

Separation of Powers

-- Questionnaire --

1. Relationship between the Parliament and the Tax Authorities: The influence of the tax authorities on tax legislation

1.1. Does your Government have legislative competence on tax matters?

Assuming “legislative competence” as the competence of presenting draft tax bills, the answer is YES. (The President of Brazil has this competence)

The Presidente has also the competence to produce provisory measures (valid for 60 days that can be extended for more 60 days) that are binding as tax law. These provisory measures can be changed or rejected by the Parliament.

These provisory measures have a special legislative procedure and – if not voted – they block every other discussion in Parliament.

1.2. Does your Government draft tax bills proposals and present them to Parliament?

YES

1.3. In case your answer to 1.1. and 1.2. is positive:

1.3.1 Does your Government usually exercise that competence?

YES

1.3.2 Does your Parliament passively accept the draft bills provided by tax authorities or does it discuss them in detail and introduce changes to them?

It depends on the matter. Sometimes discuss on detail and changes them; in general the Parliament accept the draft bills and the provisory measures.

1.4. How does the literature in your country and your domestic Courts interpret the situation as you described it in 1.3.?

Literature criticizes the use of provisory measures and asks for more discussion on tax matters.

Domestic Courts don't say anything; accept it as law but use the competence to control their constitutionality.

2. The meaning of legal indeterminacy in tax matters

2.1. Is your domestic tax legislation vague, when defining the tax object, tax subject and/or tax base, leaving a large margin for discretion, or, is it, on the contrary, very detailed, avoiding indeterminate concepts?

We have both situations. For example, on income tax it is detailed; on communication tax it uses indeterminate concepts.

2.2. How do you/does the literature in your country evaluate the use of both techniques in tax legislation?

In general criticize the use of indeterminate concepts. But also criticizes the great number of laws regulating tax matters.

2.3. Are there independent domestic Courts obliged to control the constitutionality of tax legislation?

YES. Not only Courts but also the single judges can control the constitutionality of any law or inferior rule that conflicts with the Constitution (including tax legislation).

2.4. Is legal indeterminacy considered to be unconstitutional/ has a tax rule ever been declared unconstitutional due to legal indeterminacy?

In general legal indeterminacy is not considered to be unconstitutional. Once a tax law has been declared unconstitutional because it had insufficient determinacy (tax on aerial transportation).

3. The consequences of legal indeterminacy in tax matters

3.1. In case of legal indeterminacy not considered to be unconstitutional, who has the final word regarding the interpretation of the rule – the tax authorities or the domestic Courts?

Always the Courts.

3.2. Is there a constitutional basis for either the tax authorities or the domestic Courts having the final word on interpretation of indeterminate legal rules?

YES. If it's a matter of interpretation we have a national Court (Superior Court of Justice) to decide the interpretation to prevail. If it's a matter of constitutionality we have another national Court (Supreme Federal Court [our constitutional Court]) to decide it.

3.3. Is legal indeterminacy normally fulfilled by regulations, administrative rulings and/or case law?

YES

3.4. Are administrative rulings binding to the taxpayer and/or the Courts?

They are binding only to the taxpayer but he can go to Court to discuss them. There is no restriction to go to Courts to discuss tax legislation; the taxpayer can go to Courts even if there is only a threat to his rights.

4. Relationship between the Tax Administration and the Domestic Tax Courts:

4.1. Do your domestic Courts control application of tax law by your Tax Administration?

YES

4.2. Do your domestic Courts, in their case law, take into account rulings and binding information emerging from your Tax Administration?

YES.

4.3. Does your Tax Administration take into account the domestic courts case law and/or the ECJ case law when applying the law?

YES. (ECJ not applicable)

4.4. Is there a principle of reciprocal observation of the interpretation of tax law by the Tax Administration and domestic Courts?

Reciprocal, NO. The Tax Administration must observe the interpretation of the Courts.

4.5. Is your Tax Administration legally bound to the decisions of supreme courts and/or the ECJ?

YES. (ECJ not applicable)

4.6. Does your Tax Administration circumvent your domestic courts' case law?
NO, but often he tries to change the law (through a provisory measure) or even the Constitution (ammending it).

5. Relationship between different legal sources (legal pluralism):

5.1. How do your Parliament, Tax Administration and Courts react before the different legal sources in tax matters (tax treaties and other treaties, EC Treaty, secondary law and soft law)?

The Brazilian system is very complex; see attached text and my text in EATLP "The concept of tax", p. 307-317.

5.2. How is the hierarchy of different tax legal sources recognized by the constitution and the different domestic powers (Parliament, Tax Administration and Courts)?

The hierarchy is:

1.- Constitution

2.- Complementary Law aside Ordinary Law. According to our Constitution, some specific matters can only be ruled by a Complementary Law (that has a specific legislative procedure and a special "quorum" to be approved). If an Ordinary Law conflicts with a Complementary Law the Ordinary Law is unconstitutional.

Treaties in general have the same nature of an Ordinary Law.

In tax matters, our National Tax Code (that is a Complementary Law) says that the tax treaties prevail on Ordinary Law.

There is a huge discussion on literature. We don't have a general and precise definition by the Courts.

3.- Decree

4.- Resolution, instruction etc.

5.3. Does the taxpayer have access to different legal remedies that assure him/her effective protection of his/her rights granted by tax treaties, EC law and domestic law, or are those legal remedies in fact limited to protection of rights granted by domestic law?

YES, we have legal remedies to protect the rights granted by tax treaties and domestic law (ECJ N/A)

II

Please answer the following questionnaire, which aims at confirming your answers in I

- 1. Relationship between the Parliament and the Tax Authorities: The influence of the tax authorities on tax legislation**

- 1.1. Does your Parliament control tax authorities in an efficient way? yes - **NO**
- 1.2. Do tax authorities influence tax legislation to a major degree? **YES** - no
- 1.3. Does your Parliament a) usually accept the bills provided by tax authorities? **YES** - no
 b) refuse the bills provided by tax authorities? never - **SOMETIMES** - often
 c) improve the bills provided by tax authorities? never - **SOMETIMES** - often
- 1.4. Is your Parliament able to discuss the bills thoroughly? **YES** - no
- 1.5. Is there sufficient knowledge of tax law in Parliament? **YES** - no
- 1.6. Are tax rules often so vague, that tax authorities have to fill the gaps themselves by administrative regulations? never - **SOMETIMES** - often
- 1.7. Have tax authorities the competence to typify and fill out the legal gaps without control by the Parliament? never - sometimes - **OFTEN**

2. Relationship between the Parliament and the Domestic Tax Courts

- 2.1. Are there independent (Tax) Courts in your country entitled to control legislation? **YES.**
- 2.2. If “yes”, do they control tax legislation: 0 ex ante or 0 **EX POST**?
- 2.3. Are Courts competent to clarify whether a specific written tax rule is compatible with constitutional standards? **YES** - no
- 2.4. If a high Court is convinced that a specific tax law violates constitutional standards, is the court in this case allowed to ignore the law? **YES and also the single Judge can do it** - no

3. Relationship between the Tax Administration and the Domestic Tax Courts

3. 1. Are there independent (Tax) Courts in your country, obliged to control your Tax Administration? **YES**
- 3.2. Are your domestic Courts bound to administrative regulations/orders/rulings, which are issued by tax authorities? yes - **NO**
 If "no", do the courts follow them in fact? never - sometimes – **OFTEN** - very often

3.3. Are first instance Court decisions on a tax case, normally accepted by the Tax Administration (i.e. do they not try to appeal against the decision)? **NEVER** - sometimes - often - very often

Please report statistics if available!

3.4. Is a final judicial decision on a single tax case, followed by the Tax Administration not only in this case but also in all other similar cases? never - **SOMETIMES** - often - very often

3.5. How does the Tax Administration react when it is convinced that the final judicial decision is wrong or not "acceptable" because, e.g., it is too expensive for the public?

a) Does it accept the (from their point of view) wrong decision? never - sometimes - often - **VERY OFTEN**

b) Does it try in another similar case to convince the Court to decide in a different way? never - sometimes - often - **VERY OFTEN**

c) Does it try to influence the Parliament to change the law? never - sometimes - often - **VERY OFTEN**

d) Does it make sure that the Internal Revenue Service will not follow this decision in similar cases? never - **SOMETIMES** - often - very often

e) Does it try "to hide" such a decision, e.g., not publishing the decision with the result that the Internal Revenue Service does not know this decision? **NEVER** - sometimes - often - very often

If possible, please add statistics to the answers!