# OVERVIEW OF GLOBAL TRENDS IN THE PROTECTION OF TAXPAYERS' RIGHTS BY 2019, ACCORDING TO THE IBFD OBSERVATORY ON THE PROTECTION OF TAXPAYERS' RIGHTS (PART 1)

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*Título*

Visión general de las tendencias globales en la protección práctica de los derechos de los contribuyentes para 2019, según el Observatorio para la Protección de los Derechos de los Contribuyentes del IBFD (Parte 1)

*Resumen*

El artículo describe las tendencias mundiales en la protección práctica de los derechos de los contribuyentes en lo tocante a (i) confidencialidad de la información del contribuyente en manos de la Administración Tributaria (ii) procedimientos tributarios, tanto administrativos como jurisdiccionales (iii) medios de impugnación; (iv) sanciones penales y administrativas (v) ejecución forzosa de créditos tributarios, y (vi) situaciones transfronterizas, en lo relativo a las salvaguardas para los contribuyentes en el intercambio de información, con base en los datos del Anuario 2019 del Observatorio para la Protección de los Derechos de los Contribuyentes del Buró Internacional de Documentación Fiscal (IBFD, por sus siglas en inglés).

*Palabras clave*

Derechos de los contribuyentes, confidencialidad, procedimientos tributarios, situaciones transfronterizas, reporte obligatorio de mecanismos transfronterizos, intercambio de información, derecho al debido proceso, derecho a la defensa, *habeas data*, proporcionalidad, no autoinculpación, *non bis in ídem*, simplificación de procedimientos, regularización voluntaria, ejecución forzosa.

*Abstract*

The article describes the current global trends in the practical protection of taxpayers» rights, with regard to (i) confidentiality of taxpayers' information held by the tax authorities (ii) tax procedures, both administrative and judicial (iii) reviews and appeals; (iv) criminal and administrative sanctions (v) enforcement of taxes, and (vi) cross-border situations, regarding the safeguards for taxpayers in the exchange of information, based on the data of the 2019 Yearbook on Taxpayers' Rights, released by the IBFD Observatory on the Protection of Taxpayers' Rights.

*Keywords*

Taxpayers' rights, confidentiality, tax procedures, cross-border situations, mandatory disclosure rules, exchange of information, right to *due process*, right to defence, *habeas data*, proportionality, *nemo tenetur se ipsum accusare*, *non bis in idem*, simplification of procedures, voluntary disclosure, tax enforcement.

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**SUMARIO**

## 1. Global trends in the protection of taxpayers' rights in practice in 2019

This article summarizes the main developments, reported in 56 reports by 85 national reporters from 44 countries[1], in the practical protection of taxpayers' rights by 2019 in seven areas: (i) confidentiality, as regards the rules of mandatory reporting of potentially aggressive tax schemes and the protection of taxpayers' rights associated with professional secrecy; (ii) tax proceedings, regarding the practical protection of the four fundamental principles (*ne bis vexari*, proportionality, *audi alteram partem* and *nemo tenetur se ipsum accusare), as well as the* right to *due process* and defense, *habeas data* and taxpayer participation, as well as that of *bona fide* third parties in administrative proceedings; (iii) more intensive audits, with respect to judicial authorizations for home visits and areas of confluence between the tax procedure and the preliminary stage of the criminal procedure; (iv) reviews and appeals; (v) enforcement of taxes; (vi) criminal and administrative sanctions; and (vii) cross-border procedures, especially with respect to the need for safeguards for taxpayers in the exchange of information (IBFD Observatory on the Protection of Taxpayers' Rights, 2020).

## 2. Confidentiality of taxpayer data held by the Tax Administration

The confidentiality of taxpayer information held by the Tax Administration is one, if not the most, of the areas in which there have been most developments in the practical protection of taxpayers' rights by 2019.

### 2.1. Tendency towards greater protection of confidential taxpayer information held by the Tax Administration

Since at least 2009, the tax systems have been assuming transparency as one of their fundamental paradigms in the fight against tax evasion, avoidance and fraud (Weffe, Feb. 2020).

A natural consequence of the process is an increase in demands for information relevant to tax purposes, both from taxpayers and from third parties connected in one way or another with the performance of the taxable event or with its evidence. This facilitates the assessment, in the sense of allowing the Tax Administration to know, straightforwardly, the taxable event and the taxa-

1 Argentina, Australia, Austria, Belgium, Bosnia and Herzegovina, Brazil, Bulgaria, Canada, Chile, China, Chinese Taipei, Colombia, Croatia, Cyprus, Czech Republic, Denmark, Finland, Germany, Greece, Guatemala, India, Italy, Japan, Kenya, Luxembourg, Mauritius, Mexico, Netherlands, New Zealand, Panama, Peru, Poland, Portugal, Russia, Serbia, Slovenia, South Africa, Spain, Taiwan, Sweden, Switzerland, United Kingdom, United States, Uruguay and Venezuela.

ble base; that is, the direct knowledge of the generating event and the circumstances of its occurrence that allow an exact measurement of the ability to pay expressed in its realization, as defined, for example, by Article 136.1 of the Model Tax Code for Latin America of the Organization of American States and the Inter-American Development Bank (Giuliani Fonrouge, Gomes de Sousa, & Valdés Costa, 1967) Article 54.a) of the Model Tax Code of the Inter-American Center of Tax Administrations (CIAT, 2015) and Articles 50.2 and 51 of the Spanish General Tax Law, where it is referred to as «direct estimation» (Spain, 2020).

Naturally, the above commits the responsibility of the State-administrator with respect to the preservation of the confidential nature of the information thus obtained, in a double sense. First, to ensure that the information thus obtained is used solely for tax purposes, and second, to make sure that this information is accessible and used only by the officials who are specifically responsible for the inspection and control of the taxpayer's tax obligations. As it follows from Articles 9.3 and 106.2 of the Spanish Constitution (Spain, 1978) and Articles 139 to 144 of Law 30/1992, on the Legal System for Public Administrations and Common Administrative Procedure (Spain, 1992), the State shall be obliged to make good any damage caused by the activities of the public authorities, without exception (Tejera Hernández & Herrera Molina, 2014).

In general terms, there is an increase in legal and administrative measures for the protection of taxpayers' data held by the tax administrations.

In this regard, a minimum standard is the establishment of specific legal guarantees for confidentiality, with sanctions effectively applied for officials who make unauthorized disclosures. Since the beginning of the activities of the Observatory for the Protection of Taxpayers' Rights (OPTR), a favorable trend has been recorded in this respect: the vast majority of the countries surveyed have some formula for the legal protection of taxpayer information held by the Tax Administration (IBFD Observatory on the Protection of Taxpayers' Rights, 2018).

This favourable trend continues to this day (IBFD Observatory on the Protection of Taxpayers' Rights, 2020). For instance, during 2019 the U.S. *Taxpayer First Act* only permits disclosure of information to Tax Administration contractors when effective safeguards have been taken for the confidentiality of the information, and it increased the applicable penalties for the improper use or disclosure of confidential information by tax return preparers.

On the other hand, 58% of the countries surveyed protect through encryption the confidential taxpayer information held by the Tax Administration by 2019. However, only 47% of the countries surveyed limit access to this data to officials directly involved in tax inspection and control tasks with respect to a given taxpayer, by requiring some form of identification to access the data.

The experience of Canada in 2019 is particularly noteworthy. A special report described as positive the ethical culture of the Canadian Tax Administration's staff with respect to the safeguards applicable to taxpayer information, although there are no protocols designed for the unauthorized disclosure of information. The same may be said of China, which has physically separated servers containing sensitive taxpayer information from those not containing this type of data.

On the other hand, there was a massive leak of personal data from more than four million taxpayers in Bulgaria. During the investigation, it became known that the level of encryption and online security of the Bulgarian Tax Administration was particularly low (IBFD Observatory on the Protection of Taxpayers' Rights, 2020).

In the same vein, Canada, the Netherlands and Peru reported progress in conducting regular access audits to verify whether or not unauthorized access occurred, which enabled Canada to detect 263 privacy breaches by tax officials between November 2015 and November 2018. Sixty-three percent of the countries surveyed reported conducting regular access audits.

In turn, it is significant that the number of countries surveyed willing to publicly disclose information on debts held by named taxpayers, also known as «*naming and shaming,*» has declined in 2019 compared to 2018. According to data from the OPTR, these measures are still in place in 37% of the countries surveyed (IBFD Observatory on the Protection of Taxpayers' Rights, 2020) compared to 45% who stated that such measures were applicable in their jurisdiction by 2018 (IBFD Observatory on the Protection of Taxpayers' Rights, 2019).

Among those countries that do practice «*naming and shaming*» as a mechanism to encourage voluntary compliance with tax obligations and, in parallel, discourage tax avoidance and evasion, the measure adopted in 2019 by the Netherlands stands out, which, has introduced «*naming and shaming*» as an accessory penalty to the commission of some of the tax offences associated with the failure to provide information on reportable schemes in the context of the implementation of mandatory reporting rules for potentially «aggressive» tax schemes, as will be discussed in section 3.1.2. (IBFD Observatory on the Protection of Taxpayers' Rights, 2020).

## 2.2. Mandatory reporting rules for potentially aggressive tax schemes and professional secrecy

Professional secrecy can undoubtedly be described as the «cornerstone» of the exercise of all professions that have consulting as part of their activity. The confidential treatment of the information provided by the client depends, to a great extent, on the client's *trust*, and consequently provides all the factual information necessary for the advisor to better understand the client's business and its problem, and thus be able to provide the best possible advice. Thus, on the secrecy of information between client and advisor depend (i) the adequate protection of the client's right to privacy, given that the information subject to secrecy is so insofar as its disclosure is likely to cause harm to the client or third parties; (ii) the quality of the professional advice provided by the advisor; (iii) indirectly, the existence, relevance and quality of the business decisions taken by the client, based on the advisor's advice; (iv) the possibility or quality of the collaboration with the client's defense that the advisor may provide, especially lawyers. Therefore, it has been rightly said that «*the existence of the professional secret of the lawyer is one of the essential conditions –sine qua non– of the existence and possibility of the legal profession, which cannot be broken even*

*by the requirements of a law that we consider in this respect would be intrinsically unjust*». (Andino Lopez, 2014).

In this vein, the OPTR has expressed the importance of protecting the confidentiality of the relationship between client and advisor. In the opinion of the OPTR, expressed in the voice of one of its directors, Philip Baker, the granting of greater powers to the tax administrations should be accompanied by a clear and effective guarantee of the rights of taxpayers (The IBFD Yearbook on Taxpayers' Rights – Philip Baker, 2020). In this respect, the Observatory has stated that the application of professional secrecy to the relationship between taxpayers and their lawyers should be taken as a minimum standard, which ideally —as best practice— should be extended to all types of advisers who provide professional advice in a similar way to that of lawyers, and not be limited exclusively to them. This is the trend followed by countries such as Belgium and Spain, and jurisdictions such as Cyprus, Slovenia and Mexico have shifted away from it (IBFD Observatory on the Protection of Taxpayers' Rights, 2020).

However, the assumption of greater transparency as a paradigm of the tax systems has generated significant state pressure to reduce the scope of professional secrecy, to the point that the OPTR has said that such secrecy «*is under siege*». (IBFD Observatory on the Protection of Taxpayers' Rights, 2020).

In effect, the adoption of mandatory reporting schemes for potentially «aggressive» tax planning, as a consequence of the reception in domestic law of the recommendations of the Final Report of Action No. 12 of the OECD and G-20 Project on Base Erosion and Profit Shifting (OECD, 2016) has tested the dialectic tension between the public interest committed to the early detection of potentially «aggressive» tax planning mechanisms, as an information tool to guide tax policy and effectively close the gaps in the tax system that facilitate these behaviors, and the rights of taxpayers to legal assistance, economy of choice and economic freedom, as well as legitimate confidence and plausible expectation, in its relationship with professional secrecy (Čičin- Šain, 2019).

In this respect, the domestic adaptations to the aforementioned Final Report, among which the progressive transposition of the Sixth Amendment to Directive 2011/16/EU of the Council of the European Union, Directive (EU) 2018/822 of 25 May 2018, with regard to the automatic and compulsory exchange of information in the field of taxation in relation to the mechanisms subject to communication of information, also known as DAC-6, stands out (European Union, 2018). The new tax laws and regulations, which have been implemented by the government, have implied an important development of the limitations to tax advice in general, which directly affect the privilege of privacy of communications between the taxpayer and his or her tax advisors.

These developments seem to explain the declining trend in the level of adoption of the minimum standards and best practices of the OPTR in this area. Particularly, that is the case for Cyprus, Slovenia and Mexico in 2019. In the first of these countries communication between taxpayers and their advisors is not protected; rather, tax advisors are responsible for failing to report the activities of their clients that are reasonably suspected of constituting money laundering, as a result of the implementation of the 4th and 5th Anti-Money Laundering

Directives. In turn, Mexico registered a decrease in its level of adoption of the minimum standard that recommends that visits to offices and other private premises of persons that may contain privileged information require the presence of a third party (ideally, an independent lawyer) to protect such privilege, and its reporting regime of potentially «aggressive» schemes is applicable retroactively and without any protection for documents that could be considered privileged in the case of visits by the Tax Administration to the domicile of the tax advisor (IBFD Observatory on the Protection of Taxpayers' Rights, 2020).

In terms of specific state practices, the extension of professional secrecy to advisors other than lawyers is a jurisprudential construction in Brazil, and in the United States a limited privilege is in force for public accountants. In the latter country, the so-called «Kovel agreements» allow for the extension of professional secrecy to accountants who work as a team with lawyers. Communication with advisors other than lawyers has been reported as not protected in Russia, and in Uruguay the Tax Administration has indicated that professional secrecy is only applicable to communications with lawyers linked to a specific tax procedure, even though this interpretation is not shared by the courts or by most of the doctrine of that country (IBFD Observatory on the Protection of Taxpayers' Rights, 2020).

## 3. Tax procedures

Tax procedures are an essential part of the work of the Tax Administrations. In the Rule of Law, administrative activity is fundamentally regulated, which means that the powers and duties of the Administration to act in the public interest –which, in our case, translates into actions aimed at the declaration with legal effects of the existence and amount of tax obligations– must be directed through a legally defined formal channel (Fraga-Pittaluga, 1998), where proper safeguards for the protection of the rights of citizens, whose rights may be affected by State action, are in place (Andrade Rodriguez & Weffe, 2010).

### 3.1. The four fundamental principles

In this context, the OPTR has identified four basic principles that are inherent to the exercise of its competencies by the Tax Administration at the time of determination: *ne bis vexari*, or prohibition of multiple investigations for the same facts, proportionality, *audi alteram partem,* or principle of the contradictory, and *nemo tenetur se ipsum accusare,* or right to non-self-incrimination. From all of them, guiding criteria arise for the Tax Administration in the exercise of its auditing powers, and correlative rights for taxpayers that may well be qualified as part of the bundle of constitutional positions to which fundamental rights refer (Alexy, 1993).

The OPTR found developments regarding the practical implementation of all these principles in the countries surveyed in 2019. As a general rule, there seems to be a trend towards the expansion of the Tax Administration's powers to carry

outactions to discover taxable events and the quantification of taxable base, with a correlative reduction in the scope of taxpayers' fundamental rights, as will be seen below.

### 3.1.1. Proportionality

In general terms, the trend recorded by the OPTR for 2019 regarding proportionality refers to the relaxation of material limits to the possibility of the Administration to require and obtain information. Now, this power extends, in practice, to information not relevant for the determination of the tax in question, which —as can easily be noticed— has a direct link with the confidentiality problems previously referred.

This trend directly contradicts the OPTR minimum standard according to which tax authorities may only require information that is strictly necessary for the determination, that is not otherwise available and in the least burdensome manner for the taxpayer. However, the standard has been reportedly improved in practice by Canada and Colombia, and where the furthest departure from the principle is noted in Bulgaria, Guatemala, Mexico and Peru (IBFD Observatory on the Protection of Taxpayers' Rights, 2020).

Regarding the former, Canada leads the way. In that country, the information requirements policy of the Tax Administration limits information requirements based on three criteria: object of the audit, foreseeable relevance and reasonableness, and transparency. In this regard, a valid business reason is necessary for the Tax Administration to seek to obtain specific information from the taxpayer, to whom this reason must be communicated in expression of the *audi alteram partem* principle. The same is reported in the United States, where limits have been established for conducting audits on the same taxpayer in consecutive years (IBFD Observatory on the Protection of Taxpayers' Rights, 2020).

Regarding the latter, the practice in Slovenia, Guatemala and Mexico knows no limits for the Tax Administration in the type and relevance of the information that may be obtained coercively by the Tax Administration. In the case of the latter country, the Supreme Court issued a binding precedent requiring that all documents from which evidentiary effectiveness is sought for tax purposes must have a certain date, given by a notary public, in order for them to be admissible as evidence for tax purposes, thus reducing the possibilities of taxpayers' defense (IBFD Observatory on the Protection of Taxpayers' Rights, 2020).

### 3.1.2. Ne bis vexari, or prohibition of double investigation

The *non bis in idem* appears to be similarly undermined *in* 2019, judging by the data collected by the OPTR; only 25 per cent of the countries surveyed limit the frequency of investigations to the same taxpayer. The practice in South Africa, where *ne bis vexari* is only applicable to criminal liability charges, thus opens up the possibility of double or multiple prosecutions for any other matter, including tax. Switzerland reports that the interpretation of the principle is

«*restricted*», and in Uruguay the tax authorities have the possibility, within an environment of rejection of the *ne bis vexari,* to restart tax administrative procedures on the basis of alleged procedural replacements due to formal defects, thus paving the way for multiple revisions, in practice, of the same taxable events (IBFD Observatory on the Protection of Taxpayers' Rights, 2020).

It's not all negative, though. It is worth noting the steps taken in Spain towards the implementation of the minimum standards and best practices according to which, in application of the procedural aspect of *non bis in idem,* the taxpayer should only receive one audit per tax year, except when the relevant facts are known after the completion of the procedure. According to a new interpretation of the case law, there is room for a new audit only if the facts and documentation that support the determination of a certain tax year differ, so that there cannot be such procedural duplication –and consequently, there is protection of *res judicata*– in the case of facts that have been the subject of a previous provisional determination (IBFD Observatory on the Protection of Taxpayers' Rights, 2020).

### 3.1.3. Audi alteram partem

One consequence of the implementation of the reporting obligations of potentially «aggressive» tax planning schemes at the head of tax advisors, called «intermediaries», is to allow the Tax Administration access to relevant documentation on the tax situation of the taxpayer without the latter being aware of it, and consequently without the possibility of controlling the evidence thus incorporated into the tax investigation at the time of its evacuation (IBFD Observatory on the Protection of Taxpayers' Rights, 2020). This, needless to say, reduces the scope of the taxpayer's rights.

This situation is in line with the generally negative trend with respect to the effective enforcement of this principle in tax administrative procedures. In this regard, the OPTR records for 2019 a decrease in its application with respect to 2018, from 84% to 81%. The establishment of a simplified assessment procedure in Colombia allows the tax authorities of that country to issue a determination act without the need for any prior action or guarantee of *res judicata*, only to accelerate tax administrative procedures. Serbia does the same, where new legislation allows the Tax Administration to issue an *ex officio* assessment based only on the official records, in case the taxpayer fails to file his tax return and without giving him the opportunity to file the omitted return or, if applicable, defend himself against the allegations made by the Administration (IBFD Observatory on the Protection of Taxpayers' Rights, 2020).

The decision of the Court of Justice of the European Union in the Glencore case (C-189/18) of 16 October 2019, duly reported in the 2019 OPTR Yearbook, is noteworthy in this regard. *The thema decidendum* in this case covered the right to *due process* and defence during the audit, in accordance with Article 47 of the Charter of Fundamental Rights of the European Union, and in particular the rights to *habeas data*, *audi alteram partem* and the protection of *bona fide* third parties in a tax fraud scheme, in the specific case of VAT (IBFD Observatory on the Protection of Taxpayers' Rights, 2020).

In evolution of its jurisprudential line, the Court expressly recognizes that the referred rights are of integral and immediate application throughout the entire administrative tax procedure, and that they are especially applicable in the case in which a third party in good faith, under conditions in which he did not know or could not reasonably have known that the transactions in which was taking part as purchaser were being used by its suppliers as formulas to evade VAT, is discussing with the tax authorities the deductibility of the tax credits effectively borne by him in the acquisition of goods and services incorporated in its production process (The IBFD Yearbook on Taxpayers' Rights – Pasquale Pistone, 2020).

### 3.1.4. *Nemo tenetur se ipsum accusare*, or the right to non-self-incrimination in administrative tax proceedings

At this point, the OPTR notes the general tendency of the countries surveyed not to apply the principle in practice. The cases of China, where the right is reported as non-existent, Mexico, where the right, although formally existing, is not protected, and Uruguay, where some specific implications are not yet admitted, although the principle is formally recognized, stand out. In the United States, the right is recognized only in criminal proceedings, to the extent that the taxpayer cannot refuse to declare taxes on the basis of *nemo tenetur,* and the legal obligation to warn the taxpayer of his right to remain silent (the so-called «Miranda warning») is only enforceable in very specific circumstances (IBFD Observatory on the Protection of Taxpayers' Rights, 2020). On this subject, one of the directors of the OPTR, Pasquale Pistone, has announced future results of the study group on international taxation of the *International Law Association* (The IBFD Yearbook on Taxpayers' Rights – Pasquale Pistone, 2020).

As positive data worthy of mention, the Portuguese Constitutional Court declared unconstitutional the interpretation of certain procedural regulations that allowed the obtaining of documents during a tax inspection, without prior knowledge or judicial authorization, for their subsequent use as evidence in the criminal investigation against the taxpayer (IBFD Observatory on the Protection of Taxpayers' Rights, 2020).

### 3.1.5. The structure and content of tax administrative procedures

In order to comply with its guarantee function, especially in relation to legal security, it is ideal that tax administrative procedures follow a pattern established in guides accessible to the public; a manual of good practices at a global level is a *desideratum* in this sense.

It is towards these best practices that the events in Canada and Spain in 2019 were directed. The first of these countries follows a detailed pattern for those audits of large taxpayers that are presented as risky, based on algorithms that allow the identification of the risk, complemented with the requirements for taxpayer documentation. In addition, the Canadian Tax Administration holds

meetings with the managers of taxpayers identified in this way as risky, to communicate the compliance problems detected, lack of transparency and other issues identified during the procedure, in a trend that is closely followed by New Zealand and Russia. In the case of Spain, the publication of the general guidelines of the Annual Tax and Customs Control Plan is reported (Spain, 2019) and the decision of the Supreme Court of 13 November 2018, which establishes that the request made by the tax inspectorate to obtain information from intermediaries in order to combat fraud is not reasonable, as it does not correspond to the provisions of the Annual Tax and Customs Control Plan (IBFD Observatory on the Protection of Taxpayers' Rights, 2020).

## 3.2. More intensive audits

The term «more intensive audits» means tax inspection procedures in which indications of the possible commission of a tax offence are detected. On the one hand, such a finding requires more intense investigative activity on the part of the Tax Administration and, if appropriate, the Public Prosecutor's Office and other criminal investigation bodies. This more in-depth scrutiny may include activities that are more invasive of the taxpayer's privacy, such as telephone tapping or monitoring of financial activity. On the other hand, it is natural that such activity requires a strengthening of taxpayer guarantees against the activity of the Tax Administration, instrumented –fundamentally– through the authorization and judicial review of the state investigative activity carried out in these circumstances (IBFD Observatory on the Protection of Taxpayers' Rights, 2020).

### 3.2.1. *Nemo tenetur se ipsum accusare*, or the right to non-self-incrimination in administrative tax proceedings

In this context, intensive inspections are limited to what is strictly necessary to ensure an effective response to non-compliance as a corollary of proportionality and therefore best practice. Obviously, connected with this idea is the demand for greater protection of the taxpayer's right not to self-incrimination when the inspection work allows for the anticipation that the taxpayer could be held criminally liable, a best practice in which Denmark registered progress, Canada and Mexico experienced setbacks and Peru reported an ambiguous assessment of its performance in 2019, according to data provided to the OPTR.

In practice, *nemo tenetur* is reported as applicable in 54% of the countries surveyed. Of the countries that recognize it, half have restrictions on the use of the information provided by the taxpayer for a subsequent criminal charge, or the imposition of an administrative penalty. In the same vein, in only 8 of the countries surveyed (19% of the total) the taxpayer can invoke the guarantee as an excuse for not providing accounting information to the tax authorities. On the other hand, in 53% of the countries surveyed, the right to non-self-incrimination is guaranteed through a procedure that allows the identification of the circumstances in which the taxpayer may be charged with the commission of a

tax crime, and consequently allows for the concrete determination of the temporary point of operation of the guarantee in the inspection procedure. Thus, in 40% of the countries surveyed, a warning of the «Miranda» type is required from the tax authorities (Weffe, The Right to Be Informed: The Parallel between Criminal Law and Tax Law, with Special Emphasis on Cross-Border Situations, 2017) so that the taxpayer is informed that he has the right not to self-incriminate (IBFD Observatory on the Protection of Taxpayers' Rights, 2020).

### 3.2.2. Authorization or notification for administrative interventions

A rational limit to administrative investigative activity in the rule of law, especially that linked to the exercise of the power to impose penalties, requires prior judicial review of administrative investigative actions which, by their nature, may result in aggressive intervention in the sphere of the subjective rights of individuals (Fraga-Pittaluga, 1998).

Naturally, the OPTR states as a minimum estándar that the entry to private premises of persons or the interception of communications by the Tax Administration must be authorized by the courts. Only exceptionally, in cases of urgency, may the highest level of the Tax Administration authorize this type of intervention. In such a scenario, it is necessary that the action be ratified as soon as possible by the judiciary.

From the different reports to the OPTR, it is possible to confirm that in 2019 a trend towards a drastic reduction, in some cases such as Mexico, of the practical requirement of judicial authorization for inspections of the taxpayer's establishment. However, for other types of interventions, such as telephone tapping, obtaining financial information or visiting the taxpayer's home, the requirement for such judicial authorization is maintained, although the protection afforded to access to financial information held by banking institutions has been severely reduced. As a result, banking secrecy has been declared «dead». (IBFD Observatory on the Protection of Taxpayers' Rights, 2020).

In fact, from the statistical information obtained by the OPTR, it can be seen how 66% of the countries surveyed indicated that prior judicial authorization was not necessary for the entry of the Tax Administration into the taxpayer's establishment in 2018, a record that rose to 71% of the countries surveyed in 2019. In this regard, in Belgium, case law allowed tax authorities free access to taxpayers' establishments and to the copy of all documents held by the taxpayer, including by digital means; according to the judiciary, the right to privacy is not violated even in the case of private documents being copied in the process. Italy, for its part, has passed legislation authorizing the Financial Administration to use information from the Financial Data Archive of banking institutions, based on the particular public interest in combating fraud. In Peru and Serbia, financial institutions are required by law to provide the tax authorities with «significant» information about taxpayers, without prior judicial authorization, and in Uruguay, judicial authorization is only necessary for the registration of the taxpayer's home. Mexico goes even further, allowing the Tax Administration to enter

the taxpayer's home in the event that the taxpayer conducts business from there (IBFD Observatory on the Protection of Taxpayers' Rights, 2020).

On the other hand, there is a positive trend with respect to the protection of privileged information in the context of an inspection at the taxpayer's premises. While in 2018, 46% of the countries surveyed had a procedure in place to ensure that documents subject to privilege –such as communications between the taxpayer and its advisors– were not seized in the course of the inspection, by 2019 this figure increases to 55% of the countries surveyed. In this regard, 70% of the countries surveyed, compared with 76% in 2018, require judicial authorization before conducting wiretaps, or monitoring the activity of the suspected taxpayer on the Internet (IBFD Observatory on the Protection of Taxpayers' Rights, 2020).

## 3.3. Reviews and appeals

Following the mandate of the apothegm *ubi ius, ibi remedium* (Pistone, Problemáticas actuales y nuevas fronteras de los medios de impugnación nacionales e internacionales, 2016), when it comes to managing the public interest through administrative activity, as in our case, this must be guaranteed both administratively and judicially, through reviews and appeals.

In the light of the data provided by the 2019 Yearbook of the OPTR, it can be concluded that this area of protection of taxpayers' rights has had highs and lows. There has been a massive digitization of administrative and judicial challenge procedures, with some cases worthy of particular relevance, combined with total freedom to exercise appeals and appeals before the courts. However, judicial delays are great in the overwhelming majority of the countries surveyed, and private hearings are generally not allowed in cases involving sensitive or confidential information, in contradiction to the minimum standards of confidentiality. Furthermore, in general, prior exhaustion of administrative remedies is still required for access to judicial proceedings, thus compromising the guarantee of effective judicial protection.

### 3.3.1. Prior exhaustion of the administrative channel as a filter for access to jurisdiction

The effectiveness of the means of judicial review, especially in the light of the fundamental right of access to jurisdiction, requires the possibility for the taxpayer to have access to a prompt and efficient judicial remedy, without procedural obstacles that unduly limit such possibility (The IBFD Yearbook on Taxpayers' Rights – Pasquale Pistone, 2020). That is why the OPTR has established as a minimum standard that the legal standing for the exercise of the legal actions to challenge tax assessments should not depend on the previous exhaustion of the administrative way. Unfortunately, this is not the case in 51% of the countries surveyed in 2019 (IBFD Observatory on the Protection of Taxpayers' Rights, 2020). and we see cases such as that of Croatia, where the administrative procedure serves merely to confirm the tax claim, without any real examination

of the substance of the taxpayer's situation (The IBFD Yearbook on Taxpayers' Rights – Pasquale Pistone, 2020). This situation confirms the concerns that have been expressed by scholars on this particular point (Fraga-Pittaluga, 1998).

Denmark has incorporated the minimum standard into its legislation, removing the requirement for prior exhaustion of administrative remedies with effect from 1 July 2020. In the same vein, access to the Indian High Court is occasionally allowed without the need for a prior administrative procedure, and Portugal changed, in that idea, some rules of appeal of the decisions of courts of first instance, among others (IBFD Observatory on the Protection of Taxpayers' Rights, 2020).

### 3.3.2. Digital services and time length of reviews and appeals

The effectiveness of a procedural remedy depends, among other things, on time. Seneca said that «nothing resembles injustice as much as delayed justice». That is why speed in the processing of administrative and judicial appeals is essential to ensure that taxpayers' rights are properly protected. To this end, the growing digitalization of human processes can serve as a powerful tool to facilitate and expedite the processing of taxpayers' claims, as is already evident in several countries around the world and as recommended by Pistone in the General Report to the Congress of the European Association of Tax Law Professors (EATLP) in 2019 (Pistone, General Report, 2020).

This has been understood by the OPTR, which has defined as best practice the establishment of mechanisms for the electronic filing and processing of administrative and judicial appeals to speed up the processes, and that the time for the substantiation and decision of administrative and judicial appeals should not exceed an ideal maximum of two years. In this regard, in 2019, electronic filing and processing of administrative appeals was introduced in Bulgaria, Russia and Peru. With regard to the speed of procedures, Australia, Canada, Denmark and Japan showed progress in 2019, while Bosnia and Herzegovina, Guatemala and Peru reported setbacks in this area. In the case of Australia, an excellent average of 28 days was verified for the decision of administrative appeals for small businesses (The IBFD Yearbook on Taxpayers' Rights – Pasquale Pistone, 2020).

## 4. References

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