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Recovery of Disputed Tax Claims

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Tax-levying jurisdictions have to grapple with the tension between affording taxpayers a right to effective remedies and the revenue authority's responsibility to efficiently and effectively collect taxes. This article shows that, in the main, jurisdictions tend to follow a rule-exception approach in terms whereof they deviate from their stance on whether or not disputed tax claims should be recovered pending the adjudication of the dispute in certain instances. This ensures proportionality to ensure that appropriate means are used to obtain policy objectives. Nonetheless, some jurisdictions apply the principle of "*solve et repete*", in terms whereof taxpayers cannot challenge the assessment before they have paid at least part of the assessed amount. This is devoid of any proportionality and highly questionable from a fundamental rights perspective. This article further considers the cross-border recovery of disputed tax claims and points out that the requesting tax authority should thoroughly examine the grounds for taking recovery or precautionary measures in the form of mutual assistance while the tax claim is still disputed. It must set out its considerations in its request so that the requested tax authority can assess whether action on a disputed claim is compatible with the public policy of the requested state. In that regard, the justification of a request to enforce a disputed claim is of high legal relevance for the requested tax authority and, if it is missing, the assistance has to be denied.

1. Introduction

When taxpayers dispute tax claims there is potential conflict as two competing interests are at play. One, taxpayers' right to an effective remedy, which includes the right to access courts, and two, the obligation of the revenue authority to collect effectively and efficiently outstanding taxes. The question arises how these two competing interests should be balanced. Should the enforcement of the disputed tax claim be suspended until the dispute has been finalized or should the revenue authority proceed with enforcing the outstanding disputed tax claim?

In section 2. of this article, the two competing interests are discussed to provide a basis for the subsequent discussions. Section 3. evaluates how these competing interests are dealt with on a domestic level by reflecting on approaches of various jurisdictions. Section 4. then considers disputed tax claims in a cross-border context with a focus on EU law.

2. Right to Effective Remedy vs Efficient and Effective Tax Collection

The right to an effective remedy is an essential component of the rule of law. In terms of the rule of law, every action of the state must be permitted by law, which in a democracy embodies the will of the people. Compliance with the law by every state authority is ensured by independent courts who cannot monitor every single governmental action by themselves. Thus, to make it possible for them to fulfil their control function, unhindered access to the courts by the people must be guaranteed. The right to an effective remedy also gives effect to the principles of natural justice, to wit *audi alteram partem* and *nemo iudex idoneus in propria causa est*.[1]

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1. NG: SC, 11 Dec. 2009, Case no. 76/2007, *Olufeagba v. Abdur-Raheem*, ALL FWLR (Pt. 512), at p. 1042; ZA: CC, 16 Nov. 1999, Case no. CCT 23/99, *Lesapo v. North West Agricultural Bank*, BCLR, at para. 11.

Because of the exuberant importance of the right to an effective legal remedy, it is prominently covered in numerous international human rights regulations.[2] The International Covenant on Civil and Political Rights (ICCPR), which is legally binding in all 173 states that have ratified it,[3] states in article 2(3):

> Each State Party to the present Covenant undertakes:
>
> (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
>
> (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy; […]

Similarly, article 6(1) of the European Convention on Human Rights (ECHR) stipulates that:

> In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. […]

Furthermore, article 47 of the EU Charter, article 7 of the African Charter on Human and Peoples' Rights and article 8(1) read with article 25 of the Multilateral American Convention on Human Rights[4] afford persons the right to an effective remedy by providing the right to approach a competent court.

The right to an effective remedy can also be found in domestic instruments. For instance, the right to access to courts, contained in section 34 of the Constitution of the Republic of South Africa 1996 (South African Constitution) provides the right to have a dispute decided in "a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum." Section 36(1) of the Constitution of the Federal Republic of Nigeria 1999 affords a similar right.

Section 19(4) of the Constitution (Basic Law) of the Federal Republic of Germany guarantees every person the recourse to independent courts if their rights are violated by a public authority. The Federal Constitutional Court of Germany (*Bundesverfassungsgericht*) interprets this provision as a guarantee of an effective legal protection of the basic human rights which includes a timely and fully judicial review of the administrative act.[5] Facing the severity of the basic human laws its effective protection means also a precautionary or preliminary protection if the subsequent review is too late or serious, irremovable damages will emerge.[6]

The question arises whether this right to an effective remedy should apply to tax disputes. This is especially relevant for purposes of article 6(1) of the ECHR as it only refers to "civil rights". While the English term leaves room for an understanding synonymous to "human rights",[7] the European Court of Human Rights interprets it in a more narrow sense of rights and obligations in the field of civil – or private – law.[8] That understanding is in line with the German version of the Convention which uses the term "*zivilrechtliche Ansprüche*" which means "claims in the field of civil law". Therefore, the European Court of Human Rights generally excludes claims in the field of public law.[9] The Court considered that tax matters still form part of the hard core of public authority prerogatives and the public nature of the relationship between the taxpayer and the community is remaining predominant.[10] It decided that tax disputes fall consequently outside the scope of civil rights and obligations, despite the pecuniary effects which they necessarily produce for the taxpayer. However, in the same decision the Court also acknowledges that the Charter must be interpreted in an autonomous European way whereby the field of application can be broader than in the sense of the respective national law.[11] Meanwhile the Court has developed a wider approach, according to which the "civil" limb has covered cases which might not initially appear to concern a civil right but which may have direct

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2. Including the legally non-binding UN Declaration of Human Rights in art. 8.
3. The current state of ratification can be viewed at https://indicators.ohchr.org (accessed 10 Jan. 2023).
4. *Pact of San José, Costa Rica*. Signed at San José, Costa Rica, on 22 Nov. 1969.
5. DE: Federal Constitutional Court (Bundesverfassungsgericht, BVerfG), 19 June 1973, 1 BvL 39/69, 1 BvL 14/72, German Federal Constitutional Court Gazette (*Entscheidungen des BverfG*, BVerfGE), Vol. 35, p. 263 (274); BVerfG 27 Oct. 1999, 1 BvR 385/90, BVerfGE Vol. 101, p. 106 (p. 123 f.) = ECLI:DE:BVerfG:1999rs19991027.1bvr038590.
6. DE: BVerfG, 16 May 1995, 1 BvR 1087/91, BVerfGE, Vol. 93, p. 1 (13 f.); BVerfG, 13 April 2010, 1 BvR 216/07, BVerfGE Vol. 126, p. 1 (p. 27 f.) = ECLI:DE:BVerfG:2010rs20100413.1bvr021607.
7. Cf. the Oxford Dictionary Online (available at https://www.oxfordlearnersdictionaries.com/definition/english/civil-rights?q=civil+rights (accessed 10 Jan. 2023)): "the rights that every person in a society has, for example to be treated equally, to be able to vote, work, etc. whatever their sex, race or religion".
8. *See* the examples of European Court of Human Rights (ECtHR), Guide on Article 6 of the European Convention on Human Rights, Right to a Fair Trial (civil limb), updated to 30 April 2022, at p. 14, point 32 ff.
9. ECtHR, 12 July 2001, Case no. 44759/98, Reports 2001-VII, Grand Chamber, *Ferrazzini v. Italy*, with an only narrow majority (*see* the concurring opinion of judge Ress, p. 362 f., and the dissenting opinion of six other judges, pp. 364-370); regarding custom duties or charges *see* ECtHR, 13. Jan. 2005, Case no. 62063/00, Third Chamber, *Emesa Sugar N.V. v. The Netherlands*, p. 10.
10. ECtHR, *supra* n. 9, para. 29; different: application of Art. 6 ECHR against the assessment of tax surcharges and tax penalties, *see* ECtHR, 23 July 2002, Case no. 34619/97, First Chamber, *Janosevic v. Sweden*, point 65 ff.
11. EctHR, *supra* n. 9, point 24.

and significant repercussions on a private pecuniary or non-pecuniary right belonging to an individual.[12] Accordingly, the Court regards disputes might fall within the scope of article 6 proceedings which, in domestic law, is categorized under "public law" and whose result is decisive for private rights and obligations or the protection of "pecuniary rights".[13] Therefore, we find in the jurisdiction of the European Court of Human Rights decisions which have applied article 6(1) of the ECHR for example in a case of child allowances[14] or in a case of real estate tax on housing.[15]

The European Court of Justice, on the other hand, considers the right of an effective remedy to be a general principle of EU law that applies when the authorities intend to take a measure against a person that will adversely affect them.[16] That is in line with the provision of article 47 of the EU Charter which stipulates the following:

> Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this article.
>
> Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.
>
> Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.

As a result of a general principle of EU law, article 47 of the EU Charter protects persons, both natural and legal, against arbitrary or disproportionate intervention by the public authorities in the sphere of those persons' private activities.[17] The essence of the right to an effective remedy includes, among other aspects, the possibility, for the person who holds that right, of accessing a court or tribunal with the power to ensure respect for the rights guaranteed to that person by EU law and, to that end, to consider all the issues of fact and of law that are relevant for resolving the case before it.[18]

While the Charter is only applicable where Member States' authorities deploy Union law,[19] the German Federal Constitutional Court (*Bundesverfassungsgericht*) recently argued that the European fundamental rights stand equally aside the domestic fundamental rights and can also apply where mere national law is deployed in cases where they would grant more freedom than the national fundamental rights.[20] While that decision only addresses German authorities, the ruling of the German Constitutional Court may pave the way for a modern understanding of the European fundamental rights, by which the Charter constitutes a minimum standard of fundamental rights that should be recognized by all European Member States.

Therefore, considering that the right to an effective legal remedy is an elemental part of the rule of law, that it is acknowledged by the ICCPR as well as the ECHR and the EU Charter, it can be understood as a general principle that underlies legal considerations regarding European procedure law. Thus, the right to an effective legal remedy also applies to tax cases.

To make a legal remedy effective, it must have the prospect of success. Success in this context means that the administrative action challenged by the remedy does not come into effect. For example, if an authority orders a building to be demolished because of a risk of collapse and the owner challenges the decision, the legal remedy would be useless, if the authority enforces the order and tears down the building before the court is able to decide upon the matter. While the owner could still receive financial compensation, the possibility of a legal remedy would significantly lose its value when authorities could undermine it by creating a fait accompli. Suspensive effects deal with that problem by preventing the authorities from enforcing the challenged decision so long as the appeal is pending in court. Thus, the enforceability of the administrative decision is suspended by the appeal.

In that regard, tax matters present a specialty. They are usually about a payment obligation, meaning that wrongfully paid taxes can generally be paid back. Therefore, paying an outstanding tax claim before its lawfulness is ensured does not per se bear the risk of causing irreparable damage to the taxpayer. Notwithstanding, such irreparable damages are far from impossible. For example, a high tax payment might drive an entrepreneur into insolvency. In milder cases, it might hinder them from taking time-limited business opportunities. Therefore, the absence of any suspensive effect of appeals against tax assessments can impair the right to an effective legal remedy.

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12. ECtHR (Guide on Art. 6 ECHR), *supra* n. 8, p. 15, point 38 and with examples in point 39.
13. ECtHR (Guide on Art. 6 ECHR), *supra* n. 8, p. 14, point 34.
14. EctHR, 1 Apr. 2010, Case no. 12852/08, Fifth Chamber, *N. v. Federal Republc of Germany*, point 32.
15. ECtHR 4 Apr. 2014, Case no. 7552/09, Fourth Chamber, *Church of Jesus Christ of Latter-Day Saints v. United Kingdom*, point 23 ff. (regarding Art. 9, 14 ECHR: freedom of religion and prohibition of discrimination).
16. HU: CJEU 17 Dec. 2015, C-419/14, ECLI:EU:C:2015:832, *WebMindLicences*, point 84, Case Law IBFD; *see* L. Vandenberghe, *Enforcement of Disputed Taxes, in Particular Customs Duties*, EU and International Tax Collection News 2, 30, (2017), at p. 30.
17. LU: CJEU, 16 May 2017, C-682/15, ECLI:EU:C:2017:373, *Berlioz Investment Fund*, point 51, Case Law IBFD; LU: CJEU, 6 Oct. 2020, C-245/19, C-246/19, ECLI:EU:C:2020:795, *Etat luxembourgeois*, point 57, Case Law IBFD.
18. LU: CJEU, 6 Oct. 2020, C-245/19, C-246/19, ECLI:EU:C:2020:795, *Etat luxembourgeois*, point 66, 82, Case Law IBFD.
19. SE: CJEU, 26 Feb. 2013, C-617/10, ECLI:EU:C:2013:280, *Åkerberg Fransson*, Case Law IBFD.
20. DE: BVerfG, 6 Nov. 2019, 1 BvR 276/17, ECLI:DE:BVerfG:2019:rs20191106.1bvr027617, *Recht auf Vergessen* II, at point 60.

Despite the importance of fundamental rights such as the right to an effective remedy, these rights are not absolute and can be restricted for reasons that are of public interest when the restriction is proportionate to the aim pursued.[21] Regarding tax claims, the public interest consists in the fact that national budgets depend on steadily and reliably paid taxes to realize its socio-economic objectives. Where appeals against tax claims are numerous and court cases can last for several years, suspending the enforcement of the disputed tax claims could seriously hamper budgetary planning and the overall financial stability of the public sector. Furthermore, the risk of insolvency of the taxpayer is borne by the state where the tax claim is suspended. Finally, taxpayers might lodge futile appeals to postpone their obligation to pay. Although these fiscal interests are valid, waiving any suspensive effect of appeals against tax claims could lead to cases where obviously unlawful tax claims would be enforced despite detrimental consequences for the taxpayer that would exceed the risk of the treasury many times over.

3. Domestic Approaches to Disputed Tax Claims

3.1. Contrasting interests

The question of how the right to an effective remedy should be balanced with efficient and effective collection of taxes is a question every tax-levying jurisdiction must grapple with. In determining the appropriate approach, various aspects need to be considered, such as the jurisdiction's reliance on taxes (the reliance might be more in developing countries or countries that are not rich in natural resources), the efficiency of the adjudication procedure and, of course, taxpayers' rights.

An approach where the enforcement of a dispute claim is suspended centres on taxpayers' rights as the right to an effective legal remedy prevails over the revenue authority's interest in the efficient and effective collection of taxes. In the main, a jurisdiction would be more inclined to follow an approach of suspension if it is not too reliant on taxation as a source of revenue. For instance, in Nigeria, the general approach of suspending the enforcement of a disputed tax claim could be ascribed to the fact that most of Nigeria's government revenue comprises of income earned from the sale of crude oil.[22]

However, when the enforcement of a disputed claim is suspended, generally interest continues to accrue on the outstanding tax. This means that the loss a revenue authority suffers due to the time value of money is recouped to some extent by way of interest. Apart from this recoupment for the revenue authority, the accrual of interest plays a role in a taxpayer's decision[23] to challenge a tax claim as the risk of the accruing interest might be too high for some taxpayers.[24]

On the other side of this spectrum, the enforcement of the tax claim is not suspended. Thus, the adjudication of the merits of the matter and the collection of the disputed tax are separated. An overburdened court system would make this approach attractive so as not to compromise the efficient and effective collection of taxes. Proponents of this approach also argue that this approach reduces the number of frivolous objections and appeals taxpayers lodge.[25] Even so, it is somewhat doubtful that a taxpayer would lodge an objection or appeal when there is no merit in the dispute. Apart from the interest that the taxpayer would have to pay if the dispute is decided in favour of the revenue authority, they would also incur legal expenses and court fees.[26]

This section first considers how various jurisdictions attempt to balance the competing interests, before discussing the principle of *solve et repete*. Although this discussion focuses on selected jurisdictions only, it highlights some approaches that are used when dealing with disputed tax claims.

21. For the EU Charter, *see* IE: CJEU, 8 Apr. 2014, C-293/12, ECLI:EU:C:2014:238, *Digital Rights Ireland*, point 38; 17 Oct. 2013, C-291/12, ECLI:EU:C:2013:670C, *Schwarz*, point 23; AT: CJEU, 22 Jan. 2013, C-283/11, ECLI:EU:C:2013:28, *Sky Österreich*, point 41. For the ECHR, *see* EctHR, 16 Dec. 1997, Case no. 21353/93, Reports 1997-VIII, Camenzind, point 45; 25 Feb. 1993, Case no. 10828/84, Funke, point 57; Cf. Vandenberghe, *supra* n. 16. *See also* ZA: Constitution of the Republic of South Africa, 1996 (amended 2012), sec. 36; Canadian Revenue Authority *Taxpayer Bill of Rights Guide: Understanding your Rights as a Taxpayer*, p. 6.
22. C. Fritz, *Payment Obligations of Taxpayers Pending Dispute Resolution: Approaches of South Africa and Nigeria*, 18 African Human Rights Law Journal 1, p. 173 (2018). J. Madugba, M. Ekwe & S. Okezie, *Evaluation of the Contribution of Oil Revenue on Economic Development in Nigeria*, 8 International Journal of Economics and Finance 6, p. 210 (2016) indicated that 80% of the Nigerian government revenue comprises of income from the sale of crude oil.
23. *See* K.-D. Drüen & P. Butler, *Interests in Light of the Proportionality Principle*, in *Surcharges and Penalties in Tax Law*, EATLP International Tax Series, Vol. 14, pp. 85 ff (R. Seer & A. L. Wilms eds., IBFD 2016), Books IBFD.
24. M. Keating, *Tax Disputes in New Zealand: A Practical guide*, p. 8 (CCH New Zealand 2012); The Taxation Committee of the New Zealand Law Society and the National Tax Committee of the New Zealand Institute of Chartered Accountants *Joint Submission: The Dispute Resolution Procedures in Part IVA of the Tax Administration Act 1994 and the Challenge Procedures in Part VIIIA of the Tax Administration Act* Appendix A (4 Aug. 2008).
25. ZA: W, 24 Nov. 2000, Case no. ZACC 21, *Metcash Trading Ltd v. Commissioner for the South African Revenue*, SA 232, at p. 243.
26. G. Walde, *Solve et Repete*, 8 Finanzarchiv 2, p. 444 (1941).

3.2. Domestic examples

3.2.1. New Zealand

In New Zealand, taxpayers' payment obligations as regards disputed taxes are deferred until the "due date" for payment,[27] meaning that 30 days after the final liability has been determined, the tax collection can commence.[28] Thus, the deferral of the payment obligation will cease either 30 days after the Commissioner receives notice that the taxpayer is not proceeding with the dispute anymore, or 30 days after the Tax Review Authority or a court has adjudicated the dispute.[29] As such, the enforcement of the disputed tax claim is suspended until the dispute has been finalized.

Section 138I(2B) of the Tax Administration Act 1994 provides an exception to the general position of suspending the enforcement of the tax claim when a dispute is pending, namely when the Commissioner opines that there is a significant risk of the taxpayer not paying the disputed claim if it was decided against the taxpayer. The Tax Administration Act 1994 does not provide any guidance of when a significant risk would be present.

Nonetheless, Lennard equates this exception to when a court may order a plaintiff to furnish security for costs.[30] The latter would occur when a judge has reason to believe that the plaintiff would be unable to pay the costs of the defendant, should the plaintiff be unsuccessful in the matter.[31] In *AS McLachlan Ltd v. MEL Network Ltd* (CA 39 of 2002)[32] the court cautioned that when a substantial amount of security for costs is ordered, it could prevent the plaintiff from pursuing the matter. Consequently, the court held that such an order should "be made only after careful consideration and in cases in which the claim has little chance of success. Access to the courts for a genuine plaintiff is not lightly to be denied."[33]

Although both furnishing security for costs and the significant risk exception for disputed tax claims relate to a person's ability to perform if a decision is made in favour of the other party, even more caution must be exercised when determining whether to apply the significant risk exception for tax claims. This is because furnishing of security is ordered by a judge, who independently determines the prospect of success and if security should be furnished. Contrariwise, the significant risk exception for disputed tax claims is determined by the Commissioner. In this respect, significant risk cannot mean that the prospects of success should be determined. Such a meaning would result in the Commissioner adjudicating the merits of the tax dispute as opposed to whether there is a risk of the taxpayer being unable to pay. Significant risk in the context of disputed tax claims should rather entail inter alia whether there is a risk of assets being dissipated.[34]

3.2.2. Canada

Generally, the Canadian Revenue Authority cannot proceed with collecting an assessed tax before 90 days have lapsed after the notice of assessment was sent.[35] This 90-day-period provides taxpayers with the opportunity to determine whether or not they want to dispute the assessed tax.[36] If a taxpayer lodges an objection, the Canadian Revenue Authority is unable to proceed with collection of the disputed tax until 90 days have lapsed after confirming or varying the assessment.[37] In the same way, if a taxpayer lodges an appeal to the Tax Court of Canada, collecting the assessed amount may only occur after the decision of the court to confirm the assessed amount is mailed to the taxpayer or when the taxpayer withdraws the appeal, whichever occurs first.[38]

However, this situation changes when a further appeal is brought to the Supreme Court of Canada as there is no provision that restricts the Canadian Revenue Authority's collection powers at that stage of the appeal process.[39] This could be because article 7 of the Canadian Taxpayer Bill of Rights stipulates that you have the right to have your payment obligation suspended until your matter has been *impartially* considered, which would have occurred when the matter was heard by the Tax Court of Canada.

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27. NZ: Tax Administration Act 166 of 1994, sec. 138 I (2).
28. Sec. 142 of the Tax Administration Act 1994 read with "period of deferral" as defined in sec. 3 of the Tax Administration Act 1994.
29. "Day of determination of final liability" as defined in sec. 3 of the Tax Administration Act 1994.
30. M. Lennard, *Security for Costs – Another Brick in the Wall?*, Taxation Today 15 (Aug. 2010).
31. Rule 5.45 (1)(b). In terms of rule 5.45(1)(a), security for costs may also be ordered when the plaintiff is not resident in New Zealand or not a corporation incorporated in New Zealand.
32. NZ: CA, 29 Aug. 2002, Case no. CA 39 of 2002, *AS McLachlan Ltd v. MEL Network Ltd*, 16 PRNZ 747.
33. *AS McLachlan Ltd v. MEL Network Ltd McLachlan* (Case no. CA 39 of 2002), at paras. 15-16.
34. C. Fritz, *An Appraisal of Selected Tax-enforcement Powers of the South African Revenue Service in the South African Constitutional Context* p. 222 (2017).
35. CA: Income Tax Act, 1985 (amended 2022), RSC c 1 (5th Supp), sec. 225. 1; 225. 1 (1.1)(c).
36. K. Wintermute, *Tax Appeals: How to Deal with an Income Tax, GST or Payroll Assessment* p. 22 (2003).
37. Sec. 225.1(2) Income Tax Act 1985 [hereinafter ITA 1985].
38. Sec. 225.1(3) ITA 1985.
39. C. Fritz, *Reconsidering the "Pay Now, Argue Later" Approach of South Africa in relation to Disputed Taxes – Lessons from Canada and Australia*, 44 Journal for Juridical Science 20, p. 31 (2019).

The Canadian approach of suspending enforcement of disputed tax claims up to a certain point does not apply in all instances. When the amount in dispute relates to withholding taxes, such as a payroll deduction, the Canadian Revenue Authority can proceed with collections despite the fact that the taxpayer disputes the tax.[40] Additionally, when a taxpayer is classified as a large corporation,[41] the Canadian Revenue Authority may collect 50% of the assessed amount once the notice of assessment has been sent, regardless of whether an objection has been lodged.[42] Requiring a large corporation to pay half of the disputed tax can have serious cash flow implications for that corporation.[43]

The payment obligation is also not suspended when a judge is satisfied that there are reasonable grounds to believe that the collection of the assessed amount is in jeopardy, if the collection is delayed.[44] Reasonable grounds may be established when taxpayers sell or transfer assets, they evade their tax obligations, or there is reason to believe that the taxpayer has acted fraudulently.[45] In the main, this jeopardy order will be served on the taxpayer within 72 hours after it was granted.[46] The affected taxpayer can then take this matter on review,[47] which allows the taxpayer the opportunity to make representations as to the perceived jeopardy.

Even though the enforcement of a disputed tax claim in Canada is generally suspended until the matter has been adjudicated by an impartial forum, most taxpayers pay the disputed tax to stop interests from accruing.[48] The fact that resolving the tax dispute could take a considerable amount of time, meaning the accrual of considerable interest, may induce a taxpayer to pay the disputed tax.

Another mechanism in Canada to prevent taxpayers from lodging frivolous objections and appeals is contained in section 179.1 of the Income Tax Act. This section provides the Tax Court of Canada with the discretion to levy a penalty of up to 10% of the amount which the taxpayer disputed, if it is of the view that the dispute resolution process was mainly used to postpone the payment of taxes.

3.2.3. Australia

In Australia the tax *may* be recovered even if a review or appeal against the assessed tax has been lodged.[49] Consequently, the Commissioner of the Australian Tax Office has a discretion, not an obligation, to recover taxes pending dispute resolution.[50] In *Deputy Commissioner of Taxation v. Roma Industries Pty Ltd* (1976),[51] it was held that this discretion should be used.

> against that class of taxpayer who might withhold payment and use the money as sinews of war to conduct appeals against the Commissioner who being finally unsuccessful, was found to be unable to meet his tax liability having spent his money on the litigation.[52]

As such, the Australian Tax Office exercises its discretion to defer the payment of disputed taxes when there is a genuine dispute.[53] Whilst there is no clear definition of what constitutes a genuine dispute, a genuine dispute requires more than lodging an objection, review or appeal.[54] According to the Australian Tax Office, when a taxpayer delays dispute resolution proceedings, it would be indicative that there is no genuine dispute.[55] The Australian Tax Office would need to consider the merits of the case to establish whether or not to suspend the payment obligation on the basis that there is a genuine dispute.

Furthermore, the Australian Tax Office can, after conducting a risk assessment, conclude a 50/50 agreement with a taxpayer.[56] This 50/50 agreement is an agreement in terms whereof the taxpayer pays at least half of the disputed tax, the collection of

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40. Sec. 225.1(6) ITA 1985. This approach can be problematic if the crux of the dispute is whether there is a withholding tax obligation.
41. In terms of sec. 225.1(8) of the ITA 1985 a taxpayer is a large corporation when the amount by which the corporation's capital exceeds its investment allowance for that year is more than USD 10 million.
42. Sec. 225.1(7) ITA 1985.
43. Fritz, *supra* n. 34, at p. 195.
44. Sec. 225.2(2) ITA 1985.
45. CA: FC, 13 May 2009, *Canada (National Revenue v. Cormier-Imbeault)*, 6 CTC 4, para. 7.
46. Sec. 225.2(5) ITA 1985.
47. Sec. 225.2(8) ITA 1985.
48. N. Simard, *How to Object to Assessment in Canada*, Lexology (30 Aug 2015), available at http://bit.ly/1PMSI05 (accessed 10 Jan. 2023).
49. AU: Taxation Administration Act, 1953, sec. 14ZZM & 14ZZR.
50. K. Wyatt & W. Gumley, *Are the Commissioner's Debt Recovery Powers Excessive?*, 95 Monash University Department of Banking and Finance Working paper 4, p. 32 (Dec. 1995).
51. AU: NSWSC, 1976, *Deputy Commissioner of Taxation v. Roma Industries Pty Ltd*, 76 ATC 4113. *Roma Industries* dealt with sec. 201 of the Income Tax Assessment Act 1936, the predecessor of sec. 14ZZM & 14ZZR of the Taxation Administration Act, 1953.
52. *Deputy Commissioner of Taxation v. Roma Industries*, *supra* n. 51, at p. 4116.
53. Australian Tax Office, *Practice Statement Law Administration (PS LA 2011/4) – Collection and recovery of disputed debts*, para. 43 (2015).
54. AU: QCA, 28 Sept. 2007, Case no. QCA07-312, *DCT v. Neutral Bay Pty Ltd; DCT v. MA Howard Racing Pty Ltd; DCT v. Broadbeach Pty Ltd* 2008 HCA 41, para. 22.
55. Australian Tax Office, *supra* n. 53, at paras. 12-13.
56. Australian Tax Office, *supra* n. 53, at para. 26.

the outstanding amount is then deferred and if the matter is decided against the taxpayer, there will be a partial remission of interest as only half of the disputed amount would have been unpaid.[57]

Suspending the payment obligation pending dispute resolution, either because of a 50/50 agreement or because there is a genuine dispute, remains within the Australian Tax Office's discretion. This leads to inconsistencies and uncertainties. For instance, large businesses and high-wealth individuals are not treated the same in similar circumstances as the Australian Tax Office sometimes makes payment arrangements and other times proceeds with enforcement actions.[58] Such inconsistencies and uncertainties are contrary to the rule of law as it becomes impossible "to foresee with fair certainty how the authority will use its coercive powers in given circumstances, and to plan one's individual affairs on the basis of this knowledge".[59]

As the Australian Tax Office has the discretion to collect taxes pending dispute resolution, the court will only order otherwise in limited circumstances.[60] In this respect, Glass J commented, "the needle stands in the Commissioner's favour close to one hundred and it requires a weighty case to be presented by the taxpayer in order to depress it below the halfway mark".[61] In *Deputy Federal Commissioner of Taxation v. Mackey* (1982) the court identified such weighty cases to include when the Commissioner abuses its position[62] or when the payment of the disputed tax would cause extreme personal hardship to the taxpayer.[63]

3.2.4. South Africa

Section 164(1) of the Tax Administration Act 28 of 2011 (amended 2021) provides that in general the enforcement of a tax claim is not suspended when a taxpayer disputes such a claim. This "pay now, argue later" approach, as it related to the erstwhile section 36(1) of the Value-added Tax Act 89 of 1991 (amended 2021), was challenged in the matter of *Metcash Trading Ltd v. Commissioner for the South African Revenue Service and the Minister of Finance*.[64] The challenge in this matter centred around an aspect that is pertinent for purposes of this article, namely does this "pay now, argue later" approach unreasonably and unjustifiably infringe on a taxpayer's right to access to courts. The Constitutional Court held that this approach does not oust the court's jurisdiction and consequently it musters constitutional scrutiny.[65]

This judgment has been subject to criticism. Olivier remarked that the question should not have been whether the court's jurisdiction is completely ousted, but instead, whether the court's jurisdiction is excluded at the moment the "pay now, argue later" rule applies.[66] Although there are dispute resolution mechanisms taxpayers can use to dispute the assessment and merits of the case, the fact that they have to "pay now, argue later" means that the revenue authority "helps itself". This is contrary to one of the stated aims of the right to access to courts, namely, to prevent self-help.[67]

Furthermore, it also means that the revenue authority becomes the judge in its own case at that point in time, which conflicts with the *nemo iudex* rule. Additionally, from a physiological perspective, when taxpayers have to fulfil disputed tax claims, taxpayers may be discouraged from proceeding with the dispute as they have already "lost" the money.[68] Also, if taxpayers have to pay the disputed tax, they may not have any money available to proceed with the dispute.[69]

Nonetheless, taxpayers may request to have the enforcement of their tax claims suspended if they intend to dispute or in fact dispute the tax claims.[70] When exercising this discretion to suspend or not, a senior South African Revenue Service official should consider inter alia (i) the potential risk of tax collection if the enforcement of the disputed tax claim is suspended; (ii) the taxpayer's tax compliance history; (iii) whether there is prima facie fraud involved; (iv) if the taxpayer has tendered adequate security and accepting it is beneficial to the South African Revenue Service or the fiscus;[71] and (v) if paying the disputed tax

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57. Australian Tax Office, *supra* n. 53, at para. 4.
58. Inspector General of Taxation, *The Management of Tax Disputes – A Report to the Assistant Treasurer* para. 5.4 (2015). According to Australian Tax Office, *Tax Compliance for Small-to-Medium Enterprises and Wealthy Individual* (2012), "Australian resident individuals who, together with their associates, effectively control an estimated net wealth of $30 million or more" would constitute high wealth individuals.
59. F. Hayek, *The Road to Serfdom* 72, (1944) as quoted in A. Sykes, *The Rule of Law as an Australian Constitutionalist Promise*, 9 Murdoch University Electronic Journal of Law 1, para. 13 (2002).
60. AU: ATC, 1982, *Deputy Federal Commissioner of Taxation v. Mackey*, p. 4571, at p. 4574.
61. *Deputy Federal Commissioner of Taxation v. Mackey* (1982), *supra* n. 60, at p. 4575.
62. An example of such abuse is when the Commissioner proceeds to collect tax in defiance of a court order. Id.
63. Id.
64. ZA, CC, 24 Nov. 2000, Case no. CCT3/00, *Metcash Trading Ltd v. Commissioner for the South African Revenue Service and the Minister of Finance*, 1 SA 1109.
65. *Metcash Trading Ltd v. Commissioner for the South African Revenue Service and the Minister of Finance* (CCT3/00), *supra* n. 64, at p. 1132.
66. L. Olivier, *Tax Collection and the Bill of Rights*, Tydskrif vir die Suid-Afrikaanse Reg , p. 196 (2001).
67. C. Keulder, *"Pay Now, Argue Later" Rule – Before and After the Tax Administration Act*, 16 Potchefstroom Electronic Law Journal 4, p. 140 (2013).
68. Davis Tax Committee, *Report on Tax Administration*, p. 75 (2017).
69. Fritz, *supra* n. 39, at p. 24.
70. SA: Tax Administration Act 28 of 2011, sec. 164(2) (amended 2021).
71. The South African Revenue Service's interest in tax claims relates to its obligation to collect and enforce the payment of taxes, whilst the fiscus' interest pertains to using the collected taxes to realize socio-economic objectives.

will lead to irreparable hardship for the taxpayer that outweighs the prejudice caused to the South African Revenue Service and the fiscus by not collecting the taxes under dispute.[72]

Explicitly listing what should be considered when exercising this discretion is important for a few reasons. One, it establishes a clear criterion as to prevent selective application. Two, it aids transparency, which is a constitutional imperative for public administration in terms of section 195(1) of the South African Constitution. Three, the South African Revenue Service's discretion is fettered, which ensures that it aligns with the rule of law[73] as it establishes "pre-announced, clear and general rules".[74]

Even so, the factors stipulated in the Tax Administration Act 2011 are not without problems. For instance, considering whether fraud is prima facie involved in the origin of the dispute and not an actual fraud conviction, means that an impartial forum has not yet determined if fraud was in fact present. Such an adverse finding by the South African Revenue Service does not only mean that it is considering the merits of the matter without granting the taxpayer the opportunity to state their case, but it is also contrary to the right to be presumed innocent until proven guilty, as contained in section 35(3)(h) of the South African Constitution.

Another problematic factor is whether paying the disputed tax will lead to irreparable hardship for the taxpayer, which outweighs the prejudice caused to the South African Revenue Service and the fiscus by not collecting the disputed taxes. Besides the concept of "irreparable hardship" being subjective, the South African Revenue Service is required to weigh up the prejudice it and the fiscus may suffer if the payment obligation is suspended against the possible irreparable hardship. This creates a conflict-of-interest contrary to the *nemo iudex* rule.[75] Furthermore, a "catch-22" situation is possibly created. If there is no evidence that paying the tax pending dispute resolution could result in irreparable hardship, then most probably the payment of taxes will not be suspended. Equally, if there is evidence that irreparable hardship might be suffered, the South African Revenue Service could argue that the taxpayer would not be able to pay the tax at a later stage and it would therefore be in the South African Revenue Service's interest to proceed with collections at present.[76]

Yet, one could argue that in some instances it would also be in the fiscus' interest not to proceed with collections pertaining to a disputed claim when it can lead to irreparable hardship. For instance, if collecting the disputed taxes would leave the taxpayer destitute, they would be unable to provide for themselves (and their dependants) and may be compelled to rely on social grants from government. In the long run it would be better for the fiscus to have lesser people reliant on government support for their survival than collecting a disputed tax.[77] When assessing the possible hardship collecting disputed taxes may cause, it is important to also consider the ripple effect the collection may have on society for instance when the taxpayer employs several people.[78]

3.2.5. Germany

In Germany,[79] generally, the enforcement of disputed taxes is not suspended.[80] Similar to South Africa, an application can be made to suspend the tax collection.[81] Such an application can be brought forward both to the tax authority during an extrajudicial opposition procedure[82] as well as in court when the tax claim is challenged there.[83] In both cases the tax authority can on its own initiative suspend the enforcement of the disputed tax claim. Only if the authority refuses to do so, the taxpayer can apply for the measure. Article 361(2) of the German General Tax Code (*Abgabenordnung*, AO) and article 69(2) of the Law on Fiscal Court Procedures (*Finanzgerichtsordnung*) have to be understood from the view of an

72. Sec. 164(3) SA Tax Administration Act.
73. Fritz, *supra* n. 34, at p. 37.
74. ZA: CC, 7 June 2000, Case no. CCT 35/99, *Dawood v. Minister of Home Affairs; Shalabi v. Minister of Home Affairs; Thomas v. Minister of Home Affairs*, 2000 (5) BCLR 837, p. 842; ZA: CC, 11 Mar. 2005, Case no. CCT 27/04, *Affordable Medicines Trust v. Minister of Health of the RSA*, 2005 (6) BCLR 529, para. 108.
75. Fritz, *supra* n. 39, at p. 27.
76. B. du Plessis & P. Dachs, *Pay Now Argue Later, Tax ENSight* (23 July 2014), available at https://www.thesait.org.za/news/182713/Pay-now-argue-later.htm (accessed 10 Jan. 2023).
77. C. Fritz, *Plucking Goose Feathers with the Least Possible Hissing: Suggestions for Tax Collection in Respect of Third-party Appointments*, 83 Journal for Contemporary Roman Dutch Law, p. 112 (2020).
78. ZA: SATC, 27 June 2017, *Nondabula v. Commissioner for the South African Revenue Service*, 19 SATC 333, para. 25 where the court considered the impact of tax enforcement on the community.
79. Regarding other examples of Member States of the European Union, *see* as an overview: P. Pistone (ed.), *General Report*, in *Tax Procedures*, EATLP International Tax Series, Vol. 18, p. 63 (tax collection), p. 69 (reviews and appeals) (IBFD 2020), Books IBFD, with further national reports of Austria, Belgium, Croatia, Czech Republic, Finland, France, Greece, Hungary, Italy, Luxembourg, Netherlands, Poland, Portugal, Spain, Sweden and additonal of non-EU countries like Brazil, Norway, Russia, Switzerland, Turkey, Ukraine and United Kingdom.
80. Art. 361(1) of the German General Tax Code (*Abgabenordnung*, AO) [hereinafter AO].
81. Art. 361(2) AO.
82. Art. 361 AO.
83. Art. 69(2) German Fiscal Court Code (*Finanzgerichtsordnung*, FGO).

effective protection of law which is guaranteed by article 19(4) of the Federal Constitutional Basic Law.[84] In all cases, the prerequisites for a suspension are the same, i.e. either serious doubts exist about the legality of the challenged tax assessment or the enforcement of the challenged decision would mean an undue hardship for the taxpayer that cannot be justified by the public interest in immediate execution of the claim. In general, the legality of the tax claim shall be reviewed summarily, and the enforcement shall be suspended when doubts are substantial.[85] Thereby, the unlawfulness does not have to be more likely than the legality.[86] Undue hardship can be interpreted to exist when the payment would lead to irreparable damage for the taxpayer that succeeds the pure burden of the payment, that is the payment would mean the destruction of their economic existence.[87] Yet, even such circumstances shall not justify a suspension of enforcement when there are no doubts about the legality of the challenged claim.[88] Consequently, the German tax authority is also required to consider the merits of the disputed claim to which it is a party and the impact collecting on a disputed tax claim may have on the taxpayer.

3.2.6. Results by comparing the examples

The discussion of the selected jurisdictions above makes clear that jurisdictions that suspend the enforcement of a dispute tax claim as a point of departure, do allow for exceptions where they will proceed with tax collections. Similarly, jurisdictions that do not suspend a disputed tax claim as a point of departure also allow for exceptions where they will suspend the enforcement of disputed tax clams. This rule-exception approach presents a rational balancing of the taxpayers' right to an effective appeal on the one side and the interest of the fiscus in a stable recovery of its revenue on the other. This gives effect to the principle of proportionality, which means that appropriate means should be used to obtain policy objectives.[89] Consequently, the means to collect taxes should be necessary and appropriate and the effect thereof should not be disproportionate to the aim.[90]

3.3. Paying disputed tax as prerequisite for disputing a tax claim

In addition to the permutations of suspending or not suspending a dispute tax claim as highlighted above, a few jurisdictions require the payment of the disputed tax or a portion thereof before a taxpayer can lodge an appeal. The ratio behind this principle of *solve et repete*,[91] which stems from Roman law,[92] is that taxpayers might lodge appeals just to postpone the payment even though the appeals appear to be futile. Taxpayers employing such a strategy would unnecessarily burden the judicial system while also presenting a threat to the fiscal income the same way an obligatory suspensive effect would.[93] However, this argument is not convincing, because the possibility of incurring legal expenses and court fees would prevent taxpayers from lodging appeals without the prospect of success.[94] Incurring those costs without the prospect of the tax claim being waived would only make sense for taxpayers if they indeed anticipate being insolvent before the final judgment as regards the tax claim is made. For example, the managers of a company in sincere financial trouble could try to secure as much existing money as possible for themselves and the shareholders. But that, too, does not make sense when no suspensive effect of a legal remedy applies. From a tax creditor's perspective, there is no difference between a tax claim that has or has not been challenged if the claim can be collected either way.

While, as seen, the positive effect of *solve et repete* for the revenue is all but non-existent, the impact on the taxpayers' right to an effective legal remedy is severe. Taxpayers who are unable to pay the requested tax would effectively be prevented from

84. In this regard, consult sec. 2.
85. DE: Federal Fiscal Court (*Bundesfinanzhof*, BFH), 25 Apr. 2018, IX B 21/18, ECLI:DE:BFH:2018:BA.250418.IXB21.18.0.
86. *See* R. Seer, in K. Tipke & W. Kruse (Founder), *Commentary on the German Fiscal Court Code* (*Finanzgerichtsordnung*), sec. 69, No. 89 (Feb. 2021) with a number of proofs of the German jurisdiction; some scholars speak of a probability of 50%, *see* B. Rätke, in Klein (ed.), *Commentary on the German General Tax Code* (*Abgabenordnung*), § 361 No. 16 (15th ed., 2020).
87. DE: BVerfG, 11 Oct. 2010, 2 BvR 1710/10, ECLI:DE:BVerfG:2010:rk20101011.2bvr171010.
88. Id.
89. D. Bentley, *Taxpayers' Rights: Theory, Origin and Implementation* 247, Series on International Taxation (Kluwer Law International 2007).
90. C. Daiber, *Protection of Taxpayers' Rights in Germany*, in *Taxpayers' Rights: An International Perspective*, p. 159 (D. Bentley ed., The Revenue Law Journal 1998).
91. Cf. P. Baker & P. Pistone, *General Report*, in *The Practical Protection of Taxpayers' Fundamental Right*, p. 51, point 6.5 (P. Baker ed., 2015) (IFA 2015 Basel Congress); J, Kokott, P. Pistone & R. Miller, *Public International Law and Tax Law: Taxpayers' Rights: The International Law Association's Project on International Tax Law - Phase 1*, 52 Georgetown Journal of International Law 2, p. 491 (2021).
A different understanding of the term can be found at O. Bühler, *Prinzipien des Internationalen Steuerrechts*, p. 39 (IBFD 1964). He uses the term to describe the system of withholding taxes, where taxes are deducted from a money transfer before challenging the existing of a respective tax debt is even possible. Bühler may have mistaken the phrase "*solve et repete*" for being synonymous to the German phrase "*Dulde und Liquidiere*", which translates to "tolerate first, litigate later". The German Federal Fiscal Court (*Bundesfinanzhof*, BFH) has adopted this misleading understanding in its ruling of 18 Sept. 1968 – I R 56/67, *Bundessteuerblatt* (German Federal Tax Gazette) Part II 1968, p. 797 (juris – point 18).
92. J.P. Santopinto, *Knock-for-Knock Indemnities and Their Application in Oil and Gas Contracts in Argentina*, 7 International In-House Counsel Journal 28, p. 13 (2014).
93. Cf. G. Walde, *supra* n. 26, at p. 444; S. Lewis, *The Rule "Pay First, Litigate Later" or Solve et Repete in Chilean Law*, 8 Journal of Comparative Law 1, p. 105 (2013); ff.; P. Baker & P. Pistone, *supra* n. 91.
94. Cf. G. Walde, *supra* n. 26, at p. 453 with further reference to M. Pugliese.

lodging an appeal. Accordingly, the principle of *solve et repete*, which once existed in Italian administrative law[95] as well as in Spain and in many South and Central American countries,[96] has been ruled unconstitutional in most of those states.[97] While the Spanish Supreme Court places emphasis on a violation of the right to an effective legal remedy by a *solve et repete* rule which it calls unthinkable ("inconceivable"),[98] the Italian Constitutional Court held that the requirement to pay a tax before an appeal can be lodged, violates the constitutional principle of equality because the ability to challenge a tax claim in court would depend on the individual wealth of the taxpayer, which is not an appropriate decisive factor.[99] It is, however, still in effect in Argentina,[100] Ecuador, Bolivia and Chile.[101]

Various courts have held that even requiring a partial payment of a disputed tax claim would not alleviate the problem. For instance, in *Fuelex (U) Ltd v. Uganda Revenue Authority* (2020),[102] the Constitutional Court of Uganda held that a provision requiring a taxpayer to pay a 30% deposit of the disputed tax or the part of the tax not disputed, whichever is greater, before proceeding with an objection is unconstitutional. Kukuru, JA compared the unfairness of such a provision to a boxing match where one of the opponent's arms is tied behind its back.[103]

In a similar vein, in *Cantos v. Argentina* (2002)[104] the Inter-American Court of Human Rights held that "[a]ny law or measure that obstructs or prevents persons from availing themselves of the recourse in question is a violation of the right of access to the courts".[105] Furthermore, the court held that requiring the taxpayer to pay 3% of the disputed claim was unreasonable and "there is no relationship of proportionality between the means employed and the aim being sought by Argentine law".

The *solve et repete* principle is not directly stipulated in the law; in some instances it manifests indirectly. For instance, in Nigeria collecting income tax is usually held in abeyance when an assessed tax is disputed[106] and only a month after the dispute has been finalized in the Federal Inland Revenue Service's favour can the Federal Inland Revenue Service commence with collections.[107] Thus, prima facie the taxpayers' right to an effective remedy enjoys preference over the effective and efficient collecting of outstanding taxes. Even so, a taxpayer may be ordered to pay a portion of the disputed tax before the Tax Appeal Tribunal will hear the matter. Paragraph 15(7) of the Fifth schedule to the Federal Inland Revenue Service (Establishment) Act 2007 sets out the instances where a taxpayer would need to pay a portion of the disputed tax. This is when the Federal Inland Revenue Service can prove that (i) the taxpayer has failed to provide returns for the relevant year of assessment; (ii) the appeal is frivolous, vexatious or abusing the appeal process; or (iii) for expedient purposes the taxpayer should pay an amount as security.

If one of the requirements is met, the taxpayer needs to pay an amount equal to the preceding year of assessment amount or 50% of the amount currently disputed, whichever is the lesser, plus 10% of that amount. If a taxpayer fails to pay this amount, the assessment is confirmed and they have no further right to appeal the assessment.[108]

Whilst the first requirement would be easily verified, the other two requirements are less straightforward. For the Tax Appeal Tribunal to be genuinely satisfied that the appeal is frivolous or vexatious or abusing the appeal process, the Tribunal should have to consider the merits of the case completely and not simply the version that the Federal Inland Revenue Service has put before the court as is currently the case. Similarly, the requirement of security is puzzling. When would it not be considered expedient for the taxpayer to rather pay the disputed tax as security? Moreover, KPMG Nigeria opines that the Tax Appeal Tribunal does not really consider whether one of the requirements contained in paragraph 15(7) has been proven by the

95. Cf. G. Miele, G. Cotzi & D. Falconi, *Italian Administrative Law*, 3 International and Comparative Law Quarterly 3, p. 438 (1954); G. Walde, *supra* n. 26, at pp. 444; for a respective principle in Italian civil law *see* G. Gorla, *Standard Conditions and Form Contracts in Italian Law*, 11 American Journal of Comparative Law 1, p. 10 (1962).
96. Lewis, *supra* n. 93, at p. 105 ff.; for Spain, *see* G. Moreno, J.L.B. Cholbi & C.U. Egido, in P. Pistone, *supra* n. 79, Ch. 24 (Spain), pp. 921 and 927.
97. Id.
98. Tribunal Supremo, ruling of 4 Jun. 2012 – STS 4126/2012 (ECLI:ES:TS:2012:4126). Along similar lines, The Inter-American Bar Association regards *solve et repete* to be contrary to art. 8 of the American Convention on Human Rights (Pact San Jose, Costa Rica), which affords the right to a fair trial. *See* Resolution 12 of the 24th Conference of the Inter-American Bar Association, published in University of Miami Inter-American Law Review 24 (1992-1993), p. 205 in this regard.
99. *Corte cost. sez. un.*, 24 Mar. 1961, point 21, Giur. it., II (ECLI:IT:COST:1961:21); G. Delledonne & F. Fabbrini, *The Founding Myth of European Human Rights Law: Revisiting the Role of National Courts in the Rise of EU Human Rights Jurisprudence*, 44 European LR 2, p. 178 (2019) even argue that the decision of the Italian Constitutional Court was part of an anti-authoritarian approach in which it redressed legislative remains of the Italian fascist regime.
100. Santopinto, *supra* n. 92.
101. Lewis, *supra* n. 93.
102. UG: UGCC, 24 July 2020, *Fuelex (U) Ltd v. Uganda Revenue Authority*.
103. *Fuelex (U) Ltd v. Uganda Revenue Authority* (2020), Kukuru, JA's rule, p. 10.
104. AR: IACHR, 28 Nov. 2002, *Cantos v. Argentina*.
105. *Cantos v. Argentina* (2002), *supra* n. 104, at point 52.
106. NG: Personal Income Tax Act 104 of 1993, sec. 68(2) (amended 2004).
107. FIRS, *Information Circular: Collection Procedure*, point 1.4 (1993).
108. NG: Federal Inland Revenue Service (Establishment) Act 2007, para. 15(7) of the 5th Sch.

Federal Inland Revenue Service and as such in most instances a taxpayer would be required to pay the amount required in terms of paragraph 15(7).[109]

Making payment a prerequisite to proceed with disputing a tax claim should be distinguished from a general situation where a taxpayer's payment obligation is not suspended. Usually, when a payment obligation is not suspended, the revenue authority can invoke its enforcement powers to collect the disputed taxes if the taxpayer fails to make the payment. However, failure to pay the outstanding taxes in the general scenario does not prohibit the taxpayer from having the disputed adjudicated impartially. Consequently, the dispute and the collection of taxes are separated. In relation to appeals to the Tax Appeal Tribunal, the payment of the disputed claim is a condition to appeal that claim and as such the principle of *solve et repete* applies.

4. Cross-Border Approaches to Disputed Tax Claims

The above discussion on a domestic level, has shown that jurisdictions deal with disputed tax claims differently. What happens when a jurisdiction needs to rely on another jurisdiction for the enforcement and collection of a disputed tax claim? In this section, the authors consider both mutual assistance recovery procedures and precautionary measures by examining the EU Council Directive 2010/24/EU and the jurisdiction of the Court of Justice of the European Union and recent decisions of the German Federal Financial Court.

4.1. Mutual assistance recovery procedures

Article 11(1) of Council Directive 2010/24/EU[110] rules that a request for recovery of a tax claim to another Member States' authorities cannot be made "as long as the claim and/or the instrument permitting its enforcement in the applicant Member State are contested in that Member State […]". Consequently, this rule suspends the mutual assistance for recovery of tax claims.[111]

If the claim or the instrument permitting its enforcement is challenged after a request for mutual assistance recovery procedures is made, the applicant authority is, according to article 14(3) of the Directive, obliged to inform the requested authority about the contestation. The requested authority must then suspend the enforcement procedure as far as the contested part of the claim is concerned according to article 14(4) of the Directive. For the enforcement procedure to continue nonetheless, the applicant authority can apply for continuation despite the contestation.[112] This application is only admissible in so far as the relevant laws, regulations and administrative practices in force in the requested Member State allow for such action. Furthermore, the request shall be reasoned by the applicant authorities. As the German Federal Fiscal Court pointed out,[113] the requirement to reason the request shall make it clear to the applicant authority that, if the contestation is subsequently held to be in favour of the debtor, the applicant authority is liable not only for reimbursing any sums recovered but also for any compensation due to the enforcement measures.[114]

The reason the Recovery Assistance Directive suspends the effect of recovery assistance when a tax claim is disputed, might lie in the distribution of responsibilities for legal remedies as foreseen by Directive 2010/24. According to article 14 (1) of the Directive, any dispute regarding the tax claim itself or the uniform instrument permitting enforcement, shall fall within the competence of the competent bodies of the applicant Member State. This attribution is reasonable, since the legality of the tax claim and the request for recovery assistance must be judged in terms of the law of the applicant state, which can most accurately be assessed by the courts of that very state. Additionally, granting the taxpayer the opportunity to challenge the legality of the tax claim in the requested state would make it possible for them to challenge the claim twice without any reasonable justification therefor. However, since the requested state will take enforcement measures based on its own procedure law, the legality of those measures can consistently only be challenged in the requested state according to article 14(1) of Directive 2010/24.

Now, if legal remedies in the applicant state against the tax claim have no suspending effect and thus, the requested authority would take enforcement measures while the claim is still contested in the applicant state, the taxpayer would have no chance to stop the enforcement based on the plea that the measures lead to irreparable damage for them. Such a plea could not be

109. KPMG Nigeria, *TAT Rules in Favour of Taxpayer's Statutory Charge Deposit with FIRS and Assumes Jurisdiction to Hear the Case* (Nov. 2021), available at https://bit.ly/3MpH6y6 (accessed 10 Jan. 2023).
110. Council Directive 2010/24/EU of 16 March 2010 concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures, OJ L84 (2010), Primary Sources IBFD.
111. In this regard, the CJEU (26 Apr. 2018, C-34/17, ECLI:EU:C:2018:282, *Donnellan*, point 57, Case Law IBFD) has argued that a tax claim should also be considered being contested when the taxpayer has not been duly notified about the tax claim, because the notification presents a mandatory requirement for a contestation.
112. Art. 14(4) subpara. 3 Directive 2010/24.
113. German Federal Fiscal Court (BFH), 30 July 2020, VII B 73/20 (AdV), ECLI:DE:BFH:2020:BA.300720.VIIB73.20.0, point 65.
114. Art. 14(4) subpara. 3 sentence 3 Directive 2010/24.

brought forward directly against the enforcement measures because the enforcement of tax claims does not per se lead to such consequences. The plea of impending irreparable damages is only admissible where the legality of the underlying measure is still in question. However, if the legality of the tax claim is of concern only in the applicant state and cannot be challenged in the requested state, then it is also, in general, no condition for the legality of the recovery assistance. Thus, the debtor could not effectively challenge the enforcement measures in the requested state if the request is formally legitimate. For the same reason, an application for suspension of operation in the requested state would miss the mark because the enforcement measures would obviously be legitimate. While taxpayers could file for a suspension of operation in the applicant state, they might not be able to properly substantiate a pending irreparable damage, because such will often depend on the particular enforcement measures conducted by the requested state and the assets the taxpayer has in the requested state. As a result, the requested authority might put forward the enforcement measures and irreparable damage could occur even if the legal remedy of the taxpayer in the applicant state is subsequently successful. Since that scenario is exactly what a suspensive effect shall prevent regarding to the right to an effective legal remedy, article 14(1) of Directive 2010/24 plays an elemental role regarding the taxpayers' fundamental rights.

As seen, the operating principle of article 14(1) of Directive 2010/24 stems from the duality of legal jurisdiction that is immanent to international recovery assistance. A recent judgment of the Federal German Fiscal Court[115] illustrates this multilayered nature of disputes in recovery assistance cases. The decision involved an application for suspension of several attachment orders issued by the German tax authorities as a measure of recovery assistance for another EU Member State. The applicant was a company located in that Member State that kept several bank accounts in Germany. Before going to court, the applicant raised an objection against the attachment orders and applied for a suspension of operation. Regarding the objection, the applicant argued that the enforcement had to be postponed based upon an administrative order whereby taxpayers economically affected by the COVID-19 pandemic can file for a deferment of their due payments. When the tax authorities rejected both the objection and the application for suspension, the applicant took court action against the attachment order and applied to the court for suspension of operation. The applicant argued that they would have to close their business and file for insolvency should the application be rejected. They also claimed to have been overindebted for months and could not give any securities.

The plaintiff argued that the major claim by the requesting state was based upon an unconstitutional provision and that the requesting state would not provide proper intermediate legal protection. Thereby any recovery assistance would violate the public policy principle. Furthermore, the plaintiff raised several objections against the enforcement measures themselves, namely that the tax authorities involved were not competent in the case, that the attachment orders showed the wrong tax creditor, that the taxpayer was not formally notified to pay before the enforcement was initiated and that the attachment orders themselves were phrased vaguely and would thereby be null and void. Additionally, they stated that they had lodged appeals against the major claim in the requesting state, that the requesting tax authority had failed to notify the requested authority about these appeals and that a disputed tax claim could not be subject to recovery assistance under Directive 2010/24. Also, they expressed doubts about the accuracy of the claim to be enforced, namely that the requesting tax authority asked for more than they were entitled to. Finally, the plaintiff also argued that they were affected by the COVID-19 pandemic in the sense of the beforementioned administrative order and thereby the enforcement of the tax claim had to be suspended.

While the trial tax court decided in favour of the plaintiff and granted the suspension,[116] the German Federal Fiscal Court (*Bundesfinanzhof*) as the appellate court judged in favour of the tax authorities and rejected the suspension of operation.[117] It argued as follows:

For a suspension of operation, the legality of the disputed attachment orders had to be seriously doubtful, that means the doubts lead to a likelihood of at least 50% of a violation of the law.[118] Regarding this prerequisite, the German Federal Fiscal Court ruled firstly that the respective authority was competent to provide the recovery assistance in the form of the attachment orders and that the preconditions for such an assistance as laid out in the Recovery Assistance Directive, i.e. the minimum amount and the age of the claim, were met. It also stated that it was not necessary for the requested authority to formally notify the tax debtor to pay before initiating enforcement measures since the enforcement would either way be obligatory for the requested authority.[119] Regarding that sentiment, it is not clear whether the court was speaking of an obligation of the requested authority towards the requesting authority, or an internal obligation of the competent tax authority towards the German central liaison office as its superior authority.[120] Nonetheless, the court continued its decision by stating that the

115. BFH, *supra* n. 113.
116. Tax Court of Hessen (*Hessisches Finanzgericht*), 19 May 2020 – 4 V 540/20, ECLI:DE:FGHE:2020:0519.4V540.20.00.
117. *See supra* n. 113.
118. *See supra* n. 113, point 45 ff.
119. *See supra* n. 113, point 61 ff.
120. In the authors' opinion, only the last understanding of the ruling would be in line with the law, because the requested authority is not in any case obliged to grant the assistance to the requesting authority. On the contrary, it not only has to check whether the request is admissible but also whether the assistance is possible and proportionate.

enforcement was not inadmissible because of the objection raised against the original tax claim in the requesting state. In this respect the court referred to article 11(1) and 14(4) of Directive 2010/24 whereby the enforcement of a claim contested in the requesting state shall only be continued when the applicant authority makes an explicit and reasoned request for this. Although in the decided case, the requesting authority did not reason its request, the court stated that such a reasoning may only be necessary to make the requesting authority aware of the fact that it can be held responsible for any damages resulting from an unjustly carried out enforcement.[121] Therefore, the court seems to opine that the lack of such a reasoning can only be brought forward against the request for recovery assistance in the requesting state and is thereby irrelevant to the admissibility of enforcement measures by the requested tax authority.

Secondly, the court found that the substantial objections against the orders – regarding the clarity and the presented creditor of the claim – were unjustified. It also ruled that the administrative order regarding the deferral of payments due to the effects of the COVID-19 pandemic was not applicable in the given case. Lastly, it thoroughly examined whether the recovery assistance had to be denied because of an infringement of the public policy principle. It thereby referred to the specific circumstances as explained by the plaintiff, but, in all cases, found that the respective statements were unsubstantiated and therefore an infringement of the public policy principle was not likely. Accordingly, the court stated that no serious doubts about the legality of the attachment orders existed and thus no suspension of operation had to be granted.

The case illustrates that objections against the tax assessment itself are relevant to the legality of recovery assistance measures only insofar as they refer to serious infringements of fundamental rights that could justify the denial of the assistance due to the public policy principle. Besides that, the enforcement is admissible regardless of the original tax assessment so long as it is effective. Therefore, the abovementioned risk of irreparable damage for the taxpayer is real and the decision of the German Federal Fiscal Court deserves criticism regarding its judgment upon the role of the application for enforcement when the underlying tax assessment is disputed in the requesting state. The court argued that the question whether a disputed claim should be enforced via recovery assistance is only of concern of the requesting tax authority. While that might be true in general, the absoluteness of the courts claim undervalues the importance that the mechanism of articles 11(1) and 14(4) of Directive 2010/24 has for the taxpayers' right to an effective legal remedy. If, for whatever reason, the requesting state does not suspend the operation while a tax claim is disputed and irreparable damage might occur in the case that the requested authority enforces the claim, that would violate the taxpayers' fundamental rights and therefore, the requested authority could be obliged to deny the assistance due to the public policy principle. It is of legal significance for the requested authority to know why the enforcement shall be continued despite the claim being contested. Since Directive 2010/24 states that the requesting state has to "ask" for a continuation of the enforcement, the requested authority is obviously entitled to deny such a request when the reasoning does not justify the continuation.

4.2. Precautionary measures

Besides the possibility of requesting assistance in recovering disputed tax claims, mutual assistance can also be requested in the form of precautionary measures. According to article 16 of Directive 2010/24, such a request can be made where a claim or the instrument permitting enforcement in the requesting Member State is contested at the time when the request is made, or where the claim is not yet the subject of an instrument permitting enforcement in the requesting Member State, in so far as precautionary measures are also possible, in a similar situation, under the national law and administrative practices of the requesting Member State.

Regarding their intensity towards fundamental rights, precautionary measures differ from enforcement measures in two directions. On the one hand, they are less intense regarding their effects, since precautionary measures are by design preliminary. On the other hand, they can present infringements of the taxpayers' freedoms that are only weakly justified, because they are possible even before the claim, whose recovery they are intended to secure, is finally assessed by the tax authority. In mere national cases, these scenarios will presumably present the major use for precautionary measures, because, as seen above, definite but contested claims can be recovered either way, therefore precautionary measures are mostly unnecessary in those instances.

In cases of mutual administrative assistance, however, precautionary measures are an important instrument to secure contested claims. Because of their preliminary nature, the risk of irreparable damage for the taxpayer is less pronounced, although it does exist, especially when it comes to the most common precautionary measure, namely the attachment of bank accounts. The affected taxpayer might lose their creditworthiness. At least, they will get a worse score for the credit ranking which leads to more expensive loan interests or bank guarantees. Furthermore, while such an attachment can be lifted when the taxpayer successfully challenges the tax claim, it might still prevent them from making important investments during the attachment. Therefore, strict conditions must be met to take precautionary measures.

121. *See supra* n. 113, point 65.

For example, according to section 324 of the AO an *arrest in rem* can only be ordered if it is to be feared that otherwise the recovery will be thwarted or made considerably more difficult. A threat situation in that sense is deemed to exist if, on the basis of a prognosis, it can be expected that the debtor's behaviour will worsen their own financial situation.[122] Since article 16 of Directive 2010/24 allows for precautionary measures by the requested state only in so far as they are also possible, in a similar situation, under the national law of the requested state, the request for such measures should be reasoned. While the Directive does not speak of such a mandatory reasoning, it provides that the requesting tax authority shall attach to the request "the document drawn up for permitting precautionary measures in the applicant Member State and relating to the claim for which mutual assistance is requested". In most cases, that document will presumably contain the information needed for the requested tax authority to assess whether a comparable situation exists.

That assessment, however, is limited to the comparability of the situation, while the requested tax authority is neither obliged nor authorized to doubt the correctness of the presented factual basis. That distinction has been made clear by the CJEU in the case of *Heavyinstall*.[123] In that case, the CJEU established that "the courts in the requested Member State are competent to rule on whether the procedure for application of precautionary measures complies with the legal provisions and administrative practices of that State, but not on whether the substantive conditions exist for application of those measures." For its judgment the court on the one hand referred to article 14 of Directive 2010/24 which, although not directly but mutatis mutandis, is applicable in cases of precautionary measures. On the other hand, the court referred to the principle of mutual trust, whereby it shall be assumed that all Member States of the European Union act only in a matter that complies both to their respective domestic law as well as to European Union law.

The legal argumentation of the CJEU is sound. It would be neither effective nor, in many cases, comprehensively possible to examine both the actual presence of the circumstances explained by the applicant authority and whether those circumstances meet the conditions for precautionary measures under the domestic law of the applicant state. However, as the CJEU also rightfully emphasizes, the requested authority may refuse precautionary measures on the same grounds on which it may refuse recovery assistance, namely on the grounds set out in article 18 of Directive 2010/24 and where the precautionary measures would conflict with the public policy of the requested state. Thus, the right to an effective remedy is also relevant in cases of precautionary measures. If the requesting tax authority does not provide sufficient information on whether the taking of precautionary measures is proportionate and the taxpayer provides substantial reason to believe that it is not, the requested tax authority may refuse to provide assistance. It is therefore again crucial for the requesting tax authority to explain the specific circumstances under which it is requesting assistance.

To simplify and standardize communication in that regard, Ilse De Troyer suggests an uniform instrument permitting precautionary measures similar to the uniform instrument permitting recovery measures.[124] For the underlying procedure, she refers to the European Account Preservation Order (EAPO) introduced by Regulation (EU) 655/201, whereby in civil law cases a creditor can obtain a respective order to freeze foreign accounts of the debtor up to an amount to which the creditor claims to be entitled. However, this approach does not take into account the requirement of comparable circumstances that must be met in order for the requested tax authority to take precautionary measures. Such circumstances are highly individual and difficult to fit into a standard form. It might even reduce the motivation of requesting tax authorities to thoroughly consider the need for precautionary measures and to justify a request for such measures. Therefore, the existing system of article 16 of Directive 2010/24 seems to strike a reasonable balance between the interests of the taxpayer and the tax authorities, so long as the need for the requesting authority to justify the requests in advance and the extent to which the courts of the requested state can review the legality of the measures are taken seriously.

5. Concluding Remarks

This article has shown that jurisdictions deal with the tension between taxpayers' right to effective remedies and the revenue authority's responsibility to efficiently and effectively collect taxes in different ways. However, no matter what default approach a jurisdiction chooses, there are exceptions. For the most part (i) whether the taxpayer has a strong case; (ii) the risk associated with delaying the collection of taxes; and (iii) the impact collecting the taxes pending dispute resolution will have on the taxpayer are considered to determine if the collection will be held in abeyance.

It makes sense to balance the revenue authority's and taxpayers' interests by considering the impact a delay could have on the collection, from the revenue authority's perspective, against the impact proceeding with tax collection of a disputed claim could have on the taxpayer. Yet, allowing a revenue authority to consider the merits of the case as a factor to determine suspending

122. German Federal Fiscal Court (BFH), 26 Feb. 2001, VII B 265/00, *Bundessteuerblatt* (German Federal Tax Gazette) Part II 2001, p. 464.
123. EE: CJEU 20 Jan. 2021, C-420/19, ECLI:EU:C:2021:33, *Heavyinstall*, Case Law IBFD.
124. I. De Troyer, *European Union - Legal Protection of Tax Debtors in Respect of Cross-Border Use of Precautionary Measures to Guarantee Tax Recovery*, 61 Eur. Taxn. 6 (2021), Journal Articles & Opinion Pieces IBFD.

the payment obligation is nonsensical. If the merits of the case play a role, then the taxpayer should have the opportunity to present their full case and that would result in a duplication of the actual dispute resolution proceedings.

Even though there appear to be some commonalities in the various jurisdictions on what to consider when determining if the payment obligation will be suspended pending dispute resolution, the situation in the jurisdictions is not the same. When the point of departure is that the revenue authority can proceed with collecting a disputed tax claim, as is the case in Australia, Germany and South Africa, it means that taxpayers' rights start out on the back-foot and the taxpayer would usually need to show the presence of certain instances for the payment obligation to be suspended. In turn, in Canada and where the payment obligation is suspended as a starting point, the revenue authority needs to ensure that exceptional circumstances are present before deviating and proceeding with enforcement actions.

The principle of "*solve et repete*", whereby taxpayers cannot challenge the assessment before they have paid at least part of it, is highly questionable from a fundamental rights perspective. Accordingly, it has been abandoned by Italy and Spain as well as many South American countries.

When it comes to the Recovery Assistance Directive, it provides for a multifaceted but appropriate approach to the recovery of contested claims, taking into account the different levels of judicial control in a cross-border situation. However, for the envisaged system to function accordingly, it is crucial that the requesting tax authority thoroughly examines the grounds for taking recovery or precautionary measures in the form of mutual assistance while the tax claim is still disputed. It must set out its considerations in its request so that the requested tax authority can assess whether action on a disputed claim is compatible with the public policy of the requested state. In that regard, the justification of a request to enforce a disputed claim is of high legal relevance for the requested tax authority and, if it is missing, the assistance has to be denied.