

Principle 10 Protect suspects' rights

Taxpayers suspected or accused of committing a tax crime must be able to rely on basic procedural and fundamental rights.

Introduction

132. Persons subject to a criminal tax investigation should be able to rely on certain procedural and fundamental rights, which are afforded to everyone suspected or accused of a criminal act, including tax crime.

133. The United Nations' Universal Declaration of Human Rights sets out the fundamental human rights which are to be universally protected (United Nations, 1948^[1]). Similar rights and guidelines can for instance be found in the European Convention on Human Rights (European Court of Human Rights, Council of Europe, 1950-2010^[2]) and the African Commission on Human & Peoples' Rights, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa (African Commission on Human and Peoples' Rights, 2003^[3]). These rights may be given effect in domestic law by being enshrined in a jurisdiction's constitution or bill of rights, or within criminal procedure law (US Government, 2002^[4]) (Government of Canada, 2021^[5]).

134. In particular, taxpayers suspected or accused of committing a tax crime should be able to rely on the following rights:

- The right to a presumption of innocence;
- The right to be advised of their rights;
- The right to be advised of the particulars of what one is accused of;
- The right to remain silent;
- The right to access and consult a lawyer and entitlement to free legal advice;
- The right to interpretation and translation;

- The right to access documents and case material, also known as a right to full disclosure;
- The right to a speedy trial; and
- The right to protection from double jeopardy (*ne bis in idem*).

135. The criminal tax investigation agency needs to be aware of these fundamental rights since failure to do so will not only negatively impact on the rights of an individual, but may have an adverse effect on an investigation and prosecution of a tax crime, for example, where evidence obtained becomes inadmissible if the individual's rights were violated.

136. In particular, as there are instances where a criminal investigation may have originated as an ordinary civil examination or audit procedure, jurisdictions should have safeguards to ensure that the rights of an accused are protected when there is a change from administrative to criminal law. For example, in a civil examination, the taxpayer has an obligation to provide information to the tax administration; however in a criminal investigation, the suspect may have the right to remain silent. This issue is of particular importance for tax administrations which direct and conduct criminal investigations within the same organisational structure as the civil tax (audit) function, referred to as organisational Model 1 in Principle 4 above.

137. The line that separates a civil tax matter from a criminal tax matter can require judgement and may be unclear. Based on the survey, most jurisdictions reported that a civil investigation becomes a criminal investigation when there is a reasonable suspicion that a crime had been committed, or where the facts indicate that a crime may have been committed. A smaller number of jurisdictions use an objective marker to determine when a civil matter becomes a criminal investigation, and which is based on a threshold of the amount of tax evaded. Based on survey data, 11 jurisdictions reported that civil and criminal investigations cannot run in parallel, and in practice the civil / administrative tax audits would be suspended and the criminal investigation would take precedence. 19 jurisdictions reported the possibility for civil / administrative tax audits to be conducted in parallel with criminal investigations. Many of these added that there are safeguards to ensure that the rights of an accused are protected when there is a parallel civil and criminal investigation, such as ensuring the investigations are run independently.

138. More detail on each of the rights of suspects is set out below.

The right to a presumption of innocence

139. This is the principle that a person is considered innocent until proven guilty and it is a critical component of the criminal justice system. The presumption of innocence means the burden of proof is on the prosecution and not on the accused.

140. As an example of how this can be implemented, the European Council recently adopted a directive to strengthen certain aspects of the presumption of innocence (European Council, 2016^[6]). This Directive requires member states to respect the following related obligations: “before the final judgement, suspects and accused persons should not to be presented as being guilty through the use of measures of physical restraint and the burden of proof is on the prosecution while any reasonable doubts as to the guilt should benefit the accused.”

The right of the suspect or accused to be advised of their rights

141. This right places a duty on the investigating agency to advise a suspect or accused of their rights. In some jurisdictions, this obligation may be fulfilled by orally advising the person of their rights or in writing by issuing a “Letter of Rights”. These rights will generally include the right to remain silent, the right to be informed of the accusations against the person and the right to access a lawyer or in some circumstances

the right to free legal advice. For example, in the United States this is known as a “Miranda Warning,” and many other jurisdictions have equivalents (The Law Library of Congress, 2016^[7]).

142. In practice, jurisdictions may administer these rights at different stages of an investigation. Some jurisdictions advise an accused of their rights at the commencement of any questioning, while others may do so when a person is arrested.

The right to remain silent

143. This is the right of an accused person to refuse to comment or provide answers when questioned by a criminal investigator. This right is recognised by most legal systems and protects an individual from self-incrimination. This right usually applies both prior to and during a trial.

The right to be advised of the particulars of what one is accused of

144. This right enables the accused to know the nature and substance of the allegations against them. This would generally include the elements of the offence, such as the essential aspects of the offence, details of the alleged conduct which led to the charge and in the case of a tax crime, the alleged damage to the state. Generally, the particulars must be provided to an accused prior to the accused entering a plea in court.

The right to access and consult a lawyer and entitlement to free legal advice

145. Someone accused of having committed a tax crime must have the opportunity to seek legal advice. In addition, if the accused cannot afford legal advice or legal representation, then there may be a right to state-funded legal assistance. This fundamental right is essential to a fair legal system, given the potentially serious consequences of a conviction.

146. The specific details of these rights vary from jurisdiction to jurisdiction. Jurisdictions may have different practices with respect to when the right to seek legal advice becomes available. For example, in Canada the right extends to someone who has been detained or arrested. Jurisdictions will also have different approaches to the right to state-funded legal representation, which may be available only in specific circumstances such as where the accused meets certain financial criteria.

147. In Europe, Article 6(3)(c) of the European Convention on Human Rights provides that a person charged with a criminal offence has the right “to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require” and this right may be applied both at the pre-trial stage and during the trial.

The right to interpretation and translation

148. This right allows an accused person to understand the information about the criminal proceedings in their own language. This ensures that language barriers are not an obstacle to receiving a fair trial. The costs associated with these services are usually borne by the prosecuting authority.

149. Generally this right should apply to the questioning of the suspect or accused by a representative of the state authority, meetings between the prosecution and the accused and their lawyer, and during all court appearances and hearings.

150. For example, within the European Union, these rights extend to the translation of essential documents, including any decision depriving a person of his or her liberty, any charge or indictment and any judgment.

The right to access documents and case material, also known as a right to full disclosure

151. This means that the accused has the right to know the details of the case which is argued against them, including the evidence held by the prosecutor. This allows the accused the opportunity to prepare a defence. This disclosure can also encourage the resolution of the case before going to a trial, such as encouraging an accused to confess to the crime and plead guilty.

152. The way jurisdictions implement this right will vary. In some jurisdictions there is a duty on the prosecutor to provide disclosure of all evidence to an accused person, including evidence that is favourable to the accused and evidence that is favourable to the prosecution. This may be subject to the prosecutor's discretion with respect to timing and withholding information for valid reasons such as protection of an informant.

The right to a speedy trial

153. This right should protect an accused person from undue delay in the resolution of a trial. This is because undue delay may:

- Prejudice the accused person from receiving a fair trial because evidence may become unavailable or less reliable. For example, the memory of a witness may become weak over time or witnesses may die.
- If the accused person is in prison pending the outcome of the trial, he or she may be imprisoned for an unreasonably lengthy period if subsequently found not guilty of the crime or if the sentence imposed on the accused is less than the time already served in prison.

154. There may not be a definitive measurement of what is or is not a speedy trial and it may depend on several factors. In determining whether a breach of the right to a speedy trial has occurred, relevant factors may include:

- The length of the delay from the time the accused was charged with the crime until the case is tried;
- The reasons for the delay, including the complexity of completing the work necessary for the case to be tried, delays caused by the defence, delays caused by the prosecution, institutional delays such as limited availability of trial dates in the relevant court, and other reasons for delay;
- Whether the accused has waived any delay; and
- The prejudice to the accused in terms of a fair trial, such as the impact on the availability or reliability of evidence.

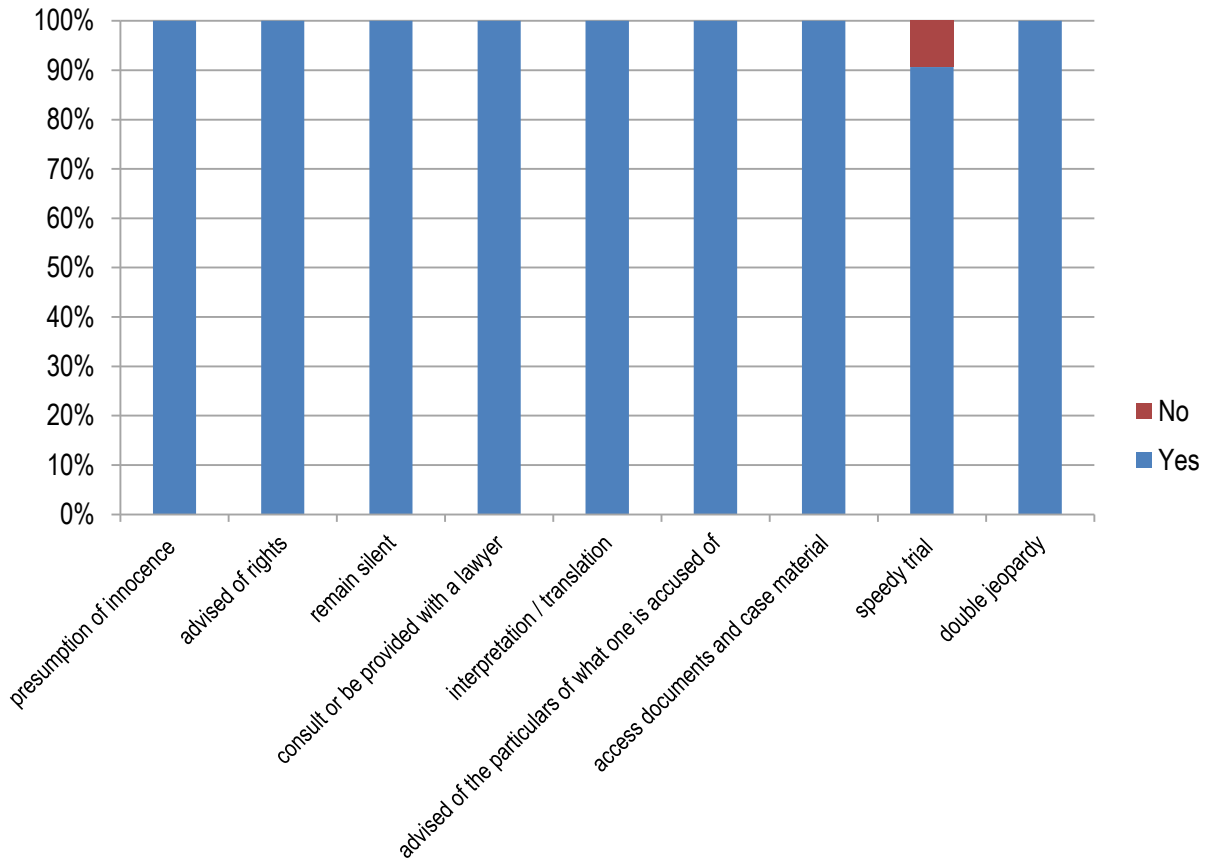
The right to protection from ne bis in idem (double jeopardy)

155. This right protects an accused from being tried twice for the same crime, where the person has previously been found guilty and served their sentence or the person has been acquitted by a final judgement. This also protects an accused from being tried again for a less serious crime, where all of the elements of that less serious crime are subsumed in the elements of the more serious crime. However,

this right does not prevent successive investigations where one investigation may not have resulted in criminal charges, but a subsequent investigation is commenced which is based on new evidence.

156. The survey conducted shows that these rights are almost universally granted. The availability of these rights amongst surveyed jurisdictions is shown in the following chart.

Figure 10.1. Availability of suspects rights in tax offence cases



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