

Seminar K
Practical Protection of Taxpayers in the Tax Litigation Process



+ Introduction



The Panel

- Chair
 - Justice Pagone (Australia)
- Panel Members
 - Justice Cortot-Boucher (France)
 - Justice Drüen (Germany)
 - Justice Kothari (India)
 - Justice Rip (Canada)
 - Robert Attard (Malta)
- Secretary
 - Filip Debelva (Belgium)



The Panel

- Moot Trial Counsel
 - Philip Baker Q.C. (UK)
 - Robert Attard (Malta)
 - Peter Connors (USA)

+ Agenda

- Introduction
- **Topic A: Pre-trial Proceedings**
 - Pre-trial proceedings in Canadian tax cases
 - Pre-trial proceedings in French tax cases
- **Topic B: Expert Evidence and Testimony**
 - Current issues in German tax cases
 - Current issues in Indian tax cases
- **Moot Trial**

+ Topic A: Pre-trial proceedings

(a) Pre-trial proceedings in Canadian tax cases to facilitate resolution of tax disputes

Justice Rip

+ Topic A: Pre-trial proceedings

(b) Pre-trial proceedings in French tax cases to facilitate resolution of tax disputes

Justice Cortot-Boucher



Which characteristics in French law ?

- Tax litigation proceedings are written
- Tax litigation proceedings are inquisitorial
- The French legal system a system of civil law

+ Which definition ?

- All proceedings which, in view of a trial, enable the taxpayer and the administration to exchange their arguments on the dispute and, if possible, to solve it before the judge's ruling.
- It includes:
 - (a) administrative proceedings if they have a strong enough link with the trial;
 - (b) investigation proceedings before courts.

Prior Administrative Claim

In France, most tax disputes are resolved outside the presence of a judge under prior administrative claim proceedings

- It is compulsory to submit an administrative claim before seizing a lower court
- When dealing with a claim, tax authorities rule on the basis of law; the claim is not one for tax forgiveness
- The claim has a strong link with the prospective trial
- 2013: 3.4 million prior administrative claims, 18 000 claims brought before lower courts

Prior Administrative Claim

Which rights for the taxpayer ?

- A lesser level of protection than in front of a judge
- But not a substitute to the recourse to the judge
- A wide-open procedure...
 - (a) extensive time-limit
 - (b) absence of formalism
- ... Giving the right to get the payment of the tax suspended
- ... And, in case of a serious dispute, the right to access a lower court that will not be clogged with claims

+ Tax Litigation Proceedings

In France, only a minority of tax disputes are brought before a court

- This is only for 0.5% of all tax disputes
- For those disputes, the investigation proceedings before the court represent the ultimate chance to come to an agreement before the judge decides on the case
 - (a) tax relief decided by the administration
 - (b) withdrawal decided by the taxpayer

+ Tax Litigation Proceedings

Investigation proceedings are written

- The protection of the taxpayer's rights is mainly provided by the principle of confrontation, which includes:
 - a) The right to get all the documents and pieces produced by the adversary party (e.g. Conseil d'État 26 January 2011, *Weissenburger*, n° 311808)
 - b) The right to reply to all the arguments put in the debate, including the measures of inquiry decided by the judge

Tax Litigation Proceedings

Investigation proceedings are inquisitorial

- It is up to the judge to conduct the investigation of the case
 - He may take instruction measures
 - He may decide which documents have to be communicated and which amount of time each party has to reply
 - He does a lot of research by himself on the case
- The judge acts as a regulator between the parties more than as an arbitrator

Tax Litigation Proceedings

The protection of the taxpayer's rights rarely goes beyond what written law demands.

- Tax litigation is an objective litigation, not a subjective one.
- It is up to the legislator to find the right level of protection, not up to the judge.
- This logic is that of a civil law country.

+ Topic B: Expert Evidence and Testimony

(A) Quis iudicabit? Expert-evidence in German tax procedures:
Foundations and current developments

Prof. Dr. Klaus-Dieter Drüen

+ The *ex officio* principle

Justification, scope and limitation

- Private expert-evidence ≠ judicial expert-evidence
- Establishing the facts and freely evaluating the evidence is **privilege** and **responsibility** of the court (*ex officio* principle)
- correct legal decisions require expertise
 - Solution: Appointment and consultation of independent experts
 - Function: Compensation of missing expertise of the court
- Problems:
 - **Who** can be appointed as expert?
 - **When** must expert-evidence be obtained?
 - Is expert-evidence **binding**?



Appointment of and protection against experts

- Qualification-requirement: Expert-evidence requires relevant expertise
- **Taxpayer protection:** Tackling the appointment of specific experts
- Guiding principle: *“An expert may be rejected for the same reasons for which a party is entitled to challenge a judge.”*
- Primary reason for exclusion: fear of bias

+ Necessity of expert-evidence

- The compensating function of expert-evidence
 - missing expertise by the court => obligation (!) to consult an expert
 - Failure to consult expert-evidence => procedural fault
- Consultation of expert-evidence required by the law:
 - *explicit* demand for expert-evidence, e.g. medical certificates
 - *implicit* demand for expert-evidence, e.g. asset-valuation



Examples: classic fields of expert-evidence

- National
 - **Asset-valuation** and assessment of art, real estate, unlisted companies
 - Assessment of **facts** relevant to the eligibility for tax benefits ...
- International
 - Transfer prices?
 - Hidden dividends?
 - (-) not in Germany (BFH, 17 Okt. 2001 – I R 103/00)

+ Real estate valuation

- Recent decision: BFH, 7 Jan. 2015, I B 42/13
 - The appointment of an expert is at the courts discretion.
 - The valuation of real estate regularly requires the expertise of an independent sworn expert.
 - A court may only refrain from the consideration of expert-evidence, if it exceptionally disposes of sufficient and relevant own experience. Recourse to own expertise must be made clear.
- Taxpayer protection: Tackling the persuasiveness of expert-reports
 - Presenting own expert-evidence § 198 II BewG
 - Problem: Probative value of privately organized and funded expert-evidence



Binding or not? The legal status of expert evidence

- Principle of free consideration and evaluation of evidence
 - Must be controlled on the basis of common sense
 - Must be coherent and transparent
 - Not all mistakes – only essential ones – harm the credibility of an expert-report
- Problem: several contradictory expert-reports
- If common sense-check supports an expert-report then there might be an obligation to acknowledge its results

+ Topic B: Expert Evidence and Testimony

(B) Current issue concerning expert evidence in Indian Tax Cases

Dr. Justice Vineet Kothari

The Indian Evidence Act 1872

- When the Court has to form an opinion upon a point of foreign law or of science or art, or as to identity of handwriting [or finger impressions], the opinions upon that point of **persons specially skilled in such foreign law, science or art**, or in questions as to identity of handwriting [or finger impressions] **are relevant facts**. Such persons are called experts.

Who is an Expert?

- A person who devotes time, study, practice and or observation **to a special branch of learning**
- Expert Assistance is NOT Expert Evidence.



Case Law for Expert Evidence in Tax Litigation

- Chuhurmali v. CIT [1988] 172 ITR 250 (SC)
- Though the rigor of the rule of evidence contained in the Evidence Act did not apply to the proceedings under Income Tax Act but that did not mean the taxing authorities were barred from invoking the principles of the Evidence Act in proceedings before them.



Case Law for Expert Evidence in Tax Litigation

- State of Himachal Pradesh Vs. Jai Lal & Others (1999) 7 SCC 280 (“Apples Scam Case”)
- The Supreme Court held that the scientific opinion evidence given by an expert has to give **necessary criteria** for testing the accuracy of the conclusions, so as to enable the Judge to form his independent opinion and the Report submitted by Expert does **not go in evidence automatically**.



Case Law for Expert Evidence in Tax Litigation

- Speculation versus Evidence?
- In *Dasreef Vs. Hawchar* (2011) 277 ACR 611 High Court held that **speculative opinions or “guesstimates”** of experts are not admissible evidence.



Case Law for Expert Evidence in Tax Litigation

- M/s Japan Airlines Co. Ltd. Vs. CIT (2015) 85 SCALE 467
- The Supreme Court of India relied upon various technological aspects with expert documentary evidence contained in Airport Economic Manual & International Airport Transport Agreement (IATA) applicable to all contracting States to validate certain usage charges for airport & air navigation services



Case Law for Expert Evidence in Tax Litigation

- The Supreme Court of India in the case of CIT v. Bharti Cellular Ltd. [2011] 330 ITR 239 (SC) in its decision of 12 Aug 2010 emphasized and directed CBDT to issue necessary instruction to all the assessing authorities necessarily examining the technical experts, where the issue of technical nature involving huge revenue, arise for adjudication.
- The issue before Delhi HC and later on in appeal before SC in this case was whether payment made by Airtel (Bharti Cellular) to BSNL/MTNL toward interconnection/access/port charges for providing the facility of connecting calls of consumers from one circle to another, was “fees for technical services” requiring TDS u/s 194 J of the ITA.



Legislation in India for Prevention of Tax Evasion

- The Black Money (Undisclosed Foreign Income & Assets) And Imposition of Tax Act, 2015 (to be forced from 1st April 2016)
- The Prevention of Money Laundering Act, 2002
- The Prevention of Money Laundering (Amendment) Act, 2012 (15 Feb 2013)
- Foreign Exchange Management Act, 1999
- Multilateral Competent Authority Agreement (MCAA) on Automatic Exchange of Information (AEOI) (July 2015)
- The Benami Transaction (Prohibition) Act, 1988
- The Benami Transaction (Prohibition) (Amendment) Bill, 2015 (Date yet to be notified)



Legislation in India for Prevention of Tax Evasion

- Income Tax Act 1961
- Search and seizure provisions and additions to be made to disclosed income for unexplained income or expenditure or investments.
- Expert evidence in the form of **evaluation of seized articles** like gold and diamond jewellery, valuation of immovable properties is frequently used in India to bring to tax undisclosed income on the basis of such Expert evidence.



Legislation in India for Prevention of Tax Evasion

- The Black Money (Undisclosed Foreign Income & Assets) And Imposition of Tax Act, 2015
- Section 73 of Black Money & Imposition of Tax Act, 2015 authorizes Central Government to enter in to Agreement with Govt. of any other country for **exchange of information** for prevention of evasion or avoidance of tax on undisclosed foreign income.

Current Issues - Shortcomings

- Sufficient No. of Experts in the field of International Taxation - not available
- Sufficient data of comparables not available in public domain
- Large number of cases /disputes generating due to increase in international trade and services.
- Number/Tier of Hierarchies in Tax Disputes determination/resolution – 5 tier from AA to SC
- Delay/Long time taken in resolution of international tax disputes.

Current Issues - Shortcomings

- Judiciary in India already overloaded/overburdened
- No specialized Tax court at HC/SC levels – Though HC/ SC have dedicated Tax benches.
- Govt./CBDT slow in issuing clear Instructions
- Due to Parliament logjams – important legislations like GST - stuck.



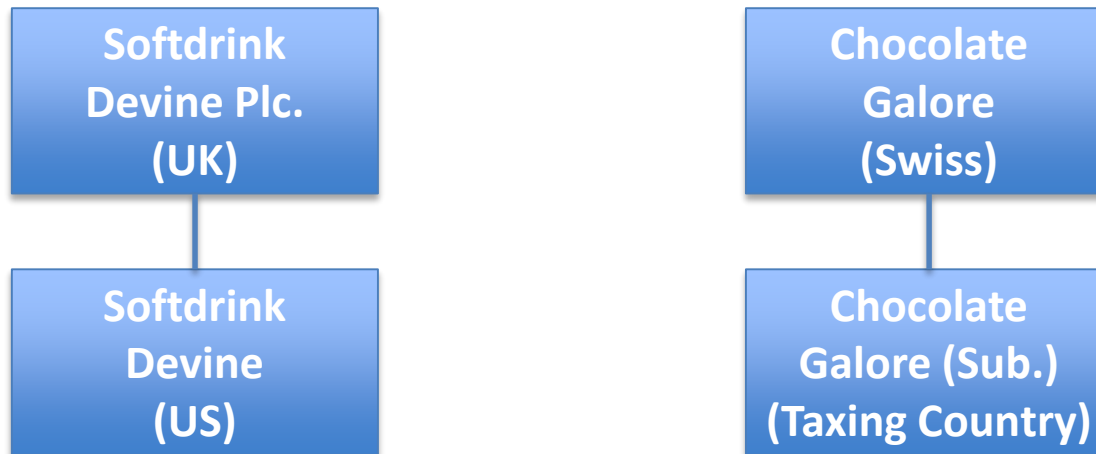
Alternative Dispute Resolution Mechanisms

- Dispute Resolution Panels (DRP)
- Settlement Commission
- Authority for Advance Ruling (AAR)
- Mutual Agreement Procedure (MAP)



+ Moot Trial

The Case Stated: Structure



The Case Stated: Counsel

- Chocolate Galore: **Philip Baker Q.C.**
- The DRA: **Robert Attard**
- Softdrink Devine: **Peter Connors**

The Case Stated I

- 1 The Domestic Revenue Agency (“the Revenue”) has assessed Chocolate Galore (Domestic) Inc (“the taxpayer”) to tax under the domestic transfer pricing rules. The taxpayer’s assessment has been challenged and is pending for hearing in the Tax Court at IFA sitting in Basel.
- 2 The taxpayer is a domestic subsidiary of Chocolate Galore AG (“the taxpayer’s parent company”), a multinational Swiss public company which sells chocolates throughout the world.
- 3 The Revenue contends that the taxpayer’s domestic income is impermissibly reduced by excessive amounts charged by its parent for the intellectual property and know-how needed to produce ‘Choc N’ Roll’ (“the product”), a chocolate-infused pop drink that is aimed at the teenage market.

The Case Stated II

4 The Revenue proposes to rely at trial upon evidence of the internal pricing structure of Softdrink Devine plc (“the third party”), a soft drink manufacturer incorporated in the United Kingdom, which the Revenue contends is an appropriate comparator.

5 The third party has made agreements with its subsidiaries in North America under which it licences intellectual property and know-how needed by its subsidiaries to produce a soft drink called ‘Sugar Hit’. The Revenue contends that ‘Sugar Hit’ is comparable to ‘Choc N Roll’.

6 The internal pricing structure of the third party that the Revenue proposes to rely upon in its assessment of the taxpayer has come to it in the normal course of its investigation into the affairs of the domestic subsidiary of the third party.

The Case Stated III

7 The information in the possession of the Revenue may include or refer to communications between the third party and its legal advisers, including views on the law expressed by the legal advisers partly in reliance on factual analysis performed by expert analysts to assist the legal advisers to give their advice.

8 The third party has a United States subsidiary called Softdrink Devine (US) Inc.

9 Some of the information available to the Revenue concerns the operations of the group of the third party in the United States which has been explicitly relied on for the United States tax filings of Softdrink Devine (US) Inc.

The Case Stated IV

10 The taxpayer seeks from the tax courts access to the information to be used by the Revenue, to enable the taxpayer to prepare its case. The third party has become aware of that and wants to prevent its internal pricing structure from being disclosed to the taxpayer and from becoming public. The taxpayer has made interlocutory applications to the Court seeking access to the details of the internal pricing structure of the third party from (a) the Revenue and (b) the third party. The Revenue wants to rely upon the information of the third party's internal pricing structure.

Orders I

The **taxpayer** seeks the following order:

- 1 That all material to be relied upon by the Domestic Revenue Agency in this proceeding be made available to Chocolate Galore AG, Chocolate Galore (Domestic) Inc and their counsel, legal advisers and experts.

- 2 That the information possessed by Softdrink Devine PLC of its internal pricing structure be made available to Chocolate Galore AG, Chocolate Galore (Domestic) Inc and their counsel, legal advisers and experts.

Orders II

The **Revenue** seeks the following order:

- 1 That the evidence it proposes to rely upon of the internal pricing structure of Softdrink Devine plc be received by the tax court in camera and not be disclosed to Chocolate Galore (Domestic) Inc except to its legal advisers upon them giving an undertaking that they not disclose the information to their client.



Orders III

Softdrink Devine plc seeks the following order:

- 1 A declaration that the information in the possession of the Revenue about the internal pricing structure used by Softdrink Devine plc in connection with the licensing to its subsidiaries of the intellectual property and know how to produce the soft drink “Sugar Hit” is commercial in confidence information (“trade secret”).

- 2 That the information referred to in 1 above not be disclosed to Chocolate Galore (Domestic) Inc and that it not otherwise be used in Court or otherwise be made public.

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- 2 That the information referred to in 1 above not be disclosed to Chocolate Galore (Domestic) Inc and that it not otherwise be used in Court or otherwise be made public.



Provision of information (*Income Tax Act*)

241. (1) Except as authorized by this section, no official or other representative of a government entity shall

- (a) knowingly provide, or knowingly allow to be provided, to any person any taxpayer information;
- (b) knowingly allow any person to have access to any taxpayer information; or
- (c) knowingly use any taxpayer information otherwise than in the course of the administration or enforcement of this Act, the *Canada Pension Plan* the *Unemployment Insurance Act* or the *Employment Insurance Act* or for the purpose for which it was provided under this section.



Provision of information (*Income Tax Act*)

(2) Notwithstanding any other Act of Parliament or other law, no official or other representative of a government entity shall be required, in connection with any legal proceedings, to give or produce evidence relating to any taxpayer information.

(3) Subsections 241(1) and 241(2) do not apply in respect of

(a) ...

(b) any legal proceedings relating to the administration or enforcement of this Act, the Canada Pension Plan, the Unemployment Insurance Act or the Employment Insurance Act or any other Act of Parliament or law of a province that provides for the imposition or collection of a tax or duty.



Provision of information (*Income Tax Act*)

(4) An official may

(a) provide to any person taxpayer information that can reasonably be regarded as necessary for the purposes of the administration or enforcement of this Act, the Canada Pension Plan, the Unemployment Insurance Act or the Employment Insurance Act, solely for that purpose;

(b) provide to any person taxpayer information that can reasonably be regarded as necessary for the purposes of determining any tax, interest, penalty or other amount that is or may become payable by the person, or any refund or tax credit to which the person is or may become entitled, under this Act or any other amount that is relevant for the purposes of that determination;



Provision of information (*Income Tax Act*)

231.1 (1) An authorized person may, at all reasonable times, for any purpose related to the administration or enforcement of this Act,

- a) inspect, audit or examine the books and records of a taxpayer and any document of the taxpayer or of any other person that relates or may relate to the information that is or should be in the books or records of the taxpayer or to any amount payable by the taxpayer under this Act, and
- b) examine property in an inventory of a taxpayer and any property or process of, or matter relating to, the taxpayer or any other person, an examination of which may assist the authorized person in determining the accuracy of the inventory of the taxpayer or in ascertaining the information that is or should be in the books or records of the taxpayer or any amount payable by the taxpayer under this Act,



Provision of information (*Income Tax Act*)

and for those purposes the authorized person may

- (c) subject to subsection 231.1(2), enter into any premises or place where any business is carried on, any property is kept, anything is done in connection with any business or any books or records are or should be kept, and
- (d) require the owner or manager of the property or business and any other person on the premises or place to give the authorized person all reasonable assistance and to answer all proper questions relating to the administration or enforcement of this Act and, for that purpose, require the owner or manager to attend at the premises or place with the authorized person.



Provision of information (*Income Tax Act*)

231.1(2) Where any premises or place referred to in paragraph 231.1(1)(c) is a dwelling-house, an authorized person may not enter that dwelling-house without the consent of the occupant except under the authority of a warrant under subsection 231.1(3).

231.2 (1) Notwithstanding any other provision of this Act, the Minister may, subject to subsection (2), for any purpose related to the administration or enforcement of this Act (including the collection of any amount payable under this Act by any person), of a listed international agreement or, for greater certainty, of a tax treaty with another country, by notice served personally or by registered or certified mail, require that any person provide, within such reasonable time as is stipulated in the notice,

(a) any information or additional information, including a return of income or a supplementary return; or

(b) any document.



Provision of information (*Income Tax Act*)

231.2 (2) The Minister shall not impose on any person (in this section referred to as a “third party”) a requirement under subsection 231.2(1) to provide information or any document relating to one or more unnamed persons unless the Minister first obtains the authorization of a judge under subsection 231.2(3).



Canadian Charter of Rights and Freedoms

Life, liberty and security of person

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

Search or seizure

8. Everyone has the right to be secure against unreasonable search or seizure.



Canadian Charter of Rights and Freedoms

Self-crimination

13. A witness who testifies in any proceedings has the right not to have any incriminating evidence so given used to incriminate that witness in any other proceedings, except in a prosecution for perjury or for the giving of contradictory evidence.



Canadian Charter of Rights and Freedoms

Enforcement of guaranteed rights and freedoms

24. (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.



Canadian Charter of Rights and Freedoms

Exclusion of evidence bringing administration of justice into disrepute

(2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

Taxpayer Bill of Rights

1. You have the right to receive **entitlements** and to pay no more and no less than what is required by law.
2. You have the right to service in both official **languages**.
3. You have the right to **privacy** and **confidentiality**.
4. You have the right to a formal **review** and a subsequent appeal.
5. You have the right to be **treated** professionally, courteously, and fairly.
6. You have the right to complete, accurate, clear, and timely **information**.

Taxpayer Bill of Rights

7. You have the right, unless otherwise provided by law, not to pay income tax amounts in dispute before you have had an **impartial review**.
8. You have the right to have the law applied **consistently**.
9. You have the right to lodge a service **complaint** and to be provided with an explanation of our findings.
10. You have the right to have the **costs** of compliance taken into account when administering tax legislation.
11. You have the right to expect us to be **accountable**.
12. You have the right to relief from penalties and interest under tax legislation because of **extraordinary circumstances**.

Taxpayer Bill of Rights

13. You have the right to expect us to publish our service standards and **report** annually.
14. You have the right to expect us to **warn** you about questionable tax schemes in a timely manner.
15. You have the right to be **represented** by a person of your choice.
16. You have the right to lodge a service complaint and request a formal review without fear of **reprisal**.



+ Thanks for your attention