

# VAGUE CONCEPTS AND UNCERTAINTY IN TAX LAW: THE CASE OF COMPARATIVE TAX JUDICIAL REVIEW

Roberto P. Vasconcellos\*

<b>ABSTRACT</b> .....	3
<b>I. INTRODUCTION</b> .....	4
<b>II. COMPARING TAX JUDICIAL REVIEW JURISPRUDENCE AND THEORY</b> .....	6
A. Brief Analysis of Some Famous English Cases .....	6
B. Acceptable Grounds To Tax Judicial Review and Their Contribution to Uncertainty .....	13
<b>III. THE INEFFICIENCY OF LEGISLATION</b> .....	17
A. Complex Legislation and Tax Judicial Review .....	17
B. Would Statutory Rules of Tax Judicial Review Be Useful? .....	20
<b>IV. SPECIFIC SOURCES OF UNCERTAINTY TO TAX JUDICIAL REVIEW AND SOME POSSIBLE SOLUTIONS</b> .....	27
A. Questions of Law and Questions of Fact .....	28
B. Uncertainty In The Law As a Possible Defense For The Taxpayer ...	31
C. Some Familiar Concepts and Their Influence on Tax Judicial Review	33
1. Public Law .....	33

---

\* LLM, London School of Economics; Former World Bank and Japanese Government Scholar; BA Law Degree, Universidade Federal do Rio de Janeiro; Attorney in Rio de Janeiro, Brazil. My thanks go to Ian Roxan, Ann Mumford, Joseph Jacob, Leonardo Greco and Gabriel Rosenberg for their valuable comments and insights not only about comparative tax law but also the common law system in general. Any mistakes that remain are my sole responsibility. roberto.prado\_de\_vasconcellos-alumni@lse.ac.uk

2. Public Interest .....	36
3. Legitimate Expectations .....	38
D. An Interesting Example of Tax Reform .....	41
<b>V. CONCLUSIONS</b> .....	<b>44</b>

## **VAGUE CONCEPTS AND UNCERTAINTY IN TAX LAW: THE CASE OF COMPARATIVE TAX JUDICIAL REVIEW**

### **ABSTRACT**

What causes uncertainty in tax judicial review jurisprudence? Why is uncertainty a common problem to many different legal systems? Can we blame the changing jurisprudence or the unclear legal concepts found in courts decisions? Many schools of thought and intellectual traditions are almost identical in different countries. However, even among identical thinking it is not difficult to find cultural reasons for legal systems choosing a certain school of thought. Therefore, this Article takes familiar legal concepts such as public law, public interest and legitimate expectations and studies how they are applied, as well as how they should be applied by the courts. Special attention is devoted to the taxpayer rights regarding unclear and changing tax judicial review jurisprudence. As in any tax litigation, tax judicial review decisions should not include reasoning aimed at increasing government's income. Judges in tax judicial review should not assume that the State rights are more important than the private rights. Both have to be outweighed in each case.

This is a comparative tax law study which also takes account of related legal theory discussions such as the differences between principles and rules and how they relate to suggested solutions to the problem of uncertainty in tax judicial review.

Fighting uncertainty in the law is a way to defend the application of the due process principle. That is why I included some analysis of the application of the equality principle in tax judicial review. It is important that equality should prevail even against unfair statutes biased towards the Treasury. On the one hand, addressing

legal uncertainty by relying on lawmakers only is deceiving. International experience shows that statutes are rarely effective in solving controversies. On the other hand, precedents are not playing their roles if their reasoning is not clear enough to provide either the taxpayers or the tax authorities an idea of how the next similar and related cases will be decided. It is a basic right for those involved in tax judicial review to understand what courts mean by the legal concepts they often apply (e.g., fairness, reasonableness etc). I am not against tax decisions referring to vague concepts but their meaning should be made as clear as possible so they are not considered vague in the cases they are mentioned. Civil law countries tend to follow a set of abstract interpretation rules when referring to statutes, but this is also not the best approach to the problem because only in real cases you see what the issues involved are, as well as what questions related to them arise.

This Article is mainly divided in three parts: the uncertainty problem through examples, the solution through legislation and the influence of familiar vague concepts on the jurisprudence of tax cases. The first part gives examples on how tax judicial review cases have been decided. The second is mainly about how helpful legislation can be and the third part analyzes frequently applied legal concepts in comparative tax judicial review jurisprudence.

## **I. INTRODUCTION**

One special feature of tax judicial review is that it involves issues of interest to the whole community. Almost every person has to deal with taxes at some point in their lives. Hence, the need for less uncertainty in this field is stronger than in any

other.<sup>1</sup> The objective of this Article is not to present an in-depth study of tax judicial review, but rather to focus on the causes of uncertainty in tax judicial review jurisprudence.<sup>2</sup> In order to find ways to decrease the current state of unpredictability, legal concepts frequently used in relevant precedents will be analyzed and discussed in order to assess their contribution to uncertainty in the legal systems.

This is a comparative tax law study that relies mostly on legal articles of different countries to compare how diverse legal systems deal with uncertainty and unpredictability in their courts decisions. The analysis is mostly comparative and theoretical. Some cases are used to illustrate the sources of uncertainty in tax judicial review jurisprudence and to support conclusions on how courts can improve their decisions. English jurisprudence, for example, has dealt with a few very broad and vague legal concepts such as fairness, reasonableness, legitimate expectations, the difference between questions of law and questions of fact, irrationality etc. None of these concepts will be analyzed in detail because their definitions are uncertain as well. Furthermore, the difference between them is not always clear.<sup>3</sup>

The idea that inspired this Article is to give courts a few directions on how to better address the Tax authorities and the taxpayers' right of less uncertainty in the law. For this purpose, rather than using broad and vague legal concepts like the ones mentioned above, it is necessary to define the limits of review as well as the ways theories should be applied to facts. If this is done, certainty will become an achievable

---

<sup>1</sup> IAN SAUNDERS, TAXATION – JUDICIAL REVIEW AND OTHER REMEDIES, 102 (1996).

<sup>2</sup> Judicial review plays a relevant role in unveiling the fundamental values of the legal system. See JOHN HART ELY, DEMOCRACY AND DISTRUST - A THEORY OF JUDICIAL REVIEW, 43-72 (1980).

<sup>3</sup> For an in-depth analysis of some of these concepts in relevant tax cases, see *id.* at 124-157.

target and not just a dream for those who suffer with the inconsistent tax judicial review jurisprudence.

This Article main purpose is to identify the causes and consequences of an uncertain tax judicial review jurisprudence and compare it to modern tax law reasoning. Section II describes some important cases found in English jurisprudence, as well as some judicial filters adopted for reviewing tax authorities decisions. Section III analyzes how legislation and many of its traditional interpretations have not helped making judicial decisions become clearer and more coherent. Section IV searches how some frequently used legal concepts contribute to creating uncertainty in tax judicial review. It also analyzes and suggests some solutions to improve how tax judicial review cases are being decided. Last but not least, whenever there is no reference to the nationality of the mentioned precedent, it should be assumed it is taken from English law.

## **II. COMPARING TAX JUDICIAL REVIEW JURISPRUDENCE AND THEORY**

### ***A. Brief Analysis of Some Famous English Cases***

Fortunately, throughout the years, judicial review has been strengthened by the courts. It is taking its place as an essential legal institute in modern democracies. However, that does not mean it is being well conducted. English courts, for example, have adopted many vague legal concepts as grounds for a possible judicial review application. Perhaps their intention is to make it clear that judicial review is becoming a more efficient remedy against the abuses of the tax authorities. The adoption of so

many broad legal concepts could be a way for the courts to show that more doors are being opened to those who need them,<sup>4</sup> that access to justice is being improved.

The use of these vague concepts has become the source of much of the uncertainty regarding the outcome of tax judicial reviews in England. For example, in *R. v. IRC, ex p. Unilever*,<sup>5</sup> the Court of Appeal dealt with the concept of unfairness stating that it could mean abuse of power. It is understood from the reading of this case that more categories could fit in the concept of unfairness. Although this has become a very important decision, the court only did what it was expected to do when dealing with a tax judicial review case, i.e., stop public authorities from abusing their power. However, by using ‘unfairness’ as a criteria, it seems clear that there was an analysis of the merits of the decision<sup>6</sup>, and not of the way the decision was reached (the same conclusion would be possible had the court used ‘unreasonableness’ or ‘irrationality’ in its reasoning).

Before *Unilever*, the House of Lords used “unfairness” to justify its decision in *R v IRC, ex parte Preston*.<sup>7</sup> In this case, it was considered unfair for the Inland Revenue (IR) not to keep its promise, which was not to make any more inquiries if the taxpayer withdrew some claims on interest relief and capital loss. Consequently, because the IR did not consider the taxpayer’s withdrawal, made further inquiries and cancelled the taxpayer’s tax advantage, the House of Lords considered the IR decision

---

<sup>4</sup> Kenneth J. Arenson is one of those that still sees in Britain a certain resistance for an efficient judicial review system. Arenson, *Rejection of The Power of Judicial Review in Britain*, 3 Deakin L. Rev. 47-53 (1996).

<sup>5</sup> [1996] S.T.C. 681

<sup>6</sup> Ian Saunders, *Judicial Review: Successes For The Taxpayers*, 2 B.T.R. 118 (1997) [Hereinafter: Ian Saunders, *Judicial Review: Successes For The Taxpayers*].

<sup>7</sup> [1985] A.C 835.

unfair. Lord Templeman stated that “In most cases in which the court has granted judicial review on grounds of “unfairness” amounting to abuse of power there has been some proven element of improper motive”.<sup>8</sup>

In *Inland Revenue Comrs v. National Federation of Self-Employed and Small Businesses Ltd.*<sup>9</sup>, the House of Lords did not go any further by saying that the National Federation had no sufficient interest in pleading an investigation as to why the Inland Revenue granted amnesty only to a certain group of workers. The first major mistake in this decision was that the House of Lords did not analyze whether there was a constitutional right that required the tax authorities to treat taxpayers equally by law.<sup>10</sup> Second, if that right exists, which is not always easy to see in England because its constitution is not a written document, it could have said what would constitute a ‘sufficient interest’.<sup>11</sup> The reading of the decision leads the interpreter to wonder if that ‘sufficient interest’ means the few occasions when the Inland Revenue’s duty of confidentiality regarding the taxpayers should be put aside. Third, because it said that the Federation had no ‘sufficient interest’ it could have explained why. Fourth, by using this expression, the House of Lords has contributed to increasing uncertainty in

---

<sup>8</sup> *Id.* at 864.

<sup>9</sup> [1981] STC 260.

<sup>10</sup> In contrast, Sir K. Schiemann thinks of this decision as a milestone for a more open system where anything considered unlawful could be challenged. Schiemann, ‘*Locus Standi*’, AUT, PL, 346 (1990). Although it is possible to say that this right is implicitly recognized in the decision, court decisions should provide more answers and avoid maintaining controversies by using vague concepts.

<sup>11</sup> The ‘sufficient interest’ test is set out in the RSC Order 53, r. 3 (7). In Scottish judicial review, the Court of Session requires the petitioner to state not a ‘sufficient interest’, but to establish ‘title and interest’, which in the end has the same effect as in the English judicial review. See Chris Himsworth, *Judicial Review in The Court of Session* in JUDICIAL REVIEW AND SOCIAL WELFARE 279 (Trevor Buck ed., 1998).

the law because future taxpayers will not find any judicial reasoning to give them an idea on how the court might decide the next similar cases.

Another decision that also involves the right of equal tax treatment is *R. v Attorney General Ex p. ICI Plc.*<sup>12</sup> In this case, the taxpayer (ICI) convinced the Court of Appeal that persistent misapplication of statutory provisions led to an inadmissible state aid to other taxpayers within art.93 EEC. However, this time the court explained the reasons why the other party's right to confidentiality could be set aside. In an extremely lengthy decision the court explained how the facts amounted to state aid. Consequently, this case answered the question about the right to be treated equally and gave one example of what can be understood as 'sufficient interest'. Still, the court could have gone further by saying in its *dicta* what systematic view it holds to cases like these. It would have contributed more to the study of the basic right of equality in tax law.<sup>13</sup>

---

<sup>12</sup> [1987] 1 C.M.L.R. 72. The right of equal tax treatment regarding taxpayers in the same legal position can be understood as the right of not being discriminated. See Natalie Lee, *Human Rights and Taxation* in REVENUE LAW: PRINCIPLES AND PRACTICES, 1175, 1176 (22d ed. 2004).

<sup>13</sup> The right to be treated equally to others who are in the same situation is a basic right in any modern democracy. This means, for example, that the tax authority cannot discriminate taxpayers by applying standards that affect essential democratic values such as race or sex. Joseph M. Jacob says that "As is well-known, Aristotle, who in giving us the maxim that like cases must be treated alike, provided one of the pillars of justice and of the case law method". See Jacob, *THE REPUBLICAN CROWN* 275 (1996). In Italy, Augusto Barbera and Carlo Fusaro say that there is no reason for treating people differently regarding their sex, race, language, religion, political thoughts and even social and personal conditions. See Augusto Barbera and Carlo Fusaro, *CORSO DI DIRITTO PUBBLICO* 167,168 (3<sup>rd</sup> ed. 2001). The last two do not seem to apply to tax law because, e.g., it is possible for governments to exempt those who have been at war and suffered brain damage. In the U.S., a racial discrimination lying behind tax benefits was recognized in *McGlotten v. Connally*, 338 F. Supp. 448 (1975). In the

One of the most interesting and controversial English cases is *R. v. Inland Revenue Commissioners, ex p. Rossminster Ltd.*<sup>14</sup> In this decision the House of Lords did not stop the Inland Revenue from executing a warrant that authorized the seizure and removal of whatever could be found in the taxpayer's premises, as long as it could reasonably believe the removed material could serve as evidence of an offence.<sup>15</sup> A distinct feature of this case is that it did not involve an 'anton piller order' nor a 'mareva injunction'. The court used a third way of restricting the taxpayer's rights over his private property and documents. These wide powers and proceedings were set out in the Taxes Management Act 1970. If a warrant with such broad powers had been really necessary, the House of Lords should have said that there were other ways to compensate the damage that was being done, such as the

---

UK, in *R v. IRC, Ex p. Mead and Cook*, [1993] 1 All E.R. 772, it was said that wealth is not an essential value so that it can be used as a criteria for the Inland Revenue to choose who to prosecute. As a result, when it comes to tax prosecution, wealth is an allowable criterion to discriminate in English law. Perhaps the court took into account that wealth is not mentioned in the schedule 1, part 1, article 14 of the Human Rights Act 1998, nor in the article 14 of the European Convention of Human Rights. John Tiley has already demonstrated his pessimistic view about courts applying human rights to taxation. See John Tiley, *Human Rights and Taxpayers*, 57 Cambridge L.J. 272/273 (1998). See also De Smith, Woolf & Jowell, *JUDICIAL REVIEW OF ADMINISTRATIVE ACTION* 575, 578 (5h ed. 1995). In France, some scholars place 'equality of the taxpayers' as an essential principle of law. See, e.g., Christophe Vimbert, *LA TRADITION RÉPUBLICAINE EN DROIT PUBLIC FRANÇAIS*, 206 (1992).

<sup>14</sup> [1980] 1 All E.R. 80.

<sup>15</sup> Lord Woolf made a curious remark on this decision by saying that it "illustrates real limitations on the effectiveness of judicial review when the crown is involved". Lord Woolf, *Tax and Judicial Review*, 3 B.T.R. 222 (1993).

idea of ‘*piller amicus*’<sup>16</sup> to follow the enforcement of the order. Yet, there should have been some remarks on whether these broad powers are acceptable in modern law. The use of these powers should only be allowed after a careful analysis of the case by the court, and not automatically as a result of a legal statute.<sup>17</sup>

If one can accept that English Parliament (or eventually the American Congress) can pass a bill giving the Tax authorities powers to enter the taxpayer’s premises and get whatever it wants as long as it thinks it is necessary to prove an offence, there can be no reason why Parliament (or Congress, depending on the country) could not do the same in favor of some insurance company or any other kind of company that awaits payments from many of its clients. Even if such statute is not technically considered unconstitutional in English law, it is surely a step back in the legal system.

Some years later, in *R. v. O’Kane and Clarke, ex p. Northern Bank Ltd*<sup>18</sup>, the same abusive powers of the Taxes Management Act 1970 were the background of a similar order. The court decided in favor of the taxpayer, but again it failed to

---

<sup>16</sup> The ‘*piller amicus*’ is an *amicus curiae* counsel who would act as a provisional judge at the time and place of the execution of the order. His role would be to make sure that the Inland Revenue do not take hold of unnecessary documents to be eventually used in future prosecutions. Martin Dockray and Hugh Laddie, *Piller Problems* 106 L. Q. R. 607 (1990).

<sup>17</sup> In Japan, for example, tax officials are only authorized to search the premises of suspected tax evaders after a warrant is issued by the court. See Ministry of Finance, AN OUTLINE OF JAPANESE TAXES, 208 (2003). In contrast, in China, the so-called Tax Audit Bureau, the main unit within the Chinese tax authority, may enter business premises of the taxpayers to conduct field investigations whenever it wants. For a look at the current state of tax judicial review in China, see Stephen Nelson, *China – Tax Controversies*, Asia-Pacific Bulletin, International Bureau of Fiscal Documentation, 236 (August/September 2003).

<sup>18</sup> [1996] S.T.C. 1249.

comment on the statutory source of the abuse. The court only reasoned that the notices sent to the taxpayer were oppressive and unfair because the Northern Bank would not be able to comply without making unreasonable efforts. This decision means that there is still an open door to illegality if the Inland Revenue does not change the way its notices are being made.

One of the most important principles in English judicial review is the prohibition of making an unreasonable decision. This is exemplified by *Associated Provincial Picture Houses Ltd v Wednesbury Corporation*.<sup>19</sup> Despite being a very old case, its principle is still largely applied to most judicial decisions. By stating that the court has the power to review the reasonableness of the decision, the Court of Appeal meant that the merits can be reviewed as well, but it can only be changed when it is very clear that the conclusion is absurd.<sup>20</sup> Although reasonableness is not a precise legal concept, its use by the courts does not contribute to uncertainty because the mistake has to be obvious.<sup>21</sup> Therefore, it is about extremes. Uncertainty rises when courts use other concepts that have a wider area of application such as, e.g., fairness.

The leave application has been sometimes a hard hurdle to get over. In *R v Secretary of State for the Home Department, ex parte Doorga*<sup>22</sup>, the Court of Appeal created the following guidelines for future decisions on leave applications: first, where there are *prima facie* reasons for granting review; second, when the case is wholly unarguable and third, where there is a cause for concern to know more about

---

<sup>19</sup> [1947] 2 All ER 680.

<sup>20</sup> Apparently, in the *Wednesbury* case the court denied that its conclusion came from an investigation on the merits. It is repeatedly said there that only the lawfulness of the decision was being appreciated.

<sup>21</sup> However, Nicholas Bamforth still thinks *Wednesbury* unreasonableness is vague. See Nicholas Bamforth, *Fairness and Legitimate Expectation in Judicial Review*, 56 Cambridge L. J. 3 (1997).

<sup>22</sup> [1990] C.O.D.109.

the case. For the latter, it was suggested that a hearing where both parties attended would be very helpful. This aforementioned example should serve to direct courts. Obviously, these are also generic guidelines but they deal with extremes. In other words, they should be interpreted like the *Wednesbury* unreasonableness. Only in very obvious cases should the court deny a leave application. If there is doubt, a hearing to be attended by both parties can be a good idea. If the judge thinks the hearing may delay the proceedings, the right approach is to go forward with the judicial review judgement itself. It is very important that courts make it as clear as possible the reason why a leave application was denied so it can be seen that they did not refuse it to avoid increasing their workload. That is why it is not surprising when Sir William Wade QC say that discretionary decisions do not go so well with the respect for personal legal rights.<sup>23</sup> However, the leave application is just one of many other grounds for courts to review a tax authority decision.

***B. Acceptable Grounds To Tax Judicial Review and  
Their Contribution to Uncertainty***

Uncertainty and instability of the tax legislation inevitably results in “less investment, lower returns to investments and slower economic growth for the

---

<sup>23</sup> Sir William Wade QC, *The United Kingdom Bill of Rights* in CONSTITUTIONAL REFORM IN THE UNITED KINGDOM: PRACTICE AND PRINCIPLES 67 (1998). In contrast, Sir Thomas Bingham thinks discretion in public law remedies can be used if it is strictly limited and the rules for its exercise are very clear. See Sir Thomas Bingham, *Should Public Law Remedies Be Discretionary?*, Spr, PL 64-75 (1991). Ben Terra and Peter Wattel say that discretion is necessary, provided it is subject to full judicial review. See Ben Terra and Peter Wattel, EUROPEAN TAX LAW 396 (3d ed. 2001).

economy as a whole”.<sup>24</sup> Therefore, when courts say that the grounds for judicial review are, for example, unfairness and irrationality, there is a dark area which makes it very difficult for the taxpayer to have an idea about what the outcome of his case might be.<sup>25</sup> Linda A. Schwartzstein gives the following example to demonstrate the difficulty in predicting the outcome of decisions when fairness is the criteria: “if two taxpayers have the same amount of earned income, but the first has a mortgage and can take a deduction for interest paid on that mortgage, is it equitable or not that the second taxpayer will pay more taxes?”<sup>26</sup>

It is interesting to notice that in economics some scholars have defined tax fairness by creating and developing principles and concepts.<sup>27</sup> As for fairness as one of the grounds for tax judicial review, (see, e.g., the *Unilever* case<sup>28</sup>), there are no

---

<sup>24</sup> Linda A. Schwartzstein, *Smoke and Mirrors: Tax Legislation, Uncertainty and Entrepreneurship* 6 Cornell J. L. and Pub. Pol’y. 62 (1996).

<sup>25</sup> Mauro Cappelletti recognized the danger of judges “pouring their own hierarchies of values or ‘personal predilections’ into the relatively empty boxes of such vague concepts as liberty, equality, reasonableness, fairness and due process”. See Mauro Cappelletti, *THE JUDICIAL PROCESS IN A COMPARATIVE PERSPECTIVE* 150 (1989). Consequently, it is not possible to agree with John Tiley when he simplifies the concept of fairness so as to say its allegation is a matter for judicial review and not for appeal. See John Tiley, *REVENUE LAW* 72 (4th ed. 2000).

<sup>26</sup> See Schwartzstein, *supra* note 24 at 91.

<sup>27</sup> E.g, in Canada, John G. Head put together a few sub-principles of fairness such as 'the benefit principle' and 'the ability to pay' and describes some discussions about their consequences. However, this is not the place to discuss relevant tax thoughts in economics. The aim is just to compare how tax law lacks a similar in-depth analysis of the concept of fairness used in recent judicial review cases. Head, *Tax Fairness Principles: A Conceptual, Historical and Practical Review* in *FAIRNESS IN TAXATION - EXPLORING THE PRINCIPLES* 4-14 (Allan M. Maslove ed., 1993).

<sup>28</sup> *Supra* note 5.

definitions or discussions by judges, practitioners or academics that can be found to be helpful. The obvious consequence for the use of these broad concepts is that taxpayers and lawyers in general are left in the dark as to what might be the outcome of their judicial review application. This creates problems that are hardly ever mentioned such as the difficulty lawyers face when presented with certain facts by their clients. Most of the time, it will be largely difficult to provide secure advice of possible risks if the facts are taken to court. This is a common problem for individuals, partnerships and corporations. The more tax judicial review cases are decided and studied through these vague legal concepts, the more unpredictable the courts decisions will be.<sup>29</sup> It is not even a matter of finding the right answer to each case or not<sup>30</sup>, but rather avoiding the uncertainty and its harmful effects on the taxpayers' savings and the economy in general.

---

<sup>29</sup> In Brazilian law, what matters to the courts is whether any specific taxpayer right has been violated. See, e.g., Mauro Luís da Rocha Lopes, EXECUÇÃO FISCAL E AÇÕES TRIBUTÁRIAS 243 (2002). According to a specific statute - article 1 of the Mandado de Segurança Act - the main grounds for the most important Brazilian remedy are illegality and abuse of power. It does not matter whether the rights violation resulted from acting or a refusal to act (*id.* at 244). The deadline for using this remedy is one hundred and twenty days and it cannot be waived by any discretionary decision (article 18 of the 'Mandado de Segurança' Act). See also Leonardo Greco, *O Valor da Causa e As Custas Iniciais no Mandado De Segurança* in GRANDES QUESTÕES DO DIREITO TRIBUTÁRIO 235, 252 (Valdir de Oliveira Rocha ed., 2001). For a brief study on the whole list of Brazilian remedies that are similar to most tax judicial review systems, see also Ricardo Lobo Torres, CURSO DE DIREITO FINANCEIRO E TRIBUTÁRIO 312-316 (9th ed. 2002).

<sup>30</sup> Ronald Dworkin thinks it is possible to find the right answer to cases where vague language is found in relevant statutes. He claims that there is no theory of legislation in general use, but states that it cannot be assumed it does not exist. See Ronald Dworkin, A MATTER OF PRINCIPLE 130 (1985) [hereinafter Ronald Dworkin, A MATTER OF PRINCIPLE]. Dworkin's concern is with the lawyers

Because the private property of individuals can be at stake when taxes are not paid or are paid less than what is due, it seems fair that, in case of doubt, the taxpayer should be considered exempted from payment<sup>31</sup> and, in case of overpayment, any extra value be returned by the tax authority without delay.<sup>32</sup>

In the case of English law, perhaps the only clear and straightforward legal concept very commonly admitted as a ground for judicial review applications is natural justice. In the United Kingdom, it is well-known that natural justice implies the right of having an unbiased adjudicator and the right to a fair notice to make it possible for the defendant to have the time to prepare his defense, as well as to let him/her know exactly what he is being accused of.<sup>33</sup> Yet, because uncertainty can lead

---

and courts' struggle to make the words in the statute clear, but what makes it worse in tax judicial review is that many courts are adopting vague concepts that are not found in any applicable statute.

<sup>31</sup> It was decided in *Partington v Attorney General*, [1869-70] L.R. 4 H.L. 100, that in case it is not possible to see under the current law if the tax has to be paid or not, the decision should be made in favor of the taxpayer. In Japan, Masaaki Iwasaki says that if the words of the statute are unclear or are ambiguous, the taxpayer must be given the benefit of the doubt and not be forced to pay tax. This is the reason to adopt *in dubio contra fiscum* in tax law. Iwasaki, *Interpretation of Tax Statutes in Japan* in INTERPRETATION OF TAX LAW AND TREATIES AND TRANSFER PRICING IN JAPAN AND GERMANY 42,43 (Klaus Vogel ed., 1998).

<sup>32</sup> See *Woolwich Building Society (formerly Woolwich Equitable Building Society) v Inland Revenue Commissioners*, [1993] AC 70. Article 1 of Protocol 1 of the European Convention on Human Rights also generally provides for the right of recovery of overpaid tax.

<sup>33</sup> See, e.g., Ian Saunders, *Judicial Review: Successes For The Taxpayers*, *supra* note 6, at 135. In Spain, some scholars say that if the right to be heard is denied in administrative proceedings, the procedure cannot be considered legal. See, e.g., Eduardo García de Enterría and Tomás-Ramón Fernández, CURSO DE DERECHO ADMINISTRATIVO II 399 (2nd ed. 1986).

to the lack of fair notice of the taxpayer's duty, it inevitably violates natural justice.<sup>34</sup> Therefore, the problem does not lie in the usage of natural justice as a ground for judicial review because, in English law, its concept is not vague. The real problem lies in determining whether the law (legislation and relevant precedents) is uncertain or not at some point.

### III. THE INEFFICIENCY OF LEGISLATION

#### A. *Complex Legislation and Tax Judicial Review*

In many countries, tax legislation has been historically complex. In most common law countries, like the United States and England, tax legislation is so complex that it does not take long to realize that courts decide cases relying more on precedents than on statutes.<sup>35</sup> Simple and straightforward rules are also the best

---

<sup>34</sup> In the words of Colleen S. Yamaguchi “The principal rationale for the unconstitutional vagueness and uncertainty doctrine in tax cases has been the due process concern providing the taxpayer with fair notice of his legal duty”. See Colleen S. Yamaguchi, *Uncertainty in The Law: An Uncertain Defense in Criminal Tax Prosecution*, 39 *The Tax Lawyer* 399 (1986).

<sup>35</sup> Although it can be possible to think that precedents play a bigger role because of the common law tradition, it seems undeniable that complex legislation strengthens the reliance on judicial precedents. In general, civil law jurists have the wrong idea that common law systems ignore most precedents when they have a specific statute to regulate a certain area of law. Amanda Rowland thinks it is actually unrealistic to expect tax legislation to be simple and straightforward. See Amanda Rowland, *Is the Revenue Being Fair? Revenue Statements and Judicial Review*, 2 *B.T.R.* 115 (1995). Other countries like Estonia, Latvia and Lithuania are getting rid of their complex tax legislation by adopting a flat-tax system. For an analysis of their experience so far, see *Special Report – Simplifying Tax Systems: The Case for Flat Taxes*, *THE ECONOMIST*, April 14<sup>th</sup>-22<sup>nd</sup>, 2005, at 69-71.

propaganda to attract business. Many tax havens work their way by making their legal systems clear and not subject to abrupt changes. Under the so-called tax law rewrite programme, English tax law is having its statutes reformed to make it simpler and easier to be understood. So far, it has achieved great results, but there is still a long way ahead.<sup>36</sup>

Before any efforts are directed towards making precedents and tax statutes clear and eloquent, judicial review will remain the main remedy against arbitrary decisions of the public authorities. The limits of courts' intervention have never been very clear but have always been very flexible. The discussions concerning how far can a court decision go in judicial review seem to be heading toward legitimatizing a more active court control.<sup>37</sup>

Complexity leads to uncertainty and makes any legal rights and duties taxpayers may have unclear.<sup>38</sup> For instance, the system of 'checks and balances' works very well in democratic systems where it is possible to know exactly which right has been violated and the remedy to heal it. In tax judicial review, sometimes it is possible to reasonably think one has a certain right and find the court later saying that it never existed. In addition, the grounds for judicial review are still shaky. And

---

<sup>36</sup> Leonard J.H. Beighton says The Tax Law Review Committee has significantly pushed forward the debate on tax legislation. See Leonard J.H. Beighton, *Simplification of Tax Legislation: How Are We Getting On?* 6 B.T.R. 606 (1996).

<sup>37</sup> F.L. Morton describes the evolution of the main court of French judicial review (the *Conseil Constitutionnel*) as follows: "The most striking characteristic of the *Conseil Constitutionnel* has been the rapid ascent of its political influence and prestige". Morton, *Judicial Review in France: A Comparative Analysis*, 36 Am. J. Comp. L. 89 (1988).

<sup>38</sup> An emphasis on the need of clear, simple and intelligible rules are also found in John Rawls, JUSTICE AS FAIRNESS A RESTATEMENT 54 (2001).

the use of broad legal concepts like fairness and rationality can be a powerful tool to disguise arbitrary judicial reasoning.

One of the other consequences of having highly complex tax legislation is that it naturally leads to the need of the Internal Revenue Service (IRS) issuing statements where it publishes its interpretation of the law. In fact, the IRS habit of making statements is supposed to be nothing more than mere interpretations of the law.<sup>39</sup> However, because they are issued by the tax authority, taxpayers feel confidence in relying on them when conducting their affairs.<sup>40</sup> Therefore, the taxpayer has an acquired right not to be surprised by any threat of criminal tax prosecution if the IRS later changed its interpretation of the law. If the way law is being applied by the tax authority is to be changed, another ruling has to be issued and major publicity has to be followed.<sup>41</sup> Even if the majority of academics disagree with any interpretation

---

<sup>39</sup> Ellen P. Aprill says that “The American IRS takes the position that tax regulations are almost always interpretive and only rarely legislative”. Ellen P. Aprill, *Muffled Chevron: Judicial Review of Tax Regulations*, 3 Fla. Tax Rev. 57 (1996).

<sup>40</sup> In *R. v D.H.S.S., ex p. Overdrive Credit Card Ltd*, [1991] 1 W.L.R. 635, after deciding that the Treasury’s statement was wrong, the Divisional Court did not get to the point of drafting a new one. In fact, the court act cautiously. Perhaps it was too cautious. It could have at least rewritten a few small parts if that would have been enough to fix the problem. For this reason, Lord Woolf is right when he says that “...there should be no difficulty in obtaining a declaration from the court correcting any mis-statement in such a document”. See Lord Woolf, *supra* note 15 at 229. The American Supreme Court decided in *National Muffler Dealers Association v. United States*, 440 U.S. 472 (1979), that an interpretive tax regulation is to be upheld so long as it carries out congressional mandate in proper manner and whether it harmonizes with the plain language of the statute.

<sup>41</sup> See Philip Baker, *Taxation and The European Convention On Human Rights*, 4 B.T.R. 225 (2000).

adopted by the Treasury, the taxpayer will still have his right to rely on what was said by the tax authority.<sup>42</sup>

Brian J. Arnold says that, in Canada, it is possible for taxpayers to request a binding opinion from the Revenue Canada concerning the tax consequences. He also says that this is just one of several actions that Revenue Canada has taken to minimize the uncertainty caused by the introduction of the general anti-avoidance rule.<sup>43</sup>

### ***B. Would Statutory Rules of Tax Judicial Review Be Useful?***

If one agrees that the current state of tax judicial review is unpredictable and uncertain, it would not be odd to consider whether Congress should enact some statutory rules on this matter.<sup>44</sup> The new statute would give more precise directions to judges and taxpayers by bringing together some solutions given in tax judicial review

---

<sup>42</sup> According to Yoshihiro Masui, this can be seen as an application of the principle of good faith in tax law. The Japanese Supreme Court has admitted that the principle is applicable to cases where: 1- the tax authority gave a public opinion to the taxpayer; 2- the taxpayer acted in reliance upon such an opinion; 3- the taxpayer suffered economic damage because of the action by the tax authority contrary to the former public opinion; 4- the taxpayer is not at fault in taking such action. See Yoshihiro Masui, *Statutory Interpretation as a Process of Tax Law Making: The Case of Japan*, *supra* note 31 at 33. In Israeli law, the tax authorities can change their interpretation but the new one is not applied retroactively to the taxpayer that asked for the ruling or approval. See Leon Harris, *Advance Tax Rulings* in ISRAELI BUSINESS LAW 423 (Alon Kaplan and Paul Ogden eds., 2000).

<sup>43</sup> Brian J. Arnold, *The Canadian General Anti-Avoidance Rule*, 6 B.T.R. 552, 553 (1995). In *Matrix Securities v. IRC*, (1994) STC 272, Lord Templeman said that if the statements are accurate and not misleading the Tax authorities should not be allowed to revoke it. See *id.* at 279, 280.

<sup>44</sup> Tax scholars in the United Kingdom will certainly see a parallel with the discussions on the making of GAARS to fight tax avoidance.

cases over the years.<sup>45</sup> One obvious question is whether the future statute should include only rules, principles or both. The idea of working with rules and principles in judicial review is not new. It has already been considered by scholars like John Braithwaite<sup>46</sup> and Sarah K. Harding.<sup>47</sup>

In legal theory, a major contribution to this field can be found in Ronald Dworkin's works. Dworkin criticized Hart for not attempting to distinguish in his 'Concept of Law' principles from rules.<sup>48</sup> Rules require an 'all or nothing' approach.<sup>49</sup> That is to say either rules are entirely applicable to the facts or they will be left aside. If there are two incompatible rules to be considered, one will be applied while the

---

<sup>45</sup> H. H. Monroe reports of 100 years of adherence to the plain words of statutes. And says that "There are, it now appears, contexts where the spirit of the law must prevail over the letter. How the contexts are to be identified, whether the draftsmen can rely on the principle being applied and, of course, whether there are contexts where the principle will cut in favor of the taxpayer – these are all questions which await an answer". See H. H. Monroe, *Fiscal Statutes: A Drafting Disaster*, 5 B.T.R. 266 (1979).

<sup>46</sup> John Braithwaite, *Rules and Principles: A Theory of Legal Certainty*, 27 Australian J. Legal Phil. 50, 55-57 (2002).

<sup>47</sup> Sarah K. Harding, *Comparative Reasoning and Judicial Review*, 28 Yale J. Int'l L. 455, 456 (2003).

<sup>48</sup> Hart, in the second edition of his 'Concept of Law', acknowledges that he made a mistake for not including a more in-depth analysis about the difference between these two concepts deeply enough in his book. See H.L.A. Hart, *THE CONCEPT OF LAW* 259 (2nd ed. 1994). Actually, it is interesting to observe that after considering many of Dworkin's criticisms to his book, that is the only one which Hart admits Dworkin was right about, even though he concludes that there is no reason to accept a sharp contrast between legal principles and legal rules. See *id.* at 261. However, Dworkin's thoughts were not exempted from criticism, see Joseph Raz, *Legal Principles and the Limits of Law*, 81 Yale Law Journal 823, 825-828 (1972). In general, Dworkin's theories have also been attacked by the so-called Critical Legal Studies school. See Roberto Mangabeira Unger, *The Critical Legal Studies Movement*, 96 Harv. L. Rev 571-572 (1983).

<sup>49</sup> Ronald Dworkin, *The Model of Rules*, 35 University of Chicago Law Review 23-29 (1967).

other will have no influence in the outcome. When it comes to principles, the approach is very different. Principles require a flexible interpretation.<sup>50</sup> They are not incompatible with each other. One can have a greater weight to the facts but the other is not left behind, it is applied but with considerably less weight. In other words, although the second principle will remain visible in any application of the law, it will not be seen in the first row. That is why it can be said that the difference between them is a matter of degree.<sup>51</sup>

According to Harding, the idea of having statutory rules could lead to more uncertainty because the all or nothing approach required would help tax avoiders finding loopholes in the system where the law would not be applicable. Besides that, it would “expand the number of rules, creating an unwieldy, confusing body of rules and exceptions”.<sup>52</sup> Meanwhile, if we turn to principles, the interpreter could have

---

<sup>50</sup> In civil law countries, the most common methods of legal interpretation are the literal, purposive, historical and systematical. In countries like Germany, there are important books solely concerned in building one single (but flexible) methodology of legal interpretation. E.g., Karl Larenz, *METHODENLEHRE DER RECHTSWISSENSCHAFT*, Portuguese edition: *Metodologia da Ciência do Direito*, 439-697 (José Lamego Translator, 6th ed. 1997); Claus-Wilhelm Canaris, *SYSTEMDENKEN UND SYSTEMBEGRIFF IN DER JURISPRUDENZ*, Portuguese edition: *Pensamento Sistemático e Conceito de Sistema na Ciência do Direito*, 103-241 (Menezes Cordeiro Translator, 2nd ed. 1996). Despite the sophistication of their theories, legal scholars and practitioners apply them very rarely. It is also true to say that Dworkin’s concepts of principle and rules are becoming more popular in countries like Brazil. See Luis Roberto Barroso, *TEMAS DE DIREITO CONSTITUCIONAL* 28 (2nd vol., 2003).

<sup>51</sup> See Carol Harlow and Richard Rawlings, *LAW AND ADMINISTRATION* 104 (2nd ed. 1997).

<sup>52</sup> Sarah K. Harding, *supra* note 47 at 455.

more freedom to determine the right solution to a case. He would not find himself stuck to existing rules that could lead to absurdity.<sup>53</sup>

One major criticism against the use of statutory principles is that uncertainty would be transferred from the statutes to the courts. This would be the case because one would hardly be able to predict, at least for a while, what the outcomes of the decisions would be when courts start applying statutory principles to specific situations.

---

<sup>53</sup> According to Braithwaite: 'In legal scholarship it is mostly assumed that tightly specified rules increase legal certainty'. See John Braithwaite, *supra* note 46, at 50. For a more intermediate approach to the problem of uncertainty, see David A. Weisbach, *Formalism in Tax Law*, 66 U.Chi.L.Rev. 869, 886 (1999). According to Robert Baldwin, the effect of rules should be analyzed regarding the well-intentioned, the ill-intentioned and the problematic. For those who are not well-disposed to comply, rules tend to fail when one of the reasons is that they can be 'low in intelligibility and difficult to use in court'. Baldwin, *Why Rules Don't Work*, 53 Mod. L. Rev. 324, 329 (1990). John F. Avery Jones CBE defends an approach to principles when he says that "The real choice, I believe, is not between detailed rules that we have today, and less detailed legislation, when detailed legislation wins on the ground of certainty; but between detailed rules, and less detailed legislation interpreted in accordance with principles, where less detailed legislation wins on the ground of certainty because the use of principles provides predictability". Avery Jones, *Tax Law: Rules and Principles*, 6 B.T.R. 593 (1996). Some scholars think that in public law many rules are broadly drawn from principles, consequently the trend is for the grounds of review to become less rather than more specific. See, e.g., S.H. Bailey, B.L. Jones, A.R. Mowbray, *CASES AND MATERIALS ON ADMINISTRATIVE LAW* 195 (2nd ed. 1992). In Brazilian law, however, legal scholars prefer to focus on the certainty principle as a requirement to tax statutes being specific about the relevant facts and the ways taxes are going to be charged, as well as the prohibition of discretionary decisions on Brazilian tax authorities. For an in-depth study on the certainty principle in Brazil, see Roque Antonio Carrazza, *CURSO DE DIREITO CONSTITUCIONAL TRIBUTÁRIO* 370-386 (16th ed. 2001).

The rules/principles dichotomy seems insufficient to determine the right approach to the problem. The concepts of rules and principles have been mostly used as labels to determine whether interpretation should be flexible or inflexible. Laws are never perfect, one should never assume perfection when it is well known that very few elected lawmakers know taxation well enough to make the necessary amendments and language corrections in the bills. On the other hand, it is not possible to allow the interpreter too much liberty so as to change the meaning and scope of the statute.

The idea of having a statute to regulate tax judicial review will certainly require more confidence in the way courts interpret the laws. However, if the courts know they have to respect the limits of the words and avoid interpretations that could lead to violations of basic values of the communities they serve<sup>54</sup>, then a modern statute on judicial review would not make any difference. It is important that courts acknowledge, for example, that human rights must not be violated whether directly or indirectly.<sup>55</sup> Due to their great importance in the legal system, they should always be visible in every interpretation, like principles according to Dworkin's famous theory.

---

<sup>54</sup> H. Wade MacLauchlan accepts the idea that interpretation should be 'consonant with normal expectations of the relevant community and with general procedural standards. See H. Wade MacLauchlan, *Judicial Review of Administrative Interpretations of Law*, 36 U. Toronto L.J. 1 377 (1986).

<sup>55</sup> "Adopting a narrow construction of the rights protected risks denying Convention scrutiny in cases where a fundamental right may be affected, albeit indirectly" – Peter Duffy QC, *The European Convention on Human Rights, Issues Relating to Its Interpretation In The Light Of The Human Rights Bill* in CONSTITUTIONAL REFORM IN THE UNITED KINGDOM: PRACTICE AND PRINCIPLES, *supra* note 23 at 100. Lord Lester of Herne Hill Q.C. emphasized that the English Human Rights Act would bring an important shift in the nature of judicial review proceedings. Lord Lester of Herne Hill Q.C, *The Impact of the Human Rights Act on Public Law* in *id.* at 107. In Brazilian

It is important that judges avoid using their personal views and values<sup>56</sup> and try to reach for those that are neutral because they are considered social standards by civilized societies in general. References to morality, for example, may serve as a disguise for judges to impose their ‘different ideal conceptions of society’.<sup>57</sup> If it is assumed that judges are inevitably pursuing their own interests, or those of their class, by saying that they apply their view of what they consider to be the public interest<sup>58</sup>, tax law, for example, the list of essential rights include the tax officials duty of confidentiality, the taxpayer’s privacy, the prohibition of obtaining unnecessary information to the tax investigation and of using humiliating means for it. For a summary of the Brazilian theoretical approach, see Luciano Amaro, DIREITO TRIBUTÁRIO BRASILEIRO 142 (9th ed. 2003). And for an insight into the Brazilian law treatment of privacy violation, see Roberto Prado de Vasconcellos, *Provas Ilícitas (Enfoque Constitucional)*.791 Revista dos Tribunais 456 (2001).

<sup>56</sup> Hart and Dworkin’s discussions on this matter are well-known. Hart says that it is inevitable that judges apply their own values. See H.L.A. Hart, *supra* note 48 at 273. On the other hand, Dworkin, when talking of law suits, says there is inevitably a moral dimension to an action at law. Ronald Dworkin, LAW’S EMPIRE 1 (1998). Hart says that, according to Dworkin’s theory, every proposition of law involves a moral judgment. This Article gets closer to Dworkin but explicitly rejects his ideas of using morality as part of the judicial reasoning. A rather different view is expressed by Joel C. Bakan who says that constitutional theories attempt to compensate the open-textured nature of the legal materials by establishing principles and standards without which the judges would inevitably reflect their personal world views. Joel C. Bakan, *Strange Expectations: A Review of Two Theories of Judicial Review*, 35 McGill L. J., 443 (1990).

<sup>57</sup> Despite his belief in judges applying their own values to decisions, Hart says that “Such differences of weight or emphasis placed on different moral values may prove irreconcilable. They may amount to radically different ideal conceptions of society”. H.L.A. Hart, *supra* note 48 at 184.

<sup>58</sup> It is not possible to entirely agree with J.A.G. Griffith’s political theory of judges. However, he seems to be right to say that the reason why the judiciary is more politically polarized in England than in other countries such as France and Italy is due to the different ways judges are appointed. See Griffith, THE POLITICS OF THE JUDICIARY 337 (5th ed. 1997). Griffith’s view of the judiciary is

many past arbitrary decisions will be legitimized. Judges are expected to be as impartial as they can. That is the kind of professionals they are and that is the role they are expected to play. It is also necessary not to regard the search for Legislative intent as a necessary tool to interpret laws.<sup>59</sup> Its usefulness should be limited to understanding if the document as a whole is a result of a special time in history that moulded its clauses to reach a certain purpose.<sup>60</sup> Kate Malleson is right when she says that "...it is less the form of Bill of rights than who sits on the bench that matters".<sup>61</sup> Therefore, in order to strengthen judicial review legitimacy, judges should avoid

---

the opposite as that defended by Ronald Dworkin when the latter says that courts should be concerned with arguments of political principle, not with those of political policy. See *infra* Section IV.C.1.

<sup>59</sup> In the U.S., Aprill says that "The realities of the legislative process inevitably produce ambiguity and mixed congressional motives". See Ellen P. Aprill, *supra* note 39 at 85. In the American case *Hirschey v. FERC*, 777 F.2d 1, 7-8 (D.C. Cir. 1985), Justice Scalia said that one of the reasons for him being hostile to the use of legislative intent is that members of Congress do not have a single will or intent. In France, there has been some occasions when the *Conseil d'État* has decided against explicit legislative intent. See Guy Braibant and Bernard Stirn, *LE DROIT ADMINISTRATIF FRANÇAIS* 232 (5th ed. 1999).

<sup>60</sup> It has been said that in Japan the tax legislative materials and draftings are done by young bureaucrats in the Ministry of Finance tax bureau. See Hugh J. Ault [et al.], *COMPARATIVE INCOME TAXATION: A STRUCTURAL ANALYSIS* 76 (Hugh J. Ault ed., 1997).

<sup>61</sup> Kate Malleson, *Judging Judicial Review – Criteria for Judicial Appointment* in *JUDICIAL REVIEW IN THE NEW MILLENIUM* 24 (Richard Gordon ed., 2003). P.P. Craig seems to share the same view when he says that: "Lawyers in the United Kingdom have much to gain by reflecting upon the experience in the United States. At the most fundamental level this serves to remind us that the existence of a written Constitution is not the end of constitutional controversy, but rather a watershed and the beginning of contestable interpretations concerning the 'proper' direction for public law". See P.P. Craig, *PUBLIC LAW AND DEMOCRACY IN THE UNITED KINGDOM AND THE UNITED STATES OF AMERICA* 10 (1990).

generic references to morality or social standards without specifying which one they are referring to.<sup>62</sup>

#### **IV. SPECIFIC SOURCES OF UNCERTAINTY TO TAX JUDICIAL REVIEW AND SOME POSSIBLE SOLUTIONS**

This section analyzes a few basic concepts that are very familiar to tax judicial review and examines two possible solutions to the current state of uncertainty created by them. It starts with the question of law and question of fact dichotomy because not only it is mentioned in important cases but also because it is not as straightforward as it may seem. It will prove that it is not right to say that tax judicial review only takes place if a question of law is presented.

Other theoretical legal concepts like public law, public interest and legitimate expectations often cited by tax lawyers and academics are studied to demonstrate that,

---

<sup>62</sup> For this reason it is not possible to agree entirely with Imtiaz Omar who does not say anything about the dangers of using these broad concepts to legitimize judicial decisions. See Imtiaz Omar, RIGHTS, EMERGENCIES AND JUDICIAL REVIEW 257 (1996). Some scholars are skeptical about the effectiveness of judicial review or any other remedy because according to Yoshihiro Masui “the general principle approach also has a limitation, it is an *ex post* remedy without procedural guarantee. In today’s turbulent market, businesspersons wish to obtain rulings even before they make economics decisions, most preferably as a matter of right, not as an *ad hoc* remedy to some extremely harsh situation. The new challenge for the Japanese legal studies is to institute an *ex ante* conflict resolution procedure, rather than merely rescuing unfortunate taxpayers in hard cases on an *ex post* basis. The general advance ruling system not only gives certainty to taxpayers but also reduces unnecessary administrative costs in cases where *ex post* conflicts are prevented”. See Yoshihiro Masui, *Statutory Interpretation as a Process of Tax Law Making: The Case of Japan*, *supra* note 31 at 35.

despite being concepts with a reasonably clear meaning, their broadness often misleads the ways tax cases are decided.

#### A. *Questions of Law and Questions of Fact*

It has been quite common to see the distinction between questions of law and question of fact have a major importance in the reasoning of judicial review cases.<sup>63</sup> At the same time, the use of these concepts has generated a great amount of controversy because there are many situations where it is hard to distinguish one from the other. Academics do not often agree on how to differentiate them, and this lack of consensus is reflected in the courts decisions.<sup>64</sup>

At a first look, it may seem that the issue does not apply to tax law because it deals mainly with questions of law. However, even in taxation there can be many situations where it will not be possible to achieve consensus. There are plenty of

---

<sup>63</sup> E.g., *Pearlman v. Governors of Harrow School*, (1979) QB 56, where it was said that the remedy of *certiorari* is not excluded when the judge had erred in law.

<sup>64</sup> Back in 1967, Harry Whitmore concluded that, in the United States legal context, a system of review based on the law-fact distinction is, in any event, unlikely to prove satisfactory”. See Harry Whitmore, *O! That Way Madness Lies: Judicial Review for Error of Law* 2 Fed. L. Rev. 170 (1967). Jack Beatson concluded that Lord Diplock and Lord Denning have very different approaches to “the method to be used in characterizing an error as one of fact or law”. Jack Beatson, *The Scope of Judicial Review For Error of Law*, 4 Oxford J. Legal Stud. 35 (1984). The public/private law distinction in judicial review is also criticized by Ian McLeod. See Ian McLeod, JUDICIAL REVIEW 127-130 (2nd ed. 1999). George A. Bermann says that, in the European context, the lack of consensus in general is much broader than the question of fact and law distinction. See Bermann, *Marbury v. Madison and European Union “Constitutional” Review*, 36 Geo Wash. Int’l. L. Rev. 565, 566 (2004).

situations where taxes will be levied based on facts of the taxpayer's life.<sup>65</sup> For example, property taxes are a very common example where facts will have to be proven in order to provide a fair assessment and, consequently, a fair tax.

The main criterion to distinguish a question of law from one of fact should not simply be that the former is a legal assessment of a fact, but rather whether it is necessary for the taxpayer to produce evidence other than the one analyzed by the competent tax authorities. If this is taken as a guideline it will be a step ahead of the misleading labels of questions of fact and questions of law.<sup>66</sup>

There is a fundamental difference between decisions involving discretion and others concerning questions of law. The former can take a few possible decisions while the latter can take only one. The difference between both is essential for judicial review because if the decision under attack was discretionary, courts will not be able to substitute it just because the judges concluded that the best option was not taken.<sup>67</sup>

---

<sup>65</sup> An interesting example of how confusing this distinction can be is given by Eric L. Goldberg when he says that, in his opinion, a tax benefit (government support) to persons or organizations to violate or diminish rights is an injury in fact. See Golberg, *Standing for Public and Quasi-Public Interest Tax Litigants*, Wash. U. L. Q. 578 (1978).

<sup>66</sup> Rupert Cross and J.W. Harris say that "the distinction between law and fact is one that has to be drawn in several different contexts". And that "questions of the sufficiency of evidence must be treated as questions of law where there is a jury; but they are hardly a suitable subject-matter for a precedent" See Cross and Harris, *PRECEDENT IN ENGLISH LAW* 222, 223 (4th ed. 1991). In contrast, it seems that many tax law scholars still consider vital the difference between questions of law and fact. See, e.g., David R. Salter and Julia L. B. Kerr, *EASSON: CASES AND MATERIALS ON REVENUE LAW* 30 (1990).

<sup>67</sup> Whitmore recognizes that, although the most important questions of review are questions of discretion, they are very different from the so-called questions of law because for the latter there can be only one possible answer. See Whitmore, *supra* note 64 at 169, 174. In *Edwards v. Birstow* [1956]

On the other hand, if it is about error of law, then the decision under attack could have chosen only one possible option. If there is controversy in the law, the courts should not change the tax authorities' decision unless it is proven that the controversy no longer exists and the decision was based on a wrong judgement.<sup>68</sup>

In cases where the mistake can be considered a minor error or a merely irregular one, there exists potential for a successful judicial review application. This would be the case in many situations where the taxpayer lives in a poor area of the city, and the tax authority overestimated the value of his land. It could be said that this is a problem of reasonableness, but what makes an application for judicial review possible is that there is no need for the taxpayer to produce more evidence.<sup>69</sup>

In the Californian jurisprudence, this controversy has been resolved by differentiating methodology error from substantial evidence issues (also called

---

A.C. 14, 29, Viscount Simonds seems to say that the distinction between questions of law and questions of fact is not essential.

<sup>68</sup> Despite making the right point about how the idea of error of law can be misleading, Jack Beatson seems not to differentiate it from discretionary decisions when he says that error of law “cannot possibly serve as an organizing principle for judicial review because it would lead to too intrusive a scope of review”. See Beatson, *supra* note 64 at 45.

<sup>69</sup> That is why it is not possible to agree with E. Blythe Stason, not only because he does not recognize the right to judicial review in these cases, but also because he thinks that otherwise the certainty and regularity of public revenues would be substantially reduced. See Stason, *Judicial Review of Tax Errors – Effect of Failure to Resort To Administrative Remedies*, 28 Mich. L. Rev., 643,645 (1930). In other words, he uses an argument of political policy (see *infra* Section IV.C.1) to deny a taxpayer's right to judicial review.

“application” issues).<sup>70</sup> The former means that the court is wrong in the way it approached the issue. In other words, it is a matter of error of law.<sup>71</sup> On the other hand, ‘substantial evidence’ is about whether there was enough evidence to lead to the decision that is currently being attacked by judicial review. All the court has to do is see if the conclusion reached was related to the evidence made available in court.<sup>72</sup> The court’s powers are considerably more limited in these cases because it is not possible for the taxpayer to produce any additional evidence when using the judicial review route.<sup>73</sup> In other words, this jurisprudence accepts the need to offer more evidence as a filter for denying a judicial review application.

If the taxpayer has to deal with such an inconsistent jurisprudence it should also be analyzed whether the current state of uncertainty in tax judicial review can be a valid defense for the taxpayer.

### ***B. Uncertainty In The Law As a Possible Defense For The Taxpayer***

---

<sup>70</sup> For a in-depth analysis of this jurisprudence, see John J. Doherty, *Judicial Review of Property Tax Disputes*, 24 U. S. F. L. Rev., 170-178 (1989). T.R.S. Allan sees ‘substantial evidence’ as a ground for review in English law. See T.R.S. Allan, *LAW, LIBERTY AND JUSTICE* 194 (1993).

<sup>71</sup> See John J. Doherty, *supra* note 70 at 171.

<sup>72</sup> Doherty says that, with this criteria, the problem remains the same. However simple these ideas are in theory, they do not seem to make the difference clear in practice. See *id.* at 178.

<sup>73</sup> It seems wrong to conclude, as Doherty concludes (*id.*), that extrinsic evidence should be permissible in methodologies issues because courts can adopt an “expert testimony on foreign law” approach. If courts admit new evidence it will give them the unofficial status of an appeal court. And what is right is that courts should only substitute the tax authorities’ decision if they have been clearly wrong in their conclusions.

There are two types of uncertainty: objective and subjective. The former results from the statute itself, while the latter comes from the taxpayer's point of view. The main concern at this stage is to consider if uncertainty can be a valid defence for the taxpayer. There is a great controversy in the American jurisprudence over the degree of uncertainty that should constitute such a defense.<sup>74</sup> The idea of distinguishing the objective from the subjective uncertainty is understandable because the burden is on the taxpayer to prove that the uncertainty comes from the law itself. The subjective uncertainty has to be a natural consequence of the objective uncertainty, therefore it is possible to conclude that the distinction between them is useless. And because this is clearly a matter of law the court can recognize the lack of clarity even if the taxpayer does not make any reasonable effort to prove it.<sup>75</sup>

In fact, it is not enough to leave the doors of the courts open to the taxpayer. In order to avoid the unlawfulness, it should also not be enough to give the taxpayer notice of his legal duty, because the uncertainty comes from the law itself. The taxpayer could not plan his business life in advance even if he wanted to and had the best of intentions. Actually, the uncertainty problem in the law is serious enough to exempt the taxpayer from any penalty whether it is proven that he had good or bad intentions.<sup>76</sup> As a result, it is not even enough for the law to expressly state that,

---

<sup>74</sup> An analysis of the conceptual difference of objective and subjective uncertainty as well as the American jurisprudence on this matter can be found in Colleen S. Yamaguchi, *Uncertainty in The Law: An Uncertain Defense in Criminal Tax Prosecution* Yamaguchi, *supra* note 34 at 398-399.

<sup>75</sup> Philip Baker says that the principle of legal certainty is inherent throughout the European Convention on Human Rights. See Baker, *supra* note 41 at 224.

<sup>76</sup> Assessing whether the law is uncertain or not is certainly a feature of the so-called "hard cases" which, in the words of Hart, are "cases which the law has left incompletely regulated and where there is no known state of clear established law to justify expectations". See Hart, *supra* note 48 at 276.

despite the uncertainty, sanctions will be applied if it is proven that the taxpayer was a purposeful tax violator.<sup>77</sup> The reason is quite simple: if the obligation to pay tax is not made clear in the statute, the sanctions would represent a punishment on someone's intention.<sup>78</sup> If the law is uncertain, it should not have any harmful effects upon the taxpayer. In addition, it is not reasonable to require the ordinary citizen to consult a lawyer every time he needs to deal with tax statutes.<sup>79</sup> If legislation is to be applied to everyone, it should be made simple so people can understand it without having to spend more time and money. Furthermore, it must not be overlooked that there are many cases where non-payment can lead to criminal charges.<sup>80</sup>

### ***C. Some Familiar Concepts and Their Influence on Tax Judicial Review***

#### ***1. Public Law***

---

<sup>77</sup> However, in *Screws v United States*, 325 U.S. 91, 102 (1945) the US Supreme Court decided that uncertainty is not allowed as a defense if the act had a requirement of willfulness.

<sup>78</sup> Yamaguchi also says that there is a danger of 'creative tax shelter promoters' presenting a plausible interpretation of the law at trial even though that interpretation did not guide the taxpayers at the time of the illegal action. See Yamaguchi, *supra* note 34 at 402,403. Despite looking effective, this view can only be applied if the burden is upon the Tax authorities to prove that the taxpayer did not have the same interpretation before. However, if the law was objectively uncertain, there is no illegality. Otherwise any sanction would be a punishment on the taxpayer's intention.

<sup>79</sup> For a few examples on Brazilian legal uncertainty, see Roberto Prado de Vasconcellos, 840 *Revelia e Julgamento Justo* 73-74 (2005).

<sup>80</sup> It is fortunate that there are cases in American tax law that have stated that the ignorance of the law can be a valid defense for criminal (tax) prosecutions. E.g., *United States v. Bishop*, 412 U.S. 346, 360-361 (1973).

In *O'Reilly v. Mackman*<sup>81</sup>, it was decided that, in judicial review applications, the court only deals with matters of public law. However, it does not seem that the solution to the uncertainty problem lies in differentiating public from private law, but rather in seeing how different courts should work with rights against the state as opposed to rights against other private legal entities.<sup>82</sup> In reality, judicial review is about rights, not policy.<sup>83</sup> Judges should only be concerned with the violation of taxpayers rights, and not whether the policy behind the law is being followed or is effective.<sup>84</sup> As a result, it should not make any difference if the right is against the

---

<sup>81</sup> [1983] 2 AC 237

<sup>82</sup> T.R.S. Allan says that “Although individual rights in public law must be sharply distinguished from private law rights – as rights against the state, their content is closely related to the nature and scope of the powers and duties entrusted to public officials and agencies...”. Allan, *supra* note 70 at 183. Michael Fordham says that this distinction "involves difficult grey areas, and raises important policy questions (like why "private" decision-makers should not be amenable to similar legal standards)". Fordham, JUDICIAL REVIEW HANDBOOK 562 (2004).

<sup>83</sup> Allan also emphasizes that judicial review is not about what public interest requires but, in his opinion, about whether the authority treated the applicant fairly. See Allan, *supra* note 70 at 184. Patrick Elias says that judicial review is not only about the protection of rights but also the protection of interests which do not constitute rights in the strict sense. And it is a task of administrative law to define which interests will be afforded the protection of public law. See Elias, *Legitimate Expectations and Judicial Review* in NEW DIRECTIONS IN JUDICIAL REVIEW 37 (J.L.Jowell & P.Oliver eds. 1988).

<sup>84</sup> In France, Agathe Van Lang is not precise enough when she claims that it is not right to say that the Judiciary is superficial, formalist and protector of private interests. See Van Lang, *JUGE JUDICIAIRE ET DROIT ADMINISTRATIF* 200 (1996). In fact, judges are neither protector of the private interests or the state's interests or policies, they care about violation of rights. Ronald Dworkin noticed that, in Britain, fairness is usually meant as fairness to groups or classes within the society, while the

state, a private firm or an individual, the judicial reasoning has to be the same. Ronald Dworkin is right when he says that courts should use arguments of political principle rather than arguments of political policy.<sup>85</sup> The difference between them is that the former is more concerned with the rights of individual citizens, while the latter is aimed ‘to promote some conception of the general welfare or public interest’.<sup>86</sup> The courts’ concern is if people’s rights were violated and not if the State’s policy is being carried out effectively.<sup>87</sup> Fortunately, there are examples in English jurisprudence that

---

Americans, by insisting that rights belong to individuals, have resisted measuring fairness by classes rather than people. See Ronald Dworkin, *A MATTER OF PRINCIPLE*, *supra* note 30 at 31.

<sup>85</sup> *Id.* at 11.

<sup>86</sup> *Id.* Dworkin also says that “British judges really make political judgements according to their own lights disguised as judgements about legislative intentions or history”. *Id.* at 23.

<sup>87</sup> According to Christopher P. Manfredi, Canadian courts have been resolving disputes in favor of individual rights when they are in conflict with collective rights, despite a few exceptions in case-law. See Manfredi, *The Canadian Supreme Court and American Judicial Review: United States Constitutional Jurisprudence and the Canadian Charter of Rights and Freedoms*, 40 *Am. J. Comp. L.* 234-235 (1992). Jurgen Schwarze says that the European Court of Justice has been interpreting unclear written rules in the best possible way to protect individual rights. Schwarze, *Judicial Review in EC Law - Some Reflections On The Origins and The Actual Legal Situation* 51 *Int’l & Comp. L. Q.* 22 (2002). Still according to Schwarze, English control of unlawful administrative action has developed significantly after the incorporation of the European Convention on Human Rights in 2000. See *id.* at 17. Others say that The Human Rights Bill is the best bill English law has or is likely to have. See Sydney Kentridge Q.C., *The Incorporation of the European Convention on Human Rights in CONSTITUTIONAL REFORM IN THE UNITED KINGDOM: PRACTICE AND PRINCIPLES*, *supra* note 23 at 69.

have shown signs of flexibility regarding the distinction between public and private law.<sup>88</sup>

When dealing with tax judicial review, courts should have no doubts that they are dealing with the legality of a public authority's decision. By having to judge individual rights against the state and its taxing power, courts should acknowledge that there is no duty to put the social good, represented by the policy behind the levying of the tax, ahead of the taxpayers' basic rights and liberties.<sup>89</sup>

## **2. *Public Interest***

It is not because tax law is mostly about the state's limits to levy tax that it should be thought that the state is always pursuing the public interest. The idea of public interest can be misleading. It should not be seen as synonym of the state's interest, or the Treasury's interest.<sup>90</sup> In fact, public interest can sometimes be found to be the same as the individual interest or the tax authority's interest. It should represent

---

<sup>88</sup> E.g., see the House of Lords decision in *Mercury Communications Ltd v Director General of Telecommunications* [1996] 1 WLR 48.

<sup>89</sup> To quote Samuel Freeman on Rawls's theory of justice: "...justice as fairness assigns the basic liberties strict priority over other social goods. This means basic liberties can be limited only for the sake of maintaining other basic liberties. They cannot be compromised to promote greater aggregate happiness in society, to increase national wealth, or to promote perfectionist values of culture". See Samuel Freeman, *Introduction: John Rawls – An Overview* in *THE CAMBRIDGE COMPANION TO RAWLS* 5 (2003).

<sup>90</sup> Gian Antonio Micheli says that applying tax laws is a way to implement the public interest behind them, but the taxpayer protection against arbitrary decisions is part of broader public interest. See Micheli, *CORSO DI DIRITTO TRIBUTARIO* 208-209 (2nd ed. 1974).

a fair balance of both interests at stake.<sup>91</sup> The technical and impartial application of the law is part of the public interest. Therefore, there is no principle of superiority of the state's interest.

Before courts come to a conclusion, it is important to realize that they are not looking to find the public interest behind the policy, but rather to see if any right has been violated by a public authority. Although public interest does not automatically coincide with the interest of the Treasury or the taxpayer, it will be decided whether it will be identified with any of the parties involved.<sup>92</sup>

The importance of getting the right approach to public interest in this area is that the IRS and the taxpayer should be seen as being in equal positions. Therefore, in the case of a biased statute like the English Taxes Management Act 1970 mentioned above<sup>93</sup>, the court should look for other ways to restore the balance between them by taking precautionary measures in favor of the taxpayer.<sup>94</sup> It is also the duty of the IRS to give the money back to the taxpayer without delay if the tax was unduly charged.<sup>95</sup> In this case, the courts' concern will be the Treasury's unjust enrichment.

One perfect example of how the English House of Lords dealt with issues of public interest and tax is found in *Bromley London Borough Council Respondents v. Greater London Council*<sup>96</sup>. In *Bromley*, the Labor Party was elected to the Greater London Council and wanted to keep its promise of reducing the fares of London's

---

<sup>91</sup> That is what J.A.G. Griffith means when he says that he takes 'public interest' to include the interest of the people at large too. See Griffith, *supra* note 58 at 296.

<sup>92</sup> See *supra* Section IV.C.1.

<sup>93</sup> See, e.g., the *Rosminster* and *Northern Bank* cases.

<sup>94</sup> Such as the 'piller amicus' solution. See *supra* Section I.A, note 16.

<sup>95</sup> See, e.g., the *Woolwich* case.

<sup>96</sup> [1983] AC 768.

buses and tubes by 25%. However, things would not be simple. According to Lord Denning, to compensate the lost, the GLC issued an order (precept) directed to all London boroughs to raise the necessary funds.<sup>97</sup> This would be done by making a substantial supplementary rate to all London ratepayers. The House of Lords decided that both the public users and taxpayers' interests should be balanced. The decision was in favor of the latter by saying that the order was *ultra vires*.<sup>98</sup> A more theoretical analysis of *Bromley* would say that the public interest was identified with the saving of money by the public transport users, and that it was not considered stronger than the allegedly violated rights of London taxpayers. This case is also interesting because the House of Lords did not consider not quashing the order because it was one of the promises under which the Labor Party was elected for, but rather decided that implementing it was beyond statutory powers.

### 3. *Legitimate Expectations*

Legitimate expectations are about the respect for rights that are clearly established and consolidated by statute or judicial precedents over the years. They should include only basic constitutional rights such as the right to be taxed by law. The right to receive from the tax authority the same treatment regarding other taxpayers that are in a similar situation is also to be considered.

It is a legitimate expectation of both taxpayers and the Treasury that the courts decide cases in a way to make the outcomes of the next similar cases as predictable as

---

<sup>97</sup> *Id.*, 771.

<sup>98</sup> For the possible criticism on the indeterminacy of the *ultra vires* principle, see Paul Craig, *Ultra Vires and Judicial Review*, 57 C.L.J. 66-70 (1998).

possible. And by using vague legal concepts, they are certainly not contributing to it. If courts go on naming different concepts that in the end mean mostly the same thing, uncertainty will rise at a faster pace.<sup>99</sup> In tax judicial review, legitimate expectation is not a right to a certain court decision on the merits, but rather an expectation that the courts will review the Treasury's behaviour to see if the principles of natural justice, as English law knows it, have been respected, if the basic values of democracy were not violated and so on.<sup>100</sup> If, for example, the IRS has interpreted one same statute the same way for many years, it cannot change its interpretation without previous due notice to the taxpayers because they had a legitimate expectation to be treated the old way. And according to that expectation, they planned their business, as well as their social and economic life. Consequently, if the taxpayer, who had previously consulted the tax authority for some reason, has been notified by the Treasury of a change of policy, he must have the opportunity to argue that the new policy is not applicable to him.<sup>101</sup> It is a continuous conflict between the need for legal certainty and the

---

<sup>99</sup> Somehow, the use of abstract legal concepts is inevitable, but courts should attempt to demonstrate how precise they become in each case they decide.

<sup>100</sup> F.A. Hayek says that "The judge ... is not concerned with what any authority wants done in a particular instance, but with what private persons have 'legitimate' reasons to expect". See Hayek, *LAW, LEGISLATION AND LIBERTY*; v. 1, RULES AND ORDER 98 (Routledge et Kegan Paul, 1973).

<sup>101</sup> P.P. Craig makes the same point although not in a tax law context. See Craig, *Legitimate Expectation: A Conceptual Analysis*, 108 L. Q. Rev. 85 (1992). John Rawls explains legitimate expectations by saying that "In a well-ordered society individuals acquire claims to a share of the social product by doing certain things encouraged by the existing arrangements. The legitimate expectations that arise are the other side, so to speak, of the principle of fairness and natural duty of justice. For in the way one has a duty to uphold just arrangements, and an obligation to do one's part when one has accepted a position in them, so a person who has complied with the scheme and done his share has a

principle of legality, which in tax law (as in public law in general) means that the Treasury has to conform to its authorized powers. Even if cases where the courts recognize binding effects to *ultra vires* statements become very common, there is no danger that this jurisprudence might serve as an incentive to the tax authorities making statements beyond its powers. The reasoning is simple: if it becomes clear that the IRS rulings are repeatedly going beyond its legal powers, then a broader solution should be the punishment of those who are responsible for the *ultra vires* rulings. The courts should not stop protecting those who relied on those rulings because their duty is to judge the breach of people's rights, not to let rights be violated because protecting them could lead to more frequent illegal behaviours by the Tax authorities.<sup>102</sup>

Allan holds a very interesting point of view by arguing that legitimate expectation is about justice.<sup>103</sup> On the other hand, he also says that to find out what justice is, F.A. Hayek's theory should be followed and applied to public law. In other words, what he is saying is that because positivism had succeeded in demonstrating that there is no positive criterion to define justice, a negative one should be adopted. Therefore, in Allan's view, it is easier to say what is not justice rather than what is justice. He also states that "Rules of just conduct were determined by a persistent effort to bring consistency into the system of rules inherited by each generation".<sup>104</sup>

---

right to be treated accordingly by others. They are bound to meet his legitimate expectations". See John Rawls, A THEORY OF JUSTICE 275 (Revised ed., Oxford University Press 1999).

<sup>102</sup> In *R. v. Board of Inland Revenue, ex p. M.F.K. Underwriting Agencies Ltd*, [1990] 1 All E.R. 91, the English court decided that the Inland Revenue rulings are binding where directly applicable but in circumstances less formal a deeper investigation is required.

<sup>103</sup> T.R.S.Allan, *supra* note 70 at 197.

<sup>104</sup> *Id.* at 210.

There is an important academic discussion about whether there is also a substantive legitimate expectation that differs from a procedural one.<sup>105</sup> As explained above, if it is possible to have legitimate expectations for substantive basic rights, there is nothing wrong in saying that these rights are an example of substantive legitimate expectations.<sup>106</sup> As a result, rights consolidated by settled practice, or included in rulings, in general or specific representations by the IRS<sup>107</sup>, are considered substantive legitimate expectations.<sup>108</sup>

#### ***D. An Interesting Example of Tax Reform***

---

<sup>105</sup> John Francis Larkin makes this point in an Irish law context. See Larkin, *Judicial Review in Northern Ireland* in JUDICIAL REVIEW AND SOCIAL WELFARE 302 (Trevor Buck ed. 1998). See also *infra* notes 106, 108.

<sup>106</sup> E.g, the right not to pay more taxes than others because of any criterion based on race. In *R v. Secretary of State for the Home Department, ex p. Ruddock*, [1987] 1 WLR 1482., the court recognized the existence of a substantive legitimate expectation by deciding the applicant had the legitimate expectation of the application of a previously published criteria on phone interception. Geraldine E. Rivera talks of reasonable expectations when commenting an American case where a war veteran should have had his right to property tax exemption recognized. See Rivera, *New Mexico Vietnam Veteran's Property Tax Exemption and Judicial Review in Equal Protection Analysis: Hooper v. Bernadillo County Assessor*, 15 N. M. L. Rev. 397 (1985).

<sup>107</sup> Not any representation, but only those made by a person with ostensible authority to make the representation.

<sup>108</sup> See De Smith, Woolf & Jowell, *supra* note 13 at 571-574.

The idea of diminishing legal uncertainty through law reform is almost uncontroversial. However, the means by which this should be done vary a lot.<sup>109</sup> The most obvious way is currently being prepared in the United Kingdom where there are a few proposals of changes in the structures and proceedings of tribunals and courts.<sup>110</sup>

As part of a wider plan to reform administrative justice, there are some proposals to create a unified tax jurisdiction across the United Kingdom.<sup>111</sup> One of the main objectives of these proposals is to unify the jurisdictions of the Section 703 Tribunal, the Special Commissioners, the General Commissioners and the VAT and Duties Tribunal within a single tax jurisdiction.<sup>112</sup> The new structure is supposed to consist of two tiers. The first will be in charge of hearing all taxation appeals, while the second, the so-called appellate tier, will be responsible for the appeals against the first tier decisions. These appeals will depend on permission and will have to be on a point of law.<sup>113</sup> Further appeals will lie to the Court of Appeal.<sup>114</sup> This new structure is meant to be able to deal with all kinds of tax cases, even the most complex ones. It will also lead to a fresh new start to courts decisions, but it is less clear whether this is

---

<sup>109</sup> In Italy, some say that there are too many judicial remedies and a shortage of alternative ways to avoid the courts. See, e.g., Domenico Sorace, *Administrative Law* in INTRODUCTION TO ITALIAN LAW 157 (Jeffrey S. Lena & Ugo Mattei eds. 2002).

<sup>110</sup> See *supra* note 33.

<sup>111</sup> *Reform of Section 703 Tribunal Appeal Routes*, Consultation Paper CP 07/05 – 02/03/2005, Department of Constitutional Affairs, <[www.dca.gov.uk/consult/tribunalappeal/sect703-tribunal-appeal-cp07-05.pdf](http://www.dca.gov.uk/consult/tribunalappeal/sect703-tribunal-appeal-cp07-05.pdf)> 3 (visited Aug. 15th, 2005).

<sup>112</sup> *Id.* at 4, 6.

<sup>113</sup> *Id.* at 6.

<sup>114</sup> *Id.* See also, John F. Avery Jones, *The Tax Law Review Committee Report On Tax Appeals*, 3 B.T.R. 141 (1997).

the solution that taxpayers, Treasuries and courts have been waiting for so many years. Since permission will be required, it is likely that courts will keep on using the same vague legal concepts as acceptable grounds for this new appeal. Furthermore, the point of law requirement will keep the courts making the same contradictory decisions if they do not take into account the necessity of new evidence criterion as proposed in Section IV.A above.

Appeal and judicial review should remain different remedies because their aims are different. The latter does not substitute the former, it completes it. On appeal, it is possible to discuss the facts and the evidence that support them. In contrast, on a judicial review application, facts cannot be discussed.<sup>115</sup> It is the judgment and conclusions regarding those facts that are to be reviewed. That is not to say that courts should not analyze a judicial review application just because it says ‘appeal’ by mistake in the paper.<sup>116</sup> What matters is the content of the application because otherwise courts would adopt a stronger kind of formalism that should already be vanished from modern judgments. On the other hand, if it is decided that the powers of judicial review should be expanded, there will be a clear danger of

---

<sup>115</sup> Allan makes it simple and says that the difference between appeal and review is a matter of degree. See Allan, *supra* note 70 at 187.

<sup>116</sup> E.g., in *Henry Moss of London Ltd. v. Customs & Excise Commissioners*, [1981] 2 All E.R. 86, the English court of appeal decided to deal with an appeal as if it was a judicial review application. In the nineties, it was suggested that more remedies should be made available for taxpayers in France. See, e.g., Jean-Yves Nizet, FISCALITÉ, ÉCONOMIE ET POLITIQUE 492 (1991).

creating a ‘government of judges’. If this becomes reality one day, it will be very hard to find an explanation for its legitimacy.<sup>117</sup>

The idea of having specialized tax judges (for instance, those working in VAT tribunals) is not an essential one. What is essential is that judges are able to identify any direct or indirect violation of rights within taxation in general, e.g., respect for principles of impartiality, legality etc.<sup>118</sup> The problem with too much specialization is that it can lead to bureaucracy by not motivating the judges to keeping updated with controversies and precedents in other areas of public law that might have a direct or indirect relation to taxation. However, it is useful that the proposals aim to maintain the existence of general tax tribunals as a first step for taxpayers before they go to court.<sup>119</sup>

## V. CONCLUSIONS

The aim of this Article is to rethink ways to avoid increasing uncertainty in tax law. Tax judicial review is a remedy that should be applicable depending upon the

---

<sup>117</sup> However polemic, George Stewart Brown explicitly defended this point of view in the thirties when he said that judicial review should be of either questions of law or questions of fact. See George Stewart Brown, *Judicial Review in Taxation* 27 Geo. L. J. 42 (1938).

<sup>118</sup> In 1978, Gilbert Tixier and Guy Gest suggested that, following the successful experiences in Portugal and Greece, all tax litigation in France should be judged by specialized judges. See Gilbert Tixier and Guy Gest, *DROIT FISCAL* 265 (12th ed. 1978).

<sup>119</sup> In Japan, for example, if the dispute regards local taxes they cannot be appealed to the Japanese national tax administrative bodies. Instead, such disputes must be appealed directly to the judicial courts. See Masatami Otsuka, Ichiro Otsuka and Elichiro Nakatani, *TAX LAW IN JAPAN* 23-24 (2001).

nature and effect of the decision itself and not upon pre-determined classifications and vague legal concepts.<sup>120</sup>

The legal concepts frequently used in tax authorities' rulings and by courts in tax judicial review reasoning (fairness, rationality etc) do not have precise definitions and the difference between most of them is not clear.

The increasing use of these vague concepts as grounds for an effective judicial review application can be a way for courts to show that the right of access to justice is being improved.

The *Unilever* and *Wednesbury* cases proved that it is possible for courts to assess the merits of the decision by using concepts such as fairness and reasonableness. In *Wednesbury*, the English Court of Appeal made it clear that the concept of 'unreasonableness' is about extremes. In other words, it can only be used in cases where the public authority mistake was obvious. In both cases the focus was not the way the decision was reached but in the result it produced in the end.

Courts should avail themselves to make a deeper analysis of the legal issues involved. For example, in *National Federation of Self-Employed*, the House of Lords did not go deep enough to assess the application of the principle of equality in tax law, as well as missed the opportunity of developing its systematic views in the *ICI* case. In other relevant cases, such as *Rossminster* and *Northern Bank*, nothing was said about the adequacy of the abusive powers set out in the English Taxes Management Act 1970 in modern law.

One of the few examples where the court decided in a way to make its future decisions not so unpredictable was in *ex parte Doorga*. The guidelines developed in

---

<sup>120</sup> Fiona Wheeler, *Judicial Review of Prerogative Power in Australia: Issues and Prospects* 14 Sydney L. Rev. 473 (1992).

this decision made it clear that only in very obvious cases should a leave application be denied.

Because there are no definitions by academics, practitioners or judges which make the meaning of concepts such as fairness or rationality clear, the more tax judicial review cases are studied through them, the more unpredictable the decisions will be.

The use of broad and vague concepts can be a powerful tool to disguise arbitrariness not only in judicial decisions, but also in tax authorities' rulings.

Complex legislation leads tax authorities, practitioners and judges to rely more on precedents than statutes. Therefore, if courts avoid using vague legal concepts, they will begin to alleviate some of the uncertainty which plagues the current system.

The rulings made by the IRS revealing its interpretation of the law are binding because the taxpayer has the right to rely upon them to plan his financial life. It is not acceptable that the taxpayer is caught by surprise due to any sudden change of interpretation without previous notice.

The idea of having a new statute consolidating the current judicial review case-law is to be discarded as long as judges are aware they have to avoid interpretations that lead to violations of basic values of the communities they work in.

References to morality or social standards are not worthy substitutes for vague legal concepts unless courts and tax authorities specify which value or social standard they are referring to when rendering decisions.

The distinction between questions of law and fact is misleading as case-law history proves it. In judicial review, it is not important whether fact or law is being discussed, because what truly counts is to assure that no new evidence is produced.

If the obligation to pay tax is not clear in the statute, applying sanctions to the taxpayer will be the same as a punishment on his/her intentions.

In tax judicial review, courts should be concerned with the violation of rights, and not if any public policy is being carried out effectively.

Public interest must not be identified with the state's interest. Its definition is very flexible and thus can be found to be the same of either the taxpayer or the Treasury's interest. What should matter to courts is whether rights have been violated by some illegal decision. In extreme cases it may be possible to outweigh the public and the private interest as it happened in the *Bromley* case.

Legitimate expectations are the expectations of having basic rights, whether procedural or substantive, respected by the tax authorities and the courts. In tax judicial review, it also includes predictability of the IRS decisions.

The legitimate expectations of the parties involved in tax judicial review can be used to serve as a means to avoid legal uncertainty. In other words, it means that if the taxpayer had previously consulted the IRS and later has been notified by a change of policy, he has the right to argue that the change will not be applicable to him.

The English tax reform proposals do not seem to address the problem of uncertainty properly because despite all the controversy among academics and in case-law it maintains the leave requirement, as well as states that judicial review applications have to be on a point of law.

Appeal and judicial review should remain separate remedies because they are used for different purposes. They should coexist to complete each other, to increase ways to make rights effective in modern democracies.

The idea of having a unified tax jurisdiction can be productive but it is far more important to have judges who are capable of identifying any direct or indirect violation of rights within taxation in general.