CHAPTER 8

ANALYSIS OF SECONDARY LEGAL AND ADMINISTRATIVE RIGHTS

I INTRODUCTION

This Chapter concludes the analysis of taxpayers' rights for inclusion in the Model. It continues the functional analysis begun in Chapter 7. The rights discussed cover the normal operations of a revenue authority on a daily basis. If a revenue authority provides taxpayers' with these rights, it is necessarily largely complying with the framework of principles set out in Chapter 3 and balancing the competing claims of those principles. The rights do not attempt to deal with detailed design of the tax system and therefore matters such as substantive horizontal and vertical equity. They do cover the principles that underlie the administration of the tax system: elements of each of: equity and fairness, certainty and simplicity, efficiency, neutrality and effectiveness. They also seek to provide a balance between the competing principles.

The rights set out in this Chapter implement more specifically the primary legal rights of Chapter 6. They provide the substantive content for the administration of a tax system supported by the framework identified in Chapter 7 (including the principles of good governance) and enable the integration of the principles of good practice. The rights are set out following the functions of the tax system: general administration; information gathering, audit and investigation; assessment; sanctions and enforced collection; and objection and appeal.
Chapter 8

The rights comprise secondary legal rights, and primary and secondary administrative rights. Secondary legal rights focus on the specific operation of the law, whether at a general level in providing a standard for its operation, or in the context of individual procedures and specific processes. These rights may also be protected as primary administrative rights, in which case the content may be broader but less certain. At a lower level of operation, secondary administrative rights provide a form of protection in the context of detailed processes and less formal interaction. The distinction is made clear as appropriate in the analysis that follows. In many cases, the level of enforcement will depend upon how the right is adopted in a particular jurisdiction.

The rights discussed in this Chapter flow from the essential functions and operation of tax administration. The literature on each of these areas is immense both at a general level and in each jurisdiction. They comprise many controversial areas of the law, such as legal professional privilege and the rule against self-incrimination. It is beyond the scope of this thesis to explore the detailed legal content of each area, the debates and controversies. It does not pretend to do so.

The aim of this thesis is to develop a model of rules of best practice. Each jurisdiction will adapt the Model to its own legal system and wider context. It is therefore legitimate to draw from a particular reading of some of the literature those rules that seem to reflect best practice and can be so adapted. Any choice is necessarily idiosyncratic. However, that does not undermine the validity of making a choice, provided it follows a similar process to the requirements for the exercise of discretion set out below. The advantage of a Model of best practice is that it is just that. It provides a basis for reasoned argument, critical analysis and reflective development and improvement.

---

II ADMINISTRATIVE PRINCIPLES

A The Exercise of Discretion

1 The Nature of Discretion

The principle of legality requires the imposition of tax in accordance with the law. In Chapter 6 it was argued that under the legality principle there should be clear limits on discretion and a framework for its exercise. Discretion normally relates to process rather than the imposition of tax. However, revenue authorities may in many jurisdictions legitimately exercise discretion, for example, as to the level of penalty applicable. The revenue authority may also follow settlement procedures that allow a taxpayer in some circumstances to pay less than the legally stipulated tax due. The detail of when and how this is appropriate is dealt with below. However, the examples illustrate that although discretion is largely procedural, it can govern matters of substance.

In Chapter 6 it was also noted that the exercise of discretion is more common and broader in scope in common law jurisdictions than the more formal and legal approach to administrative law in many civil law jurisdictions. The body of law in both types of jurisdiction is useful in deriving the principles that should apply to the administrative exercise of discretion. The starting point of common law administrative law is generally to define the avenues available to challenge government action and to identify the remedies applicable where the action is unlawful. In defining taxpayers' rights, the result may be the
same, but the starting point is to define appropriate criteria for lawful and appropriate
decision-making. This is more akin to the civil law approach.

Defining appropriate criteria takes place, essentially, at two levels. On one level there
are specific criteria, which may differ depending upon the type of decision being made and
the nature of the decision-maker. Most of the criteria governing the decision to allow a
settlement of a significant tax dispute with a major corporation are going to differ from
those governing the decision whether a telephone request from a taxpayer asking a
relatively insignificant question is an oral binding ruling. However, at a higher level, there
are arguably basic principles that should provide a framework for any administrative
decision. This is the approach adopted under the administrative law of many jurisdictions.

In one of the more extensive studies of the theory behind common law discretionary
powers, Galligan supports this view and argues that one such principle 'is that officials to
whom powers have been delegated must account for their actions to the community'.¹

Even in undemocratic states, this is particularly true of the tax system. Earlier chapters
have highlighted that it is important for voluntary compliance that taxpayers perceive the
tax system as broadly fair. Aspects of this are political, but there is a strong requirement for
legal accountability wherever a decision is delegated and requires the decision-maker to
exercise discretion.

The nature of principles is that they are not precise and they overlap.² Broadly,
Galligan suggests that decisions should be: rational or reasonable; directed towards serving
the purpose or end for which the decision-making power was conferred; and compliant
with general considerations of morality.³ Perhaps the most important concept flowing from
the last point is that 'the rights and interests of individuals be treated with understanding
and respect' and from this, in turn, flow principles such as fairness and non-

---

D.J. Galligan, ibid., p. 5.
³ D.J. Galligan, above n. 3, p. 5.
discrimination. This can be seen in German administrative law. It places emphasis on controlling discretionary power both generally and in the tax courts to manage very carefully the interaction between the revenue authority and the individual along these lines, while protecting the integrity of state power. This analysis is consistent with the protection that the administrative law provides to those who are affected by decisions that require the exercise of discretion. It also coincides with the principles that underpin decision-making in tax administration.

It is worth reiterating that it is only where a decision-maker may exercise discretion that these principles apply. Most substantive tax decisions and many procedural tax decisions are matters of law governed by rules. It is not up to the revenue authority to decide differently from the rule, however, irrational, unfair or lacking in purpose the rule may seem. The making of tax rules should be governed by the primary legal rights set out in Chapter 6, which should prevent such problems with rules. If primary legal rules are not in place to do so, then political accountability comes into play and must deal with the problem, whether through the formal political process or informally, through rising levels of non-compliance, as described in Chapter 7.

---

6 Ibid.
8 See the comprehensive analysis of Diplock LJ in *Council of Civil Service Unions v. Minister for the Civil Service* [1989] AC 374 at 408.
9 As was stated, e.g., by the Canadian Federal Court of Appeal in *Ludmer v. The Queen* 95 DTC 5311 (FCA) at 5317. Although see the discussion on UK extra-statutory concessions in S. Eden, "Judicial control of tax negotiation" and N. Lee, "The Effect of the Human Rights Act 1988 on Taxation Policy and Administration", papers presented at the 6th International Conference on Tax Administration, Atax (Sydney, 15-16 April 2004).
To enable a revenue authority to be effective and comply with the principles of good governance outlined in Chapter 7 requires an emphasis on high level recruitment, training and motivation of revenue officers.\(^8\) The principles of good practice discussed in Chapter 7 will only work if there is a culture in place to support them, which is why there is such a strong emphasis in revenue authority business plans on outcomes, performance and quality service delivery. A strong quality-focused and service-oriented culture is equally important when it comes to the exercise of discretion. CIAT makes this clear, for example, in its 'Minimum necessary attributes for a sound and effective tax administration'\(^9\). It places significant emphasis on strengthening the human resources of a revenue authority, including the environment in which revenue staff work.\(^10\)

Where decision-makers have the training and ability to make decisions, there is nonetheless a requirement to follow certain processes in decision-making in order to reach an appropriate decision. The large body of administrative law devoted to the process of decision-making demonstrates that it is by no means straightforward. The development of English administrative law has seen a number of cases that set out the basic principles governing delegated decision-making. The principles reflect those often found in other jurisdictions, particularly in the common law family. Lord Greene MR in *Associated Provincial Picture Houses Ltd v. Wednesbury Corporation*\(^11\) emphasised that the decision-maker is required to come to a reasonable decision, taking account of certain matters in reaching a decision.

---


13 [1948] 1 KB 223 at 228-234.
and not taking account of others. Lord Hailsham L.C. in Chief Constable of the North Wales police v. Evans\(^4\) added the requirement that the individual must be given fair treatment by the decision-maker. The essence is that decisions should be reasonable, based on criteria or standards, and fair.

Galligan reaches the same conclusion from a theoretical analysis. He argues that the precepts of decision-making require at a minimum:\(^5\)

(a) that any exercise of powers be based on reasons, and that the reasons be applied consistently, fairly, and impartially; (b) that the reasons be intelligibly related to a framework of equally intelligible purposes, policies, principles, and rules (in general, standards) which can be seen fairly to fall within and be the basis of delegated authority; (c) that in matters of procedure and substance there be compliance with general, critical considerations of morality. Around these foundations more detailed and specific principles can be created. Their significance is that they go towards regulating the relationship between citizens and the state by stipulating the processes and principles that must be satisfied if the exercise of official powers is to be considered justifiable and legitimate. In particular they eliminate decision-making by whim, caprice, chance, or ritual; they provide the basis for identifying and eliminating arbitrariness, for developing general standards in making decisions, and for extending the requirements of fair procedures; and they open the processes of decision-making to external public scrutiny. There is then a focal point from which the decision-maker can have a critical view of his own decisions, and there is a basis for legal and judicial controls.

Decisions made in this way comply with the basic principles set out in Chapter 3.

Taxpayers would generally perceive decisions made as fair. The process ensures that

\(^4\) [1982] 3 All ER 141 at 143.
\(^5\) DJ. Galligan, above n. 3, p. 6.
decisions are not arbitrary, are transparent, and taxpayers can anticipate in advance the way a decision affecting them will be made, even if the outcome is still dependent on the exercise of the discretion. A clear process of this kind is efficient and helps to reduce both compliance and administration costs. Consistency facilitates business decisions. Timely decision-making is a factor in an assessment of reasonableness, particularly in the tax context, because it contributes to return on the use of funds. Most important, discretion is often given to revenue authorities to ensure that the tax system is effective in a dynamic environment. A proper process ensures that the rights of the taxpayer can be balanced against the requirement to safeguard the collection of revenue in a way that is both fair and seen to be fair.16

Galligan comes from a common law background. Yet the general theoretical approach is not dissimilar in this narrow sphere from the civil law tradition. The difference in approach between the Model and common law administrative law is that the Model sets out the requirements for the effective exercise of discretion, whereas administrative law sets out the requirements for review of the exercise of discretion. The latter is narrower in scope, although the reasons for review inform the criteria governing the appropriate exercise of discretion.

In his comparison of the common and civil law administrative traditions, Thomas' analysis suggests that the Model is more aligned to the civil law tradition.17 He states, for example, that French administrative law starts with the notion that the administration should be constrained by those limitations 'necessary to protect the individual in light of the needs of public administration'.18 German administrative tradition is distinctly different. However, the point of departure for German administrative law is also the concept of

16 Although G. Turley, Transition, Taxation and the State (Aldershot, Ashgate, 2006), p. 113 argues that in transition countries, it is important for effectiveness to reduce the discretionary power of tax officials and inspectors.
18 Ibid., p. 15.
protecting the subjective rights of individuals from the exercise of state power and
discretion; a protection subsequently reinforced by strong judicial review. It is an
approach accepted by the European Community as it has sought to blend different
administrative law practice. As such, it provides justification for the Model to provide
guidance for the exercise of discretionary decision-making powers themselves rather than
for how a court might subsequently review such decisions.

3 Criteria Governing the Exercise of Discretion

The broader legal constraints governing the exercise of discretion are discussed in Chapter
6 and covered by Article 5 of the Model. This would cover such issues as the legality of
decisions, acting beyond the powers of the decision-maker and the improper legal exercise
of discretion. It also covers the principles of non-discrimination and proportionality.

Using Galligan’s analysis, the first criterion governing the exercise of discretion is
that any exercise of powers should be based on reasons, which are applied consistently,
fairly, and impartially. There is no general requirement to give reasons in administrative
law, but increasingly in revenue administration, the requirements of consistency, fairness
and impartiality demand it. To ensure the operation of an effective tax administration it is
important to explain tax decisions to provide transparency, certainty and to encourage
taxpayers to see the system as fair. It is clear from the discussion in Chapter 7 that revenue

---

19 ibid.
20 ibid., p. 19. See also the discussion in H.W.R. Wade and C.F. Forsyth, above n. 2, ch. 7 on the increasing
and significant changes foreshadowed by the incorporation of European Law into the UK common law.
p. 367 et seq. and p. 630 et seq.; and J. Jowell, 'The Legal Control of Administrative Discretion' [1973] Public
Law, 178.
22 For example, see H.W.R. Wade and C.F. Forsyth, above n. 2, p. 517.
authorities, themselves, see their commitment to explain decisions to taxpayers as fundamental.²³

If reasons are to be given, what are the characteristics that they should have? Implicit in the giving of reasons is that they should be rational and logical. It is not always clear to a decision-maker when a decision is made that it is illogical or irrational. However, that the decision-maker must address the additional requirements of consistency, impartiality and fairness overcomes obviously illogical and irrational decision-making. Review mechanisms provide added protection. For example, in the common law it falls within the grounds for judicial review of administrative decisions.²⁴ However, the provision of both dispute mechanisms and recourse to a Revenue Ombudsman under Article 11 of the Model ensures that taxpayers can raise such issues without having to go first to the courts, which can be too costly for many taxpayers in time and money.

The requirement that decisions be applied consistently, fairly and impartially accords with the principles set out in Chapter 3, addressing in particular: perceptions of fairness, certainty, the rule against arbitrariness, transparency and efficiency. Many revenue authorities provide advance tax rulings, often with extensive explanations, to cater for this demand. However, there is a clear understanding among revenue authorities that the principles of good practice discussed in Chapter 7 increasingly demand that any decision given should reflect these characteristics. Inconsistent application of the law leads to a breakdown in trust. Perceptions of unfairness where taxpayers in the same position are treated differently can lead both to concerns as to the integrity of the system and to increased non-compliance.²⁵ Partiality reflects not only bias, but the threats of arbitrariness

²⁴ R. Douglas, above n. 21, p.446.
and corruption, as discussed in Chapter 7. The first criterion is therefore consistent with
good practice in tax administration.

From a practical standpoint this raises important questions in relation to resources,
management, structure and organisation within a revenue authority. The CIAT 'Minimum
necessary attributes for a sound and effective tax administration' mentioned above, focus
heavily on the requirements necessary to guarantee integrity, impartiality and taxpayer trust.
Many of these relate to training, resources, systems and procedures. It follows on from the
discussion on principles of good tax practice in Chapter 7.

Revenue authorities recognise the importance of encouraging these principles. In
2006, South Africa introduced a legally binding ruling system, 'intended to promote clarity,
consistency and certainty' and following the example of countries such as Australia and
New Zealand. However, with the best intentions, even the most sophisticated OECD
revenue administrations struggle to achieve consistency. In Canada, for example, an audit
in 1993 of the relatively new GST ruling system found that 'in an unmailed system...the
risk of issuing inconsistent or inaccurate rulings and interpretations is relatively high. The
decentralization of interpretation services...increases the risk of inaccuracies in rulings and
interpretation'.

Although institutionally it is difficult to achieve complete consistency and fairness,
there are two levels of response: organisational and individual. Organisationally, for
example, it is important to ensure that systems are in place to enable consistent, fair and

---

16 See, e.g., Turley's analysis of corruption in 25 countries in transition in G. Turley, above n. 16, pp. 97-123
and L. Rakner and S. Gloppen, 'Tax Reform and Democratic Accountability in Sub-Saharan Africa',
paper presented at an IDS Taxation Seminar (28-29 October 2002), p. 6,
<www.ids.ac.uk/gds/cfs/activities/Taxation-Seminar.html>, 1 October 2006.
19 See, e.g., in Australia, The Treasury, Report on Aspects of Income Tax Self Assessment (Canberra, The Treasury,
Chapter 8

impartial decision-making across the revenue authority. This will require sufficient resources to allow decisions made in one part of the organisation to be made available to decision-makers making similar decisions in other parts. It will require adequate training of both decision-makers and those responsible for collating and disseminating information. It will require taxpayer education so that the information provided by taxpayers and upon which decisions are made is sufficient to ensure consistency. Individually, however, it will require training for decision-makers so that whatever the resources, systems and information available to them, they make the best possible decision that they can make on the basis of the information before them.

This leads directly into Galligan's second criterion, paraphrased as: the reasons given for a decision should be intelligibly related to a framework of equally intelligible standards which can be seen fairly to fall within and be the basis of delegated authority. The criterion sets out how a decision should be made. Any decision-maker is constrained by the extent of the discretion afforded. Within the parameters constraining the exercise of discretion, how should the decision-maker approach her or his task? The essential point established by Galligan here is that no decision is made in a vacuum. There are rules, principles, policies, guidelines, precedents and other factors that inform the context and framework within which a decision is made. All of these elements can usefully be described as constituting standards, which, using Galligan's criterion, should form the basis for any decision.

Given the breadth of formal and informal rules and other influences on any decision, how does a decision-maker determine a hierarchy of their importance in reaching a decision? Modern management and decision-making processes have made this

30 One of the purposes of the work carried out by the OECD, see OECD, Strengthening Tax Audit Capabilities: General Principles and Approaches, above n. 10; OECD, Strengthening Tax Audit Capabilities: Auditor Workforce Management, above n. 10.

31 That this is vital in the broader context of tax administration can be seen in G. Tutley, above n. 16, and in a specific country example, J.K. Hyun, 'Mongolia: Reform of the Tax Audit System', (2006) 12 Asia-Pacific Tax Bulletin, 341.

32 For an extensive discussion of theories of the model of rules and discretionary authority, see D.J. Galligan, above n. 3, p. 56 et seq.
determination much easier based on substantial theoretical work on structuring discretion.\textsuperscript{33}

The extent of the influences on a decision is confined by the context, particularly at lower levels of decision-making. Many of the decisions can be confined strictly within certain parameters and if they fall outside the designated areas within which a decision can be made, they are escalated to a higher level decision-maker.\textsuperscript{34} The decision-making process is highly structured and manuals, check-lists, databases and comprehensive procedural guidelines are in place across revenue authorities and within individual areas to facilitate high quality decision-making across the organisation. The quality of the process is maintained through checking mechanisms by both peers and officers at a higher level. Fairness is increasingly enhanced by the transparency in revenue decision-making processes.\textsuperscript{35}

Two types of problem can arise from this approach. First, it does not guarantee that revenue officers will follow it. A number of studies of reforms of tax administration in developing countries note the difficulty in making revenue officers follow the rules where the culture within the tax administration and the broader environment do not reinforce adherence to the rules.\textsuperscript{36} This is a systemic issue that needs resolution whether or not discretion is given to revenue officers.

\textsuperscript{13} Pioneered by K.C. Davis, \textit{Discretionary Justice} (Baton Rouge, Louisiana State University Press, 1969) and discussed extensively in D.J. Galligan, ibid, p. 167 et seq.

\textsuperscript{14} These form part of the operational guidelines within almost every revenue authority and are reflected in the CIAT, 'Minimum Necessary Attributes for a Sound and Effective Tax Administration', above n. 11, e.g., p. 6: 'Actions, methodology and performance standards system implemented and in operation for management control'.

\textsuperscript{35} CIAT, ibid. The extent of consultation in developing internal guidelines is quite remarkable in some revenue authorities. Although it could be argued that some of this is window dressing, the range of avenues for community input in jurisdictions such as Australia, New Zealand and Canada ensures that taxpayers are very satisfied with their revenue authorities: see the detailed discussion under the heading, 'Principles of Good Practice' in Chapter 7.

Second, structured decision-making can encourage a technical or mechanical application of the relevant standards. It is a problem if appropriate exercise of discretion is constrained so that it does not take account of the particular factors relevant to a particular case that distinguish it from other cases of the same kind. This can be overcome by effective training of personnel, a system of escalation of more complex matters to revenue officers with more experience and a system of checking and approving decisions at a higher level, before they are sent out. This step is also important as it ensures that, in their review, higher level revenue officers can take appropriate account of policy, legislative and other developments that might impact on the decision.

The use of procedures, manuals and checklists to aid in decision-making does not obviate the exercise of discretion, but it makes it manageable. It also does not prevent a mix of approaches to decision-making. A decision on an objection against an assessment may be relatively easily dealt with on the information provided in accordance with a set of fairly specific standard procedures. A decision on an advance ruling request in a complex technical area might require a range of activities by the revenue officer in coming to a decision. They might include: discussions and even negotiations with the taxpayer to understand and refine understanding of the question and the relevant facts; research using a range of libraries, databases and the experience of other officers; and conferencing with senior officers from different locations and sections. Standard procedures in answering a complex advance ruling request may be comprehensive, but can still be framed sufficiently

---

37 This is the case in all institutional decision-making. See the tension in the European Court of Human Rights between objective and subjective approaches to interpretation, particularly during Sir Gerald Fitzmaurice’s term as a judge; described in C. Ovey and R.C.A. White, *Jacob’s & White: The European Convention on Human Rights* (4th edn, Oxford, OUP, 2000), p. 52 et seq.

38 D.J. Galligan, above n. 3, p. 169 et seq. He notes at p. 178 that ‘the risk of arbitrariness is high...where powers are exercised by officials whose expertise and training are limited, and whose decisions are unlikely to be reviewed or checked in a systematic way by other officials.’
broadly to cater to a multi-step process incorporating substantial information from numerous sources.\(^\text{39}\)

The essence of this approach is to ensure the best quality decisions can be made in a complex and changing world. Structure and constraint in decision-making, when properly applied, addresses the common concerns that decision-makers can use their powers for improper purposes, take account of irrelevant considerations in reaching their decisions and not relate the reasons they give to the standards used.\(^\text{40}\) To avoid misuse of discretion in more complex matters, where the standards are less specific, it is important to escalate the decision to more senior revenue officers. The requirement for reasons and the transparency that comes with it, places an obligation on the decision-maker that helps to focus attention not just on making the right decision, but being able to justify it.

At a higher level of abstraction, there is an overarching requirement of reasonableness required for intelligible reasons to fit within intelligible standards that fairly fit within the scope of the discretion. The common law concept of reasonableness, which can be used to exclude irrationality, discrimination and disproportionality,\(^\text{41}\) is extended in the civil law by the principles of proportionality and legitimate expectation.\(^\text{42}\) Although the common law does not have the clear theoretical rationale for the application of the reasonableness principle, the civil law aim of ensuring that there is an optimal balance between public administration and social interests and the safeguarding of individual interests is inherent in proper decision-making within any tax administration.\(^\text{43}\)

The broader concept of reasonableness relates also to the third Galligan criterion: that in matters of procedure and substance there be compliance with general, critical

---


\(^{40}\) R. Douglas, above n. 21, p. 399 *et seq.*

\(^{41}\) R. Douglas, ibid., p. 461 *et seq.* and R. Creyke and J. McMillan, above n. 21, p. 304 *et seq.*

\(^{42}\) R. Thomas, above n. 17, p. 15.

considerations of morality. This may perhaps be better expressed for our purposes: that discretionary power should be exercised fairly and reasonably in matters of procedure and substance. It returns to the fundamental principle of Chapter 3, that it is important that the public perceives the tax system as fair.

What does this mean in practice? The common law tends to define reasonableness to mean what is not unreasonable. Although Lord Hailsham LC underlines the difficulties in defining reasonableness, as two reasonable people can reasonably come to opposite positions on the same set of facts, the core content of what is fair and reasonable is generally understood and has changed little over the years. Coke CJ in 1598 said that the exercise of discretion in reason and law:

is a science or understanding to discern between falsity and truth, between wrong and right, between shadows and substance, between equity and colourable glosses and pretences, and not to do according to their wills and private affections.

This concept is accepted by revenue authorities. It is the substance underlying, for example, the ATO ‘core values of fairness and professionalism; transparency and accountability; and consultation, collaboration and co-design.’ It is why the ATO, like other revenue authorities, seeks affirmation of taxpayer perceptions that it is fair and reasonable in the exercise of its powers. The ATO is proud that in 2006, of over 1500 businesses surveyed

---

15 B. Torgler, 'Tax Morale and Tax Compliance: A Cross Culture Comparison', in National Tax Association, Proceedings: Ninety-Sixth Annual Conference 2003 (Washington DC, National Tax Association, 2004), p. 63, p. 72, notes, e.g., that in a cross-cultural study involving empirical data gathered from both Costa Rica and Switzerland, there was a strong positive correlation between taxpayers' trust in the government and legal system and tax morale, leading to the conclusion that compliance is higher in jurisdictions with a government and legal system that are seen as fair and supportive of their taxpayers.
72 per cent said that the ATO administers the tax system fairly and 88 per cent said that
the ATO treats them in a fair and impartial way.50 Even those revenue authorities in
jurisdictions with governments ranking higher on corruption indexes recognise these
values. For example, as noted in Chapter 7, the Zimbabwe Revenue Authority website has
as its banner headline, 'Integrity, Transparency, Fairness: We are here to serve'51 and the
Kenya Revenue Authority highlights on its website its annual survey to help it provide
better quality service to its customers.52

To be fair and reasonable encompasses such aspects as proportionality: adminis-
trative measures must not unnecessarily or disproportionately interfere with
individual rights to achieve their aim.53 It extends to procedural fairness or natural justice,
which has been recognised as a 'kind of code of fair administrative procedure' in the
common law.54

One of the more important elements of reasonableness not dealt with elsewhere is
the principle of legitimate expectations. It has been accepted in the common law55 and
reflects a longstanding civil law principle that protects those legitimate expectations that
have been raised through administrative conduct.56 Particularly important in the tax
context, it does not extend to subjective hope or an implied promise, but it can arise as a
result of administrative inaction.57 It is an element of reasonableness and the courts will
only entertain expectations that are reasonable in the light of all the circumstances.58

Whether the legitimate expectation induced can operate when it falls outside the
power of the revenue authority will depend upon the law of the jurisdiction. In Germany,

---

85 <www.zimra.co.zw>, 1 October 2006.
86 <www.kraz.go.ke>, 1 October 2006.
comprehensive analysis of the common and civil law positions.
90 Ibid.
91 R. Thomas, above n. 17, p. 53.
92 Ibid., p. 55.

355
the expectation can be fulfilled through a principle that allows the balancing of the interests of legality and legal certainty, while Netherlands courts will allow reliance on the expectation provided the interests of third parties are not affected. The UK follows the European Court of Justice and "balances the protection of the general public interest against the individual's legitimate expectations." This has seen a number of extra-statutory concessions made by the Inland Revenue upheld by the courts for the sake of fairness even though they are contrary to the law.

Fairness extends to matters of legal certainty in the considerations of the European Court of Justice. In *Gebr. van Es duurzame Agents* v. *Inspecteur der Invoerrechten en Accijnzen*, the Commission failed to amend a regulation concerning tariff nomenclature when it was required to do so. This resulted in uncertainty on the part of the individuals as to their legal obligations, and had the consequence that the Court held that the regulation could not thereafter be applied. For fairness, the European Court of Justice also requires adequate notice before administrative and legislative measures can take effect. Although, exceptionally, a Community measure may take effect before its publication where the purpose to be achieved and legitimate expectation demands it.

The Model should adopt Galligan's criteria for the exercise of discretion in Article 6. From the analysis it should include the reasonableness and fairness requirement. The meaning extends to cover the principle of legitimate expectation. Legitimate expectation also falls within the concept of certainty in rule-making, covered in Article 9 of the Model.

---

59 Ibid., p. 56.
61 Ibid., p. 408 and S. Eden and N. Lee, above n. 9.
Whenever a taxpayer is entitled to a decision or action by the tax authority, it should occur either within a specified period or within a reasonable time. Likewise, whenever a taxpayer is required to do something, provide information, or otherwise assist the revenue authority, it should be after the taxpayer is given reasonable notice, unless it is clear that such notice would reasonably impact on the success of the relevant administrative action. This latter point is dealt with more fully in the context of search and seizure.

Statistics contained in the reports from the Ombudsman office in most jurisdictions suggest that delays, errors and misunderstandings form the greater part of the work of these offices. Tax legislation, by virtue of the requirement of legal certainty, sets out numerous time limits within which taxpayers must fulfil their obligations. It is less helpful in providing time limits within which the revenue authority must act outside formal procedures. This is appropriate, as much of the point in giving the revenue authorities powers to administer the tax system would disappear if administrative procedures were legislated.

Revenue authorities recognise the obligation that they have to act fairly, efficiently and effectively. It is not in the best interests of good administration for administrative delays to form the bulk of complaints about the tax system. The OECD GAP002 sets out in its model administrative charter a number of rights for which specific turnaround times should be inserted and a number of others which should be dealt with ‘as quickly as possible’. This is reflective of most tax administrations, which use published key

---


66 Above n. 23, p. 8.
performance indicators, as discussed in Chapter 7, to measure and improve their administration.

The principles of reasonable time and reasonable notice underpin the CIAT, 'Minimum necessary attributes for a sound and effective tax administration'. There is therefore widespread acceptance of their importance to good tax administration. However, it is also important that they are articulated as general principles, rather than simply specified as a particular requirement for particular actions. As a general principle, they can cover a range of actions for which a specific time period is inappropriate, especially when an action depends upon particular facts and circumstances. Ideally, the principles would be legislated to provide the option of judicial review. However, if it is felt strongly in a jurisdiction that this is inappropriate, they should at least be articulated clearly and given administrative enforceability through the dispute resolution mechanisms identified in Article 11 of the Model.

C The Principle of Fairness in Administrative Action

There are certain generally accepted rules of fairness governing administrative action. We have seen that in the common law they are articulated in terms of review of administrative action; in the civil law administrative procedure is usually clearly set out in a code. The rules of fairness apply to most administrative procedures considered in the Model.

---

67 Above n. 11, p. 7.
69 For example, see H.W.R. Wade and C.F. Forsyth, above n. 2.
Although each jurisdiction will have its own procedures under its administrative law, the Model sets out the general minimum standard expected for administrative procedures applicable to taxpayers. There will be variations: certain search and seizure actions undertaken by revenue authorities may not fulfil all of these requirements. It is important to establish a standard for administrative actions so that variations from the standard have to be justified.

A useful example of a code which melds many of the common and civil law principles is the South African Promotion of Justice Act 2000. The Constitutional basis for the Act is set out in the Preamble and is found in section 33 of the Constitution of the Republic of South Africa. It provides ‘the right to administrative action that is lawful, reasonable and procedurally fair and the right to written reasons for administrative action’. Section 3 of the Act sets out the requirements for procedurally fair administrative action and requires:

(a) adequate notice of the nature and purpose of the proposed administrative action;
(b) a reasonable opportunity to make representations;
(c) a clear statement of the administrative action;
(d) adequate notice of any right of review or internal appeal, where applicable; and
(e) adequate notice of the right to request reasons.

For example, G. Richardson, ‘An Analysis of the Impact of Tax Fairness Perceptions on Tax Compliance Behavior in a Non-Western Jurisdiction: The Case of Hong Kong’ paper presented at the 6th International Conference on Tax Administration (Sydney, Australia, 15-16 April 2004).

This is a straightforward, simple and clear statement of requirements that are generally accepted. They are contained in slightly different ways in almost every charter or statement of revenue administration practice. This formulation is therefore used in the Model.

D The Principles of Publication, Dissemination and Education

Article 6 of the Model requires that all rules applicable in the tax system shall be compiled and published accurately and in a form that is accessible to all users. It is fundamental to the effective operation of the tax system. Unless taxpayers know that they are required to pay tax in a particular situation and know how to go about it, it is difficult for them to comply. As tax compliance research has developed, it has become increasingly self-evident that compliance improves with publication and dissemination of information, and with taxpayer education.

There is a strong emphasis on information dissemination generally, but particularly to assist in any major change process. Change in tax systems is a constant and information dissemination and education is essential if taxpayers are going to perceive the system as fair. The more information that is available, the more certain are taxpayers of their duty to comply with the obligations that the tax system places upon them. If the information is

---

75 The general compliance literature and papers at successive conferences on international tax administration reflect this: e.g., the annual IRS Research Conferences (US) biennial ATAX International Tax Administration Conferences, (Sydney, Australia) and the Tax Research Network Annual Conferences (UK). It is essential to the proper operation of self-assessment and the successful introduction of reform. See, e.g., J. Allen, B. Jackson and M. McKee, 'Audit Information Dissemination, Taxpayer Communication, and Compliance: An Experimental Approach', paper presented at 2004 IRS Research Conference (Washington DC); D.R. Vos (Australian Inspector-General of Taxation), 'The Importance of Certainty and Fairness in a Self-Assessing Environment' and M. Redmond, 'Ireland -- a Case Study in Tax Administration Change Management', papers presented at the 7th International Tax Administration Conference (Sydney, Australia, 2006); and C. Richardson, 'Administrative Burdens and Simplification in HMRC', paper presented at the Tax Research Network Annual Conference (Southampton, UK, 2006).
simple to understand and designed to reach all types of taxpayer, including those in minority groups, with limited education or particular disabilities, it can provide greater certainty and comfort with the system. It also becomes more effective in collecting the tax due and more efficient in reducing the burden on taxpayers as they go through the process of complying with the law.

Most revenue authorities have extensive school and community education programs. The internet has transformed revenue authorities' ability to provide massive amounts of information relatively cheaply and easily to those who have access. Publication, dissemination, education and assistance are seen as necessary attributes for a sound and effective tax administration. They should be recognised as principles underlying the tax administration.

The consequence of recognising these principles would not be to open a floodgate of challenges to revenue decisions on the basis that proper information was not provided. This option would only be open, in most cases, where a taxpayer could show the adjudicator in the administrative dispute resolution process that there was a genuine lack of information available. Errors and misunderstandings through too little or misinformation are already a significant component of the work of an ombudsman office. Rather, it would provide general underlying principles to assist in the process of administrative dispute resolution. It would also allow the revenue authority to support budgetary claims for additional resources for an essential component of its administration.

---

The fairness principle reinforces the wider prohibition in most jurisdictions against discrimination generally. There is increasing awareness of the responsibilities that government agencies have to take action to support non-discrimination. This can be seen in public service legislation, public service charters and in the business or other plans of revenue authorities.

Taxpayers’ charters usually include some statement that taxpayers have the right to be informed, assisted and heard. However, a right to assistance should be articulated as a basic principle and in connection with those taxpayers requiring special or particular assistance. The benefit is as much to the revenue authority as it is to the taxpayer. Overtly making assistance available to those who need it acts both as an education process and assists to bring within the tax system those marginalised members of the community who are most likely otherwise to fall within the black economy.

Obviously, the breadth and depth of assistance required will directly affect a jurisdiction’s ability to budget for it. However, this does not warrant making the principle only a recommended right. All jurisdictions should do what they can for those taxpayers needing special assistance. The level of assistance will simply vary depending upon

---

80 For example, the International Covenant on Civil and Political Rights, art. 26; and European Convention on Human Rights, art. 14, discussed in C. Ovey and R.C.A. White, above n. 37, p. 412 et seq.

81 For example, in Australia, which has no national charter of rights and is not subject to a treaty such as the European Convention on Human Rights, the Constitution, various discrimination acts, the Human Rights and Equal Opportunities Commission and Public Service Act 1999 (Cth) are but a few of the statutes and bodies that place obligations on the ATO to deliver taxpayer assistance in a non-discriminatory manner: M. McLennan, above n. 68, p. 38. See in the US, N.E. Olsen, ‘Taxpayer Rights, Customer Service and Compliance: A Three-Legged Stool’ (2003) 51 Kansas Law Review, 1239.

82 For example, see OECD Taxpayers’ rights and obligations, above n. 74 and GAP002, above n. 23, p. 3.

83 For example, see OECD Taxpayers’ rights and obligations, above n. 74 and GAP002, above n. 23, p. 3.

It is important, however, that the principle of assisting all taxpayers is expressly articulated as fundamental to any tax administration. It is arguable, given the extent of the requirements in the Model to adopt principles of good governance and good practice, and to ensure the independence, fairness and impartiality of the revenue authority, that there is no need to articulate ethics and professionalism as a separate principle. There are several reasons why it is appropriate.

First, the extent and effect of corruption in governments and revenue authorities around the world suggests that it is essential for taxpayers to have a general principle that they can rely on in bringing a complaint through the revenue authority dispute resolution mechanism and, ultimately, a revenue ombudsman. Rarely would a revenue authority refuse to say that its officers act ethically and professionally. It is far more likely that a government would not introduce principles of good governance and comply with the International Monetary Fund Code of Good Practices on Fiscal Transparency. At least a statement of general principle gives some ground for administrative protection.

Second, although there are usually laws, both criminal and administrative, which require ethical and impartial behaviour, they are normally fairly specific because there are penalties associated with them. They do not necessarily cover the less obvious areas of

---

81 See A. Halkyard, above n. 77, p. 146 on the Hong Kong Taxpayers’ Charter.
82 G. Turley, above n. 16; S.S. Everhart, J. Martinez-Vazquez and R.M. McNab, ‘Corruption, Investment and Growth in Developing Countries’ in National Tax Association, above n. 45; and see the discussion in Chapter 7 on this point.
83 For example, in Australia: the Public Service Act 1999 (Cth), the Administrative Decisions (Judicial Review) Act 1977 (Cth), the various discrimination acts and the Crimes Act 1922 (Cth) to name but a few.
unethical conduct, where there may be a minor conflict of interest, a slightly dubious decision, or an unprofessional attitude which is affecting the proper determination of a taxpayer's liabilities. A general principle would do so.

Third, the nature of a principle of tax administration makes it a useful protection both for the taxpayer and the reputation of the revenue authority. Although it could be used both as a ground for judicial review and a basis for administrative complaint, it still has force even where it is only a basis for administrative complaint. It ensures that there is ground for complaint using the internal revenue authority dispute resolution mechanisms. It also allows escalation to the independent office of a revenue ombudsman.

The principles of ethical behaviour and professionalism are encapsulated in some form in most taxpayer's charters. It makes sense to reflect this in the Model. For those jurisdictions where it is not clear that they can be relied on by taxpayers using existing remedies, they are a useful additional protection. For those jurisdictions that do adhere to the principles as part of the general requirement of civil servants, stating them clearly as part of the rules governing the tax administration gives added weight to their content in a tax context. Professional behaviour includes the subsidiary concept that revenue officers will not draw an adverse inference simply because a taxpayer chooses to exercise available legal or administrative rights.

III INFORMATION GATHERING, AUDIT AND INVESTIGATION

---

87 M. McLennan, above n. 68, p. 34. Japan strongly emphasises this approach: National Tax Agency, above n. 70, p. 3 et seq.

88 For a wide range of country specific examples, see D. Bentley, above n. 7. For a general survey of the application of these obligations, see OECD Taxpayers' rights and obligations, above n. 74 and OECD, Tax Administration in OECD and Selected Non-OECD Countries: Comparative Information Series (2006) (Paris, Centre for Tax Policy and Administration, 2006) ("2006 OECD Comparative Survey").
It was noted in Chapter 2 that the Model does not include taxpayer obligations. It provides guidance on best practice to policy makers, setting out the rights that the rules governing the tax system should include. However, those rights are firmly rooted in taxpayer obligations. Nowhere is this more important to understand than in the context of information gathering, audit and investigation. Taxpayers’ rights must provide an appropriate safety net for taxpayers without undermining the purpose and effectiveness of the tax system.

Taxpayers’ rights have been used in the past as a stick with which to beat revenue authorities. Greenbaum argued that the US Taxpayer Bills of Rights 2 and 3 were simply vehicles used for political purposes to undermine and reduce the powers of the IRS. He suggested that:

There is a serious problem associated with undermining the IRS unnecessarily or excessively. The concern is that the IRS would no longer be perceived as a credible or effective tax administration and widespread voluntary compliance with the law would cease.

Particularly in an environment of increasing self-assessment, comprehensive powers are critical to a revenue authority’s effective operation: most importantly to gather information, audit taxpayers and enforce the payment of taxes that are legally due and payable. Much of the analysis in this thesis so far has focused on the importance of the relationship between taxpayers and revenue authorities. This is appropriate as it is the engine room of voluntary compliance. However, there are several themes in modern tax administration that require

---

A. Greenbaum, 'United States Taxpayer Bills of Rights 1, 2 and 3: A Path to the Future or Old Whine in New Bottles', in D. Bentley, above n. 7, p. 347, p. 377.
Chapter 8

a relatively powerful steel fist within the velvet glove of improved relationships. The following paragraphs identify some of the more important of these themes.

First, self-assessment has become the preferred form of assessment of taxpayers over administrative assessment procedures because it is seen as more effective and more efficient. Where administrative assessment is used, it is largely automated. The result is a focus by revenue authorities on a risk-based and targeted verification process designed to identify the most significant instances of non-compliance. These are dealt with using a range of methods designed to encourage voluntary compliance, but designed also to penalise those who abuse the system; in particular those engaged in fraud and evasion. It is critical to maintain the balance between encouragement and deterrent to make the tax administration as effective as possible.

Second, there is a strong trend in revenue authorities towards performance-oriented budgeting and performance management as governments and citizens demand value for money (efficiency and effectiveness) from their revenue authority. OECD revenue authorities are arguably reasonably well resourced. Non-OECD countries are usually not. The emphasis on outcomes inevitably means that there is a welcome trend towards ensuring that there is efficient use of the resources that are available. This loops back again to the importance of tax audit activities and verification and related functions.

---

92 2006 OECD Comparative Survey, above n. 88, p. 57.
93 Ibid.
94 Ibid. Most revenue authority websites publish the annual compliance program, which identifies the most pressing compliance issues.
98 2006 OECD Comparative Survey, above n. 88, p. 100 et seq.
100 2006 OECD Comparative Survey, above n. 88, p. 105 and N. Brooks, above n. 25, p. 33.
Third, the advent of electronic commerce has been identified for some time as a threat to revenue. Revenue authorities have responded both individually: through domestic measures; and also multilaterally: for example, by amending relevant articles and commentary in the OECD Model Tax Convention on Income and on Capital, designed to flow through to individual double tax agreements. However, electronic commerce transactions remain as a significant compliance risk requiring strong measures to combat avoidance and evasion.

Fourth, globalisation has a number of ramifications for revenue collection. Harmful tax competition and the problems associated with bank secrecy relating to accounts held by non-residents of the host jurisdiction have attracted significant revenue activity. The ATO Compliance Program 2006-07, which is illustrative of the issues facing most mature economies, also identifies as problems activities such as: profit shifting, international consumption tax schemes, cross-border financing, and compliance issues associated with individual mobility. Tanzi has written extensively for many years from an IMF perspective about these challenges to the revenue authorities; he adds to the list the taxation of derivatives and hedge funds and the inability to tax financial capital. As soon as taxpayers entering into these activities move beyond acceptable tax planning, these issues have nothing to do with lapses in voluntary compliance and everything to do with intentional avoidance and evasion of taxes. It is essential that revenue authorities have the tools to counter serious risks to revenue of this kind.

Above n. 95. See further, the Final Seoul Declaration, following the Third Meeting of the OECD Forum on Tax Administration (14-15 September 2006), <www.oecd.org>, 1 November 2006.
Chapter 8

Fifth, aggressive tax planning, defined by Braithwaite as 'a scheme or arrangement put in place with the dominant purpose of avoiding tax',¹⁰⁵ is widely recognised as a growing risk to revenue in countries around the world.¹⁰⁶ At its extremes it blurs into evasion of taxes and fraud. The latter remain significant threats to the revenue, particularly in the context of corruption, organised crime and money laundering activities.¹⁰⁷

Realistically, revenue authorities are often at a disadvantage in combating systematic and intentional tax evasion by powerful taxpayers. This is reflected in works by international experts with titles such as The Crisis in Tax Administration.¹⁰⁸ Tillinghurst notes:¹⁰⁹

The number of challenges facing the Internal Revenue Service in administering and enforcing compliance with the international provisions of the U.S. tax law is indeed prodigious... Criminal types are not, of course, cooperative, nonreporters are hard to find, and the multinationals, even when compliant or relatively so, present a daunting range of issues of both legal and factual complexity.

It is particularly so in non-OECD countries where limited resources and a relatively immature infrastructure compounds weaknesses in enforcement programs.¹¹⁰ The aim of taxpayers’ rights therefore should not be to undermine a revenue authority’s duty and ability to collect the tax that is legally due under the laws of the jurisdiction in which it

---

¹⁰⁶ J. Braithwaite, ibid, describes the recurring cycles of aggressive tax planning in the US and Australia. This is reflected in the ATO, Compliance Program 2006-07, above n. 95 which includes the topic as one of its major issues.
¹⁰⁷ In some countries these issues threaten the viability of the tax system. See, e.g., G. Turley, above n. 16.
¹¹⁰ N. Brooks, above n. 25 and n. 68 and G. Turley, above n. 16.
operates. Braithwaite notes that in the 21\textsuperscript{st} century, the measures required to ensure compliance will continue to include: responsive regulation, escalating enforcement to counter increasingly egregious breaches of the law, and adequate and escalating penalties to act as a serious deterrent.\textsuperscript{111}

Taxpayers' rights provide a safety net to ensure that a tax system operates according to accepted rules of procedural fairness and provides adequate opportunity for taxpayers to seek review. Taxpayers' rights provide a legal and moral basis for the proper operation of the tax system. They rest not simply on the laws of a particular jurisdiction, but also on generally accepted norms of international law and practice. Within these parameters, it is appropriate to assume that taxpayers should be expected to act honestly and themselves comply both with the rules of the jurisdictions in which they live and those in which they choose to operate or simply enter into transactions.

A direct result of this assumption is that in the increasingly difficult environment for collecting taxes, the revenue authority has the right to complete information that it requires to assess the tax liabilities of each taxpayer. It is essential that there is appropriate protection in place to prevent misuse of that information. However, by giving the revenue authority complete information the taxpayer demonstrates the good faith that then allows the operation of a wide range of protective rights in relation to the way that information is used. The same rights simply cannot be afforded to taxpayers who refuse to provide complete information.

It comes back full circle to the rule of law. Where a taxpayer submits to the rule of law in a jurisdiction, that taxpayer is given the full protection of the law and a wide range of non-legal rights associated with voluntary compliance. Where a taxpayer intentionally steps into the gloomier shadows of legal uncertainty, the protective rights afforded to the taxpayer become more restricted. Where the taxpayer intentionally breaks the law, the

\textsuperscript{111} J. Braithwaite, above n. 105, p. 177 et seq.
rights are limited to legal rules of procedural fairness in criminal proceedings. The description of best practice in tax administration set out in this section does not therefore extend taxpayers' rights beyond what is reasonable in the current compliance environment. It rather seeks to maintain an appropriate balance between taxpayers' rights and the legal obligation of the revenue authority to collect taxes due.\(^{112}\) It mirrors the requirements of transparency and accountability demanded of the revenue authorities themselves, which are fundamental to principles of good governance and good practice.

A General Information Gathering

Revenue authorities rely on information to assess a taxpayer's liability to pay tax under the law and/or to verify taxpayer self-assessment. The primary legal rights in Chapter 6 govern the requirements for the imposition of a tax liability. Secondary legal rules normally govern the procedures for the practical administration of the tax system. These will cover such matters as: who must file a return or other document; who has the authority to demand a return, an additional return or another document; the information that must be included in a return or other document; and the timing for lodgement of a return or other document. Primary legal rights cover matters that might impact on the proper operation of the rule of law, such as the general requirement that laws should not operate retroactively and that the rules governing the provision of information must be published and available to taxpayers so that they can comply with the law.

The general rights to privacy in a jurisdiction cover such issues as national identification numbers and their broader use by government. Such arguments are often

\(^{112}\) J.G. McCubbin, above n.96.
caught up in the debate over taxpayers' rights, but taxpayers' rights are limited to ensuring the confidentiality of information provided for tax purposes. It is the application of the general rights of citizens that provide limitations on how a jurisdiction may choose to identify or register its citizens. Most revenue authorities now use unique taxpayer identifiers or another high integrity number for both personal and business taxation.

There are four general areas of importance that relate to information gathering:

1. secrecy or confidentiality provisions governing information gathered;
2. gathering information from taxpayers;
3. gathering information from third parties; and
4. exchange of information with other revenue authorities.

They are dealt with in order. As noted above, the general assumption is that it is legitimate for a revenue authority to require the provision of information by its citizens. The rights considered here are those that are concerned with how the information is obtained and how it is dealt with once it has been obtained.

1 Secrecy or Confidentiality Provisions

The gathering of information from taxpayers is predicated upon the revenue authorities treating the information as confidential. Most jurisdictions have general privacy laws, but tax laws involve the provision of some of the taxpayer's most detailed and intimate information. It is therefore in the public interest that there should be additional specific

---

113 This has been a particular issue in Japan. See K. Ishimura, 'The State of Taxpayers' Rights in Japan' in D Bentley, above n. 7, p. 227, p. 256.
114 2006 OECD Comparative Survey, above n. 88, p. 121.
115 OECD Taxpayers' rights and obligations, above n. 74, para. 2.26 and OECD, GAP002, above n. 23, p. 9.
and stringent safeguards governing information provided for tax purposes. They should set out precisely how, when and where information relating to a taxpayer can be used.

The rules should govern the collection, storage, security, access to, correction of, use and disclosure of information provided. They should note, in particular, the importance of a revenue officer using the information only in the course of her or his duties. The rules should extend to third parties working for the revenue authority and given access as a result to confidential taxpayer information.

There should be restrictions on revenue officers making records of information or divulging or communicating information about anyone's tax affairs. The restrictions should continue to apply after they cease employment as a revenue officer. Within the revenue authority these activities should be restricted to the course of normal duties as they affect that taxpayer's tax affairs. That might extend to divulging information about one taxpayer to another where the basis of assessment of the other taxpayer depends upon that information. In common law jurisdictions this can occur, for example, with trust distributions where details of the trust distribution notified to the revenue authority by a trust may be disclosed to the taxpayer to whom the distribution was made.

Sometimes information is passed to other government departments as revenue authorities take on roles wider than tax collection. The same rules should apply to officers of other departments in respect of confidential tax related information. Passing information outside the revenue authority or to an approved government department should normally only occur in connection with tax recovery proceedings or to other

---

116 For example, Australia Income Tax Assessment Act 1936 (Cth) s. 16, and Crimes Act 1914 (Cth) s. 70. See further, Australian Law Reform Commission, Protecting Classified and Security Sensitive Information Discussion Paper 67 (Canberra, Commonwealth of Australia 2004), p. 113 et seq. Canada has extensive security arrangements in place, particularly to protect electronic data: <www.crarc.gc.ca>, 1 November 2006.

117 For example, K. Wheelwright, 'Taxpayers' Rights in Australia' in D. Bentley, above n. 7, p. 57, p. 74 and M. McLennan, above n. 68, p. 43.

118 For example, Canada has extensive security arrangements in place, particularly to protect electronic data: <www.crarc.gc.ca>, 1 November 2006.


120 2006 OECD Comparative Survey, above n. 88, p. 14 and OECD Taxpayers' Rights and Obligations above n. 74, para. 2.27.
Revenue authorities in connection with treaty provisions (discussed below). Section 241 of
the Canadian Income Tax Act permits disclosure, for example, where there are: 121

- criminal proceedings;
- legal proceedings that relate to the enforcement of the tax law;
- imminent danger of death or physical injury to any individual; and
- intra-governmental or inter-governmental transfer of specified information.

The rules should be particularly clear on levels of authorisation and the reasons required
before confidential information is released. This might extend to disclosure of the names of
taxpayers with significant outstanding tax debts as a form of penalty, as occurs in
Hungary.122

Taxpayers should have reasonable right of access to information held about them by
the revenue authorities, provided it does not unduly hinder the administration of the tax
system.123 This is normally available in a jurisdiction under freedom of information or
similar provisions. It extends to requests to amend or annotate details about them that are
incorrect. Restrictions on access usually include access to documents with references to
third parties, internal working documents or where such access is against the public
interest.124

In most revenue authorities there are regular checks to ensure that the confidentiality
provisions are not being breached. Normally, breaches of the provisions by a revenue
officer would constitute a breach of her or his employment contract and a criminal

121 Discussed in J. Li, 'Taxpayers’ Rights in Canada' in D. Bentley, above n. 7, p. 89, p. 96. See the similar
German provisions in C. Daiber, above n. 7, p. 171.
122 Discussed in D. Deak, 'Taxpayer Rights and Obligations: The Hungarian Experience' in D. Bentley,
above n. 7, p. 200, p. 212.
123 M. McLennan, above n. 68, p. 44.
124 Freedom of Information Act 1982 (Cth) Part IV, and see M. McLennan, ibid.
The sanctions should allow both dismissal from the revenue authority and criminal penalties ranging from fines to imprisonment, depending upon the seriousness of the offence. Criminal sanction is justified in this instance as it is in the public interest. Where a taxpayer can demonstrate damage or loss as a result of a revenue officer breaching confidentiality provisions, compensation should be payable.

In certain circumstances taxpayer information that does not directly or indirectly reveal the identity of the taxpayer to whom it relates may be released. This commonly occurs with redacted information contained in ruling requests. It is of particular concern in relation to transfer pricing arrangements and advance pricing agreements, where taxpayers provide sensitive competitive information to revenue authorities. It has been the subject of debate, particularly in countries such as the US and Australia. Care has been taken in both jurisdictions to protect the confidentiality of information provided using appropriate legal mechanisms. Further issues arise in relation to information exchange (discussed below).

Advances in technology mean that tax authorities need to place particular emphasis on the protection of confidential information held on databases. The protection should extend to provide strong sanctions to deter unauthorised third parties from accessing confidential taxpayer information. No system is completely safe from computer hackers and there must be protection for taxpayers against unauthorised dissemination of information possibly critical to the commercial survival of those taxpayers. Where third party providers are used in data collection, management or storage, they should fall within the confidentiality provisions governing taxpayer information applicable to revenue

---

125 OECD Taxpayers' rights and obligations, above n. 71, para. 2.26.
127 For example, the Canadian Income Tax Act (RSC 1985 (5th Supp.) c. 1), s. 241.
128 OECD, above n. 74, para. 2.29.
129 See M. Markham, above n. 39, p. 280 et seq.
130 OECD Taxpayers' rights and obligations, above n. 74, p. 20. For example, this is governed in part in Switzerland by, Ordinance of the FDF on Electronically Transmitted Data and Information (30 January 2002), <www.estv.admin.ch>, 1 November 2006.

374
officers. It is important that individuals are personally liable for unauthorised release of taxpayer information. The companies or organisations that they work for should also bear concurrent liability.

2 Gathering Information from Taxpayers

Tax authorities require information to assess a taxpayer's liability to tax. This usually requires the return of information of some kind. The 2006 OECD Comparative Survey noted that the four main types of personal income tax arrangements for employee taxpayers include a largely return-free alternative for taxpayers with only one or limited sources of income, which is used in a number of countries. In such cases, employees provide information on entitlements to their employers, who then calculate the applicable tax rate so that the correct amount of tax is paid through the withholding system. Filing a return is therefore the norm for taxpayers in all but a few jurisdictions. The return and any subsequent investigation can result in the provision of substantial information to the revenue authorities covering every aspect of a person’s or business’s activities.

Due process demands that taxpayers should be aware of the requirement to provide information, that they should have the capacity to provide the information, and that there should be a presumption that they are acting honestly unless they act otherwise. This is covered under the requirements for certainty, publication and the principles of good practice discussed in Chapters 6 and 7. Under the basic right to privacy there should be limits on the scope of the tax authorities’ information gathering powers. This is normally phrased as a requirement that information collected relates to the financial affairs of the taxpayer. Related information extends to information that impacts upon the tax affairs of

---

the taxpayer. For example, provision of a tax rebate may depend upon the detailed personal circumstances of the taxpayer. Determination of residence for tax purposes can involve a detailed examination of a taxpayer's private life.\(^{132}\) The privacy laws of each jurisdiction should identify how the laws apply to the revenue authorities. These will be governed, for signatories, by Article 17 of the International Covenant on Civil and Political Rights.

Collection of tax does not require the provision of unlimited information; in most cases revenue authorities want only relevant information so that they can operate more efficiently. What is the best way to protect a taxpayer against abuse of information gathering powers where, for example, a taxpayer is targeted by a rogue officer who keeps on demanding unnecessary information? It is essentially a management issue. Authorisation for significant information demands should be given by a senior officer. Therefore it is best dealt with through the application of the principles of good practice combined with an effective internal dispute resolution process. There is the further option of referral to an ombudsman if the issue is not resolved. As with most rights included in this chapter, there is an assumption that the basic organs of state are operating more or less effectively.

3 Gathering Information from Third Parties

Tax administration depends increasingly upon reporting and withholding by a wide range of third parties.\(^{133}\) The OECD notes that there are two pre-conditions for effective and efficient use of information reporting and matching: the reporting body must be able to capture and send reports electronically; and the reporting body must use a high integrity taxpayer identifier to enable the revenue authority to match the information.\(^{134}\) As revenue

---


\(^{133}\) 2006 OECD Comparative Survey, above n. 88, p. 59 and the Table on p. 63 et seq.

\(^{134}\) Ibid, p. 60.
authorities are able to meet these pre-conditions, this kind of reporting will increase to improve audit efficiency. Meanwhile, there is still significant capture of confidential data from third parties, even if it cannot all be used.

Taxpayer’s rights do not cover the holding of information by third parties. That is covered by the privacy laws of the relevant jurisdiction. They do cover the request for information and the treatment of the information once it is provided. The latter point is covered by the confidentiality provisions discussed above.

The requirement to provide information to a revenue authority about a taxpayer should be governed by legislation. The right to privacy is recognised as a fundamental right under Article 17 of the International Covenant on Civil and Political Rights. Article 17 provides that no-one should be subjected to arbitrary or unlawful interference. This requirement is normally translated into the privacy laws of a jurisdiction. The result is that both the revenue authority and the third party provider are protected where the requirement to provide information is legislated.

For the standard reporting function there should be no requirement that the taxpayer is notified before a report is made. It would be impossible anyway in many instances of automated reporting, where lists of transactions are transmitted. The revenue authority should, as part of its compliance program, publish the wide range of information that it is entitled to collect. It should also explain how the information is used and the procedures it follows to keep that information confidential. Many revenue authorities do this as a matter of course. It falls within the principles of good practice.

Where additional information is sought from a third party as part of an investigation or audit, the circumstances are different. Before a revenue authority exercises its powers of search and/or seizure (discussed below), it may wish to gather further information from a wide range of sources. Again, the power to make such requests should be legislated, even if it is part of a general power of administration.
Should the taxpayer be notified before an order to produce such information is made to a third party? There is a danger that notifying a taxpayer might result in the taxpayer obstructing the investigation. However, taxpayers would be concerned that a request for information outside the automatic reporting requirement immediately tells the third party that they are under investigation. This could negatively impact on a taxpayer; for example, where a bank delays or refuses a loan request because the bank is made aware that the taxpayer's tax liability is under investigation. In the US, the rationale for requiring notification of a taxpayer is to give the taxpayer the opportunity to provide the information before an approach is made to a third party.136

The US approach does not appear to be common.136 However, it could be listed as a recommended right. Even then it may be too stringent for general adoption and should be ameliorated by the requirement that notification need not be given if the revenue officer has reasonable grounds to suspect that prior notification would result in the taxpayer obstructing the investigation.137 The reasonable grounds should be written and approved by a senior officer in the revenue authority. This additional step then provides support for the revenue officer in the event of a subsequent investigation by the ombudsman.

Certain third parties are exempt from providing information on request and this is considered below under privilege. Where a third party wilfully provides fraudulent information about a taxpayer this should constitute an offence and the taxpayer should be able to bring a civil action for damages or compensation.138

135 (c)(1) prohibits the IRS from contacting any person other than the taxpayer without giving the taxpayer reasonable notice prior to the contact.
136 2006 OECD Comparative Survey, above n. 88, p. 88 and OECD, above n. 74, p. 16 and Table 7, p. 44 et seq.
138 For example, see Internal Revenue Code §7434(a). Discussed in A. Greenbaum, above n. 89, p. 364.
Globalisation has resulted in previously unprecedented flows of capital across borders and transformation of economies. Concomitant with these changes has been the increasing pressure on national revenue authorities to maintain their tax base and ensure tax compliance. It is reflected in the wide range of co-operative activities that revenue authorities now undertake. Among these, information exchange is seen as particularly important. Whereas previously it was used as a means to ensure that double tax agreements were properly applied, it is increasingly now found as an important component of a well-managed domestic compliance program.

The legal basis for the exchange of information is usually found in a mix of domestic legislation and bilateral and multilateral conventions and agreements. The OECD Manual on the Implementation of Information Provisions for Tax Purposes ('OECD Manual') provides an extensive list of international legal instruments used as a basis for information exchange.

 Probably the three most well used models are Article 26 of the OECD Model Convention on Income and on Capital ('OECD Model'), the 2002 OECD Model Agreement on Exchange of Information on Tax Matters ('OECD Agreement') and the Council of Europe/OECD Convention on Mutual Administrative Assistance in Tax Matters ('Council of Europe/OECD Convention'). Information exchange is highly sophisticated in Europe, particularly, for example, the Nordic Assistance Convention, the EC Directive on

\[139\] For a colourful description of the transformation, see D. Yergin and J. Stanislaw, The Commanding Heights (New York, Touchstone, 2002).


\[141\] OECD Manual, ibid, p. 5.

Chapter 8

Mutual Assistance and Council Regulation 1798/2003 on the administration of the laws on VAT.\(^\text{143}\)

The Explanatory Report to the Council of Europe/OECD Convention, in common with most such instruments, identifies as its object, 'to promote international co-operation for a better operation of national tax laws, while respecting the fundamental rights of taxpayers'.\(^\text{144}\) It goes on to say that 'The Convention specifically ensures that taxpayers' rights under national laws are fully safeguarded'.\(^\text{145}\) Given that these instruments have significant international agreement, they are the appropriate guides to best practice in taxpayer protection in matters concerning the exchange of information.

The OECD Manual identifies the main forms of information exchange that take place and these can be summarised as:\(^\text{146}\)

- exchange of information on request between jurisdictions;
- automatic exchange of information, usually in standard format: typically used for routine transfer of information comprised of multiple individual cases of the same type, such as dividends, royalties, interest, pensions etc.;
- spontaneous exchange of information, where a party obtains information in the course of administering its own tax laws, which it believes will be of interest to a treaty partner, and passes it on without any request;
- exchange of information obtained under a simultaneous examination by two or more jurisdictions, each on its own territory, of one or more taxpayers in which they have a common interest;

\(^{143}\) Directive 77/799 EEC as updated on Direct Taxation as updated. For a comprehensive discussion of information exchange in the European Union, see L.W. Gormley, EU Taxation Law (Richmond, Richmond, 2005), p. 15 et seq.

\(^{144}\) Council of Europe/OECD Convention Explanatory Report, above n. 142, para. 1.

\(^{145}\) Ibid., para. 7.

\(^{146}\) OECD Manual, above n. 140, para. 18-19.
exchange of information during an authorised visit by foreign revenue authority officers to gather information in the host jurisdiction, often through participation in a tax examination; and

exchange of information on an industry-wide level to obtain a broader view of that industry or economic sector as a whole.

Different jurisdictions take different approaches to exchange of information. It is therefore useful for the Model to take an approach based on general principles. These can then be adapted to the context of each jurisdiction, the wider framework of rules in which information exchange is based, and the particular types of information exchange in which the jurisdiction is engaged.

a Authorisation

Information exchange should be approved at the most senior levels within the revenue authority.² Treaty obligations may require a senior official in the Ministry of Finance or Foreign Affairs to be designated as the competent authority to sign off on the exchange of information. This does not mean that every exchange of any information requires approval. Obviously automatic and some forms of spontaneous information exchange require direct contact between revenue officers at many levels of the revenue authority. In cases of automatic exchange, initial authorisation will govern a substantial quantum of information exchange over a long period, subject only to regular audit and review. In others authorisation is required on each request. What is important is that there are clear procedures and guidelines for all exchanges of information once the type of information exchange.

² Ibid., p. 8.
Chapter 8

Exchange has been approved at the highest level. The procedures should ensure that
revenue officers automatically escalate matters of particular sensitivity or importance and
that the characteristics of such matters are clearly set out in the guidelines so that they are
easily recognisable by field officers.

b Scope

Exchange of information is for clearly designated purposes. Although it is intended in most
agreements that they should incorporate a very wide range of information, it is not
intended that there should be 'speculative requests for information that have no apparent
nexus to an open inquiry or investigation'. 148 This is not applicable to industry-wide
information exchange, where such arrangements allow revenue authorities to identify
trends and other factors that will enhance its general compliance program. The term,
'foreseeable relevance' is commonly used. 149 In making a request for information, a
requesting jurisdiction should provide sufficient relevant information to allow the
requested jurisdiction to make a decision on the relevance of the request.

c Guidelines and Procedures

The OECD Manual provides a number of checklists of information that should be used by
each party to an information exchange; for example, Module 1 on Exchange of Information on
Request ('OECD Manual: Module 1') sets out the information that requesting parties should

---

148 Ibid., p. 9.
149 Used in the OECD Model, art. 26; the OECD Agreement, art. 1; and the Council of Europe/OECD
Convention, art 4, above n. 142.
include with any request for the exchange of information. The advantage of the guidelines and checklists set out in the Manual is that they ensure procedural protection of taxpayers’ rights in accordance with accepted practice under the majority of international agreements. Although the protection of taxpayers’ rights is intended under information exchange agreements, how the protection works during the process of exchange is not always spelt out. It is therefore appropriate for best practice if revenue authorities ensure that they either adopt the OECD Manual or develop their own guidelines that provide equivalent procedures to ensure taxpayer protection. There should be regular audit and review of the application of procedures and guidelines to ensure proper compliance.

d Equivalent Protection to the Home State

Article 21 of the Council of Europe/OECD Convention sets out what is meant by the requirement that nothing in an agreement or convention should ‘affect the rights and safeguards secured to persons by the laws or administrative practice of the requested state.’ The principle of reciprocity in this connection is fundamental to the protection of taxpayers’ rights. The principle and its interpretation in Article 21 can be said to represent accepted international best practice and should therefore be included in the Model.

Article 21(2) is set out below with the provisions and a paraphrased meaning in italics taken from the Explanatory Report providing ‘Commentary on the Provisions of the Convention.’

---

OECD Manual: Module 1, above n. 140, p. 3.
Council of Europe/OECD Convention, above n. 142.
2. Except in the case of Article 14 (which allows that time limits remain those of the requesting state), the provisions of this Convention shall not be construed so as to impose on the requested state the obligation:

a. to carry out measures at variance with its own laws or administrative practice or the laws or administrative practice of the applicant state;

(This restricts the agreement to powers and practices that the parties have in common and prevents a state from using indirectly, greater powers in another jurisdiction than it possesses under its own law.)

b. to carry out measures which it considers contrary to public policy (ordre public) or to its essential interests;

(States will not jeopardize their own public policy or essential interests, including public security and economic interests, to provide assistance to another state.)

c. to supply information which is not obtainable under its own laws or its administrative practice or under the laws of the applicant state or its administrative practice;

(This restricts the supply of information to that obtainable by a state under its own laws and administration and reinforces safeguards such as protection of secrecy, legal professional privilege or similar privilege, bank secrecy and other procedural rights and safeguards. For example, it restricts a state from undertaking a special investigation that it would not undertake for its own purposes to obtain the information.)

d. to supply information which would disclose any trade, business, industrial, commercial or professional secret, or trade process, or information the disclosure of which would be contrary to public policy (ordre public) or to its essential interests;

(Dismissed below.)

e. to provide administrative assistance if and insofar as it considers the taxation in the applicant state to be contrary to generally accepted taxation principles or to the provisions of a convention for the avoidance of double taxation, or of any other convention which the requested state has concluded with the applicant state;
(This exclusion protects taxpayers in the event that the requested state considers, for example, that the applicable tax laws in the other state are confiscatory or that the punishment for a tax offence would be excessive.)

f. to provide assistance if the application of this Convention would lead to discrimination between a national of the requested state and nationals of the applicant state in the same circumstances.

(This provides protection against discrimination and applies to matters of both substance and procedure.)

e. Confidentiality of Information

Although Article 21(2) covers the matter of secrecy, it is a controversial area and deserves further comment. It is covered by Article 22 of the Council of Europe/OECD Convention. Before releasing information to another jurisdiction, a revenue authority must be satisfied that all information relating to a taxpayer will remain confidential, with at least equivalent protection to that enjoyed in the home jurisdiction. This is the basic hurdle that must be overcome before any information exchange can proceed. In addition, disclosure of the information is restricted to:

persons or authorities (including courts and administrative or supervisory bodies) involved in the assessment, collection or recovery of, the enforcement or prosecution in respect of, or the determination of appeals in relation to, taxes of that Party.

Only these persons or authorities may use the information and then only for the purposes set out.

---

152 For example, OECD Agreement, art. 7, above n. 142.
153 Council of Europe/OECD Convention, art. 22, above n. 142.
Secrecy is particularly important for trade, business, industrial, commercial or professional secrets or trade processes. In these cases there is normally no obligation to provide such information under an information request, even where the secrecy provisions in the requesting country are equivalent. Once legal protection is established, the justification for refusal to provide information is largely concerned with politics and trust. Tanzi and Zee give the example of the unlikelihood of the US and France exchanging information on the activities of Boeing and Airbus. Where the secrecy provisions in the requesting jurisdiction are adequate and it is other reasons that result in a decline to exchange information, it is sufficient protection that the refusal to provide information should be restricted to the secrets themselves. It would not apply to financial or similar information which, although related to the secrets, would reveal nothing about the content of the secret information.

In some jurisdictions, there is a requirement to notify the taxpayer before exchange of information occurs. This is probably not widely accepted enough to make it a recommended right in all instances. However, given the importance of trade, business, industrial, commercial or professional secrets or trade processes, it would be appropriate where there is a request for information that might affect such secrets or processes to notify the taxpayer before the information is given. This would then allow the taxpayer to make application, if desired, as to why the information should not be provided.

Providing notification to the taxpayer in such circumstances would constitute best practice and is consistent with the nature of the protective clauses inserted into exchange of information agreements. It is often only the taxpayer who has the knowledge and expertise to explain why a secret or process is deserving of particular protection. If no

---

154 Ibid.
157 For example, Germany, the UK and the Netherlands have varying degrees of additional protection.
reference is made to the taxpayer, the protective clause in an agreement loses some of its
effect.

Articles in exchange of information agreements provide for matters that fall outside
the purview of the Model. Bank secrecy and similar issues should be dealt with elsewhere in
the domestic law.

B Audit and Investigation

1 The Audit Model

Audit and investigation comprise some of the most controversial exercises of the revenue
authorities' powers. This section deals first with the rights of taxpayers in connection with
tax audits, followed by an examination of search and seizure powers. Legal professional
privilege and rules against self-incrimination are discussed in the context of search and
seizure.

The audit process is an essential tool for managing effective and efficient tax
administration, particularly in jurisdictions using self assessment or automated
administrative assessment. The focus of the modern audit can be gauged from OECD
documents and the published compliance models and approaches of revenue authorities.

A twofold aim is: to create an environment that encourages and supports high levels of

---

158 For a survey of the foundational audit research in this area, see J. Hasseldine, 'How Do Revenue Audits
159 OECD, Strengthening Tax Audit Capabilities: General Principles and Approaches, above n. 10; OECD,
Strengthening Tax Audit Capabilities: Auditor Workforce Management, above n. 10; OECD, Strengthening Tax
Audit Capabilities: Innovative Approaches to Improve the Efficiency and Effectiveness of Indirect Income Measurement
Methods (Paris, Centre for Tax Policy and Administration, 2006); and ATO, Compliance Programs 2006-07, above n. 95.
voluntary compliance by strategic use of an audit program, \(^{160}\) and to identify areas where
the law is either not operating in accordance with its policy intent or is producing
significant compliance costs. \(^{161}\) The former ensures effective use of resources and the latter
ensures efficient operation of the system, in line with the principles set out in Chapter 3.

Revenue authorities mostly no longer use random auditing. Rather, they undertake
comprehensive risk management analysis to identify the taxpayers or market segments
where there is the greatest risk of non-compliance. \(^{162}\) This allows them to allocate most of
their resources to those areas where the risk of non-compliance is highest, while
maintaining sufficient presence across all taxpayer and market segments to ensure that
taxpayers are aware of them. \(^{163}\) The ATO, for example, has found that this is a useful
approach. \(^{164}\) For the ATO it works for managing risk and responding quickly to changing
circumstances. For taxpayers, it educates them as the ATO consults with taxpayers and
representative bodies to explain in advance the profile of high risk areas and to make clear
what is expected of taxpayers in the event of an audit. \(^{165}\)

There is a wide range of audit types. They vary in scope and intensity. \(^{166}\) Depending
upon the jurisdictional time limits, audits can cover a number of years. Most important in
the exercise of the search and seizure powers of the revenue authority, audits may take
place in whole or in part in locations including revenue authority offices, taxpayer business
premises, taxpayer residential premises and the premises of third parties. This is discussed
in more detail in the following sections.

\(^{160}\) J. Alm, B.R. Jackson and M. McKee, above n. 75.

\(^{161}\) OECD, *Strengthening Tax Audit Capabilities: General Principles and Approaches*, above n. 10, p. 8 and ATO,
*Compliance Program 2006-07*, above n. 95.

\(^{162}\) For example, see the research undertaken by the IRS, some of which is described in K.M. Bloomquist,
above n. 83. This includes the development of compliance research in controlled laboratory
environments: see J. Alm, B.R. Jackson and M. McKee, *The Effects of Communication among

\(^{163}\) ATO, *Compliance Program 2006-07*, above n. 95.

\(^{164}\) Ibid.

\(^{165}\) Ibid.

\(^{166}\) OECD, *Strengthening Tax Audit Capabilities: General Principles and Approaches*, above n. 10, pp. 9-11.
In examining the best practice approaches to revenue audits and investigations, the modern compliance model neatly distinguishes between the two main approaches that revenue authorities take and the consequent rights that a taxpayer needs for protection. For taxpayers who want to comply, but who may make ignorant or careless mistakes, the aim of the audit is generally to educate them and to help them to improve their voluntary compliance.\(^{167}\) For non-complying taxpayers who are either intentionally avoiding or evading tax, the audit is a strong enforcement mechanism.\(^{168}\)

There is a gradation of rights that should be afforded to taxpayers going through the audit and investigation process. Where auditors are engaging with taxpayers to encourage voluntary compliance and instil confidence in the system, most of the lower level rights will form part of the good practices of any revenue authority. As an audit or investigation becomes more serious, the rights become more concerned with ensuring due process and natural justice. Thuronyi notes an important difference in audit procedure between common law and civil law country audits.\(^ {169}\) Whereas the procedures in common law countries are fairly informal, those in civil law countries tend to be set out formally and in detail.\(^ {170}\)

A review of the rights in the different jurisdictions does not produce significant differences in their content. It is rather the means of enforcement that differs. Informal procedures contained in a revenue manual or audit guideline are likely to be primary or secondary administrative rights. Formal procedures set out in legislation are secondary legal rights, often supported by secondary administrative rights that provide the administrative

---

\(^{167}\) ATO, Compliance Program 2006-07, above n. 95; OECD, Strengthening Tax Audit Capabilities: General Principles and Approaches, ibid., p. 8; and National Tax Agency, above n. 70, p. 42.

\(^{168}\) Ibid. See also, K.M. Bloomquist, 'Multi-Agent Based Simulation of the Deterrent Effects of Taxpayer Audits', in National Tax Association, above n. 83, p. 159.


\(^{170}\) Ibid, pp. 213-214. See further, C. Daiber, above n. 7, pp. 184-185. K. Ishimura, above n. 113, p. 237, notes that Japan conducts numerous voluntary audits, which are more informal and seen as a form of administrative guidance.
process to implement the legal rights. Once again, the rights are usually similar, but the content and form differs according to the jurisdictional context.

For many jurisdictions, a sophisticated compliance model is simply beyond their capabilities. The rights set out below are not tied to a particular compliance approach. However, the detailed content and extent of individual rights will grow as a revenue authority develops additional resources. Most are closely aligned to the improvement of voluntary compliance and form a logical part of any procedures implementing a compliance program.

One of the most important issues facing revenue authorities is the capacity of their staff to perform audits at the required level. To do this in a developing country there are several preliminary issues that must be dealt with, which have to be assumed for the Model. Yet, they go to the heart of an ability to implement the Model. If tax auditors are not paid enough and are coming into direct contact with taxpayers, the temptation to accept bribes and to pursue other corrupt practices is significant. Tax payments should be made through banks and not directly to revenue officers; auditors need sufficient training; they need to understand the rule of law applicable in their jurisdiction; and they need to understand the principles of good tax administration outlined above. The audit process is often the litmus test of whether a tax administration has reached the level of maturity to begin implementing taxpayers' rights. If the system is inherently arbitrary and corrupt, as discussed in Chapter 7, respect for the rule of law needs to be established before taxpayers' rights can have any meaning.

171 Discussed in the context of remedial measures in OECD, Strengthening Tax Audit Capabilities: Auditor Workforce Management - Survey Findings and Observations, above n. 10.
172 Ibid.
173 R.M. Bird, above n. 1, p. 141.
174 Ibid and see C. Grandcolas, above n. 97.
The Audit Process

Flowing from the requirement for legal certainty and the provision of a legal basis for the exercise of administrative discretion, it is important that there should be a legal framework providing the powers to conduct audits and to impose sanctions. The legal basis for the exercise of powers of tax administration is discussed in Chapter 7. Suffice to say, there is benefit in being specific in identifying the audit and investigation powers in legislation, as otherwise there is a degree of uncertainty, which invites taxpayers to seek judicial clarification. If the uncertainty is intended by the executive, there is a danger that the powers will be exercised arbitrarily.

The advantage of setting out clearly the legal framework for audit and investigation is to overcome challenges that may occur on the basis of discrimination or that the scope of an audit is too wide (fishing expeditions). Taxpayers will always try to invoke rights to attack legislation that may seem to offer support for their position. However, the history of such actions on these grounds to restrict audit powers properly exercised is not strong. Nonetheless, the general principle of proportionality, and the requirement that discretion must be exercised in a way that is appropriate and necessary to achieve the objectives legitimately pursued, should apply. They will place limits on the information that the taxpayer has to provide, the time and resources that the taxpayer should be expected to invest in the audit, and the scope of the audit in the taxpayer’s particular circumstances. It would not be appropriate, for example, for a revenue authority to impose requirements that would seriously impede the taxpayer’s ability to carry on its business, without good reason.

In the context of the legality of an audit, it is important to note the protection provided by the requirement that the revenue authority should be autonomous, discussed

175. OECD, Strengthening Tax Audit Capabilities: General Principles and Approaches, above n. 10, p. 12.
in Chapter 7. The US reinforces this autonomy in the context of tax audits and investigations, by making it an offence for a member of the Executive to interfere, including a prohibition on requesting that an audit be commenced or terminated. The provision also requires the IRS official approached to report the matter to the Chief Inspector of the IRS. Other laws will normally prevent this type of interference in the activities of the revenue authority. However, where they do not, this is a recommended right to protect both taxpayers and revenue officers.

The revenue authority will prepare for any audit and will take full advantage, where necessary of the record keeping obligations contained in the relevant tax rules. It will also use the information gathering powers discussed above. The information gathering powers are sometimes used outside the formal audit process. Where this occurs, similar rights should be afforded to a taxpayer. This will be particularly relevant where a taxpayer is required to attend an interview to provide information and evidence. The rights set out below would usually apply both to an audit and a formal interview of this kind. Once the revenue officer(s) concerned are ready to begin the audit, there are a number of procedures that should be followed in any audit.

The revenue authority should have a clear set of guidelines for its staff, setting out procedures to ensure consistent application of delegated authority, standards developed for audits, audit policies, audit procedures, and how and by whom interpretation of the law applicable to the audit will be carried out. Under best practice guidelines, 'Audit policies and procedures should be based on principles of

---

177 See the concerns raised in South Korea, in J.K. Hyan, above n 31, p. 345.
178 Internal Revenue Code §7217. Discussed in A. Greenbaum, above n. 89, p. 368.
179 OECD, Strengthening Tax Audit Capabilities: General Principles and Approaches, above n. 16, pp. 13-14.
181 OECD, Strengthening Tax Audit Capabilities: General Principles and Approaches, above n. 10, p. 22.
accuracy, efficiency, fairness, objectivity, transparency, completeness, consistency and defensibility. These should be separate guidelines for activities specifically authorised by law, to ensure that the legal requirements are met. For example, the ATO has a formal access manual to cover the application of the section of the law allowing the ATO access to information.

Audit guidelines should provide for conflict of interest, where for example an auditor knows the taxpayer in some capacity.

A recommended right is that the revenue authority should not conduct an audit on a non-business taxpayer for two years in a row where there were no additional taxes payable after the first audit.

Taxpayers should be given prior notification of an audit, with brief details of the expected nature, scope and duration of the audit, the information and records that will be required, and the names and contact details of the revenue officers managing the audit.

Taxpayers should be given the opportunity to request postponement of the audit if they have good reasons.

Tax auditors should always clearly identify themselves, particularly where there is any risk of confusion, for example during a significant audit carried out over a long period of time and involving many revenue officers working at a taxpayer's premises.

Before the commencement of the audit the audit process should be explained clearly and simply. The taxpayer should be given the opportunity at this time to ask for clarification and answers to questions, although this should not be seen as an opportunity to delay or hinder the audit. Explanations should include in some detail: why the taxpayer is being audited; the types of taxes and the relevant years; the

\[^{u1}\text{Ibid., p. 33.}\]
\[^{u2}\text{Ibid., p. 24.}\]
\[^{u3}\text{Ibid.}\]
information and records that will be required; full details of how the audit will proceed and relevant timeframes for the audit. If there is benefit to the taxpayer in making voluntary disclosure, for example a reduced level of penalty, this should also be explained at the beginning of the audit.

- Explanation of the audit process should include: the rights and duties of the taxpayer during an audit, the settlement practices of the revenue authorities and the avenues for objection and appeal against assessments arising out of the audit.

- Taxpayers should be advised of their right to have professional representation during the audit. Professional advisers can slow the conduct of an audit, as they attempt to protect their client’s interests, but this should not preclude their involvement. The right encompasses lawyers and other tax specialists. It is a common problem that lawyers do not always have the necessary tax expertise to provide appropriate representation, which means that taxpayers should have the right to representation by a tax specialist.

- An audit should not interfere unreasonably with the proper running of a taxpayer’s business or cause it to suffer commercial loss as a direct result of the audit activity. Meetings or interviews should take place, where possible, at mutually convenient times. Audits should usually take place in normal business hours unless otherwise agreed.

- Taxpayers should be given a reasonable time to collect information required unless search and seizure powers are exercised because the integrity or existence of documents is at risk.

- Taxpayers should have the right to take notes of any conversations or interviews.

---

185 N.E. Olsen, above n. 81, p. 1244.
187 ATO, Taxpayers’ Charter: Explanatory Booklet 10, If you’re subject to enquiry or audit, above n. 180, p. 5.
188 Ibid.
Taxpayers should have the right to request the recording of all audit interviews and be given a copy of the recording at the conclusion of the interview. Recorded audit interviews can prevent subsequent disputes over what has been said or agreed between the parties.

During the audit the taxpayer should be given the opportunity to discuss matters arising in the audit with the tax auditor. There should be discussion of the final issues arising out of the audit that will affect any assessment raised as a result of the audit, including disputed facts and their legal consequences. In the discussion, reasons should be given for adjustments, and opportunity should be given for the taxpayer to explain the circumstances that might justify a reduction of penalties or interest. The outcome should be documented and provided to the taxpayer in writing within a reasonable time, together with any rights of review and remedies that may be available to the taxpayer.

In some audits, there can be negotiations to settle the outcome of the audit where these are permitted by law. Negotiations should take place in the context of proper, fair and consistently applied settlement processes, recognised by law. The terms of any settlement agreement should be documented and the taxpayer provided with a copy.

Taxpayers should normally be advised as early as possible of an intention to seek prosecution as a result of an audit so that rules of criminal procedure may apply.

---

189 Ibid. See also, Internal Revenue Code §7520. Discussed in A. Greenbaum, above n. 89, p. 350.
190 ATO, ‘If you’re subject to enquiry or audit’, above n. 180, p. 7.
191 N.E. Olsen, above n. 81, p. 1251.
Search and seizure powers are usually used in the context of information gathering leading to or during tax audits, should be subject to strict limits, and should be used as a last resort. However, given that revenue authorities rely on taxpayers to provide the information to assess the correct amount of tax, in certain circumstances search and seizure powers are necessary to obtain the information required to make the assessment. There is scope for abuse of these powers. They have therefore been the subject of controversy in many jurisdictions.

The 2006 OECD Comparative Survey showed that all of the revenue authorities surveyed had powers to obtain relevant information from taxpayers and third parties. Most had broad access powers to taxpayers’ business premises and dwellings to obtain the information needed to verify or establish tax liabilities, if necessary by seizing those documents. The point of contention is often whether a revenue officer should have to obtain a warrant before gaining access to premises. In almost two-thirds of countries surveyed a search warrant was required to enter a taxpayer’s dwelling for any purpose. However, only approximately one-third of countries surveyed required a search warrant to enter business premises and about one half of the countries required a warrant to seize taxpayers’ documents.

To understand why a warrant should or should not be required, the Canadian and South African examples are instructive. In Canada the right to privacy is guaranteed by section 8 of the Canadian Charter of Rights and Freedoms. Li notes that the original search
and seizure powers were exercisable if the Minister believed that they were "necessary for
going proportion to the administration and enforcement of the Act." This is similar to
the previous powers of the Commissioner for Inland Revenue in South Africa, and the
existing powers of the Australian Commissioner of Taxation. In Canada, reasonable and
probable cause was introduced in 1972 as an added requirement and application to the
court for a search warrant had to be supported by evidence under oath. It was
nonetheless found to violate section 8 of the Charter of Rights and Freedoms in the 1980s
so that in 1986 and again in 1994 further amendments were introduced to overcome legal
impediments under section 8 to valid search and seizure. Section 231 of the Income Tax
Act provides that there must be a warrant; the judge must have judicial discretion in
granting the warrant; there must be reasonable grounds to believe that a document or thing
that may afford evidence of an offence is likely to be found; and the document or thing is
likely to be found in the building, receptacle or place specified in the application.

There were a number of distinctions drawn in the courts' consideration of privacy
and the requirement for a warrant. Privacy for a personal residence, which required a
warrant for audit purposes, was seen as more important than for business premises, which
did not; and the expectation of privacy for business records was assessed as relatively
low. However, the exercise of criminal investigative powers does require a search
warrant.

In South Africa, Section 14 of the Constitution provides an extensive right to
privacy. The search and seizure provisions of the Income Tax Act were amended to take
account of the new constitutional requirements in 1996.206 The courts, in considering a similar provision, relied heavily on the Canadian cases.207 They accepted the limitation on the constitutional right to privacy for search and seizure in a case similar to taxation, but followed the Canadian requirement for a warrant requiring judicial discretion.208

International and national human rights instruments have growing application. They almost invariably include a right to privacy. It is accepted that search and seizure for tax matters should limit that right.209 There is not a general consensus that a warrant is required to search business premises or to seize business records. However, a majority of developed tax systems do require a warrant for search of private dwellings and the seizure of personal records and documents. A warrant is almost universally required for criminal investigations involving search and seizure. The Model should therefore reflect these practices.

When applying for a warrant, there are usually requirements for reasonableness and proportionality.210 That requirement will be fulfilled if the magistrate or other judicial officer is satisfied that the revenue officer making application for the warrant has exercised her or his discretion in accordance with Article 6 of the Model. Article 6 of the Model applies also to exercise of search and seizure powers in relation to business premises and business records where a warrant is not required.

Normally, the powers of search and seizure are widely drawn to encompass random audits and information gathering from taxpayers and third parties. This can be justified on the basis that the more draconian powers are normally only used where the risks to revenue

---

206 Discusses in B. Croome, above n. 72.
209 A. Hultqvist, ‘Taxpayers’ Rights in Sweden’ in D. Bentley, above n. 7, p. 298 discusses the rationale in more detail, p. 302 et seq.
210 For example, Internal Revenue Code §7605.
are greatest and access to information is hardest to acquire. However, the powers should be used for their proper purpose.

There are additional rights associated with exercise of powers of search and seizure. Unless the revenue authority believes that there is reasonable cause why it would hinder the purpose of the search, the taxpayer should be informed prior to the search taking place. Searches should take place during normal business hours or by appointment, unless the circumstances are exceptional. Taxpayer should normally be invited to attend during the search together with a representative. Opportunity should always be given to claim privilege on documents (discussed below).

Tax authorities have the right to seize information during an authorised search. This would include computer disks and downloading computerised and other electronically stored data. Taxpayers would normally have a duty to translate or interpret information in a different language or form from the official language of the jurisdiction. However, taxpayers would have the right to a detailed receipt for anything taken, and an indication of when it would be returned. The taxpayer should also be able to insist that the tax authority copy the information, rather than taking an original, unless the original is crucial to the investigation, when the taxpayer should be permitted to make a copy before the information is taken. There are numerous situations that a revenue officer might face in enforcing access powers. It is therefore important for both revenue officers and taxpayers that the revenue authority publish guidelines on how access powers involving access to premises, searches and seizure of information will take place, together with details of the rights and obligations of taxpayers.

---

31 D.R. Tillinghast, above n. 109, p. 38. See also, Irish Revenue Commissioners, Statement of Practice, SP-GEN/1/94 (Revised 2006), ‘Revenue Powers Exercised in Places Other than at a Revenue Office’, <www.revenue.ie>, 1 November 2006.
32 Discussed in the leading Australian case of Industrial Equity Ltd v. DFC of T (1990) 170 CLR 649.
33 For example, the Malaysian Income Tax Act 1967, s. 80, and of the Singapore Income Tax Act, s. 65B.
Chapter 8

4 Representation and Privilege

It is generally acknowledged that taxpayers have the right to representation in tax matters. It flows from the principle of administrative fairness (discussed above) and forms part of the right to make representation, which is often through a specialist adviser. Compliance with complex tax laws is difficult. Failure to comply may lead to criminal sanctions. In most countries, revenue authorities rely on tax specialists to represent and assist taxpayers to meet their tax obligations. In many jurisdictions, representation in tax matters is often by non-legal tax specialists. Accordingly, in any formal dealing with a revenue authority, taxpayers should be advised of their right to representation by a tax specialist and be given reasonable opportunity to seek it. Revenue authority procedures should not attempt to circumvent this right, for example, by asking for private interviews without a representative being present, or by intimating to the taxpayer that there might be a more favourable outcome if the taxpayer does not ask to be represented.

Certain information in most jurisdictions is protected as professionally privileged or secret. Usually in both common and civil law jurisdictions it is based on the concept that certain communication between an individual and their confidential adviser should remain secret. In civil law jurisdictions this often extends to priests and medical practitioners. In

215 M. McLennan, above n. 68, p. 45.
217 V. Thuronyi and F. Vanistendael, ibid., p. 142 discuss the relationship between legal and non-legal tax advisers.
common law jurisdictions, it is inextricably bound up in the adversarial system. Professionally privileged or secret information is generally designed to protect.

Confidential communications between a lawyer and client, confidential communications between a lawyer and third parties when they are made for the benefit of a client, and confidential material that records the work of a lawyer carried out for the benefit of a client unless the client has consented to the disclosure.

Privileged professional information means that the revenue authority is not entitled to the information contained in the documents covered. The basis for privilege is found in the confidential nature of advice given by lawyers and other privileged persons. It is seen as fundamental to the freedom of the individual.

The effective operation of the law and the legal system relies on lawyers being able to advise their clients as to the correct operation of the law. Such advice is based on a full and frank disclosure of the facts of each case. If clients suspect that any information that they give might be revealed to a third party, they are unlikely to provide the necessary information and the system breaks down. Advice is given on the basis of incomplete information, and there is a strong risk that the taxpayer would act unlawfully.

Depending upon the jurisdiction, the restrictions on privileged information will differ. For example, it has long been held in the US that the information that is privileged must be for the purpose of confidential communication to the attorney, who must be
Chapter 8

acting as an attorney. It is important to taxpayers, however, that within the framework of
the legal system in which they reside, there is the protection of professionally privileged or
secret information.

The rationale for privilege means that there is logic in extending it to all professionals
giving advice on the interpretation and application of the tax rules. The interest of the
community in having effective representation by specialist tax advisers outweighs the
disadvantages that arise from keeping such advice confidential. In many jurisdictions,
accountants or their equivalent have taken over much of the traditional role of lawyers and
advise on all aspects of the tax rules. They can sometimes represent their clients in revenue
tribunals or courts. It makes sense for privilege to extend to clients of these advisers where
the advisers have a role to which privilege would attach if the role were undertaken by a
lawyer. The issue does not appear to be as divisive in civil law jurisdictions, where the basis
of privilege is not linked so closely to representation in court proceedings.

Many common law jurisdictions have become more open to extending privilege to
non-lawyers providing tax advice. The US and New Zealand have both legislated
extension of privilege to communications between taxpayers and tax practitioners.
Australia has had a long history of providing administrative extension of privilege to
accountants. It is becoming more widely accepted that clients of tax practitioners, who
are exercising the advisory role once dominated by lawyers, should be given the same

221
222
223
224
225
226
227
228

This does not include financial accounts given to a lawyer to complete a tax return, see *Colton v. United
States*, 306 F.2d 633 (2d Cir. 1962) and it affects tax attorneys with wide-ranging tax practices, see C.
Brooks, 'A Double-Edged Sword Cuts Both Ways: How Clients of Dual Capacity Legal Practitioners
For example, in Germany: the German Fiscal Code, § 102(1); and under Swedish law see
A. Hultqvist, above n. 209, p. 302. Compare The Netherlands, where tax consultants are given
administrative privilege only: see R.A. Sommerhalder and E.B. Pechler, above n. 219, p. 314.
R.R. Oliva, 'The CPA-Client Privilege under IRC §7525: The Elusive Definition of "Tax Advice"' 2004
(2) *Journal of Legal Tax Research*, 103, discussing the US position; and K. Kendall, 'Prospects for a Tax
Advisors' Privilege in Australia' (2005) 1 *Journal of the Australasian Tax Teachers Association*, 46, comparing
the position in Australia, the US and New Zealand.
Internal Revenue Code §7525 (US) and Tax Administration Act 1994, s. 20 (New Zealand). See the
discussion in R. Fisher, above n. 224.

402
privilege as they would receive had the advice been given by a lawyer. Given the discrepancy in approach between jurisdictions, it is appropriate to recommend this right in the Model as an example of best practice.

To the extent that privilege may be claimed on communications relating to tax matters, taxpayers should always be given the opportunity to claim that privilege. Otherwise, the basic rights of the taxpayer may be undermined by administrative process.229

5 Privilege against Self-incrimination

The European Court of Human Rights has consistently upheld the privilege against self-incrimination, which incorporates the right of silence and the right not to be compelled to produce inculpating evidence.230 In _Hanney and McGinness v. Ireland_231 it was found to be a generally recognised international standard, essential to a fair legal procedure.232

It protects the accused against improper compulsion by the authorities, thus reducing the risk of miscarriages of justice and embodying the equality of arms principle. The prosecution must prove its case without resort to evidence obtained through coercion or oppression.

Can this extend to investigations of tax matters where there are no criminal proceedings pending? Where most revenue authorities have extensive powers enabling them to require taxpayers to produce information and to answer questions, should the privilege against self-incrimination apply?


231 Case No. 34720/97 (21 December 2000).

The European Court of Human Rights has explored the concept of a fair trial included in Article 6 ECHR. The right to procedural equality, (known as the equality of arms) is seen as implicit in the concept. This includes the privilege against self-incrimination. The privilege has been extended by the European Court to cover not only criminal but also civil proceedings, where the latter deal with administrative tax penalties or fines.

*Saunders v. United Kingdom* shows the particular relevance of the privilege to the power given to revenue authorities to require the provision of information and to question taxpayers before any charge is made or penalties imposed. Similar provisions under section 434(1) of the UK Companies Act 1985 were used to request information relevant to an investigation and to require Mr Saunders to appear before the investigators to answer questions, before any charges were laid. In later proceedings, the information obtained from Mr Saunders was used to refute what he said in his trial. The European Court of Human Rights held it inappropriate that there had been legal compulsion to give evidence that was later used to incriminate Mr Saunders. It found that:

The transcripts of the applicant’s answers, whether directly self-incriminating or not, were used in the course of the proceedings in a manner which sought to incriminate the applicant.

---


236 Ibid., p. 85.

237 Ibid., and *Saunders v. United Kingdom*, above n. 236, para. 72.
Frommel contrasts the extent of the European right to silence with the narrower privilege against self-incrimination in the Fifth Amendment to the US Constitution, which does not extend to the contents of subpoenaed business records or to legal persons. He notes that the right to remain silent in European law extends beyond criminal proceedings or potential criminal proceedings to any proceeding that could lead to the imposition of penalties or fines by tax authorities. This is not the case in many jurisdictions. However, given the moral force of the European Court of Human Rights, this should at least be a recommended right in the Model.

IV ASSESSMENT

Self-assessment has become the main form of assessment; and where administrative assessment is used, it is largely automated. This is consistent with the principles of efficiency and effectiveness. For taxpayers in any form of assessment system, as noted in Chapter 3, it is important also to have as much certainty as complex tax systems allow. Taxpayers (and revenue authorities) need to anticipate in advance the tax consequences of a transaction, including knowing when, where and how the tax is to be accounted.

In the interests of both certainty and fairness, it is important that as much information about the tax assessment process is published. That is why it was suggested above that the Model should require revenue authorities:

- to publish tax rules;

---

40 Ibid., p. 93.
42 2006 OECD Comparative Survey, above n. 88, p. 57 and the Tables on p. 69 et seq.
Chapter 8

- to publish and disseminate a wide range of information in an appropriate form to assist taxpayers in understanding and complying with their full range of obligations; and

- to undertake a specific program of community education to develop and reinforce an understanding of the importance to the community of the tax system and compliance with the obligations imposed by it.

Advance rulings represent a practical and mostly effective response to taxpayers’ requests for clearer information on what are the revenue authority views on tax matters.

Advance Rulings

Revenue authorities increasingly use advance rulings to aid certainty and predictability and rulings have become an integral part of most tax systems. All countries participating in the 2006 OECD Comparative Survey except Russia issued either public or private rulings. In most countries the rulings were binding in some form. Public rulings usually provide general guidance on matters affecting classes of taxpayers and originate with the revenue authority. Private rulings usually provide guidance on specific matters raised by individual taxpayers in the context of particular facts and circumstances; they originate with the taxpayer. Public rulings can be binding on the revenue authorities, where the facts and circumstances of the taxpayer fall exactly within the ambit of the public ruling. In some

---


245 2006 OECD Comparative Survey, above n. 88, p. 87.

246 Ibid.
jurisdictions they are for guidance only. Private rulings are generally binding on the revenue authority, but they may also be offered only as advance guidance.

Advance rulings provide taxpayers with the opportunity to determine the tax consequences of a transaction or arrangement in advance. Where tax rates can impact on commercial rates of return, this is an important business advantage. Taxpayers can decide whether transactions are worthwhile based on all of the facts, including those relating to taxation. They can also change the structure of transactions, where there are no adverse consequences, so that they fit more easily within the tax rules. It is particularly useful for taxpayers to obtain certainty in decision-making in jurisdictions where different revenue offices deal with their affairs. Where decision-making within the tax administration is decentralised to regional offices of the revenue authority there may be insufficient resources to ensure that all decisions across the jurisdiction are consistent. By obtaining an advance ruling taxpayers can have the assurance that they can rely on a decision that applies to all offices of the revenue authority.

When a revenue authority uses rulings to help taxpayers plan their transactions in advance, it has the potential advantage of reducing the incidence of dispute and litigation between the revenue authority and the taxpayer. The advantage works both ways, as the revenue authority obtains information about the types of transactions that taxpayers are entering into. Where they can identify trends in taxpayer activities, revenue authorities can provide appropriate general guidance, or suggest changes to legislation to remedy shortcomings in the current law. It provides a way both for the revenue authority to counter emerging avoidance practices, while also protecting taxpayers who may be falling prey to widely marketed tax schemes that are held out to save them substantial tax. Rulings

---

247 Ibid.
248 Ibid.
are designed to assist voluntary compliance, give taxpayers a sense that the revenue authority is giving fair warning of what action it is likely to take on a particular transaction, and generally reduce compliance costs.

In determining best practice, there are some rights that flow from underlying human rights. There are other rights that have only a general basis in the rights literature, but make sense as an accepted practice across a wide range of jurisdictions. They offer benefits to the administration of the tax system and are grounded firmly in the generally accepted principles set out in Chapter 3. A rulings system is the latter kind of right. It has become sufficiently widely accepted as best practice that all revenue authorities should try to issue rulings.

The 2006 OECD Comparative Survey shows that advance rulings in most OECD and many non-OECD jurisdictions are legally binding on the revenue authorities. This is recommended best practice. However, for revenue authorities which do not have the resources to provide the necessary quality controls and administrative infrastructure to operate an effective system of legally binding rulings it may be too burdensome a requirement. Each system also needs the legal framework for a binding rulings system to operate. Accordingly, the provision of binding rulings is a recommended right in the Model.

However, this gives rise to a problem for taxpayers in those jurisdictions where rulings or advice are not legally binding. Where a revenue authority holds out a particular interpretation of the law to be correct, or follows specific procedures in implementing the law, and the taxpayer relies in good faith on the view of a revenue authority, a revenue authority should be bound by its approach even if this is only as an administrative concession. In civil law jurisdictions, the principles of good faith and legitimate

---

250 2006 OECD Comparative Survey, above n. 88, p. 87.
251 For example, see D. Sandler, 'Canada' and L. Harris, 'Israel', in D. Sandler and E. Fuks, above n. 244.
expectation may apply. Most important, a taxpayer should not be penalised in any way for following exactly an approach to a transaction or arrangement that was apparently authorised by the revenue authority.

Where rulings are binding, due process suggests that there should be an appeal in some form available against an adverse ruling. Some jurisdictions, such as New Zealand, take the view that an appeal against a ruling wastes time and resources. The argument is that taxpayers and the efficiency of the tax administration process are equally well served by the opportunity to appeal against the assessment raised on the basis of the ruling. It is said that taxpayers may even have an advantage, in that they are not bound by a ruling and may withdraw their application before it is made, when they receive an indication that the ruling is likely to be adverse. A flaw in these arguments is that taxpayers often do not enter into commercial arrangements which are, or are likely to be, the subject of an adverse ruling.

It is difficult to take strong issue with an advanced tax jurisdiction, such as New Zealand, where tax administration practices are among the best in the world. However, it is perhaps different for a developing country that is trying to implement best practice in an environment where the administrative infrastructure is not well established and resources are stretched. If binding rulings are introduced in such a jurisdiction, the practice of providing an appeal in some form against the issued ruling should be preferred. It favours

---

52 For example, see C. Romano, ‘Italy’ in D. Sandler and E. Fuks, above n. 244.
53 For example, see W.T. Cunningham, ‘Ireland’ in D. Sandler and E. Fuks, above n. 244.
54 For a comprehensive comparison of the Australian and New Zealand binding rulings systems, see A.J. Sawyer, ‘What are the Lessons for Australia from New Zealand’s First Comprehensive Remedial Review of its Binding Rulings Regime?’ (2000) 29 Australian Tax Review, 133. Sawyer raises concerns that the major flaw with the New Zealand rulings system is that there is no appeal against rulings made. It is discussed further in a UK analysis: W. Chan, ‘Binding Rulings’ (1997) 18 Fiscal Studies, 189. Sawyer discusses the arguments from New Zealand, on which this paragraph draws, in his earlier comprehensive analysis of the New Zealand system in A.J. Sawyer, ‘Binding Tax Rulings: The New Zealand Experience’ (1997) 26 Australian Tax Review, 11.
55 This is the view taken in a number of countries. See, D. Sandler and E. Fuks, above n. 244.
consistent due process and may encourage those making rulings to take more care if their
decisions are open to review.

The form of the appeal will depend upon the review mechanisms that already exist in
the relevant jurisdiction. Some jurisdictions will allow a review by a court.256 Some require a
request for a review or resubmission of the ruling request to be filed with the revenue
authority, where a different revenue officer will review the original ruling for errors.257
Others try to keep the review mechanism simple by offering an administrative review by a
different body from that which made the original ruling, such as the Ministry of Finance.258
The critical issue is that the time taken to appeal must not defeat the efficacy of the appeal
process.259

B Assessment to Tax

The assessment process determines the amount of tax that taxpayers must pay. Under self-
assessment, taxpayers assess their own tax in the first instance. Under administrative
assessment an assessment is issued after either automated or physical verification of a tax
return (where a tax return is required). In both types of assessment, verification and
auditing may result in amendments or new assessments where a revenue authority finds
discrepancies.260 Significant effort is aimed at continually improving the ‘design and
operation of effective and efficient administrative arrangements for collection of tax and

256 For example, Australia allows an objection against a ruling decision under the Taxation Administration
Act 1953 (Cth), s. 142A.2A, in the same way as an assessment, which takes the review to the
Administrative Appeals Tribunal and the Federal Court.
257 For example, Thailand: see P. Tewkhunthong and V. Jangjedrew, ‘Thailand’, in D. Sandler and E. Fuks,
above n. 244.
258 For example, the Republic of Korea: see Don Yang, ‘Republic of Korea’, in D. Sandler and E. Fuks,
above n. 244.
259 D. Sandler, above n. 249, p. xiv and see as an example, the Australian decision of CTC Resources NL v. FC
260 2006 OECD Comparative Survey, above n. 88, p. 60.
the determination of taxpayers' liabilities.\textsuperscript{261} The more tax collection can rely on third parties withholding tax at source, the less scope there is for tax avoidance and evasion by the taxpayer. The more tax verification can rely on efficient and effective data matching processes, the more confident a revenue authority can be in the validity and accuracy of its assessments. Third party withholding of tax and third party information reporting is integral to the operation of modern tax administration.\textsuperscript{262}

For the taxpayer, it is important that taxes are imposed by law, and that the laws are accessible and certain. This was discussed in Chapter 6, as these are primary legal rights. Taxpayers should only have to pay the right amount of tax and any legal or administrative process that facilitates this should be encouraged. It is consistent with the principles in Chapter 3. However, taxpayers need certain assurance where tax they owe is collected from a third party, who is required to withhold amounts payable to those taxpayers at source, and remit those amounts directly to the revenue authorities.

Any amounts withheld must be sanctioned by law. This is critical to the operation of the law. Occasionally, it can lead to difficulties in the administration of the system. For example, where tax rates change in the annual budget, the tax withholding rates must change. In Australia, the legislation to give effect to the budget changes is sometimes delayed, which can cause administrative difficulties. However, it is important that any tax is withheld only where the law is in place to allow it. This protects both taxpayers and the withholder.

The 2006 OECD Comparative Survey notes the process involved in the pre-filled personal tax return systems used by Nordic countries.\textsuperscript{263} It sets out the timelines that are required for effective operation of the system. This is consistent with the effective

\textsuperscript{261} R. Highfield, 'Pre-populated income tax returns: The next 'big thing' in reform of the administration of Australia's personal income tax system?', paper presented at the 7th International Tax Administration Conference (Sydney, Australia, 2006).

\textsuperscript{262} 2006 OECD Comparative Survey, above n. 88, p. 55 et seq.

\textsuperscript{263} Described in more detail in R. Highfield, above n. 261.
operation of any system for collecting or withholding tax. All parties must have adequate notice of the requirements and procedures that they must follow to comply properly with their obligations under the law. It should be included as a right for both taxpayers and withholders that the revenue authority must publish clear guidelines with reasonable timelines for any administrative process imposing an obligation to pay or withhold tax, or to report information.

Any information passed to the revenue authority must be kept confidential. This has been dealt with above. However, particularly where information provided by someone other than the taxpayer is used in making an assessment, the taxpayer should have the right to make sure it is accurate. This may be done easily through the process of making an objection to an assessment. It does depend upon the information provided to a taxpayer either with or on the notice of assessment.

The process of assessment of any kind should be governed by the principles of administration outlined above. This includes such issues as the provision of reasons for an amended assessment, timeliness in responding to queries and that any discretion is exercised appropriately. The bad feeling engendered among taxpayers where they perceive that they are not receiving appropriate information can be seen in the codification of information that must be provided on US assessments following Taxpayer Bill of Rights 1. Greenbaum argues that codification assists the IRS, as it knows exactly what information it must provide and that this will in itself reduce litigation. The appropriateness of this approach depends upon the system operating in any jurisdiction. The important principle is that there should be sufficient information given to taxpayers so that they know whether an assessment is accurate and therefore whether to object to the assessment made.

Where a revenue authority is reviewing a self-assessment or an earlier administrative assessment, the revenue officer should ensure that the taxpayer has paid the correct

---

264 Internal Revenue Code §7522.
265 A. Greenbaum, above n. 89, p. 350.
The requirement is implicit that the revenue authority should correct errors in the taxpayer's favour. For example, this can happen where an assessor finds that a taxpayer is entitled to tax relief, deductions or refunds not previously claimed. However, unless it was the revenue authority's fault that a claim was not made, the duty to inform the taxpayer would be limited to the relevant time limits.

Where a taxpayer is found on assessment to have paid too much tax and a refund is due, the refund should be made automatically. Interest should be paid on the refund. If a revenue authority has the use for a period of funds to which it is not entitled, it should pay for them. Otherwise, it is a further exaction of revenue from the taxpayer that should be authorised specifically by law.

It is important that there are procedures in place to regulate amendments to assessments. Normally there are time limits for amendments. The obvious exception is where there is intentional fraud or tax evasion by a taxpayer; for example, where the taxpayer has intentionally provided incorrect information, entered into concealed transactions, or misled the tax authority. Time limits for amendment also normally coincide with the time limits for keeping tax records. This is appropriate, as once a taxpayer no longer has to keep records, it is unfair to allow a revenue authority to amend the taxpayer's assessment.

An area of significant contention between tax authorities and taxpayers is where the revenue authority decides that the information on which it is to base an assessment is insufficient or incorrect. On what basis can the revenue authority create an assessment?

Most jurisdictions require some rational basis for an assessment: the revenue authority

---

266 M. McLennan, above n. 68, p. 37 and p. 41.
267 It would not be the case if the relief, deductions or refunds were optional and the taxpayer had chosen not to exercise that option. In other words, it is not the responsibility of the tax authority to act as a tax planner for the taxpayer. See further, OECD Taxpayers' rights and obligations, above n. 74, para 2.20, where it is noted that not all countries automatically give tax relief where it is due, 'even if all the information is available to the authorities'. Failure to give relief in such circumstances would seem to be a breach of the duty to properly administer the tax system.
268 OECD Taxpayers' Rights and Obligations, above n. 74, p. 20.
269 Ibid.
cannot simply pick a figure out of thin air. However much sympathy there may be for revenue authorities which have to deal with large numbers of recalcitrant taxpayers, it is precisely in such situations that taxpayers need protection of their basic rights and revenue authorities should maintain the moral high ground. It is important for the credibility of the tax system and the general compliance behaviour of taxpayers that the revenue authority observes due process in situations where it could be excused for not doing so. It is not enough to argue that if the taxpayer does not agree with the assessment that they can appeal. Accordingly, revenue authorities should maintain fairness and transparency by identifying and publicising in advance the procedures they will follow when assessing taxpayers in this situation.

V SANCTIONS AND ENFORCED COLLECTION

A Sanctions

Where the ordinary processes of assessment and collection are unsuccessful, revenue authorities require powers to impose criminal and administrative sanctions of some kind on those who refuse to comply in accordance with the law and to enforce collection of tax payable.\(^\text{270}\) Collection ensures that the government is able to raise the amount of revenue due and payable by taxpayers. Sanctions are designed to provide a combination of incentives to comply with tax rules, and penalties for non-compliance. Dealing first with sanctions; they have been the subject of intense scrutiny over the years and constitute their

\[^\text{270}\] J. Braithwaite, above n. 105, describes the growing enforcement challenges tax administrations face with the growth of aggressive tax planning internationally.
own field of research. A work of this kind can only incorporate those principles that appear to be accepted as best practice to govern the manner in which sanctions are imposed.

A New Zealand report to the Treasurer and Minister of Revenue by a committee of experts endorsed an earlier and similar kind of study on tax penalties in the US that:

Penalties can encourage those taxpayers who do not comply to do so, first, by setting and validating 'standards of behaviour' expected of taxpayers, secondly by deterring departures from these standards, and, finally, by providing taxpayers who depart from these standards with their just deserts.

Gordon argues that, 'sanctions are perhaps one of the most overrelied-upon, and poorly understood, tools for enhancing tax compliance'. Gordon reviews literature pertinent to taxation and sets out some useful principles that should underpin any framework of sanctions in taxation. They can be summarised very broadly as follows:

- As a deterrent of unwanted behaviour, sanctions should apply to negligent or unreasonable behaviour resulting in underpayment.
- Sanctions should be fair, involve fault, not be harsh or disproportionate, and should follow due process.

---

271 In the tax field, see J.G. McCubbin, above n. 96.
273 R.K. Gordon, 'Law of Tax Administration and Procedure' in V. Thuronyi, above n. 68, p. 95, p. 117. Supported by J. Braithwaite, above n. 105, p. 177 et seq. who describes the tendency of tax administrators and legislators to see-saw between punishment and persuasion.
Financial sanctions may be imposed to deter and encourage early settlement of disputes but should not be used to raise revenue: that should be the place of the taxes themselves.

The level of sanction or penalty should reflect society’s view of the heinousness of the behaviour and can include a retribution component.

The level of publicity about the sanctions, the effects of non-compliance, and the rates of detection of non-compliance, depend very much upon the particular jurisdictional and societal context. However, sanctions will be ‘ineffective unless taxpayers believe that there is sufficient likelihood that they will be caught and that the sanctions will actually be applied’.  

Sanctions that are easily applied and determined are usually easier to administer and less arbitrary. Therefore, automatic financial penalties calculated as a percentage of the amount involved are likely to be most effective. They should be applied to negligent or unreasonable failure to pay the correct amount of tax or to pay it on time.

To encourage early dispute resolution, a penalty framework could require that: all disputed amounts and penalties should be paid at the outset, or interest should be paid on outstanding amounts, and/or penalties should reduce with early settlement.

Evasion and fraud are difficult to prove, but should form part of the framework of criminal sanctions. The general rules of criminal procedure should apply to these crimes.

Penalty regimes vary significantly, but Gordon’s principles provide a sound basis for the design of higher level protection of taxpayers’ rights that will cover most such variations.

---

275 Ibid., p. 130.
276 See further, along similar lines, N. Brooks, above n. 78, pp. 30-31.
It is in the specific and particular context of penalties that the best approach for the Model is to focus on general principles. It would be too complex and would likely prove unhelpful to attempt to address the plethora of jurisdictional variations. The Model would lose its meaning as a guide to best practice.

Penalties should be distinguished from interest charged on late payment of tax. Interest is almost invariably applied. However, it will often include a penalty by way of a surcharge, and the same principles are applicable to such penalties as they are to other sanctions.

Where sanctions are laid down in statute, they will usually follow a common approach to sanctions applied across the legal system; although Gordon notes that this cannot be assumed. In any event, the primary legal rights applicable to the imposition of taxes and set out in Chapter 6 and the first part of the Model apply equally to the imposition of sanctions associated with taxation. They include the requirements for the proper exercise of discretion by the revenue authority. The latter will prove particularly important where the sanctions depend upon satisfaction of different tests of reasonableness that are assessed by revenue officers. For example, both Australia and New Zealand have developed comprehensive penalty regimes that depend in part upon an assessment of ‘reasonable care’ and ‘reasonably arguable’ or ‘unacceptable’ positions.

Application of these rules addresses Gordon’s explicit and implicit requirements that the sanctions are not arbitrary, but are certain, published, fair, consistent, proportionate, linked to the seriousness of the offence, and recognise due process in their application.

277 2006 OECD Comparative Survey, above n. 88, p. 84 and pp. 93-96.
278 Ibid.
279 Treasury (New Zealand), above n. 272, p. 205.
Nonetheless, given the importance of these principles, it is valuable to reiterate those that are specific to the application of sanctions in the Model.283

There should be a clear basis for the imposition of penalties and interest.284 Where revenue authorities have discretion as to the level of penalties and interest, it should be clear how and why the discretion is exercised.285 In the exercise of discretion the principle of proportionality requires that the penalty should be proportionate to the offence.286

The general principles governing exercise of discretion in Article 5 of the Model are particularly relevant to discretion as to the level of penalty.287 As they stand, they are clear enough: namely, that they should be based on reasons, applied consistently, fairly, and impartially; that the reasons are based on a framework of equally intelligible standards which can be seen fairly to fall within and be the basis of the discretionary powers; and that the exercise of any discretion to impose penalties is fair and reasonable in matters of procedure and substance.288 Care needs to be taken in tailoring penalties to a range of situations, as it can make them very complex and difficult for taxpayers to understand.289

Revenue authorities are very aware of the importance of these principles in pursuing best practice. A major focus of an Australian review of the self-assessment regime was to ‘mitigate the interest and penalty consequences of taxpayer errors arising from uncertainties in the self assessment system’290 and ‘to improve the transparency and fairness’.291 This was

284 See the problems in Mongolia and South Korea, where penalty provisions are rarely implemented: J.K. Hyun, above n. 31, p. 345.
285 OECD ‘Taxpayers’ Rights and Obligations, above n. 74, para. 3.29 and para 3.37 et seq.
286 J. Braithwaite, above n. 105, pp. 181-182, argues that this requires adequate and escalating penalties to cater for the growing seriousness of the offence. He argues also, p. 199 et seq., using a restorative justice framework, that the heaviest penalties should be reserved for the advisers and promoters of fraudulent tax schemes and not the taxpayers.
287 A. Smit, above n. 282, p. 97.
290 Ibid., above n. 289, p. 5.
291 Ibid., p. 4.
similar to the earlier approaches taken in the US and New Zealand.\textsuperscript{292} Best practice suggests that there should be some flexibility in remitting penalties where there are exceptional circumstances relevant to the taxpayer.\textsuperscript{293} However, Thuronyi points out that any discretion in imposing penalties opens the possibility for corruption or heavy-handedness.\textsuperscript{294} A recommended right should therefore apply in those jurisdictions where there is exercise of discretion in relation to penalties that there should be clear and transparent guidelines as to when waiver of a penalty will occur.\textsuperscript{295}

Criminal penalties for offences such as fraud and evasion are best contained in the criminal law code. The rationale for this is that the general rules of criminal procedure should apply.\textsuperscript{296} Where criminal penalties are imposed in different codes, it is normal for special procedures to apply nonetheless to a criminal investigation.\textsuperscript{297} It has important practical consequences, in that when a civil case turns into a criminal case, there are different rules governing procedure, including such matters as the privilege against self-incrimination, discussed above. However, most jurisdictions have no problem with the revenue authority conducting a case that may result in criminal prosecution until such time as it is turned over to the department responsible.\textsuperscript{298} It is logical given the special skills of revenue authority investigators in interpreting available information. However, given the stricter requirements governing the use of evidence in criminal trials, the revenue authority officers involved in such investigations will need appropriate training to ensure that they do not undermine an effective prosecution case by using methods that are unacceptable in court.\textsuperscript{299}

\textsuperscript{292} Above n. 272.
\textsuperscript{293} OECD Taxpayers' rights and obligations, above n. 74, para. 3.26; Treasury (Australia), above n. 289, p. 41. See also, the fairness legislation in Canada, which allows account to be taken of personal misfortune or circumstances beyond a taxpayer's control: J. Li, above n. 121, p. 120.
\textsuperscript{294} V. Thuronyi, above n. 169, p. 221 and G. Turley, above n. 16, p. 37.
\textsuperscript{295} V. Thuronyi, above n. 169, p. 222.
\textsuperscript{296} R.K. Gordon, above n. 273, p. 134.
\textsuperscript{297} V. Thuronyi, above n. 169, p. 226.
\textsuperscript{298} Thuronyi supports this view in his comparative analysis of the treatment of tax crimes, ibid., pp. 223-227.
\textsuperscript{299} Ibid., pp. 226-227.
Taxpayers should be provided protection against unreasonable discriminatory prosecution on the basis of such things as race, religion or status under Article 10 of the Model. For example, because of the publicity such prosecutions engender, prosecution policies may well identify public figures as providing a more effective deterrent to other taxpayers than would an unknown taxpayer; but that should not be the only basis for a prosecution. The prosecution should have a legitimate aim.

B Enforced Collection

The 2006 OECD Comparative Survey suggests that ideally enforcement powers and procedures should be included in a single comprehensive law on tax administration that covers all taxes. There will always be some overlap with other legal provisions and care needs to be taken in ensuring that the tax administration provisions work with other existing rules. Given the variations in approach, the Model can provide only general principles applicable to enforced collection of tax debts.

The general principles already contained in the Model and applicable to sanctions are equally applicable to enforced collection of tax debts for the same reasons. In particular, there must be a clear basis for any decision to pursue collection through enforcement. Where revenue authorities have discretion to pursue collection through enforcement, it needs to be made clear how and why the discretion is exercised.

300 OECD Taxpayers' rights and obligations, above n. 74, p. 19 and Deak, above n. 122, p. 212.
301 2006 OECD Comparative Survey, above n. 88, p. 85.
302 V. Throny, above n. 169, p. 220.
303 OECD Taxpayers' Rights and Obligations, above n. 74, para. 3.33.
304 G. Turley, above n. 16, p. 113.
discretion the principle of proportionality requires that the means of enforcement should be proportionate to the tax payable.\textsuperscript{305}

It is impossible to determine at what point enforcement proceedings should be taken against taxpayers: it depends upon the circumstances of each case and the risk that the tax authorities believe that there is to the revenue. The decision is a matter of judgment. However, the general principle requiring reasons applies and taxpayers should be entitled to be given reasons why a decision has been taken. They should also have the right to appeal against enforced collection decisions as part of the general appeal rights discussed in the next section.\textsuperscript{306}

In the US, Collection Due Process Hearings were introduced in 1998 as it was felt that taxpayers needed an early independent review of proposed IRS collection actions.\textsuperscript{307} National Taxpayer Advocate Olsen argued strongly that they represent an early hearing opportunity to bring the sanity of a third party, in this case the court, into what are some of the tensest dealings that taxpayers and a revenue authority can have.\textsuperscript{308} The rationale coincides with those for early collection hearings in other countries, including the very successful preliminary conferences held in Australian Administrative Appeals Tribunals.\textsuperscript{309}

Olsen makes the point that there will be frivolous arguments at these hearings, but the taxpayer is hearing from a court that they are frivolous, rather than from the IRS, and is less likely then to continue pursuing the issue through the court process in protracted proceedings.\textsuperscript{310} She also notes that the hearings have identified several major breaches of taxpayers’ rights that are ongoing matters of principle, and have ensured that the focus in

\textsuperscript{305} In Sweden, see A. Hultqvist, above n. 209, p. 307; in Japan, see National Tax Agency, above n. 70, p. 85 et seq.

\textsuperscript{306} In Australia, see K. Wheelwright, above n. 118, p. 84.

\textsuperscript{307} Internal Revenue Code §6320 and §6330.

\textsuperscript{308} N.E. Olsen, above n. 81, p. 1248.


\textsuperscript{310} N.E. Olsen, above n. 81, p. 1249.
collection proceedings is on substance rather than form. These are issues that fit squarely within the dispute resolution model discussed in Chapter 5. It is therefore recommended that where a jurisdiction has the resources, an early collection hearing should be available to taxpayers on the due process of the collection.

Taxpayers should be given appropriate notice and reasonable time to comply with demands for payment before enforcement measures are taken. All such notices should include details of the taxpayer's rights and obligations in relation to enforcement, including the right to representation and the availability of legal aid.

The 2006 OECD Comparative Survey notes a number of powers that are widely used to enforce collection and several of these require the exercise of discretion by revenue officers. Two of the most important are the discretion to grant extensions of time to pay and to formulate tax payment arrangements. Revenue authorities should provide clear guidelines on exactly how the discretion will operate and how they will make decisions involving enforcement. Normally special arrangements in relation to enforcement will be based on hardship. The onus of proving hardship in such cases should be reasonable. Agreements that allow a taxpayer to use payment methods that differ from normal collection requirements, such as instalment payments, should be binding on the tax authority. Guidelines on the operation of deferred payment arrangements should include such matters as the quantum of basic living allowances that will be taken into consideration while taxpayers pay off their tax debts, the consequences of failure to meet a payment or instalment, and when the tax authority can rescind an agreement. More than in most administrative decisions, there should be a right of review of the decision of the revenue authorities in hardship cases.

311 Ibid.
312 C. Daiber, above n. 7, p. 186 discusses the legislative requirements in Germany.
313 The 2006 OECD Comparative Survey, above n. 88, p. 86.
314 OECD, GAP002, above n. 23, p. 10.
316 In Canada, see J. Li, above n. 121, p. 119.
Protection for the taxpayer should increase with the severity of the enforcement measures. Common collection methods include collection through specific third parties who owe money to a taxpayer or hold money on their account; the use of offsets against amounts owed to taxpayers for other taxes; seizure action; and bankruptcy or liquidation.\textsuperscript{317} Liens, travel restrictions and disqualification from tendering for government contracts are other methods used.\textsuperscript{318}

A general expectation is that the revenue authority would take such actions very seriously and provide clear lines of authorisation and monitoring mechanisms to ensure that the exercise of such powers did not breach its obligations. For example, injunctions taken out by a revenue authority to prevent a taxpayer disposing of property, or placing restrictions on a taxpayer's movement, require careful monitoring to ensure that due process is followed.

There are areas of concern to affected taxpayers that will arise in each jurisdiction depending upon the particular rules. Although they are usually covered under the general principles of administration, they should also be included specifically in the guidelines governing decision-making on enforcement. For example, where a tax authority exercises its right to seize and dispose of a taxpayer's property the tax authority should take steps to realise the property for the best possible price. There should be limits on the seizure and sale of property that has a high value, where the amount of tax owing is very small in comparison. The tax authority should also have guidelines that enforce restraint and negotiation with the taxpayer where tax owing is seized from third parties that hold property for, or have debts due to the taxpayer. Otherwise serious damage can occur to a taxpayer's reputation or business, which may be out of all proportion to their tax debt.

There are other common sense principles that fall within the broader principles of reasonableness and proportionality, which are generally applicable and should be covered
\textsuperscript{317} Ibid., and R.K. Gordon, above n. 273, p. 108.
\textsuperscript{318} Ibid.
in the decision-making guidelines. For example, taxpayers should be left with sufficient to allow them to live without being an unnecessary burden on the state. The issuer of a warrant to seize assets would have to take into account the principles of proportionality and reasonableness in setting the conditions for the exercise of the warrant. It is pointless depriving taxpayers of their means of livelihood in order to pay a tax debt, if they are thereby reduced to penury, lose their ability to make any future repayments, and are forced to rely on benefits provided by the state to survive. The rights of children and those with disabilities should be protected elsewhere in the law where enforcement proceedings are taking place. If they are not, then the tax rules should make specific provision for them.

Where a taxpayer has been restrained from dealing with an asset until a debt is paid or other arrangements are made, the payment of the debt or effecting of other arrangements does not necessarily ensure release of the restrictions over the asset. Bureaucratic delays can maintain the restriction for unnecessarily long periods. A requirement that release should be within a specified time period protects taxpayers in this situation. Failure to release a restriction within the specified time should leave the taxpayer with the right to compensation, usually for actual economic loss and reasonable costs, under the right to compensation outlined below.

Cross-border enforcement of tax obligations usually takes place under bilateral or multilateral agreements in much the same way as exchanges of information, discussed above. The protection required is similar and is included in the Model with that relating to information exchange.

---

VI OBJECTION AND APPEAL

A Appeal and Natural Justice

The IMF Manual on Fiscal Transparency notes the importance of the ability to challenge the legality of actions and decisions within the tax system. The right of appeal was seen as fundamental to the operation of the tax system in the 1990 OECD survey of taxpayers' rights and obligations. It is defined:

The right to appeal against any decision of the tax authorities applies to all taxpayers, and to almost all decisions made by the tax authorities, whether as regards the application and interpretation of the law or of administrative rulings, provided the taxpayer is directly concerned.

Much of the content of the Taxpayers' Charter contained in the OECD Centre for Tax Policy and Administration Practice Note on Taxpayers' Rights and Obligations comprises details of a taxpayer's appeal rights in practice. Baker and Groenhagen argue that the consistency of international consensus on appeal matters allows the setting of international standards for tax administration.

Taxpayers require the right to object to assessments, have access to dispute resolution mechanisms and to appeal to a court or administrative tribunal of independent status. Access to dispute resolution mechanisms, both within the revenue authority and

---

321 OECD Taxpayers' rights and obligations, above n. 74, p. 12.
322 Ibid.
323 OECD, GAP002, above n. 23, p. 9.
325 National Tax Agency, above n. 70, pp. 116-118.
to third parties, was discussed in Chapter 5 in relation to enforcement of taxpayers' rights. The same rights of review and dispute resolution mechanisms generally apply to the way the tax law is administered. However, objections to tax decisions themselves and appeals on tax matters are primarily concerned with the application of the full range of substantive tax rules to taxpayers and the objection and appeal rights are therefore much wider.\textsuperscript{326}

Nonetheless, as discussed in Chapters 5 and 7, disputes are best resolved early and quickly and Article 12 of the Model provides for a dispute resolution system designed to provide an informal mechanism for early resolution of disputes arising between taxpayers and the revenue authority. The principles of good practice identified in Chapter 7 require that a revenue authority should clearly identify its complaint procedures and provide easy access to them for taxpayers. Most disputes are resolved in this way. It makes administration more effective and compliance easier.

However, not all disputes are resolved at this level and most jurisdictions have a hierarchical range of appeal procedures which allow them to contest the merits of a tax assessment.\textsuperscript{327} In some jurisdictions this extends to allow the contest of adverse rulings and other matters.\textsuperscript{328} The right of appeal is an essential ingredient in the principle of openness and accountability in government. The office of ombudsman, described in Chapter 7, provides avenues of complaint against administrative procedures that are not otherwise subject to review by a court or tribunal.

Most appeal processes begin with an internal review of an objection before the decision is confirmed and an appeal is taken further.\textsuperscript{329} This allows the identification of obvious errors. The right of subsequent appeal is usually to a tribunal of some kind that is

\textsuperscript{327} OECD Taxpayers' Rights and Obligations, above n. 74, p. 12 and p. 21.
\textsuperscript{328} See the discussion on Rulings above, and see, e.g., the countries in the 2006 OECD Comparative Survey, above n. 88, p. 87, with binding rulings. Several of these jurisdictions allow review of adverse rulings.
\textsuperscript{329} R.K. Gordon, above n. 273, p. 105.

426
independent of the tax administration. Many jurisdictions have found that a tribunal
specialising in tax matters is most appropriate at this level. There is a range of country
practices as to the operation and constitution of tribunals. Interestingly, it was found in
Australia that introducing mediation/arbitration in the form of conferences preliminary to
a tribunal hearing, reduced the cases that went forward to a full hearing by over 80 per
cent. Many tribunals use informal procedures rather than using the formal requirements
of a court hearing.

From the first level of appeal, most jurisdictions allow further appeal, sometimes to a
tax court and sometimes through the normal court appeals procedures. The analysis in
Thuronyi and Albregtse and Arendonk demonstrates the wide variation in courts and
procedures. Thuronyi notes, for example, that once US tax appeals move into the general
court system, there is little uniformity of approach and even the Supreme Court 'leaves the
law in as confused a state after its decision as it was before'. Thuronyi further points out
that the court system can offer taxpayers very low rates of success and gives Japan as an
example of 'where the low rate of success of taxpayers in court is striking'.

Given the erratic outcomes in the normal court system for tax matters, there is a
strong basis for supporting the recommendations that there should be a specialised tax
court or tribunal at least at the first level of appeal. Despite the idiosyncrasies of the

---

330 Recommended also in W.M. Hussey and D.C. Lubick, Basic World Tax Code and Commentary (Arlington,
Tax Analysts, 1992), p. 178 and p. 253 and commonly used: OECD Taxpayers' Rights and Obligations,
above n. 74, p. 12.

331 OECD Taxpayers' Rights and Obligations, above n. 74, p. 12; V. Thuronyi, above n. 169, p. 230; and

332 L. Boule, above n. 309, p. 127 et seq.

333 For example, the Australian Administrative Appeals Tribunal exercises the powers and discretions of the
Commissioner of Taxation in its determinations. See further, D. Mighalls, 'The AAT or Federal Court –
Which is the Appropriate Forum?' (2005/6) 40 Taxation in Australia, 90.

334 OECD Taxpayers' Rights and Obligations, above n. 74, p. 93.

335 V. Thuronyi, above n. 169, pp. 215-220; and D. Albregtse and H. Van Arendonk, above n. 186.

336 V. Thuronyi, above n. 169, p. 218.

337 Ibid.

338 OECD Taxpayers' Rights and Obligations, above n. 74, p. 22. This was the rationale for the introduction
of a National Tax Tribunal in India in 2005, rather than continuing to send appeals to the High Courts,
different systems, as Baker and Groenhagen suggest, there are certain standards that characterise best practice in review hearings, whether at tribunal or court level.

As noted above, taxpayers should have the right to object to assessments and to appeal on as wide a range of decisions and actions of the tax authority as possible. Taxes should be informed of their right and any time limits that apply. Most revenue authorities include a notice of complaint, review and appeal rights with each notification they give to a taxpayer of a decision. This is logically a very effective way to ensure taxpayers are aware of their rights. Practically, the notice will include contact details for taxpayers who require further information or assistance (including, for example, an interpreter) in understanding their rights and obligations.

The court or administrative tribunal should be independent. The extent to which the right to a fair trial under Article 6 of the European Convention on Human Rights ('ECHR') is applicable to tax matters is disputed. However, once the right of appeal or review is accepted, it offers useful guidance on the content of that right in an accepted international context. The European Commission on Human Rights has emphasised the importance to review proceedings of having at least one level of review that is independent from both the department of the executive which made the decision under review and also from the executive arm of government itself. The independence requirement did not mean that the executive could not appoint members of the tribunal or court, as occurs in most jurisdictions.

---

339 See further in respect of criminal charges, the 1948 Universal Declaration of Human Rights, art. 10, and ECHR, art. 6, which states that 'everyone is entitled to a fair and public hearing within a reasonable time'. For tax matters specifically see e.g., OECD, Taxpayers' rights and obligations, above n. 74, p. 12 and W.M. Hussey and D.C. Lubick, above n. 330. For general discussion in a tax context, see S.N. Frommell, 'The European Court of Human Rights and Taxpayers: The Right to a Fair Trial', above n. 233, p. 1723. I. Saunders, 'Judicial Review: Successes for the Taxpayers' (1997) 2 British Tax Review, 105; and Sir Anthony Mason, 'The Importance of Judicial Review of Administrative Action as a Safeguard of Individual Rights' (1994) 1 Australian Journal of Human Rights, 1, discuss specifically the importance of opening appeals as widely as possible.

340 OECD, Taxpayers' Rights and Obligations, above n. 74, p. 12 and OECD, GAP002, above n. 23, p. 9.


342 [1994] 1 Alls/mill Journal of Human Rights, 1, discuss specifically the importance of opening appeals as widely as possible.

There are two elements to reasonableness of time. The review or appeal should be heard within a reasonable time. Baker notes that there have been several cases before the European Court that have considered this issue, but that it is difficult to gauge what a reasonable time is. This is an issue that is peculiar to each jurisdiction depending upon the review structure, its resources and capacity. It is important, however, to stipulate that the hearing should take place within a reasonable time. This provides grounds for review in the context of the particular jurisdiction. There is otherwise a danger that the revenue authority or the taxpayer could unnecessarily delay proceedings to prevent a hearing. The second time element, that a right of appeal may be subject to time limits, is along the same lines. The criterion of reasonableness should be applied for similar reasons. However, it also means that time limits should be stipulated in order that they may be reasonable. Unless they are clearly set out for taxpayers, they become arbitrary.

The conduct of the review or appeal should be subject to due process or a fair hearing. This comprises a number of elements, discussed in turn. The hearing should be impartial. This means that the hearing is before a judge or member of a tribunal who is neither personally biased, nor biased on the basis of her or his actions in the proceedings.

‘Publicity is seen as one guarantee of the fairness of trial; it offers protection against arbitrary decisions and builds confidence by allowing the public to see justice being administered.’ Many jurisdictions do not hold public hearings at all levels for tax and administrative decisions, but a public hearing at some stage of the appeal process supports the fairness requirement. Taxpayers may wish to waive their right to a public hearing, or at least publication of the decision. They may have legitimate concerns that publication of details of their case would unnecessarily prejudice their business or their reputation.
Chapter 8

Alternatively, they may be concerned not to have their private financial records discussed in a public forum and included without preservation of anonymity in a public record of the decision. Taxpayers should be able to waive their right to a public hearing. Alternative waiver may be opposed by the revenue authority where one of the purposes of the action is to generate as much publicity as possible. This may legitimately occur, for example, where the revenue authority is undertaking a high profile campaign to publicise the effects of non-compliance. It would be up to the court or tribunal to determine whether the fairness of the proceedings would be undermined by a public hearing.

Due process includes the right to representation by a lawyer. In addition to legal representation, most countries recognise the right to representation in tax proceedings before a tribunal, and sometimes a lower court, by a representative other than a legal adviser. There is no general requirement for legal aid to assist taxpayers in bringing tax appeals, unless it involves a criminal charge. In most developing countries the resources simply do not extend to providing comprehensive legal aid and it is premature to require it other than as a recommended right.

Rules of evidence and procedure differ markedly between jurisdictions. The European Court of Human Rights has overcome the difficulties in prescribing detailed rules by setting out several principles that should apply to court proceedings in member states. Those applicable to tax proceedings include: procedural equality, an adversarial process and disclosure of evidence, a reasoned decision and effective participation.

Procedural equality or 'equality of arms' requires that there should be a fair balance between the parties and each party should have a reasonable opportunity to represent their

351 See the discussion in R.K. Gordon, above n. 273, p. 123.
352 It has flowed from the International Covenant on Civil and Political Rights, art. 14, and there is no suggestion in any tax case that the right to legal representation should be denied. OECD Taxpayers' Rights and Obligations, above n. 74, p. 22 provides country examples of different representation rights.
353 Discussed in the European context in D. Albregtsen and H. Van Arendonk, above n. 186 and more generally in OECD, 'Taxpayers' Rights and Obligations, above n. 74, p. 22.
355 C. Ovey and R. White, above n. 37, pp. 155-160.
This is particularly important in tax cases involving individual taxpayers, where the authority and resources of the revenue authority could easily intimidate a taxpayer. The tribunal or court needs to ensure that there is procedural equality and this may require intervention in the proceedings on behalf of the taxpayer. In Australia, the Administrative Appeals Tribunal takes a strongly interventionist approach in its proceedings to ensure that those least capable of presenting their case are able to do so, particularly where they are unrepresented.

An adversarial process means that the parties should have full knowledge of and be able to comment on the observations filed or evidence adduced by the other party. This requires the provision of full information about the issues being contested and the exchange of all relevant documentation within a reasonable time before the hearing. Without such information, it is difficult for a review or appeal to be fully effective. However, there are occasions where the court or tribunal should allow non-disclosure of evidence where it might adversely affect a third party. For example, the revenue authority may have used comparable information from another taxpayer to draw a conclusion as to the veracity of information provided by the taxpayer seeking review in a transfer pricing case.

Similar principles underlie the requirement for a reviewing body to provide reasons for its decision as apply to the giving of reasons for the proper exercise of administrative discretion. The taxpayer should be given the reasons for why a decision is made and the

---


M. Markham, above n. 39, pp. 177-184.

431
facts on which it is based. The reasons need not cover all points but should demonstrate that the reviewing body has not missed an issue fundamental to its decision. 301

The final point relevant to a fair tax hearing is that the taxpayer must be an effective participant in the proceedings to the extent he or she is not represented and is suffering from a disability. 361 This may require the provision of an interpreter or other special facilities for taxpayers suffering from disabilities.

There are further fairly complex issues that relate to review and appeal. Should tax be suspended pending the review or appeal? Treatment among OECD countries is inconsistent. The position varies from automatic suspension in countries such as Belgium, Finland and the US, through suspension on certain conditions in countries such as Australia, France, Greece and the UK, to no suspension in Italy and Turkey. 362 Thuronyi notes that developing and transition countries tend not to allow suspension to prevent abuse and frivolous appeals. 363 There is insufficient consistency in approach to warrant any form of right in this regard. However, it is recommended that suspension of tax should be allowed at least by application to the review body at the commencement of proceedings where there is a prima facie case and the taxpayer can show hardship. 364

Where taxpayers are successful on appeal, their costs of undertaking the appeal should be paid. 365 Whether they should be compensated for any significant loss or damage incurred as a result of the action of the tax authority depends upon the broader legal remedies. Article 14 of the International Covenant on Civil and Political Rights and Article 3 of the 7th Protocol of the ECHR contemplate that where there has been a miscarriage of

301 C. Overey and R. White, above n. 37, p. 158.
304 Ibid., p. 159.
362 V. Thuronyi, above n. 169, p. 218.
363 Ibid.
365 Ibid., p. 5; OECD 'Taxpayers' Rights and Obligations, above n. 74, p. 20; and R. Manning and D.F. Windish, above n. 288, p. 83, which sets out the introduction of changes to improve the rules governing the award of costs and fees to taxpayers in the US and to allow civil damages for negligence by IRS officers.
justice compensation should usually be paid. This would normally relate to criminal injury. 366

Assume a revenue officer commits an offence and causes personal or economic loss to a taxpayer, for example, by releasing, without authorisation, commercially sensitive information on a taxpayer's file, either generally, or to another taxpayer. There should be some form of remedy for the taxpayer in such instances. 367 The taxpayer would have to show loss. In common law jurisdictions, there may be actions for negligence and breach of duty of care. 368 There may be a cap on compensation and taxpayers would usually have to take reasonable steps to minimise any losses. 369 However, any remedy must be carefully tailored so that the revenue authority is not restrained in its proper pursuit of tax evasion and fraud for fear of facing large damages claims in the event that it cannot prove its case.

VII CONCLUSION

This chapter has set out the secondary legal and administrative rights that should be found in all tax systems, together with a number of recommended rights. It will be recalled that many of these rights can be implemented either legally or administratively depending upon the structure of the rules in a particular legal system. Their content will usually differ depending upon the means of enforcement.

The chapter begins by articulating the principles that should govern the administrative action of a revenue authority. These principles are overarching in that they cover all administrative decisions and actions. There is often overlap with specific rights,
Chapter 8

but where these provide additional protection, that protection is described in the context of those rights.

As discussed in Chapter 3, principles underlie all tax systems in some form, whether or not they are competing and quite often contradictory. The advantage of codifying these principles either legally or administratively is that it ensures that they do not then have to be 'discovered' before they can be applied. Certain jurisdictions, such as Germany, have illustrated this approach in this and other chapters. Germany has used legal codification. In countries such as Australia and the UK, where these principles are drawn from a range of statutes, the common law and administrative guidelines, the position is much less clear. This can work to the disadvantage of both the taxpayer and the revenue authority, despite the element of flexibility that comes with uncertainty.

Which approach should be used for best practice in tax administration depends upon the jurisdiction and context. However, it is easy to fudge the question of whether a jurisdiction is operating in line with best practice, by saying that the legal remedies that apply across the legal system will meet the standards set out in the Model. What is needed is a detailed review and analysis of exactly how the standards are met, by which rules, whether legal or administrative, and whether the protection provided is sufficient.

The chapter sets out the specific rights applicable to each of the major functions of tax administration. It is encouraging that despite the variations between legal families and tax families, there is a consistent understanding of the main forms of protection that should be afforded to taxpayers. It is quite often based in an understanding in other legal areas developed in the context of human rights and the practice of international law on the one hand, and the practical implementation of economic globalisation on the other. At the functional level there is wide variation evident in the ways that individual rights are observed and implemented. This is inevitable given the completely different contexts in
which tax administration operates. Nonetheless, there is a common core content that allows the clear articulation of standards of best practice in taxpayer protection.

This chapter, together with Chapters 6 and 7, flow directly into the Model set out in Chapter 9. The Model provides the best practice standards of taxpayer protection that should be found in any tax system, together with recommended rights for advanced systems. This and the earlier chapters have provided a rationale and relatively brief commentary on the meaning of these best practice standards.