtains a quick and definite answer to its legal question. The advantage for the tax authorities is often twofold. Apart from a time savings in the case at issue, the decision of the highest court may resolve, in one go, all objection proceedings that are pending before the tax administration which have been suspended there until such question has been answered. Examples of such appeals can be found in Italy and the Netherlands.

There is a special type of leapfrog appeal in France, where taxpayers have the option to challenge major national regulations directly before the Supreme Administrative Court. This allows taxpayers to quickly challenge a tax decree, regulation or guidelines, by arguing that they violate tax law or EU law. As such, taxpayers need not wait for individual taxation and go through each stage of the judicial system. If such decrees and regulations are illegal, the Supreme Administrative Court may quash them.[30] However, the French system seems to be unique in this regard. Generally, judicial appeal is restricted to administrative decisions – which excludes laws and regulations.

Another special and elaborate system is seen in Sweden in the field of advanced tax rulings. Such rulings are requested by taxpayers that desire certainty as regards an intended transaction or specific situation, and are issued by an independent body, namely the Advanced Tax Rulings Board. Both the taxpayer and the tax authorities may go directly to the Supreme Court, leapfrogging over two courts of lower instance, namely the Administrative Court and the Administrative Courts of Appeal, to request a decision on a point of law.

5.5.3.3. Preliminary procedure before the supreme court

Another means of obtaining a faster answer to critical legal questions that arise in appeals before courts of first instance, is a preliminary referral system to the supreme court, following the example of preliminary procedures before the European Court of Justice (ECJ)
in EU law. This is particularly expedient if, before courts of first instance, the same question of law arises in a massive number of pending cases. In such a system, all cases could be suspended by the lower court and the legal question in one of the cases

[30] Martin, *supra* n. 9, at 28.

submitted to the supreme court for a preliminary judgement. The difference with a leapfrog appeal is that such an appeal is initiated by a common decision of the parties, whereas a preliminary referral to a supreme court is based on a decision of the lower court. It is clear that – apart from a considerable saving of time – such a procedure could significantly reduce the workload of all courts.

Such a referral system was introduced in the Netherlands in 2016. The difference with the preliminary procedure before the EU Court of Justice is that the Dutch Supreme Court may refuse to answer the question if it considers the issue not to be suitable or not yet ready to be decided *in abstracto*, dissociated from concrete cases.[31] Also, in France, a lower court may refer a case to the Supreme Administrative Court for a legal opinion. The Supreme Administrative Court delivers an opinion within three months which is written by a judicial panel, but is not a judicial decision. The referring court has no legal obligation to follow this opinion, although this procedure would be useless if such opinions were not followed.[32]

5.5.4. Mass objection procedures

In anticipation of an increase in procedures concerning a specific legal issue initiated by numerous taxpayers that have been activated and mobilized through news reports and social media, some countries have introduced special procedures enabling the judiciary to efficiently handle such mass complaints through which can easily inundate courts of first instance.

In France, lower courts may follow an informal procedure under which, following consultation with the parties, the courts select a number of representative test cases that quickly follow the judicial procedure of appeals up to the Supreme Administrative Court, such that all of the other cases are suspended until the Supreme Administrative Court has decided on the test cases.[33] The Netherlands introduced a similar procedure in 2003 for mass complaints in tax matters.[34] This procedure commences at the political top of the tax administration with the State Secretary of Finance, who may designate a specific legal issue on which a number of objections have been submitted, to be an issue of "mass objection". Subsequently, a panel consisting of representatives of both the tax administration and taxpayers selects the test cases that must be fully litigated before the courts. All other appeals with the same legal issue are suspended until the decisions in the test cases are final. As such complaints may have a political dimension, the parliament is involved and has the right to intervene and overturn the decision of the State Secretary of Finance. After the final judgement in the selected test cases, the tax authorities resolve all suspended objections accordingly, in a single mass decision published in the media and which cannot be appealed. However, taxpayers that still wish to litigate may request an

[31] Wattel, *supra* n. 10, at 48.

[32] Martin, *supra* n. 9, at 28.

[33] Martin, *supra* n. 9, at 28.

[34] NL: Art. 25a General Tax Act.

individual decision, which they may then appeal in court; however the chances of success in such cases are slim. Indeed, to date, this procedure has been used only twice.[35]

Regarding mass complaints, all judicial systems are facing the same problems. The situation under open-door and leave-to-appeal systems is not different because leave to appeal does not apply to first instance cases.

5.5.5. Measures encouraging parties to resolve the dispute in joint consultation

Quite often, cases are lodged without being sufficiently discussed or prepared by the parties. There are several ways to deal with this. Under certain conditions, courts may refuse to deal with such cases because they are not ripe for a decision, and declare the case not admissible. The number of cases that are decided in this way in various countries is not readily available.

In such cases, the parties may be also referred to mediation. This possibility is found in quite a number of countries. This is also seen in the Netherlands, although the experience in practice is quite limited. Courts of first instance and appeal courts are used to make the parties aware of the possibility of mediation at the beginning of the procedure, but taxpayers seldom make use of it. However, in other countries, mediation seem to be an effective means of reducing the workload of courts.

Another possibility is settlement during the hearing. In the Netherlands, courts are keen to explore during the hearing whether there is a possibility to get the parties to settle . Each year, roughly 4,000 of 26,000 cases (i.e. 15%) are settled by the parties during the hearing before courts of lower instance, thereby reducing the courts' workload considerably. It is true that judges must still prepare the case, but after settlement they are relieved from having to draft a decision.

Unlike in the Netherlands where settlement is not regulated by law, under a 1997 law, settlement in Italy is elaborated in detail. That law was introduced because the number of tax disputes at that time had increased considerably. Under the Law, disputes may be settled with the tax authorities at the time of the assessment procedure or after appeal under supervision of the court. If the dispute is settled with the tax authorities, the taxpayer is entitled to a reduction of penalties to one fourth of the minimum amount applicable. If the dispute is settled before or during the hearing, the taxpayer's benefits are reduced to one third of those that would have been available to the taxpayer had the dispute been settled at the level of the assessment.[36] It is unclear how successful this law has been so far, given the considerable number of pending cases in Italy (*see* section 3).

5.5.6. Other indirect mechanisms that may have an impact on judicial case loads

[35] Wattel, *supra* n. 10, at 49.

[36] C. Innamorato, *The Judicial System in Italy*, 49 Eur. Taxn. 6 (2009).

There are many other mechanisms that might have a direct or indirect impact on reducing the number of cases. Handing down *obiter dicta* is one example of such an instrument. If the judicial system allows a court to decide on grounds other than those advanced by the parties, it may give its decision a broader scope than the specific case that is submitted to it, provided that it does not go beyond the limits of the dispute. As such, the court not only decides on the specific case but anticipates unrequested on similar related cases in the future. Another instrument is the quashing *ex officio* of a decision of a lower court by the Supreme Court, which enables the Court to give its opinion in a case that has not been submitted to it. As such, new cases dealing with the same issue can be avoided. Although rarely used, Dutch procedural law provide for this possibility.

6. Predictability of the Outcome of Proceedings

Section 5. explored mechanisms that have a direct or indirect impact on the case load of tax courts, and what courts are doing to use their available capacity as efficiently as possible. There might even be a solution from an unexpected corner. On 5 April 2016, Charlie Bruijsten defended his dissertation, "Uncertainties in Legal Reasoning in Tax Matters" at the University of Tilburg.[37] His research is focused on the question as to the extent to which it is possible to determine, on the basis of big data and computerized formulas, the outcome of disputes, including disputes in tax matters. His conclusion is that no reliable quantitative analysis is yet available. For the time being, advisors have still to rely on a qualitative analysis indicating the chances for success in judicial decisions in terms of "will", "should" and "more likely than not" opinions, whereby success ranges from 90%, to more than 70% or more than 50%. However, in future, it would be possible in his opinion to feed a computer with all available and relevant data to develop a heuristic system that is able to accurately predict the result of judicial decisions. If such prognoses become available, taxpayers will no longer go to court to obtain a time consuming and costly judicial decision. It is to be expected that in such case, the number of court cases will decrease drastically. A positive aspect is that it would resolve the capacity problems of courts. However, the downside is that, regardless of how advanced and well fed such a computer system might be, its intellectual capacity is limited to what is stored in it. Some sort of serendipity, i.e. finding what is not stored, or an ethical analysis of the case which might be needed under certain circumstances, is not possible through a computer system. Thus, there is something to win and to lose at the same time in future.[38]

7. Conclusion

Writing this article was a welcome and interesting learning experience. The domestic rules and practices appear to differ considerably from country to country. Comparative information about litigation in tax matters is not yet readily available in the international arena. The available information is always written from a domestic perspective, and for

[37] C. Bruijsten, *Onzekerheid in fiscale rechtsvinding*, Proefschrift Universiteit Tilburg.

[38] P.H.J. Essers, *Koester serendipiteit en voorkom een filter bubble*, WFR 7142 (28 Apr. 2016), at 616.

that reason in many situations is not immediately appropriate for comparison. It seems that noteworthy lessons could be drawn from comparative research in this field.

The article focused only on the number of disputes in tax matters and the mechanisms that determine these numbers. In the context of this contribution to the celebration of the 80th Anniversary of the Federal Tax Court of Mexico and the 20th Anniversary of the Iberoamerican Association of Administrative and Tax Courts, most topics could be only superficially discussed. A number of interesting questions even remain untouched, such as the extent to which the number of tax cases is influenced by the quality of the tax laws and/or the quality of the tax assessments imposed by the tax authorities. It would be a positive development if this celebration were the beginning of the fundamental research that this topic certainly deserves.