

How Can Tax Collection Be Structured to Observe and Preserve Taxpayer Rights: A Discussion of Practices and Possibilities

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I. Introduction

Tax collection occurs in many ways, which generally can be categorized as either voluntary or involuntary. The bulk of tax collection occurs voluntarily and without much thought or incident as taxpayers purchase products with a tax imposed at the source of payment, as employers withhold taxes on wages, or as taxpayers make a voluntary remittance with an estimated payment or a tax return. The discussion about taxpayer rights and collection will not focus on this voluntary, routine collection of taxes but rather on the enforcement mechanisms used by the government when the routine collection has failed.

The decisions concerning collection of taxes from persons who have not voluntarily paid impact not only the individual facing liability but also society as a whole. If the government does not have adequate mechanisms to pursue collection from those who do not pay voluntarily, citizens may be discouraged from paying. Over time, this failure to collect could become a failure that renders the tax system either unfair to those properly participating or unworkable if enough citizens “opt out.” Conversely, the government must pursue collection from those who do not pay voluntarily in a manner that does not drive them to an underground economy, to discontinue producing income or to economic positions that fall through the necessary social safety net.

In structuring a workable collection process, the government should build a system that recognizes taxpayer rights. Some of the questions it might face in making these decisions include what systems of checks and balances need to be in place to ensure that tax collection maximizes recovery of funds for the state while minimizing harm to the persons owing the tax? What relief mechanisms in either the tax system or bankruptcy system should exist to allow a person owing a tax debt to avoid being pushed out of the social safety net? How much judicial and administrative oversight is needed in the collection system to preserve taxpayer rights? How long should a taxpayer bear responsibility for a tax debt? What systems must be in place to ensure that a taxpayer has the right to challenge their responsibility for a tax debt imposed in a joint or multiparty context such as marriage or a business? Should travel restrictions based on tax debt exist and, if so, how should such restrictions be enforced? How should countries work together to collect debts when a taxpayer and their assets cross international borders? What systems should exist to ensure taxpayer rights when one country uses its power over the person or property to collect from citizens of another country?

In the context of enforced tax collection, this Article will focus on three taxpayer rights the government should preserve in building an effective system: (1) the right to be informed, (2) the right to challenge the underlying liability and the proposed collection action, and (3) the right to a fair and just tax system. In order to provide a broad outlook on these principal taxpayer rights, this Article will discuss the tax collection systems of six countries: the United States, England, Germany, Switzerland, Croatia, and Australia. Within the context of each country’s enforcement mechanism, this Article will highlight

how the identified taxpayer rights are viewed and determine the efficacy of each system structure in protecting the rights of its citizens.

Finally, after outlining the collection process of each country, this Article will offer concrete observations on how to best protect the identified taxpayer rights when collecting from citizens who did not voluntarily pay, considering the rights and needs of individual citizens, as well as the needs of society as a whole.

II. United States

A. *Basic Structure of Tax Collection System*

In the United States, the collection of taxes from those who do not voluntarily pay begins with assessment. Without an assessment, no recorded liability exists against the taxpayer. To understand the collection system and the rights citizens have, a brief discussion of the process leading to assessment lays the necessary foundation.

Most assessments result when taxpayers voluntarily tell the Internal Revenue Service (IRS) that they owe a tax. This system has the name “self-assessment system” because in most cases the taxpayer provides the information for the amount of the tax, as well as grants permission for the IRS to assess the tax. If the self-assessment aspect of the system works properly, the taxpayer knows when an outstanding tax liability exists, knows the amount and knows the reason for its existence. Accordingly, the taxpayer has the necessary information to understand why and when the collection of non-voluntarily paid taxes commences. As discussed further below, this part of the assessment system provides the taxpayer with the type of information that satisfies any “right to know” concerns.

Not every assessment, however, results from amounts reported on a return submitted by the taxpayer. Taxes assessed in alternate methods have a much greater chance of requiring the application of collection procedures. While these types of assessments represent a relatively small fraction of the overall assessments, they constitute a relatively high percentage of the taxes the IRS must collect through some process other than voluntary payment. If the taxpayer does not consent to assessment by filing a return, the IRS must find permission to assess from another source. Through the process of examination, the IRS determines whether the amount reported on a return for the period at issue matches the correct amount of tax calculated by the IRS from facts applicable to the taxpayer’s circumstances or, where the taxpayer fails to file a return, the IRS determines the amount the taxpayer should have reported on the return.

During the examination process the taxpayer may agree with the findings of the IRS and consent at that point to an assessment of additional tax not reported on a return. Where the taxpayer disagrees, or simply fails to agree, with the IRS’s findings, the IRS then must issue a notice of deficiency or notice of intention to assess—depending on the type of tax. In the case of a

notice of deficiency, if the taxpayer fails to petition the Tax Court, the IRS is granted permission to assess by default; if the taxpayer loses all or a portion of the Tax Court case, the IRS is granted permission to assess through such loss. While these processes leading to assessment require either the taxpayer's consent or notice to the taxpayer prior to the assessment, these safeguards may prove inadequate to inform the taxpayer of liability in cases where the taxpayer lacks understanding of the process or fails to receive the notice.¹

Whether the assessment results from self-reporting or from an examination, the assessment causes the IRS to search its records for payment(s) that satisfies the liability. If the IRS finds insufficient payments exist on the account for the tax period at issue, it will initiate its collection process. First, the IRS notifies the taxpayer that an unpaid balance exists. The action, required by Code section 6303, carries the name "Notice and Demand." The IRS should send the notice and demand letter to the taxpayer within 60 days of the assessment. The statute requires that "[s]uch notice . . . be left at the dwelling or usual place of business of such person, or shall be sent by mail to such person's last known address." This letter alerts the taxpayer that the collection process has begun by stating the amount of unpaid tax and the tax period(s) to which the unpaid liability relates and requesting payment within 10 days.

If the taxpayer does not respond to the notice and demand by making full payment, a federal tax lien comes into existence.² This lien, known only to the IRS and the taxpayer, attaches to all of the taxpayer's property and rights to property. Because the assessment of the tax and the non-payment of the assessment remain cloaked in secrecy by the disclosure laws set forth in Code section 6103, no one else knows of the taxpayer's delinquent tax liability at this point.³

¹This Article does not attempt to describe every possible basis for assessment. In rare cases, the IRS can assess immediately and without the taxpayer's consent because it determines that the taxpayer's action places collection of the tax in jeopardy. The IRS may also assess where it determines the self-reported tax form contains a math error. Both situations involve notice to the taxpayer prior to assessment or immediately thereafter in the case of jeopardy. Another possible circumstance of assessment results when a thief steals the taxpayer's identity and files a return using the taxpayer's name. In such a situation, the possibility for collection action against the taxpayer where the actual taxpayer received no prior notice exists because the thief has confused the IRS and the taxpayer has no knowledge of the theft of the identity. This Article will not discuss collection in the context of identity theft because the thief's actions have derailed the normal process; however, the IRS must pay attention to pleas of taxpayers who claim no knowledge of a liability to ascertain if it has resulted from the actions of an identity thief.

²I.R.C. §§ 6321-22.

³The tax debt remains a private matter between the IRS and the taxpayer unless and until the IRS decides to make it public by filing a notice of the federal tax lien, one of three administrative processes the tax code provides to the IRS to obtain collection from the taxpayer who does not voluntarily pay.

After sending the notice and demand letter, the IRS typically sends the taxpayer two reminder notices by mail.⁴ Though not required by statute, these reminder notices bring in sufficient revenue to the IRS that the benefits outweigh the costs of preparation and mailing. The notices also serve to further inform the taxpayer about the existence of the liability. Absent voluntary payment at this point the IRS will use the collection processes given to it in the statute. The processes include offset, lien, and levy.

Section 6402 grants the IRS authority to take funds otherwise due to the taxpayer from the IRS and divert them to pay any outstanding assessments. The IRS typically uses this process when the taxpayer files a tax return seeking a refund in a year subsequent to the year in which the assessment occurred. If the IRS agrees with the refund request, it will simply offset the refund against the outstanding liability and remit to the taxpayer any excess. When the IRS makes a refund offset, it notifies the taxpayer by letter that it has affected the offset and provides information regarding the amount of the refund and the tax and period to which it was applied.

As mentioned above, the IRS can make public the fact that it has a lien on the taxpayer's property. The process of making the lien public involves the filing of a notice of federal tax lien in the location where the taxpayer resides, where the taxpayer has real property or at the taxpayer's principal place of business.⁵ The filing of this notice, in a public record in a local court or with a state agency, alerts other current or potential creditors of the taxpayer of the existence of the federal tax liability including notice of the amount of the liability and the relevant period(s). When the IRS files this notice, it alerts the taxpayer by letter.⁶ The first time the IRS files this notice for a tax period, it sends the taxpayer a Collection Due Process (CDP) notice giving the taxpayer the opportunity to request an administrative hearing with the Appeals Office of the IRS and potentially to be heard in the Tax Court regarding the appropriateness of filing the notice and possible collection. This type of hearing is remedial rather than preventative and therefore can occur only after the filing of the notice of lien.

The filing of the notice of federal tax lien does not, by itself, require the payment of the outstanding taxes. It does, however, put financial and public pressure on the taxpayer to resolve the liability. Moreover, the filing of the notice will effect payment if the taxpayer sells real property since any buyer will want clear title to the property unencumbered by the federal tax lien. Finally, the impact of the notice of lien on the taxpayer's credit score provides

⁴TREASURY INSPECTOR GEN. FOR TAX ADMIN., NO. 2015-30-069, MORE INFORMATION ABOUT PAYMENT OPTIONS IN REDESIGNED NOTICES CONTRIBUTES TO MORE CASES CLOSING, BUT MORE ANALYSIS AND COLLABORATION WITH STAKEHOLDERS ARE NEEDED 4 (Aug. 25, 2015) [hereinafter Treasury Inspector General Report] (describing the collection notice process employed by the IRS).

⁵I.R.C. § 6323(g).

⁶I.R.C. § 6320. The notice must be sent to the taxpayer's last known address by certified mail return receipt requested.

a significant incentive for the taxpayer to pay the tax, if possible, rather than have this lien sit on the public record.

In addition to offset and notice of lien, the IRS can take a taxpayer's property by levy in order to satisfy the outstanding tax debt. To do this, the IRS must first send to the taxpayer's last known address a notice of intent to levy by certified mail return receipt requested.⁷ As with the notice of federal tax lien, this notice gives the taxpayer the opportunity to request an administrative hearing with the Appeals Office of the IRS and potentially to go to the Tax Court to discuss the appropriateness of levying on the taxpayer's property and possible collection alternatives. This hearing, however, occurs *before* the IRS can levy so the taxpayer must argue in the hearing that the levy would create a hardship, the taxpayer will pay over time with an installment agreement, or the IRS should agree to compromise the tax debt for a smaller payment. The prospect of a levy on taxpayer's wages or bank account puts significant pressure on the taxpayer to work with the IRS to avoid the taking of the property.

B. Sources of Relief from Tax Collection

A taxpayer who cannot pay the outstanding liability owed to the IRS may seek relief from the IRS using administrative processes set out in the Internal Revenue Code or may seek general relief available through an insolvency proceeding.

1. Administrative Relief from Tax Collection

Three basic options exist for the taxpayer who cannot pay the outstanding tax liability and who seeks administrative relief from collection: (1) currently not collectible, (2) installment agreement, and (3) offer in compromise. Each option serves a separate function and provides a different form of relief to the taxpayer seeking to avoid immediate payment of the tax liability. In addition to these three options discussed below in detail, taxpayers can also work with the IRS to postpone payment until a check arrives, property sells or some other event allows them to pay the past due taxes.

Currently Not Collectible: If the taxpayer demonstrates to the IRS that insufficient assets exist to satisfy the liability and that the necessary and allowable expenses exceed the taxpayer's income, then the IRS will place the account into currently not collectible status. This status does not reduce the liability but merely puts it on the shelf until such time as the taxpayer has the ability to pay part or all of the liability. While the account remains in currently not collectible status, the IRS can offset any refunds due to the taxpayer and generally will file the notice of federal tax lien where the liability is greater than \$10,000. This status keeps the IRS at bay while the taxpayer faces financial hardship but does not provide a guarantee that the IRS will remain dormant throughout the remaining life of the liability. While section

⁷I.R.C. § 6330.

6343 prohibits the IRS from issuing a levy when the taxpayer has a hardship, currently not collectible is an administrative remedy otherwise not required by the Internal Revenue Code. The IRS's Collection Financial Standards provide a formula for allowable expenses in this and other collection situations to determine the taxpayer's ability to pay.⁸

Installment Agreement: Section 6159 authorizes the IRS to enter into installment agreements, which allow taxpayers to pay tax liability over an agreed amount of time. During the agreement period, the IRS will not levy based on the settled liability but may file the notice of federal tax lien.⁹ The taxpayer can agree to extend to statute of limitations on collection in order to provide extra time in order to pay the taxes. The taxpayer has a right to an installment agreement in certain circumstances generally involving a relatively low amount of liability and where the taxpayer has not had previous tax collection problems.

Offer in Compromise: Finally, section 7122 permits the IRS to compromise a tax debt, called an offer in compromise (OIC). The IRS has created a list of assets that it allows the taxpayer to exclude from the calculation of available assets based primarily but not entirely on section 6334, the statute exempting property from levy. Form 433-A(OIC) guides taxpayers in calculating the excluded assets. It has also created a detailed list of allowable expenses based on Bureau of Labor Statistics information. Following this list requires use of the IRS website and some judgment in interpretation of the information. The result of the asset and expense decisions the IRS has made is a relatively clear picture for any given case of the likelihood of success a taxpayer will have in submitting an OIC based on doubt as to collectability. The IRS has even created a program that calculates this for practitioners to use prior to submission of the offer. Even where the IRS allowances do not predict acceptance, taxpayers can seek acceptance based on special circumstances or, if they have the ability to pay the liability but have special needs for the funds, based on effective tax administration.

Taxpayers who obtain an OIC have their outstanding taxes eliminated and pay the IRS only the amount agreed upon in the offer. The OIC imposes upon the taxpayer the responsibility to timely file and pay the federal taxes for the five-year period following acceptance of the offer. The failure to timely file or pay during this period causes revocation of the offer and reinstatement of the tax liabilities existing prior to the offer. The IRS views the offer program as its form of fresh start for taxpayers, similar to the concept of discharge in bankruptcy, with the hope that the fresh start will create a compliant taxpayer who needs no further attention from the IRS to file and pay going forward.

⁸ *Collection Financial Standards*, INTERNAL REVENUE SERVICE, last accessed Dec. 12, 2015, <https://www.irs.gov/Businesses/Small-Businesses-&-Self-Employed/Collection-Financial-Standards>.

⁹ I.R.C. § 6331(k) (prohibiting levy while installment agreement offer is pending and while installment agreement is being paid as well as no levy for 30 days after rejection of offer of installment agreement or termination of installment agreement).

2. *Insolvency System*

In addition to the system for collection of taxes set out in the Internal Revenue Code, persons in the United States have the option to seek relief from all debts through bankruptcy. The bankruptcy laws providing for debt relief apply to tax debts in addition to almost every type of debt a person may owe. A brief discussion of the insolvency system as it relates to tax debts will help to complete the picture of the opportunities for taxpayers to address the collection of those debts.

If the IRS files a notice of federal tax lien prior to the time the person files a bankruptcy petition and if the federal tax lien attaches to equity in property owned by the debtor, the bankruptcy case will not destroy the lien. The tax liability may get paid through the bankruptcy. If it does not, the lien interest of the IRS in the property will survive the bankruptcy case and the IRS may pursue collection from the taxpayer thereafter whether or not the taxes forming the basis for the lien were discharged.¹⁰

Where the IRS does not file a notice of federal tax lien or, if filed, the taxpayer has no equity to which the lien can attach, then the IRS has an unsecured claim in the bankruptcy case. Whether the debt owed to the IRS will survive the bankruptcy case depends primarily on the age and type of tax liability and secondarily on the timely filing of the tax return on which the debt rests or fraud in the taxpayer's actions. The bankruptcy code distinguishes between types of unsecured debts and places those with greater importance on a list of priority creditors.¹¹ These unsecured creditors get paid from the bankruptcy estate prior to general creditors who do not make the priority list. Certain taxes make the priority list. More important than getting paid through the bankruptcy estate, which in liquidation cases may have little money for unsecured creditors, is the link between priority status and dischargeability. If a tax debt makes its way onto the priority list, the exceptions to discharge apply allowing the IRS to continue pursuing collection of this debt after the conclusion of the bankruptcy case.¹²

Income tax liabilities have priority status if the due date of the tax return for year falls within three years of the date of filing of the bankruptcy petition.¹³ Income taxes also achieve priority status when the assessment of the tax occurred within 240 days of the bankruptcy petition or if the IRS may still assess the taxes.¹⁴ Taxes collected by the taxpayer and held in trust for the IRS retain their priority status no matter when assessed. Employment and excise taxes achieve priority status if the return for the tax was due within three years of the filing of the bankruptcy petition.

¹⁰ *In re Isom*, 901 F.2d 744 (9th Cir. 1990).

¹¹ 11 U.S.C. § 507 (2012).

¹² 11 U.S.C. § 523 (2012).

¹³ 11 U.S.C. § 507(a)(8)(A) (2012).

¹⁴ 11 U.S.C. § 507(a)(8)(B), (C) (2012).

In addition to the taxes not discharged in bankruptcy because of priority status, the taxpayer also cannot discharge taxes for any tax period in which the taxpayer has failed to file a return or has filed a return late and within two years of the bankruptcy petition date.¹⁵ If the taxpayer files a fraudulent return or attempts to evade or defeat the payment of the assessed tax, the taxpayer also cannot discharge the tax debt in these situations.¹⁶ While it may seem that a taxpayer can only discharge taxes in exceptional circumstances, the insolvency provisions in the United States offer many opportunities for a taxpayer to obtain a discharge of taxes which have grown old. The relief from tax collection provided by the insolvency provisions adds to the bases for relief provided under the Internal Revenue Code. In addition to the opportunity for debt relief through discharge, the insolvency provisions also allow taxpayers to postpone and restructure the payment of their taxes in the reorganization chapters.

C. Right to Be Informed

With this background in mind, the collection system of the United States can be tested against the taxpayer rights that require protection in an effective tax administration system. The right to be informed includes the right to ask questions and obtain information about the collection process. In the collection context, the taxpayer's right to be informed has more than one facet. First, the taxpayer has the right to be informed about the amount of and the basis for the underlying liability. Second, the taxpayer must be informed about the process of collection that the IRS will employ. Third, the taxpayer must be informed about the status of the debt and collection actions in effect. Finally, in situations in which the taxpayer shares the debt with others, such as a joint return or joint liability on unpaid trust fund taxes, the taxpayer has the right to know the amount collected from the other parties liable on the debt.

1. Basis of Liability

If the debt arises because the taxpayer files a return and does not remit the tax shown as due, the taxpayer should be aware of the basis for the amount of the assessment by the IRS. In most, but not all, situations of self-reported liability, the taxpayer also should know the amount that has been paid on the tax. Knowing the amount paid with a return or on a tax liability does not always, however, present a simple situation. Even though a taxpayer may obtain a transcript of their account for a tax year, the payments on the

¹⁵ 11 U.S.C. § 523(A)(1)(B) (2012).

¹⁶ 11 U.S.C. § 523(A)(1)(C) (2012).

account are not always clearly delineated.¹⁷ If a taxpayer can get through to the IRS telephone assisters, these individuals usually have the appropriate training and skills to review a taxpayer's account to determine the sources of payment and the application of payments and they can explain to the taxpayer the basis for any liability. However, the correspondence from the IRS may not contain sufficient detail to allow a taxpayer to understand the basis for the liability.¹⁸

Because it has become so difficult to speak to an IRS employee and because account transcripts do not set out all of the information necessary to understand the assessments and application of payments, the taxpayer's right to know the basis for their liability is an area in which taxpayer rights are not fully met in the United States. In order to address this problem, the IRS could send taxpayers an account transcript with the annual statement of outstanding liability or with other bills. More important, however, is having an adequate phone presence with properly trained assistors who can explain the account, which ensures that taxpayers will have the opportunity to learn the basis of their liability when questions arise.

2. Process of Collection

The IRS notice process after the assessment of a tax debt generally keeps the taxpayer properly informed of the amount of the debt. The notice phase of a collection case generally occurs in the first several months following

¹⁷For example, credits on the account often aggregate payments, making them difficult to understand if questions exist about one or more sources of payment. The IRS also takes payments intended for one account and moves them to earlier account balances if the instructions with the remittance do not clearly direct the IRS or if it misinterprets the instructions. Unwinding the application of payments can become a difficult exercise for a taxpayer in situations where liabilities exist for multiple periods and payments get posted to different accounts.

¹⁸A recent case in my clinic illustrates the difficulties that taxpayers can encounter when trying to understand the basis for their liability. This taxpayer had an outstanding assessment for an earlier year and had entered into an installment agreement for that debt which he was faithfully paying. In the subsequent year, the IRS adjusted his tax from the amount reflected on the return. He came to our clinic complaining that the IRS was trying to collect twice on the later year and he was worried that the outstanding debt on this year would cause the IRS to default the installment agreement. Using only the account transcript and without the benefit of any correspondence the IRS sent to the taxpayer, we determined that when the IRS sent the taxpayer notice of the proposed change in the later year, he immediately paid the amount reflected in that notice. At the time he made that payment, the IRS had not yet assessed the liability for the later year. Although it posted that payment to the correct year initially, it reversed that post and moved the payment to the year for which he was paying on the installment agreement. When it made the assessment for the later year, it had no funds sitting on the account to satisfy the liability so it sent notice and demand and initiated the collection process for the later year. The taxpayer tried to obtain an explanation of why it was collecting on that year after he paid it but failed in his efforts to obtain an explanation which led him to the clinic. Only after we obtained the transcripts for the past several years on his account were we able to determine the correct account status. A phone call to the IRS from our office during this process did not reveal the error.

assessment.¹⁹ Thereafter, the debt moves to another phase of the collection process, which may involve an Automated Call Site (ACS), field collection, the Queue or CNC status.²⁰ When the case moves out of the notice phase, the taxpayer generally has little knowledge of the status of their account within the IRS unless the liability is sufficiently large for field collection or the taxpayer receives a phone call from ACS. Although the IRS provides taxpayers with Publication 1, which gives a broad overview of the process, the taxpayer does not receive details of how the individual account will be handled. The current system therefore provides basic information but is not equipped to inform inquiring taxpayers about what will happen or not happen as the IRS tries to collect.

The IRS could easily provide taxpayers with a more detailed statement of the process of with a link to an explanation on its web site. Providing web based information may present a challenge to low income taxpayers who often do not have ready access to the web but may better serve most taxpayers who would not appreciate a bulky explanation of the details of the collection process. In addition, telephone assisters could receive training on how best to explain the process of collection when dealing with taxpayers who seem puzzled or have questions about collection procedure.

3. *Status of Debt and Collection Efforts*

Prior to 1996, the IRS did not have a practice of annual notification of taxpayers of the status of their account.²¹ Before this change in the law, years could pass between contacts by the IRS, during which taxpayers assumed that the liability was forgiven or forgotten. Once the taxpayers exited the notice stream, they generally entered a period of little information about the actions taken with respect to their outstanding account. When the IRS offset a refund or took other collection action after years of the liability lying dormant, it caused concern and questions from the taxpayers about the status of their case.²² The addition of the annual notice provides the taxpayer with a statement of the outstanding balance on their account. However, the annual notice does not inform the taxpayer as to where the account sits within the collection process. For taxpayers who do not have a large liability, the last nine years that their liability exists is shrouded in mystery though the sending of the annual notice of liability does let them know the IRS still looks to

¹⁹ See Treasury Inspector General Report, *supra* note 4 (describing the collection notice process employed by the IRS).

²⁰ See U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-15-744, AUTOMATED COLLECTION SYSTEM LACKS KEY INTERNAL CONTROLS NEEDED TO ENSURE THE PROGRAM FULFILLS ITS MISSION (Sept. 19, 2015) (describing the ACS process in detail).

²¹ I.R.C. § 7524; see also 2015 NAT'L TAXPAYER ADVOCATE ANN. REP., ANNUAL NOTICES: REQUIRE THE IRS TO PROVIDE MORE DETAILED INFORMATION ON CERTAIN ANNUAL NOTICES IT SENDS TO TAXPAYERS 366 (Legislative Recommendation #11) (2015).

²² Certainly, some taxpayers simply did not want to think about the liability and "wished" it away but the IRS silence supported their actions.

them to pay.²³ To better inform taxpayers of the status of their account from the collection perspective, the IRS could include with the annual statement information about whether the account was in CNC status, offer pending, OIC pending or other status and a more detailed explanation of the process.

4. *Shared Debt*

The IRS has significant restrictions on its ability to provide information to one taxpayer about another taxpayer.²⁴ These restrictions, designed to protect taxpayer rights, sometimes have the effect of impeding the rights of other taxpayers in the collection context because they prevent related or jointly liable taxpayers from knowing the full picture. Congress has taken steps to amend the disclosure provisions to permit jointly liable taxpayers to obtain information about the payments made by other persons on the debt.²⁵ The changes, which occurred in 1996, allow taxpayers to learn the true remaining liability for a debt but do not fully pull back the curtain to provide related taxpayers with all information.²⁶ These changes definitely improve the taxpayer's ability to know concerning collection actions but would benefit from further development providing the joint parties with information as co-debtors make payments.

IRS policies also play a role in the taxpayer's right to know as it comes up against another taxpayer's right to privacy. Recently, the IRS made a long needed administrative change that will assist taxpayers who become victims of identity theft.²⁷ The IRS begins collecting against certain taxpayers as a result of actions taken by an identity thief. Taxpayers in this situation have long been held at bay by the IRS in trying to obtain information about the underlying liability so that they could address the basis for the collection action. More assistance to victims of identity theft should follow. This area

²³The annual notice is a positive development in keeping taxpayers informed during the life of the liability but it does cause confusion for some taxpayers who view the annual notice as a signal that the IRS is renewing its efforts to collect in situations in which they have caused the account to go into CNC status. The IRS has recently improved the notices in the notice stream as discussed in the TIGTA report cited in footnote 19. It should look to test the market and improve its annual notice to use it to its full advantage and to insure that the notice does not create concern among some taxpayers who wrongly read it as a renewal of enforced collection action as recommended by the National Taxpayer Advocate in her 2015 Annual Report, *supra* note 21.

²⁴I.R.C. § 6103.

²⁵I.R.C. § 6103(e)(8), (9).

²⁶Pub. L. No. 104-168, §§ 403(a), 902(a), 110 Stat. 1954-60, 1996 (1996).

²⁷On November 5, 2015 the IRS announced a new process for obtaining a copy of the fraudulent return filed by the thief of a taxpayer's identity. See *Instructions for Requesting Copy of Fraudulent Returns*, INTERNAL REVENUE SERVICE, last visited Dec. 12, 2015, <https://www.irs.gov/Individuals/Instructions-for-Requesting-Copy-of-Fraudulent>Returns>. For a discussion of the change see Rachael Rubinstein, *IRS Announces Procedures for Identity Theft Victims to Request Copies of the Fraudulent Tax Return*, PROCEDURALLY TAXING, Nov. 9, 2015, <http://www.procedurallytaxing.com/?s=identity+theft>.

needs attention if the victims are to truly be informed about the collection taking place.

The IRS policy regarding the collection of trust fund liabilities places the persons liable in a difficult position regarding the actions they should take. The policy has the effect not only of disadvantaging the responsible persons but also of encouraging them to delay payment as long as possible. It combines problems with the taxpayer's right to know with policy problems regarding encouraging taxpayers to pay their just debts.²⁸ The IRS should reexamine how it informs responsible officers of the debts of the co-responsible individuals and how it posts those debts.

5. *Conclusion of Right to Be Informed*

Through both legislation and administrative practice, the IRS has improved the information provided to taxpayers in the collection process during the past two decades. The trend for providing information is moving in the right direction. Legislative changes creating the annual statement and the sharing of information of co-debtors, enacted in 1996 as part of the Taxpayer Bill of Rights 2 legislation, significantly help to shed light on the collection process. The recent administrative change to provide greater information to victims of identity theft as well as the redesign of the notices sent to taxpayers provides an example of the IRS taking steps to improve the information available to taxpayers in the collection process.

Countervailing the improvements is the significant degradation over the past decade of the ability of taxpayers to speak to someone at the IRS to obtain information about their case when the IRS engages in the collection process. Correspondence from the IRS on collection matters raises serious concerns for its recipient. Yet, taxpayers in the United States have great difficulty getting through to the IRS by telephone or in person to discuss concerns they may have about the correctness of their account or the proposed collection action. In some instances, taxpayers seeking to work out an agreement with the IRS to avoid having the IRS file a notice of lien or take levy action cannot get through to the IRS. The IRS assumes that the taxpayer's failure to make contact indicates a refusal to deal with the problem and moves forward with more serious collection action when the taxpayer has been trying to get through to the IRS without success. The right to information includes the right to obtain information from the IRS in a reasonable manner within a reasonable time frame as well as the right to exchange information. The inability or unwillingness of the IRS to properly staff the phones presents a serious failure in its ability to provide taxpayers in the United States with their right to obtain information.

²⁸ Keith Fogg, *Leaving Money on the Table and Providing an Incentive Not to Pay: The Story of a Flawed Collection Device*, 5 HASTINGS BUS. L.J. 1 (2009); see also Keith Fogg, *In Whom We Trust*, 43 CREIGHTON L. REV. 357 (2010).

D. *Right to Challenge the Underlying Debt and the Proposed Collection Action*

In the collection context, the taxpayers in the United States have several avenues to challenge the underlying debt and the proposed collection action: (1) the taxpayer may challenge the debt informally through correspondence, telephone or personal contact with the front line IRS employee, (2) the taxpayer may follow one of two semi-formal processes to challenge the correctness of the underlying liability giving rise to the debt, (3) the taxpayer may propose a statutory collection alternative such as an offer in compromise or installment agreement, (4) the taxpayer may challenge application of the debt through the statutory process provided to those claiming innocent spouse status, (5) the taxpayer may use CDP to challenge the debt itself, the filing of a notice of lien or proposed levy action,²⁹ (6) the taxpayer may seek post-assessment determination of the liability and return of money paid through the refund process,³⁰ and (7) the taxpayer may work with the Taxpayer Advocate's office to stop a collection process or redirect a process that has moved off track.

This discussion will not address the ways that a taxpayer can challenge the underlying debt prior to assessment because this Article focuses on collection. This discussion therefore begins with the assumption that an assessment exists and addresses post-assessment remedies as they relate to taxpayer rights. Pre-assessment processes for contesting the proposed assessment of tax debt exist and provide significant safeguards for most taxpayers. These safeguards break down when the process does not provide adequate pre or post assessment options for the taxpayer. Certain penalties which are neither subject to the deficiency procedures allowing the taxpayer to contest their imposition in Tax Court before assessment nor the divisible tax exception to the Flora rule allowing the taxpayer to seek judicial relief in District Court without paying the entire amount of the assessment fail to provide adequate safeguards in the process of contesting the underlying liability and can require a taxpayer to fully pay liabilities of millions of dollars in order to contest the underlying

²⁹Many opportunities exist for the taxpayer to challenge the underlying debt, to seek debt relief through forgiveness or forbearance, and to propose to the IRS the best way to collect the debt. In some ways the CDP process, which potentially allows taxpayers to contest the merits or propose alternate means to collect, has parallels in the bankruptcy process. Although the list here does not include bankruptcy, a taxpayer in an insolvency proceeding can contest the merits of the tax debt pursuant to Bankruptcy Code section 505(a) or can propose a payment plan in the reorganization bankruptcy chapters.

³⁰This Article does not address every possible opportunity to challenge the debt or the proposed collection action. In rare circumstances taxpayers may have the right to use an injunction or other extraordinary writ to stop certain action by the IRS related to collection. Because these situations are extraordinary, the Article will not spend time addressing them but it is worth noting that the possibility exists.

assessment. For this narrow group of liabilities the system of challenging the underlying debt utterly fails these taxpayers.³¹

1. *Informal Challenges to the Debt or to Collection Action*

At any time, a taxpayer engages with the IRS in the collection process, the taxpayer can raise the issue that the underlying debt incorrectly states the amount owed by the taxpayer or the proposed collection action does not represent the best method to collect the tax. The taxpayer will likely fail to persuade someone in the IRS collection function that the amount shown on the IRS account for that person contains the wrong information unless the error is obvious, but sometimes obvious errors exist. IRS employees generally will not continue to pursue collection in circumstances where doing so is obviously wrong. Taxpayers can, and should, seek to convince IRS collection employees of the incorrectness of the debt. Even in circumstances in which the collection employee will not or cannot make the change, the challenge to the underlying debt often results in forbearance of collection while the taxpayer uses one of the other processes discussed below to more formally challenge the liability.

The IRS listens to taxpayers who propose an alternative means for payment. The degree to which the IRS listens depends on a number of factors including the stage of the proceeding, the logic of the proposal and the taxpayer's prior cooperation. Taxpayers should not hesitate to make proposals at the informal stage in an effort to achieve agreement on the proposed plan for collection or forbearance. The greatest challenge to the informal system in the United States is the inability of taxpayers to reach the IRS by phone to discuss their collection issue. Many cases get pushed into the more formal remedies discussed below because of the absence of someone at the IRS to listen to the taxpayer at the informal stage. Taxpayers with high dollar liabilities will have the opportunity to discuss the situation with an individual revenue officer. Taxpayers who pick up the phone when the IRS calls will have a similar opportunity to discuss their case with someone from ACS. Taxpayers seeking to affirmatively and proactively discuss their situation with someone in collection need time and perseverance to talk to the IRS about how they can pay. As discussed above, the inability of the IRS to adequately staff its telephone sites hampers not only the ability to obtain information but also the ability to discuss the known debt and work out a mutually agreeable resolution.

³¹Lavar Taylor, *When Can Taxpayers Challenge the Merits of the Underlying Liability in CDP Appeals: Why the Tax Court Was Wrong in Lewis v. Commissioner and Its Progeny*, PROCEDURALLY TAXING, Feb. 26, 2014, <http://www.procedurallytaxing.com/page/3/?s=lavar>; see also Keith Fogg, *Contesting the Merits of the Underlying Tax in a Collection Due Process Case – A Convoluted Fact Pattern Leads to Wrong Decision*, PROCEDURALLY TAXING, Oct. 16, 2015, <http://www.procedurallytaxing.com/contesting-the-merits-of-the-underlying-tax-in-a-collection-due-process-case-a-convoluted-fact-pattern-leads-to-wrong-decision/>.

2. *Semi-Formal Challenges to the Debt or to Collection Action*

The IRS recognizes that assessments do not always reflect the correct liability of the taxpayer and that many taxpayers lack the ability to fully pay the assessment and pursue relief from the incorrect amount of debt through the refund process described below. The IRS has established a process called audit reconsideration to provide taxpayers with a chance to informally and administratively pursue debt relief where the taxpayer has information not presented during the examination stage leading to the assessment.³² The IRS developed the audit reconsideration process without a Congressional nudge. It does an excellent job of reexamining cases when the taxpayer presents new evidence. However, the IRS does a poor job of keeping taxpayers informed of its receipt and processing of the audit reconsideration request. So, taxpayers remain significantly in the dark as their case receives reconsideration. Despite problems with communications during the consideration of an audit reconsideration request, the IRS deserves great credit for administratively developing this system and nurturing it. It goes a long way toward providing taxpayer rights to challenge the debt.

In addition to the ability to challenge the debt through audit reconsideration, the IRS has a parallel process, an offer in compromise for doubt as to liability (OICDL).³³ While significant overlap in the purpose of OICDL and audit reconsideration exists, some situations develop in which audit reconsideration is not appropriate and OICDL will provide the avenue for relief. Because OICDL comes from section 7122, it does not quite fit as an informal process; however, by its nature, it operates as an informal request to abate a tax debt in exchange for a small payment. Audit reconsideration does not involve making a payment or entering into a formal compromise and differs from OICDL in that way as well.

To address the application of certain collection processes in a semi-formal yet not statutorily required manner, the Appeals Office developed the CAP appeal program in the 1990s.³⁴ Similar to the audit reconsideration program on the liability side, the CAP appeal program provides the debtor with an administrative appeal of certain collection actions or proposed collection actions to change their course before resorting to more formal methods of seeking relief. The CAP appeals program predated the passage of the CDP provisions and in some ways presaged those changes. Perhaps because the taxpayer must move very quickly to use the CAP appeal process or because of the creation of the CDP process, the number of CAP appeals may be small; nevertheless, like audit reconsideration, this is another process for which the IRS deserves credit in developing and nurturing. This informal administrative

³²I.R.M. 4.13.1(06); *see also Audit Reconsiderations*, TAXPAYER ADVOCATE SERVICE, last accessed Dec. 12, 2015, <http://www.taxpayeradvocate.irs.gov/get-help/audit-reconsiderations?taxissue=368>.

³³I.R.C. § 7122; I.R.M. 4.18.2(09).

³⁴I.R.M. 8.24.1(14); *see also Collection Appeals Program*, INTERNAL REVENUE SERVICE, last accessed Dec. 12, 2015, <https://www.irs.gov/Individuals/Collection-Appeals-Program>.

process potentially provides taxpayer relief in addressing proposed collection action and directly addresses the right to do so.

3. *Statutory Collection Alternatives*

The Internal Revenue Code provides two clear options for taxpayers seeking relief from enforced collection of their assets and one important right that leads to a less statutorily direct but still important basis for relief. The three forms of statutory relief from collection are currently not collectible (CNC), installment agreement (IA) and OIC. Each serves a different purpose but each provides a significant right to the taxpayer in addressing the prospect of enforced collection of an unpaid tax debt.

Section 6343 provides the indirect statutory path to CNC. This statute prohibits the IRS from levying on a taxpayer's assets if the taxpayer's financial situation prevents the taxpayer from paying the liability or hardship.³⁵ If the taxpayer can show the IRS that payment of the tax would create a financial hardship preventing the taxpayer from meeting life's necessities, the IRS will place the account into CNC status and forgo the use of levy to collect the debt.³⁶ This is a remedy of only partial relief because it does not protect the taxpayer from having the notice of lien filed and it does not eliminate the liability or stop the running of interest and penalties. The relief provided by CNC status theoretically lasts only so long as the taxpayer's financial condition continues to prevent the taxpayer from paying the tax and having enough money to buy life's necessities. Once the taxpayer returns to secure financial footing, the IRS can take the taxpayer out of CNC status and return them to the pool of persons subject to levy. The statutory right to have a taxpayer's account placed into a hold status, from the perspective of levy, when the taxpayer experiences financial hardship directly addresses the right to challenge the proposed collection action.

Section 6159, enacted in 1988 as a part of the first Taxpayer Bill of Rights legislation in the United States, allows taxpayers to pay their taxes over time instead of having to pay everything at once or face enforced collection.³⁷ The statute prohibits the IRS from levying on a taxpayer's property after the

³⁵ See I.R.M. 5.16.1(14).

³⁶ The benefit of CNC status is available even if the taxpayer is not current in their filing obligations to the IRS. *Vinietieri v. Commissioner*, 133 T.C. 392 (2009). The fact that a taxpayer can hold the levy at bay through CNC status even though the taxpayer is out of compliance with filing obligations provides a significant benefit to taxpayers experiencing hardship. While the Tax Court has held that the IRS cannot require filing compliance as a prerequisite to granting hardship status, it has had difficulty implementing the rule required by the case. See 2014 Nat'l Taxpayer Advocate Ann. Rep. Most Serious Problem #7, *Hardship Levies: Four Years After the Tax Court's Holding in Vinietieri v. Commissioner, the IRS Continues to Levy on Taxpayers It Acknowledges are in Economic Hardship and Then Fails to Release the Levies*, INTERNAL REVENUE SERVICE, last accessed Dec. 12, 2015, <http://www.taxpayeradvocate.irs.gov/2013-Annual-Report/downloads/HARDSHIP-LEVIES-Four-Years-After-the-Tax-Courts-Holding-in-Vinietieri-v-Commissioner-the-IRS-Continues-to-Levy-on-Taxpayers.pdf>.

³⁷ Pub. L. No. 100-647, 102 Stat. 3736.

submission of the installment agreement and while the agreement is in place. It does not prevent the filing of a notice of federal tax lien.³⁸ In addition to the statutory right to an installment agreement, the IRS has adopted certain administrative rights guaranteeing the installment agreement in certain instances.³⁹ The ability to postpone payment and pay over time provides taxpayers a significant right in challenging proposed collection action.

Section 7122 grants authority to the IRS to compromise tax debts.⁴⁰ It does not mandate that the IRS do so and the IRS basically made an administrative decision not to do so until 1991.⁴¹ The change in IRS policy at that time has had a significant impact on taxpayers and their relationship with federal tax debt. In 1998 Congress took a look at this provision for the first time in many years and made structural changes that further impacted taxpayer rights in the collection process.⁴² Congress mandated that the IRS not base its decision to compromise on the amount of money a low-income taxpayer could pay to achieve the compromise.⁴³ It also created a path to compromise for persons with the ability to pay but for whom payment of the tax would create an inequitable or unjust situation.⁴⁴ The change in the IRS policy toward the OIC process has greatly improved the ability of taxpayers, particularly low income taxpayers, to address their federal tax debts and provides a significant right in challenging proposed collection action.

³⁸I.R.C. § 6331(k). There is an absence of restriction in I.R.C. § 6323.

³⁹I.R.M. 5.14.5(14).

⁴⁰For a general overview of the modern offer-in-compromise process see generally Shu-Yi Oei, *Getting More by Asking Less: Justifying and Reforming Tax Law's Offer-In-Compromise Program*, 160 U. PA. L. REV. 1071, 1077 (2012).

⁴¹*Id.* at 1101.

⁴²*Id.* at 1103.

⁴³I.R.C. § 7122(d)(3)(A).

⁴⁴Pub. L. No. 105-206, 112 Stat. 685 (1998); Reg. § 301.7122-1(b)(3). The Committee Report for the Internal Revenue Service Restructuring and Reform Act of 1998 expressed the intent to expand use of the OIC procedure beyond the two traditional grounds:

[T]he conferees expect that the present regulations will be expanded so as to permit the IRS, in certain circumstances, to consider additional factors . . . in determining whether to compromise the income tax liabilities of individual taxpayers. For example, the conferees anticipate that the IRS will take into account factors such as equity, hardship, and public policy where a compromise of an individual taxpayer's income tax liability would promote effective tax administration.

H.R. REP. NO. 105-599, at 289 (1998) (Conf. Rep.). The Effective Tax Administration offer-in-compromise developed as a result of these directions has not met the initial promise expected when it came into the code. Obtaining an effective tax administration offer can be quite difficult. *See, e.g.*, 2014 NAT'L TAXPAYER ADVOCATE ANN. REP., OFFERS IN COMPROMISE: DESPITE CONGRESSIONAL ACTIONS, THE IRS HAS FAILED TO REALIZE THE POTENTIAL OF OFFERS IN COMPROMISE 206-07; *see also* Sandy Freund, *Effective Tax Administration Offers in Compromise – Why So Ineffective?*, 34 Va. Tax Rev. 157 (2014).

4. *Statutory Relief for Innocent Spouses*

In 1971 Congress first recognized that the joint and several liability status created by the filing of a joint return could create an unfair tax debt on one of the spouses signing the joint return. It initially addressed the problem by passing a narrow provision that allowed some spouses relief from their joint obligation.⁴⁵ In 1998, Congress significantly expanded innocent spouse relief and created a statute that provides meaningful debt relief for spouses in narrowly prescribed statutory circumstances or when such relief would provide the equitable remedy necessary for the situation. While this provision relates to the narrow circumstance of a jointly filed individual income tax return, it provides an important right in challenging proposed collection action by eliminating the underlying debt.

5. *Collection Due Process*

The greatest change in the way the United States approaches federal tax debt collection since it began collection tax debts occurred in 1998 with the passage of the CDP provisions.⁴⁶ Sections 6320 and 6330 provide persons owing federal tax debts with the right to discuss how the IRS might best collect the debt and the right to have the decision reviewed by the Tax Court. The CDP provisions allow the taxpayer to challenge the underlying debt in certain circumstances and to challenge the proposed collection action in all circumstances in which the CDP provisions apply.⁴⁷ These provisions create and recognize the significant taxpayer rights in the collection process.

The ability to raise a challenge to the merits of the underlying debt, though limited in its applicability, provides an important right in itself. Prior to the passage of the CDP provisions, taxpayers were barred in many instances from going to court to challenge a tax debt when they had not previously had the opportunity to do so. To fulfill the complete promise of this provision, Congress or the Tax Court needs to strike down the regulation treating the opportunity for an administrative hearing as meeting the full right granted by these statutes.⁴⁸

While the ability to contest the merits of the underlying liability provides a significant right when it exists, the creation of a path to discuss collection alternatives to the proposed path of the IRS represents the most significant change and improvement of taxpayer rights in collection matters. Because the Appeals employee reviewing the case must verify that the IRS has properly followed all procedures leading up to the proposed action, the taxpayer

⁴⁵I.R.C. § 6013(e) (repealed); see generally Michelle Drumbl, *Decoupling Taxes and Marriage: Beyond Innocence and Income Splitting*, 4 COLUM. J. TAX L. 94 (2012); Richard C.E. Beck, *The Failure of Innocent Spouse Reform*, 51 N.Y.L. SCH. L. REV. 929 (2006).

⁴⁶Pub. L. No. 105-206, § 3401, 112 Stat. 685, 746 (1998).

⁴⁷See Bryan Camp, *The Failure of Adversarial Process in the Administrative State*, 84 IND. L.J. 57 (2009); Les Book, *The Collection Due Process Rights: A Misstep or a Step in the Right Direction?*, 41 HOUS. L. REV. 1145 (2004).

⁴⁸Taylor, *supra* note 31; Lewis v. Commissioner, 128 T.C. 48 (2007).

receives a significant benefit of having an independent review within the IRS. The CDP process also provides the taxpayer, frequently for the first time, the opportunity to speak to a person assigned to their specific account. This individual attention to the case allows the taxpayer to provide information and approach resolution of the collection matter with a single individual rather than the pool of cases that exists in ACS. Moreover, the involvement of an individual experienced in collection matters leads to many resolutions where cases otherwise would have moved into enforced collection.

Finally, the ability to present concerns to the Tax Court gives taxpayers the opportunity to voice their concerns outside the agency and also allows them to work with a Chief Counsel attorney. The opportunity to work with a knowledgeable attorney and to go before the Court if necessary, give the taxpayer with a collection problem very significant rights to influence the IRS's decision to collect the liability and the IRS's method of collection.

6. Refund Litigation

A taxpayer's ability to seek a refund always comes after the IRS has made an assessment.⁴⁹ While it does not always come after the IRS pursues enforced collection of some type, it does, by nature, provide a safety valve for the taxpayer who believes the underlying assessment incorrect in whole or in part. Accordingly, allowing taxpayers to seek the return of the taxes they have paid provides a significant right.

In instances where the taxpayer faces financial disability, Congress extended the statute of limitations to allow individuals meeting the criteria set forth in the statute to undo collection of the tax in circumstances otherwise barred by the statute of limitations.⁵⁰ The promise of the financial disability provisions has not been completely fulfilled because of the unreasonably rigid position taken in the Revenue Procedure adopted by the IRS without notice or comment to implement the Code section.⁵¹ Fixing the administration of this provision will further enhance the rights of those from whom a tax has been

⁴⁹William T. Plumb, *Tax Refund Suits Against Collectors of Internal Revenue*, 60 HARV. L. REV. 685 (1947).

⁵⁰I.R.C. § 6511(h); Keith Fogg and Rachel Zuraw, *Financial Disability for All*, 62 CATH. U. L. REV. 965 (2013).

⁵¹See Carlton Smith, *Does Rev. Proc. 99-21 Validly Restrict Proof of Financial Disability, for Purposes of Extending the Refund Claim SOL, to Letters from Doctors of Medicine or Osteopathy*, PROCEDURALLY TAXING, June 24, 2015, <http://www.procedurallytaxing.com/does-rev-proc-99-21-validly-restrict-proof-of-financial-disability-for-purposes-of-extending-the-refund-claim-sol-to-letters-from-doctors-of-medicine-or-osteopathy-part-1/>; see also Carlton M. Smith, *Cracks Appear in the Code's "Jurisdictional" Time Provisions*, TAX NOTES (TA) 511, 511 (Oct. 29, 2012).

wrongfully collected at a time when their ability to protect their financial interests was impaired.⁵²

7. *Taxpayer Advocate*

The Taxpayer Advocate's office serves as both the backstop to persons caught up in the collection process facing hardship or other circumstances that fit into the Advocate's portfolio, as well as the voice to problems with the system.⁵³ As with the innocent spouse and CDP provisions, the revisions to the Code in 1998 made a huge change in the role the advocate's office plays in the collection process. The Advocate's office can play a significant part in deciding the course that collection activity will take. Congress granted to the advocate's office the right to issue a Taxpayer Assistance Order which can stop collection to allow time for discussion about the proposed action and in some cases stop the proposed action altogether.⁵⁴ In addition to all of the administrative and legislative provisions providing rights to taxpayers to ensure that they can contest the underlying liability and the proposed collection action, in creating the advocate's office, Congress provided an additional safeguard should the other processes fail. Unfortunately, the administrative and legislative avenues fail regularly because taxpayers do not pay attention until too late or the IRS chooses the wrong path. This safety net plays an important role in making sure that whatever breakdowns in the system of rights might occur, the taxpayer has a final option to protect their rights.

8. *Conclusion of Right to Challenge the Underlying Debt and the Proposed Collection Action*

The changes made by Congress in 1998 to the process of collecting federal tax debts in large measure, when added to the pre-existing system, have created a collection system that protects the taxpayer's right to challenge the underlying debt and the proposed collection action. With minor exception, the administrative and statutory provisions in place provide the necessary protections. The problem areas regarding this taxpayer right concern IRS employees, namely the training of employees to understand all of the

⁵²This Article will not address the wrongful levy provisions because they involve persons who are not taxpayers. The wrongful levy provisions of I.R.C. 6343 do provide a significant right for third parties against whom the IRS has wrongfully collected property. The rights of individuals facing wrongful levy situations will improve when the Courts begin to apply equitable estoppel normatively. *See, e.g., Volpicelli v. United States*, 777 F.3d 1042 (9th Cir. 2015); *see also* Carlton Smith, *Volpicelli v. U.S.: 9th Circuit Holds Time to File a Wrongful Levy Suit is Subject to Equitable Tolling*, PROCEDURALLY TAXING, Jan. 30, 2015, <http://www.procedurallytaxing.com/?s=9th+Circuit+Holds+Time+to+File+a+Wrongful+Levy+Suit+is+Subject+to+Equitable+Tolling>.

⁵³I.R.C. § 7803(c); *see* Bryan Camp, *What Good is the National Taxpayer Advocate?*, 126 TAX NOTES (TA) 1243 (Mar. 8, 2010).

⁵⁴I.R.C. § 7811; I.R.M. 13.1.20(15); TREASURY INSPECTOR GEN. FOR TAX ADMIN., REF NO. 2010-10-081, A STATISTICAL PORTRAYAL OF THE TAXPAYER ADVOCATE SERVICE FOR FISCAL YEARS 2005 THROUGH 2009 (2010).

rights and remedies in the collection area and the ability of employees to answer the phone or work on a case when the taxpayer needs assistance with a collection problem.

E. *Right to a Fair and Just Tax System*

In the collection context, the right of taxpayers in the United States to a fair and just tax system has several components. First, the system must be just for all taxpayers facing collection and not just to taxpayers who can afford representation. Second, the collection system must treat the persons from whom the IRS must use enforcement in a fair and just manner. Third, the system must be just to taxpayers who pay their taxes without the need for enforced collection. These taxpayers must feel that the system works and they have not acted foolishly in voluntarily complying.

1. *A Fair and Just System for the Represented and Unrepresented*

Taxpayers who have representation generally will obtain a better result than those who do not.⁵⁵ While the IRS may not have the ability to change the statistically more favorable outcomes for those with representatives versus those without representation, it can build systems that foster a better understanding of taxpayer problems and that seeks to resolve problems for taxpayers even when they do not know to raise them. Such a system requires a change in culture, a commitment to training and adequate staffing to address taxpayer needs and not just rush to the next case.

The culture at the IRS has a strong foundation for such a system because it rests on finding the right result rather than collecting the most revenue; however, that culture needs much more nurturing to move employees at the IRS engaged in collection from a compliance mentality to a customer service mentality. Cases in which the IRS engages in enforced collection generally foster in IRS employees a view that the taxpayer does not want to pay the liability and will actively take steps to avoid doing so. The collection employees do not begin each case thinking how can they assist the taxpayer in finding the right path to payment but generally begin with an attitude of what must I do to make the taxpayer see their responsibility to pay. Certainly, taxpayers exist who teach the IRS employees to adopt this approach; however, approaching collection cases from the negative rather than positive perspective may hinder IRS employees and the tax system from benefiting from the good will it could create trying first to assist and then to enforce.

Unrepresented taxpayers face a daunting task as they approach the collection system. They generally have smaller amounts the IRS seeks to collect which means that the IRS will not assign an individual to their account. Instead, the IRS handles their cases through ACS and the phone lines. The impersonal and very challenging phone system requires these individuals to

⁵⁵ Jeff A. Wilson et al., *Impact of Taxpayer Representation on the Outcome of Earned Income Tax Credit Audits*, 2007 IRS RESEARCH BULLETIN 91, 92 (2007).

commit significant blocks of time and phone minutes, which they may not have, simply to reaching the IRS to discuss the matter or understand a notice they have received. It also means that each time they interface with the IRS they speak to a different person who understands prior interactions only through the lens of the write up of the prior employee handling the case.

To make the system fair and just for unrepresented taxpayers, the IRS needs to significantly improve its phone service, to train its employees to identify problems and to reopen walk in sites. The move to inadequately staffed phone systems and enhanced web sites has left a significant segment of the population by the wayside.⁵⁶ The system cannot be fair and just if it leaves an entire segment of taxpayers, who are frequently forced into interaction with the tax system because Congress chose to use that system to deliver benefits, without an adequate mechanism for talking to the system. The continued reductions in IRS staffing and training take a much higher toll on the unrepresented than on those who can pay a professional to work the system.

In 1998 Congress created a small safety valve for low income taxpayers with the passage of section 7526 and the creation of grants for low income taxpayer clinics.⁵⁷ The grants for these clinics exist because of Congress's recognition that the system works best if taxpayers have a professional voice when seeking relief. The existence of the clinics also provides some benefits and relief to the IRS because the clinicians can assist taxpayers in organizing data and in recognizing which path to take in working with the IRS. The number of clinics relative to the number of taxpayers needing assistance remains small. Efforts by the ABA Tax Section and local bar associations with their own pro bono efforts to supplement the work done by clinics helps but does not fill the gap in the need for assistance to unrepresented taxpayers facing the collection system.

To make a more fair and just system, Congress must consider allocating more resources to the IRS and to representation opportunities such as clinics, the IRS must consider how it allocates its resources in a manner that adequately serves the unrepresented and the IRS needs to address cultural changes that will foster more justice for those who do not have the resources to hire representatives.

⁵⁶2014 NAT'L TAXPAYER ADVOCATE ANN. REP., SERVICE HAS REACHED UNACCEPTABLY LOW LEVELS AND IS GETTING WORSE, CREATING COMPLIANCE BARRIERS AND SIGNIFICANT INCONVENIENCE FOR MILLIONS OF TAXPAYERS 3.

⁵⁷Keith Fogg, *Taxation with Representation: History of Low Income Taxpayer Clinics*, 67 TAX LAW. 3 (2013).

2. *Treating Taxpayers in the Collection System in a Fair and Just Manner*

Not all taxpayers receive the same treatment when they owe taxes. Taxpayers who work for the IRS can lose their job if they owe taxes.⁵⁸ Taxpayers who work for the federal government can have their pension plans taken even though they may not themselves have the right to withdraw the funds.⁵⁹ Taxpayers who owe more than \$10,000 are presumed to have a liability for which the IRS should file the notice of federal tax lien whether or not they have any assets that the IRS needs to protect with the filing of the notice.⁶⁰ Taxpayers who seek to leave the country may soon find they cannot if they owe federal taxes.⁶¹ Taxpayers receiving age based social security payments can have these payments levied upon even where the amount of their social security benefits are much less than the person with a large pension from a major corporation whose pension benefits the IRS will only levy in extraordinary circumstances.⁶²

Is it fair to distinguish between taxpayers based on who they work for or who is paying the benefit rather than the amount of the tax debt and the resources available to the respective taxpayers? Congress has placed significant restrictions on IRS employees while few if any on its own employees yet which would have a bigger impact on tax compliance: the failure of a GS-4 service center employee to pay \$3,000 after mistakenly overclaiming the earned income tax credit or the failure of the chief of staff of a Senator to pay their \$20,000 tax liability after failing to report income from a Schedule C? Some of the choices Congress has made in creating categories of individuals to receive “special” treatment in the collection of taxes create a system that may lack horizontal fairness.

⁵⁸ 1998 Restructuring and Reform Act, Pub. L. No. 105-206, § 1203, 112 Stat. 770; see Keith Fogg, *Revisiting the Revenue Reform Act of 1998 – The 10 Deadly Sins*, PROCEDURALLY TAXING, Nov. 12, 2013, <http://www.procedurallytaxing.com/revisiting-the-revenue-reform-act-of-1998-the-10-deadly-sins/>; see also annual reports of the Treasury Inspector General setting out employee actions taken in response to section 1203 violations.

⁵⁹ Pub. L. No. 112-267, 126 Stat. 2440 (2013); see DEP'T. OF THE TREASURY OFFICE OF THE CHIEF COUNSEL, NOTICE 2013-007, LEVY ON THRIFT SAVINGS PLAN ACCOUNTS (Feb. 4, 2013).

⁶⁰ Before the adoption of the Freshstart program, the IRS had set the dollar level for filing the notice of federal tax lien much too low. See Keith Fogg, *Systemic Problems with Low-Dollar Lien Filing*, 133 TAX NOTES (TA) 88 (Oct. 11, 2011); see also 2011 NAT'L TAXPAYER ADVOCATE ANN. REP., MANAGERIAL APPROVAL FOR LIENS: REQUIRE MANAGERIAL APPROVAL PRIOR TO FILING A NOTICE OF FEDERAL TAX LIEN IN CERTAIN SITUATIONS.

⁶¹ Pub. L. No. 114-357, § 32,101 (enacting new Internal Revenue Code section 7345 allowing the IRS to request that the State Department revoke the passport of significantly delinquent taxpayers). See Jack Townsend, *New Transportation Bill, FAST, Adds Some Tax Provisions*, FEDERAL TAX CRIMES, Dec. 7, 2015, <http://federaltaxcrimes.blogspot.com/2015/12/new-transportation-bill-fast-adds-some.html>.

⁶² *Compare Social Security Benefits Eligible for the Federal Payment Levy Program*, INTERNAL REVENUE SERVICE, last updated Nov. 4, 2015, <https://www.irs.gov/Individuals/Social-Security-Benefits-Eligible-for-the-Federal-Payment-Levy-Program>, with I.R.M. 5.11.6 (describing the process the IRS must follow to levy on pension benefits).

As it moves to replicate some state tax authorities and impose restrictions on passport usage similar to the revocation of driver's licenses and automobile registrations by certain states, Congress enters into a dangerous zone in the fair use of the laws to "encourage" the payment of federal taxes. When passing extraordinary remedies that allow dismissal of employees, restrictions on travel and taking retirement benefits from some, Congress does so in a manner that may remove rather than inject fairness into the system.

3. Appropriately Collecting from Everyone in Order to Make the System Fair and Just for Those Who Pay Without Enforced Collection

One of the challenges of any tax systems is fairness to all. This type of fairness gets more attention on the determination of tax side than the collection side but applies with equal force in collection of taxes. The system must convince those who pay without coercion that doing so does not create a disadvantage to them. They must feel that the system will vigorously pursue collection from those who fail to voluntarily pay rather than allow them to get by without paying. As the IRS loses resources to put to the collection of taxes from those who do not voluntarily pay, this issue gains more ground. The amount of uncollected taxes written off each year is high. Could the IRS collect more with additional resources or with better use of its available resources? Does the amount of uncollected taxes that fall off the books each year encourage others to not pay taxes or are the resources currently devoted to collection sufficient to convince taxpayers that voluntarily paying remains the best option?

Starting in the 1980s, the IRS began placing cases into a collection queue rather than assigning each balance due account to a collection employee.⁶³ The amount of inventory and the number of employees reached a tipping at which IRS collection employees could not reasonably handle a divisible share of all of the balance due cases. The disparity between the number of collection employees and the number of balance due cases has only increased in the following three decades. The high volume of outstanding collection cases has recently caused the IRS to stop sending out levies because it cannot handle the incoming calls.⁶⁴ Taxpayers who place their assets in forms that make it difficult for the IRS to collect have a significantly better chance that the IRS will not spend the resources to unwind the asset structure than those who represent easier collection targets. At some point the failure to pursue persons making it difficult to collect from them could have an impact on the overall level of voluntary compliance. Both Congress and the IRS must keep a careful watch to insure the tipping point for compliance does not occur.

⁶³U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-15-647, IRS CASE SELECTION: COLLECTION PROCESS IS LARGELY AUTOMATED, BUT LACKS ADEQUATE INTERNAL CONTROLS (July 29, 2015).

⁶⁴See U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-15-744, AUTOMATED COLLECTION SYSTEM LACKS KEY INTERNAL CONTROLS NEEDED TO ENSURE THE PROGRAM FULFILLS ITS MISSION (Sept. 19, 2015) (describing the ACS process in detail).

4. *Conclusion of a Fair and Just System for the Represented and Unrepresented*

The collection of taxes in the United States generally provides taxpayers with a fair and just system for working with the IRS. The greatest impediment to this system, however, is that it favors the represented, and the IRS does not devote sufficient resources to unrepresented taxpayers. The level field also faces disruption due to the lack of resources allocated to pursuing those who can structure their assets in difficult to attack forms of ownership.

III. A Comparative Analysis of the Enforcement of Tax Debt Collection

TBOR's objective to systematize the procedural rights of taxpayers in the United States has influenced legislatures around the world. Due to systematic differences in the complexity of the tax systems, the various procedures of tax collection and the influence of constitutional and supranational law on the tax collection process, taxpayer rights, as measured by TBOR, diverge greatly in the various tax systems.

This section seeks to provide a comprehensive analysis of solutions in the field of enforcement of tax debt collection and tax forgiveness in five selected countries—the UK, Australia, Germany, Croatia, and Switzerland as well as the influence of EU law on tax debt collection. The key elements of each system are considered in order to highlight the extraordinary solutions within the U.S. system. Because this Article seeks to apply the rights created by TBOR to the areas of interaction between the tax authorities and the taxpayers in the enforcement phase, the respective regulations regarding access to information prior to the tax enforcement will be analyzed in the light of the right to be informed. The different ways to protest against decisions of the tax authorities with which the taxpayer disagrees will be analyzed under the right to challenge the underlying liability and the proposed collection action. Finally, the overall enforcement and tax forgiveness procedures are scrutinized within the context of the right to a fair and just tax system.

A. *Non-EU Countries*

1. *Switzerland*

The high level of decentralization in Swiss tax procedure strongly influences its tax procedures. Because of the right of the Swiss regional entities—cantons—to implement their own taxes and to have their own measures of tax collection within the broader context of the federal tax collection system, the Swiss enforcement procedures present complexity due to their dependence on the nature and the type of tax the government seeks to collect.⁶⁵ The following analysis will concentrate on the federal measures; but, because

⁶⁵AMEDEO FOSSAT & GIORGIO PANELLA, FISCAL FEDERALISM IN THE EUROPEAN UNION 277 (2005).

of the importance of the cantonal regulations on taxpayer rights, it also will address the more important rules arising in the cantons.

a. *Enforced Tax Collection.* The Swiss tax law has a developed system to prevent tax collection default. This system relies upon preventive distraints, which the government can impose for different reasons. Two types of preventive distraints exist: voluntary and involuntary. As denoted by its name, the government creates voluntary distraints with the consent of the taxpayer pursuant to a compromise agreement between the taxpayer and the tax authorities.⁶⁶ The government can only create an involuntary preventive distraint under certain circumstances defined by law in which the government has certain defined concerns regarding the collectability of taxes:⁶⁷ where the taxpayer has no permanent residence or headquarters in Switzerland, and where the tax authorities have objective reasons to believe that it may not be possible to collect the tax.

In circumstances where the taxpayer does not have a permanent residence in Switzerland, the legislature took into account its lack of cross-border enforcement power, which outweighs the negative effects to the taxpayer;⁶⁸ however, the validity of such a standpoint will remain unsettled for the foreseeable future with new developments concerning tax cooperation. The new developments for tax collaboration and tax enforcement, as well as the implementation of article 27 of the OECD Model Tax Convention, which contains an agreement on collaboration in enforcement matters, could provide a safeguard that calls into question the necessity of preventive measures.

An involuntary preventive distraint may occur in matters where the tax authorities have reason to believe, when considering the objective facts surrounding the tax liability, that the tax may be uncollectible. Such objective circumstances include bad faith behavior, as well as the mere fact that a taxpayer may leave the country.⁶⁹ Economic difficulties of the taxpayer are insufficient to trigger an involuntary preventive distraint because an enforced tax collection could still take place.⁷⁰ If the tax authorities believe

⁶⁶For the voluntary distraint basically the same rules apply as for other preventive distraints; the method of establishing and the ways of releasing a taxpayer from a distraint are, however, different and directly connected to a compromise agreement, which will be discussed in the subchapter below.

⁶⁷BUNDESGESETZ ÜBER DIE DIREKTE BUNDESSTEUER [DBG] art. 169 (1) [Federal Direct Tax Act] 1991 AS 1184 from 14, December 1990 as amended January 2014 (Switz.), available at <https://www.admin.ch/opc/de/classified-compilation/19900329/index.html>.

⁶⁸Verwaltungsgerichtshof [VGer] [Administrative Court of Switzerland] ZH 10.1.2001, RB 2001 No. 96.

⁶⁹VGer SZ 7.11.2002, StPS 2003, 56.

⁷⁰The Swiss doctrine distinguishes between the action of enforcement and the level of satisfaction of the claims against the taxpayer. Just if the taxpayer takes any action that would procedurally make it more difficult to enforce (by selling off assets, transporting them abroad, etc.) the criteria would be satisfied, where the fact that a car loses 15% of its value each year and therefore at the end of the procedure would be worth half its original price is not a valid reason for itself. See VGer ZH 24.3.2004, ZStp 2004, 315 E 1.2.

that one of the above-mentioned conditions is met, they will issue a so-called “Sicherungsverfügung.” This administrative act contains the reasoning of the tax authority and the directly applicable measures that will apply to the case in question.⁷¹

In the *Sicherungsverfügung* the tax authorities can utilize a preventive distraint,⁷² which allows the tax authorities to take into their possession property of the taxpayers valuable enough to satisfy the tax liability, including any interest and penalties, while title to the property remains with the taxpayer. Title cannot be transferred from the taxpayer without a separate enforcement procedure.⁷³ Regarding the measure itself, the taxpayer can either voluntarily hand over the property or, if he refuses, the rules for permanent seizure of tax debt will apply in analogy.⁷⁴ The property then remains in the possession of the tax authorities until satisfaction of the tax debt. The taxpayer has a right to protest before the cantonal *Steuerrekurskommission*, an appellate body of the tax authority.⁷⁵

When a taxpayer does not fulfill his obligations in time, the tax authorities have the option to proceed with an enforcement procedure.⁷⁶ This enforcement procedure of monetary claims is regulated the same way as private law claims in the enforcement and bankruptcy act (*Bundesgesetz für Schuldbetreibung und Konkurs*).⁷⁷ However, even though the law regulates bankruptcy procedures in general, the law does not provide an avenue for the tax authorities to initiate a bankruptcy procedure based on an ordinary tax claim.⁷⁸ If a preventive distraint exists, the enforcement nevertheless must be based on a separate decision by the tax authorities because still no assessment and enforcement act for the transfer of property exist. After the decision has been delivered to the taxpayer, the property can be seized or, if the tax authorities are already in possession of the property, the government can sell the property to satisfy the tax debt.⁷⁹ If the taxpayer lives outside of the

⁷¹Hans Reiser, *Arrest in Theorie und Praxis*, BLSCHK 2015 169, 170.

⁷²The term “preventive distraint” is used for a measure in civil law countries, which involves a preventive seizure of the possession of a property but not the transfer of the ownership. The property is just used as collateral and can later be sold if the taxpayer does not pay the tax debt when it is due. Preventive distraints are usually used just for movable property and property for which no special registers exist while for plots of land, ships and cars it usually is enough to have a lien on the property which is marked in the registers. For any information available in public registers the fiction applies that it is a generally known fact and therefore the tax authorities reserve a position in the register for enforcement purposes.

⁷³DBG art. 185 (1).

⁷⁴MARTIN ZWEIFEL & HUGO CASANOVA, SCHWEIZERISCHES STEUERVERFAHRENSRECHT: DIREKTE STEUERN 433 (2d ed. 2008).

⁷⁵DBG art. 169 (3).

⁷⁶DBG art. 165 (1).

⁷⁷BUNDESGESETZ UBER SCHULDBETREIBUNG UND KONKURS [SCHKG] [Insolvency and Enforcement Act] 1997 AS (Ger.).

⁷⁸SchKG art. 43 nr. 1.

⁷⁹SchKG art. 88.

country, the tax authorities can enforce tax debt collection without ensuring previous notice.⁸⁰

b. *Tax Forgiveness.* Swiss federal law does not regulate the tax forgiveness procedures for local taxes.⁸¹ For forgiveness of federal taxes, however, a unified system exists. The federal procedure begins through a taxpayer's request. The taxpayer can make this request at any point after the taxpayer's tax obligations have been fixed and before he has made his final payment. The procedural criteria for obtaining tax forgiveness include that the tax has not been paid yet but is past due and that special circumstances exist in connection to the taxpayer which would allow for tax forgiveness. The regulations describe the necessary circumstances as special hardship and the enforcement of the tax collection being extremely harsh for the taxpayer.⁸²

The "special hardship" is a purely economic criterion. It is defined as a situation in which the financial power of the taxpayer is so minimal that it is in a strong disproportion to the outstanding tax debt.⁸³ If the taxpayer cannot pay an outstanding tax debt using reasonable efforts and this hardship situation did not result because of his actions, the special hardship criteria is satisfied. Unlike the first criteria, the condition of a tax being extremely harsh on the taxpayer takes into account non-economical considerations, primarily fairness.⁸⁴ In most cases, a significant tax burden will not be considered harsh if the taxpayer was responsible for the final result. For example, fairness will not be applicable where a taxpayer has attempted to illegally evade taxation or has acted in a significantly unreasonable way that decreased his wealth. If the tax authorities agree to settle the debt, they can decrease, forgive or defer the debt⁸⁵ and as mentioned above, if they deem necessary, include a voluntary preventive distraint as requirement.

c. *Taxpayer Rights.* The Swiss tax authorities have published guidelines for taxpayers which briefly touch on the topic of taxpayer rights⁸⁶ but are far from developing an extensive list of all rights taxpayers have. Most taxpayer rights in Switzerland, including the right to equal treatment, the right to be informed and the right to challenge the underlying liability, have their basis in the Swiss Federal Constitution (Bundesverfassung⁸⁷). The Federal Constitution contains a bill of rights that generally applies to all aspects of

⁸⁰DBG art. 165 (1), (2).

⁸¹MARTIN ZWEIFEL & HUGO CASANOVA, SCHWEIZERISCHES STEUERVERFAHRENSRECHT: DIREKTE STEUERN 443 (2d ed. 2008).

⁸²DBG art. 167.

⁸³DBG art. 167 (1).

⁸⁴ERNST BLUMENSTEIN & PETER LOCHER, SYSTEM DES SCHWEIZERISCHEN STEUERRECHTS 347 f. (6th ed. 2002).

⁸⁵DBG art. 166.

⁸⁶See Leitfaden für zukünftige Steuerpflichtige, EIDEGENÖSSISCHE STEUERVERWALTUNG, Feb. 10, 2015, <https://www.estv.admin.ch/estv/de/home/allgemein/dokumentation/publikationen/weitere-publikationen/leitfaden-fuer-zukuenftige-steuerpflichtige.html>.

⁸⁷BUNDESVERFASSUNG [BV] [CONSTITUTION] Apr. 18, 1999, available at <https://www.admin.ch/opc/de/classified-compilation/19995395/index.html#a8>.

government action, including tax law, and also includes a special list of taxpayer rights which applies on all levels of tax collection, including cantonal tax procedures.⁸⁸ Due to the specific norm hierarchy structure in Switzerland, statutes can be considered further directions of the general rules. However, federal statutes cannot be deemed unconstitutional which prevents direct norm control through the constitutional court.⁸⁹ As a result, the constitutional rules have no way to be directly enforced against federal law and taxpayer rights are dependent on the federal tax laws to implement them⁹⁰.

The equal treatment of taxpayers is guaranteed by two constitutional provisions. First, the general provision in article 8 of the Federal Constitution guarantees equal treatment before the law. In addition, article 127 (2) guarantees equal treatment of taxpayers and taxation based on the economic capacity of an individual. While the constitutional provisions regarding equal treatment ensure that taxpayers are not discriminated against in general, the constitutional guarantee related to economic capacity determines the basic reasoning behind the definition of an individual taxpayer's tax burden. As discussed above, an adaptation of the taxpayers' burden to new developments (economic hardship, etc.) is limited because, besides the new economic situation of the taxpayer, equity reasons also receive consideration.

In addition to the above provisions, some additional constitutional articles of general applicability have some impact within the context of tax collection. Article 29 (1) of the Federal Constitution ensures that within a procedure before of a public authority, including a tax authority, every person has a right to fair and equal treatment. Under the provision of article 29 (2), all individuals have the right to be heard in any procedure before a public body. In addition, article 29, guarantees that individuals have the right to appeal a decision. Finally, article 36 (3) defines the rule of proportionality, which guarantees that all actions of public authorities which intrude into the rights of citizens must be proportional to the public benefit they aim to accomplish.

2. *Australia*

Australia operates with a federal system primarily relying upon a centralized government tax authority. Unlike the other countries analyzed in this Article, Australia has no direct ties to the European Union apart from its connection to the United Kingdom as a Commonwealth country. Accordingly, the influence of the EU's market freedoms and other peculiarities of tax enforcement have even less of an effect on Australia than on Switzerland

⁸⁸Taxpayer rights do not have to be written in the statutes regulating procedural matters but are directly guaranteed on all levels. See MARTIN ZWEIFEL & HUGO CASANOVA, SCHWEIZERISCHES STEUERVERFAHRENSRECHT: DIREKTE STEUERN 23 (2d ed. 2008).

⁸⁹BV art. 190.

⁹⁰For a discussion on this issue in the general constitutional system and the criticism of such a limitation see BERNHARD EHRENZELLER ET. AL., DIE SCHWEIZERISCHE BUNDESVERFASSUNG 2796 f. (3d ed. 2014).

a. *Enforced Tax Collection.* If a taxpayer does not satisfy a tax obligation, the tax authorities have right to file a so called claim of summons with the court in order to have the court recognize that the debt is duly owed. After the court recognizes the tax debt, the tax authorities have several alternatives for enforcement on the financial assets and property of the taxpayer to satisfy the liability. In addition to their enforced collection mechanisms under the tax code, the tax authorities can force both corporations as well as individual taxpayers into a bankruptcy proceeding.

The tax authorities are able to enforce the tax obligations of foreign taxpayers through a general withholding rule, which authorizes enforcement procedures if there is a danger that the taxpayer's income could leave the country before it has been taxed.⁹¹ The tax authorities clarified that this withholding rule is applicable regardless of whether assessment has been made.⁹² Therefore, the system effectively allows for enforcement of tax debt that is not yet due, placing international taxpayers in a disadvantageous position. In addition, the tax authorities can require a taxpayer to offer securities for the payment of future tax debt in circumstances where the taxpayer is conducting business for a limited period or if there are any other reasons that securities are an appropriate form of payment.⁹³

As mentioned above, the tax authorities also can seek enforcement by issuing a bankruptcy notice to the taxpayer as first step towards a bankruptcy procedure. Upon receipt of the notice, the taxpayer has 21 days to either pay the debt in full or make a payment arrangement with the tax authorities. In the case the taxpayer does not comply with the notice, the taxing authority may file a creditor's petition to start the bankruptcy procedure.⁹⁴ For corporate taxpayers, tax authorities can serve the corporation with a statutory demand for payment. If the company does not pay or enter a payment plan within 21 days, the tax authority can place it into a liquidating procedure, also known as a "wind-up." If this occurs, a trustee will liquidate the company and assuming sufficient assets exist, the creditors will receive payment from the liquidated assets.

b. *Tax Forgiveness and Deferral.* Under Australian law, the tax authorities have a large array of measures at their disposal to discharge a tax liability in full, including deferral rules, agreements with taxpayers and special hardship rules. First, the tax authorities may grant the taxpayer permission to enter into an installment plan or to otherwise defer the payment.⁹⁵ Such a decision rests within the discretion of the tax authorities.⁹⁶ Under the rules

⁹¹ *Income Tax Assessment Act 1936* (Cth) § 255 (Austl.); see also *Commissioner of Taxation v. Wong* (2002) 121 FCR 60 (Austl.).

⁹² Taxation Ruling No. IT 2544 1989 (Austl.).

⁹³ *Tax Administration Act 1953* (Cth) sch 1, § 255-100 (Austl.).

⁹⁴ Such a procedure will be based on section 40 f of the *Bankruptcy Act 1966*.

⁹⁵ *Tax Administration Act 1953* (Cth) sch 1, §§ 255-10, 255-15 (Austl.).

⁹⁶ *Asiament (No. 1) Resources Pty Ltd. v. Federal Commissioner of Taxation* (2003) 52 ATR 140 (Austl.).

for compromising tax debt, a taxpayer must provide comprehensive documentation of his financial situation, including all sources of income and total assets. Based on the information provided, the tax authorities may grant a partial waiver of tax debt if certain conditions are met. Importantly, the tax authorities consider the willingness of the taxpayer to pay the liability and the potential return for the government.⁹⁷ A refusal by the tax authorities based on the Administrative Decisions (Judicial Review) Act of 1977 cannot be challenged in court.

Finally, the release of tax liability due to hardship release is available only for certain individual taxes and duties.⁹⁸ One requirement for this type of release is that it must have a positive effect on the economic situation of the taxpayer; accordingly, a taxpayer who would be insolvent regardless of the hardship release would not be granted tax forgiveness.⁹⁹ In the case that a significant hardship would occur through the enforcement of a tax debt, the tax authorities can, but need not, release the taxpayer partially or in total from the debt.¹⁰⁰

c. *Taxpayer Rights.* The Australian Constitution, unlike many other constitutions, does not include a bill of rights. Therefore, the extent of individual rights protected through the constitution is rather scarce. One reason that the constitution lacks a bill of rights stems from the belief that within a democratic system, the parliament as representative of the Australian citizens provides sufficient protection for citizens' rights.¹⁰¹ This position also extends to the area of tax procedure. Similar to the United States, Australia has a taxpayer charter—a bill of rights that taxpayers can expect in the interaction with the tax authorities.¹⁰² The charter has no binding legal effect but the tax authorities have obliged themselves to follow it in all proceedings.¹⁰³ The charter outlines the rights of taxpayers and, although a broad array of rights is included, they do not fully overlap with the rights presented under the Taxpayer Bill of Rights in the United States.¹⁰⁴ Within the rights granted by

⁹⁷ See R.L. DEUSCH ET. AL., AUSTRALIAN TAX HANDBOOK 1739 (70th ed. 2015).

⁹⁸ *Tax Administration Act 1953* (Cth) § 340-10 (Austl.).

⁹⁹ *Corlette v. Mackenzie* (1996) 32 ATR 667 (Austl.).

¹⁰⁰ *Id.*

¹⁰¹ For more on the concrete influence of ordinary law on citizens' rights, see, for example, JOHN McMILAN & NEIL WILLIAMS, ADMINISTRATIVE LAW AND HUMAN RIGHTS IN DAVID KINLEY: HUMAN RIGHTS IN AUSTRALIAN LAW (David Kinley ed., The Federation Press 1998).

¹⁰² *Taxpayers' Charter: What you Need to Know*, AUSTRALIAN TAXATION OFFICE last accessed Dec. 12, 2015, <https://www.ato.gov.au/workarea/DownloadAsset.aspx?id=9438>.

¹⁰³ See R.L. DEUSCH ET. AL., AUSTRALIAN TAX HANDBOOK 23 (70th ed. 2015).

¹⁰⁴ The rights are that the tax authorities will: (1) Treat you fairly and reasonably, (2) Treat you as being honest unless you act otherwise, (3) Offer you professional service and assistance, (4) Accept you can be represented by a person of your choice and get advice, (5) Respect your privacy, (6) Keep the information we hold about you confidential, (7) Give you access to information we hold about you, (8) Help you to get things right, (9) Explain the decisions we make about you, (10) Respect your right to a review, (11) Respect your right to make a complaint, (12) Make it easier for you to comply, (13) Be accountable.

the Australian taxpayer bill of rights, three deserve special discussion in connection with collection of unpaid taxes: the right to receive an explanation of decisions, the right to a fair and reasonable treatment, and the right for an independent review.

The right to an explanation of decisions requires that the Australian tax authorities provide the taxpayer notice regarding tax determinations the basis for the decisions. The right to a fair and reasonable treatment includes on one hand, the right to be respected by the tax authorities and on the other hand, the right to equal treatment under the law even though the equality aspect itself is not mentioned in the provision and has to be considered more limited especially when it comes to discretionary decisions. Although the right for an independent review exists within the charter, it is limited in reach as the tax authorities have to the authority for discretionary decision-making.

B. *The EU and the EU Member States*

1. *The European Union*

The European Union serves as a supranational body limited to influencing just those areas of legislation of the member states within the competences explicitly transferred to the EU. Historically, tax law, as one of the most essential areas of national rather than supranational law, has largely remained with the member states. Exceptions to this general rule exist in the area of cross-border taxation, but tax procedure law and especially tax collection enforcement do not fall under the competences of the Union. EU law has two components: primary and secondary. Primary EU laws have a status similar to a nation's constitution, and all other rules must fall in line with the primary laws. Secondary EU laws operate in a manner similar to statutes of member states and have a more specific focus than primary laws. Both types of EU law have priority of application over the national law of the member states, but the primary laws only sporadically contain direct tax rules, while the secondary laws concerning taxes focus on aspects of cross-border transactions and information exchange.

However, under the principles of subsidiarity and proportionality, the existing competences of the EU apply without limitations to other areas of law outside of the usual scope of EU law legislation if necessary to fulfill the goals of the EU rules.¹⁰⁵ One prominent illustration of such an extension beyond the primary scope are the EU freedoms under which, for instance, one EU citizen cannot be discriminated against because of his citizenship in another EU member state. Even though this anti-discrimination rule is not inherently tax specific, it would apply to any discriminative tax rule in a member state, including discriminating enforcement of tax collection.

¹⁰⁵Consolidated Version of the Treaty on the Functioning of the European Union art. 5, 2002 O.J. (C 326) 01 [hereinafter TFEU], available at <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012E%2FTXT>.

In the context of this Article, several aspects of European law overlap with tax collection and enforcement. The EU fundamental freedoms consist of four main groups of freedoms: the free movement of capital; the free movement of goods; the free movement of persons; and the free movement of services. Even though these freedoms do not have tax law as their focus, they influence the ability of member states to prevent companies or individuals with existing tax debt from conducting cross-border activities or leaving the member state. Furthermore, the state aid rules of the EU limit the ability of member states to grant tax deferrals and tax forgiveness for businesses beyond a certain threshold. In addition, a secondary act, the Tax Claims Recovery Assistance Directive, influences the framework of tax enforcement through the creation of an EU-wide enforcement network. Finally, Commission efforts in support of the implementation of debt relief mechanisms are evident throughout the member states.¹⁰⁶

a. *Basic Freedoms of the EU and the Enforcement of Tax Debt Collection.*

In the context of tax debt and basic freedoms, two of the freedoms granted by the EU have special importance to this discussion: the free movement¹⁰⁷ of persons and the freedom of establishment.¹⁰⁸ As discussed above, a special treatment of foreign citizens in tax collection procedures is authorized in Switzerland and can lead to prevention mechanisms such as temporary preventive restraints, which directly affect the taxpayer. Under EU law, such an action could, however, directly violate the basic freedoms, because a seizure of assets based solely on a taxpayer's desire to move to another EU-member state or the obligation of making certain types of advance payments may discourage cross-border activities or the movement of businesses between EU countries.

Counterincentives to free movement across borders violate a fundamental freedom. Therefore, there exists a potential conflict between the protection of fiscal interests of the member states such as Switzerland which use restrictions against movement as a tax collection enforcement mechanism and the goals of the European Union. While EU law prohibits discrimination of and limitations on cross-border activities, it does not specifically purport to prohibit debt collection in any way as long as the debt was created on a valid basis.¹⁰⁹ Accordingly, member nations can use their own enforcement mechanisms to collect tax debt even if the taxpayer in question intends to move to another EU member state because the enforcement of debt, which is due does not represent a limitation of movement but rather a normal and adequate procedure. The only limitation is direct discriminatory treatment of taxpayers from other EU countries who are in the same situation as local taxpayers.

¹⁰⁶Commission recommendation of 12.3.2014 on a new approach to business failure and insolvency SWD (2014) 61-62 (Mar. 12, 2014).

¹⁰⁷TEFU art. 45.

¹⁰⁸TEFU art. 49 f.

¹⁰⁹Case C-269/09, Spain v. Comm'n 12.07.2012 E.C.J. Nr. 69; Case C-250/95, Futura v. Administration des Contributions 15.05.1997 E.C.J. I-2492.

b. *EU State Aid Law*. In addition to the basic freedoms protecting individuals, the state aid law aims to protect the EU market itself. As such, it has the goal to prevent any distortions caused by the states' intervention through subsidies in the broadest sense. State aid law is in no way limited to direct grants; actually, debt forgiveness and tax benefits represent two of the main fields in which the EU commission provides aid to member states. As those two areas themselves already have a high level of complexity, the forgiveness of tax debt, which includes both, raises even more questions as seen through recent cases in this field.¹¹⁰ To put it briefly, based on the European Court of Justice (ECJ) legislation, there exists an invisible line between debt forgiveness and taxation in the state aid field which divides the pure public law area of tax law from the actions of a state in its function as creditor; under the ECJ doctrine, for most state aid cases, the "private investor test" applies, under which the court examines whether a private investor would have acted similarly in the situation of the state.¹¹¹ For example, a debt forgiveness of 50% would not be considered state aid if a private creditor would believe that such a solution would be more beneficial for him than the insolvency of the company. Such an analogy, however, cannot be drawn in tax law, which contains arbitrarily¹¹² defined tax rates and benefits. Therefore, a tax specific framework, which takes into account the uniqueness of the tax system, is necessary.¹¹³

The ECJ held that a state's actions can be considered under the private investor test only when the state can prove that its actions were motivated by private and not authoritative interests.¹¹⁴ As a result, a state cannot take into account if a company is exceptionally important for the regional economy or if the insolvency of one company will cause insolvency of various suppliers.¹¹⁵ As all member states of the EU have to comply with this rule, debt forgiveness is strictly limited, apart from certain exceptions like the *de minimis* threshold.¹¹⁶ If a country still wants to grant state aid, it has to apply for a waiver of

¹¹⁰ See, e.g., Case C-507/08, Slovakia v. Comm'n 22.12.2010 E.C.J.

¹¹¹ Wolfram Cremer, AEUV art. 107 Nr. 21 f. in Calliess/Ruffert, EUV/AEUV (4th ed. 2011.).

¹¹² The word "arbitrarily" here is used in the sense that political decisions steer the tax system; even though some general tax principles like progressivity may apply, the exact tax burden is not given by natural law but man-made.

¹¹³ See on the issue of "normality" in tax state aid law and the definition of a tax benefit Wolfgang Schön in Koenig/Roth/Schön: Aktuelle Fragen des EG-Beihilfenrechts 115 f., addition to the ZHR 2001, 133.

¹¹⁴ Case C-124/10, European Commission v. EDF, 5.6.2012 E.C.J.

¹¹⁵ This statement may sound harsh, but it must be put in the context of the early stages of the EU, when in Germany and France the coal industry remained a strong part of the economy and because of its decreasing profitability the alternative to the state aid rules would have created an "arms race" over the highest coal subsidies in Europe.

¹¹⁶ The state aid rules do not apply to small amounts of aid under 200,000 euro in total in a 3-year period as such amounts could not distort the EU-wide market to a significant extent and controlling all cases of such size would prove impractical.

the European Commission, which may grant exceptions from the rule only if the state applying for the exception meets specific conditions.¹¹⁷ Of recent importance, the use of these exceptions saved various financial institutions during and after the financial crisis.¹¹⁸

One of the most relevant questions in the area of tax law during the recent years concerns the interplay of the EU and the national law on debt forgiveness. The issue arose when the German tax authorities waived the right to tax fictional profits created in the accounts of (nearly) insolvent companies¹¹⁹ when private investors forgave a part of their debt.¹²⁰ For example, private investors forgave a company that had assets valued at 1.5 million euro and a debt of 2 million euro half of its debt because the private investors thought that in an insolvency procedure they would receive less than the book value of the property. In such a case, the book value of the company changed from negative 0.5 million euros to positive 0.5 million euros and the company “made” a 1 million euro fictional profit.

Under German law, the tax authorities had the right to tax the fictional profit. Because the situation created no real gain but just a change in the book value of a nearly bankrupt company, the authorities waived their right to impose a tax on this form of profit. The problem in this case was that a “private investor” who received the right to enforce a debt after other private investors already waived their rights would not give up his entire claim because he could recover at least a part of the sum in an insolvency procedure.¹²¹ However, as the government acted from a purely authoritative position, which is not comparable to the situation of private investor who grants tax relief, the tax system was the dominant basis for the test. The High Tax Court of Germany approved the grant of relief under state aid considerations, amongst other reasons, because the general tax principle of taxation based on economic capacity would be the basis for relief under the following consideration: the principle requires that taxation follows the real increase of

¹¹⁷TEFU art. 107 (2), (3).

¹¹⁸See, e.g., *State aid: Commission adapts crisis rules for banks*, EUROPA, last accessed Dec. 12, 2015, http://europa.eu/rapid/press-release_IP-13-672_en.htm.

¹¹⁹This happened based on the so called “Sanierungslass” (restructuring order) Ertragsteuerliche Behandlung von Sanierungsgewinnen; Steuerstundung und Steuererlass aus sachlichen Billigkeitsgründen (§§ 163, 222, 227 AO) GZ IV A 6 - S 2140 - 8/03.

¹²⁰The circumstances presented here raise the issued addressed in section 108 of the United States tax code. The issue of debt forgiveness arises not in the context of collection of the tax but on its imposition. Yet, the nexus between forgiveness at the imposition stage versus the collection stage presents only one of semantics for the taxpayer facing the situation.

¹²¹For example, five creditors decide to forgive half of the total debt to a nearly insolvent company. If now a new debt is created for whatever reason, the new creditor would not give up the whole claim just because earlier some creditors gave up a part of their claim. He would consider the new circumstances and analyze if the debtor could pay the whole debt to him or not. He especially would not, like the tax authorities in Germany, give up his whole claim while the other creditors still hold half their claim.

economic capacity of the taxpayer.¹²² Since only a fictional increase exists and the taxpayer emerged no better off economically than before the debt relief, no factual basis existed for taxation under the general principles guiding the tax law of Germany. As a result, the *Sanierungserlass* only articulates what the constitutional principles of equal treatment require the state to do anyway; the state has to tax taxpayers equally based on their economic capacity and not some fictional economic capacity. Therefore, the measure is an essential part of the tax system which prevents unreasonable taxation and not state aid.

This case, however, demonstrates the complexity of issues at the intersection of debt forgiveness and taxation and that EU member states must consider EU law before including new debt forgiveness regulations in their national legislation.¹²³ How different the resulting tax systems can still be will be shown in the examples of three member states of the EU: Germany, Croatia, and the UK.

c. *Tax Claims Recovery Assistance Directive*. The administrative support in collecting funds amongst member states has a long-lasting tradition.¹²⁴ The current EU rule on tax enforcement—the Tax Claims Recovery Assistance Directive¹²⁵—was introduced as a measure to support inter-European trade by allowing member states to receive due taxes even if the taxpayer himself or his assets are out of the reach of tax enforcement of the respective state. Such a solution made it possible for tax authorities to be more accepting of taxpayer activities in other EU countries without the need for potentially harmful business measures. The directive included regulations regarding information exchange¹²⁶ and delivery of notices,¹²⁷ which are necessary to fulfill the prerequisites for collection and enforcement.

If the conditions for enforcement in a member state are met and the member state needs the enforcement to take place in another member state, it can

¹²²Bundesfinanzhof [BFH] [Federal Tax Court], 25.3.2015 – X R 23/13 Rn. 75 f (Ger.).

¹²³Competition drives the overriding concern at the EU level. If one nation forgives debts and another does not, does the company in the nation forgiving the debt achieve a competitive advantage over one in the country that does not forgive the debt? Does the country forgiving the debt cause other nations to, in effect, subsidize the forgiveness? Because the EU binds countries in certain economic ways but does not make all of their laws uniform, a mismatch in a tax law concerning forgiveness of debt can create an economic imbalance? This makes national laws on debt treatment within a system such as the EU much more difficult to balance than in a unified system such as the United States where federal debt collection issues apply across the entire country.

¹²⁴See Council Directive 76/308/EEC of 15 March 1976 on mutual assistance for the recovery of claims resulting from operations forming part of the system of financing the European Agricultural Guidance and Guarantee Fund and of the agricultural levies and customs duties OJ L 73, 19.3.1976, 18.

¹²⁵Council Directive 2010/24/EU of 16 March 2010 concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures, *available at* <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:084:0001:0012:EN:PDF>.

¹²⁶Council Directive 2010/24, Tax Claims Recovery Assistance Directive, art. 5, 2010 O.J. (L 84/1)(EU) [hereinafter TCRAD].

¹²⁷TCRAD art. 8.

issue a request for enforcement directed to the tax authorities in the respective member state. In the case that the debt is not challenged in the requesting state, an enforcement procedure will be initiated in the other state. Moreover, if the tax system of the requesting country normally allows collecting and enforcing tax debt even if the basis for the debt is challenged, the tax collection in another country can still take place under the directive.¹²⁸

2. Germany

The German tax collection system is built around the country's federal structure. Tax collection is within the competences of the *Länder*, the German federal states. To ensure equal treatment of taxpayers across Germany, those federal states agreed on an interstate contract, which defines the basic procedures of tax collection. Due to the rather low impact of the economic crisis in Germany and various other reasons such as a rather conservative accounting in comparison to global standards and low individual debt, the need for tax debt restructuring has not arisen as much as in other EU-countries.

a. *Enforced Tax Collection.* Enforced tax collection in Germany is executed by the tax authorities, either by the authority that issued the primary tax assessment or through the cooperation rules by any other tax authority in the country.¹²⁹ The tax authorities have a broad spectrum of measures for enforcement, which include: the seizure of bank accounts, the seizure of property, the failing for an insolvency procedure for corporations and the filing of property evaluation for individuals. The tax authorities can also use a preventive distraint in order to protect a future claim.¹³⁰ In general, Germany has adopted preventive distraint rules similar to those in Switzerland; they are different from permanent asset seizures in the way that just the possession, not the ownership rights are taken from the owner and the property just is used as collateral.¹³¹ Also they are limiting the transfer of tangible property to a foreign country¹³² or converting existing assets into money or other assets which can either be cash or cash equivalents to facilitate the transfer of an asset out of the country.¹³³ The German system as well requires that a special not purely economic reason exist and the plain financial situation of the taxpayer be not sufficient.¹³⁴ Unlike in Switzerland, however, the fact

¹²⁸TCRAD arts. 11 (1), 14 (4).

¹²⁹Abgabenordnung [AO] [Duties Act] 1.10.2002, BUNDESGESETZBLATT, TEIL I (BGBl. I) at 3866, § 250, last amended by Gesetz [G], Dec. 3, 2015, BGBl I at 2178 (Ger.), available at http://www.gesetze-im-internet.de/ao_1977/.

¹³⁰Bundesfinanzhof [BFH] [Federal Tax Court] Aug. 28, 1968, 93 SAMMLUNG DER ENTSCHEIDUNGEN UND GUTACHTEN DES BUNDESFINANZHOFES [BFHE] 405, 1968 (Ger.).

¹³¹Gerhard Bruscke, *Möhnese: Dinglicher Arrest im Steuerrecht*, 41 DStR 54, 54 (2003).

¹³²Finanzgericht Berlin Brandenburg [FG Bdbg] [Berlin Brandenburg Tax Court] 29.1.1996, ENTSCHEIDUNGEN DER FINANZGERICHTE [EFG] 1078, 1996 (Ger.).

¹³³Bundesfinanzhof [BFH] [Federal Tax Court] 2.21.1952, 56 SAMMLUNG DER ENTSCHEIDUNGEN UND GUTACHTEN DES BUNDESFINANZHOFES [BFHE] 225, 1952 (Ger.).

¹³⁴Bundesgerichtshof [BGH] [Federal Court of Justice] 10.19.1995, 131 ENTSCHEIDUNGEN DES BUNDESGERICHTSHOFFS IN ZIVILSACHEN [BGHZ] 95 (105), 1995 (Ger.).

that the taxpayer does not have German citizenship cannot in itself trigger certain remedies.¹³⁵ Because of the European regulations, the term “out of the country” means that interaction with other EU countries (transfer of assets) usually will not trigger the right to a distraint.

After Germany makes a tax assessment, the taxpayers have limited options to protect himself from enforced collection. Protest against the material part of a decision does not postpone enforcement as the fiscal interest of the state overrides postponement of collection.¹³⁶ A procedural protest against the enforcement generally does not stop the enforcement procedures. A taxpayer cannot materially protest against the assessment itself in the enforcement procedure if he has not done so within the assessment procedure, but he can consider a procedure under § 258 AO, which grants him protection from enforcement measures if the measures the tax authorities plan to take are not the least harmful for the taxpayer while equally promising for the tax authorities.¹³⁷

b. *Tax Debt Forgiveness and Deferral.* While the interstate agreement defines the procedural rules, the German Duties Act (Abgabenordnung, AO) contains the essential material rules of tax forgiveness. As a result, under German law there exist two main rules regarding tax forgiveness: a substantive rule contained in section 227 for tax forgiveness in cases defining application of the merits of the imposition of tax; and a procedural rule contained in the interstate agreement called deferral agreement “Stundungserlass” which addresses forgiveness from a collection perspective. Besides those rules, the special provision regarding tax forgiveness in extraordinary circumstances in the § 163 AO also bears mentioning.

The rule for extraordinary circumstances is based on the idea that the legislator cannot predict all factual situations in which a tax rule will apply and consequently serious inequitable solutions could arise, which this rule should counteract. The rule does not state explicit criteria besides the worthiness of the taxpayer and the extraordinary circumstances presented by the situation. However, because one of the criteria for the application of this rule requires that the legislature would have acted if it knew of the potential situation, the application of this rule has limited application because in most cases in which the legislature could have acted but did not, the presumption exists that the legislature did not want to act.¹³⁸

The rule for tax forgiveness in cases where the taxation would be inappropriate follows the main goal of adapting the personal circumstances of a taxpayer to his tax obligation.¹³⁹ As such, the rule does take into account

¹³⁵Reichsfinanzhof [RFH] [Former High Tax Court of Germany] 4.6.1932, RSTrBl 419, 1932.

¹³⁶KLAUS TIPKE ET. AL., *STUEERRECHT* para. 22 nr. 25 (20th ed. 2010).

¹³⁷If this is the case, the tax authorities will have to move to an alternative measure for enforcement purposes. However, generally no stop of tax collection procedures can be achieved.

¹³⁸BFH VII R 54/72, BFHE 116, 87, BStBl II 1975, 727.

¹³⁹Fritsch AO § 227 Erlass in Koenig AO, 3. A. Nr. 13. (3d ed. 2014).

the current economic situation of the taxpayer; however, it requires a strong reason in the personal and social circumstances to grant a tax relief and is not easily granted.¹⁴⁰ In this regard the rule is therefore similar to the Swiss solution. The *Stundungserlass* rules define, despite the name, the procedural application of deferral rules and tax forgiveness rules. As the tax authorities of the federal state are strongly hierarchical and the hierarchies do not match perfectly from state to state, the act defines explicitly the competences of certain elements of the tax administration in regard to the cases which they can compromise. Tax forgiveness is possible for every taxpayer; only the exact agent that makes the decision differs based on the size of the deferral and forgiveness. While the German system is therefore far more equitable between taxpayers that cannot pay their tax debt, it is also more rigid in granting the tax relief (be it deferral or forgiveness) to any taxpayer.

c. *Taxpayer Rights*. The German Fundamental Law, “Grundgesetz,” the *de facto* constitution of Germany, similarly to the Federal Constitution in Switzerland, has the role of creating the basis for taxpayer rights. However, it does not contain special rules applying to tax law. The reason for this is primarily the long constitutional tradition in Germany under which various constitutional tax rights have been developed based on existing provisions, so that an adaptation has not been necessary to protect taxpayers. The main rules applying to the analyzed rights are article 103 *Grundgesetz* and article 3(1) *Grundgesetz*. In article 103 of the *Grundgesetz* it is defined that everyone has the right to a hearing in front of a court on their case. Furthermore, article 3 of the constitution, which defines equality of all citizens, has been interpreted as a foundation for equal treatment of taxpayers and taxation which is based on economic capacity. Through this interpretation, the equality of taxpayers has protection on a constitutional level.

Due to the constitutional interpretation and expansion of general tax principles onto the sphere of tax law, there was no reason to create special tax law principles, as they would be redundant. However, the German Duties Act contains further rules defining how the state must ensure these rights. So article 91(1) of the act which defines the right to be heard guarantees every individual whose rights may be affected by a decision to make a statement before a decision can be rendered which could affect the rights of a taxpayer, and the violation of these rights violates the duties of the tax official.¹⁴¹ This provision does not apply to enforcement measures based on the explicit language of the statute.¹⁴² Just a right to previous information is guaranteed.¹⁴³ This provides another expression of the view that the taxpayer must exercise all procedural rights to protest against the assessment procedure before the

¹⁴⁰For a case in connection with a transfer of land that created a disproportionate tax burden, see, for example, BFH IV R 9/06, BStBl. II 2010, 664.

¹⁴¹See, e.g., Oberlandesgericht München [OLG München] 28.09.1995, 1 U 2954/95.

¹⁴²Article 91 (2) 5 Abgabenordnung.

¹⁴³Article 260 Abgabenordnung.

state makes the assessment and that once the enforcement phase begins the taxpayer may only raise deficiencies of the enforcement procedure not the merits of the liability itself.

3. Croatia

While Croatia has membership in the EU, it represents the least developed country analyzed in this Article. The tax collection system in Croatia, although now significantly improved through recent reforms, has not yet achieved the efficiency and sophistication of the systems of Western European countries. The economic crisis, a nation-wide high unemployment rate and significant private debt have lead in recent years to a steep increase of tax collection problems. Currently in Croatia about 8% of the adult citizens and more than 40,000 corporations have blocks on their bank accounts.¹⁴⁴

a. *Enforced Tax Collection.* Tax authorities under Croatian law have the right to seize tangible property, funds in bank accounts¹⁴⁵ and tax refunds.¹⁴⁶ However, in almost all cases the tax authorities do not go beyond offsetting tax refunds, seizing the funds in bank accounts of individual taxpayers and blocking the accounts from further use until satisfaction of the tax debt occurs. The informal limit on pursuing only the bank accounts of individuals does not exist in the case of corporate tax debt and collection will be enforced by any means.¹⁴⁷ The decision not to proceed with the legally possible enforcement over property, especially real estate of individuals, is not clearly explained by the tax authorities; it may however be a policy decision not to evict taxpayers or seize their valuable mobile property (cars, etc.) as the sheer number of cases which would arise would not be easily accepted in the general population.¹⁴⁸ The high level of personal debt which is often secured through mortgages may also play a role from an efficiency standpoint because in most cases after a forced sale no value would be left to the non-mortgage creditor. For the enforcement of collection of tax debt, the general rules of the foreclosure act¹⁴⁹ apply as long as no special rules of the Tax Code define otherwise.¹⁵⁰ Preventive measures in general may occur at any time before

¹⁴⁴ See Coration Financial Institutions Agency, *Statistical Analysis*, Nov. 2, 2015, <http://www.fina.hr/lgs.axd?t=16&id=16554>.

¹⁴⁵ Article 139 Opći porezni zakon [OPZ] [General Tax Act] NN 147/08, 18/11, 78/12, 136/12, 73/13, 26/15, available at www.zakon.hr/z/100/Opći-porezni-zakon.

¹⁴⁶ OPZ art. 115 (1).

¹⁴⁷ Under the current system it has become quite common that tax authorities force a company into the pre-insolvency procedure. However, if the company remains solvent, the tax authorities may place tax liens on land in lieu of the pre-insolvency process. See *Position of the Tax Authorities Statement*, Ministry of Finance, Mar. 13, 2014, <http://www.mfin.hr/hr/novosti/vlada-je-dala-iste-sanse-svim-poduzeticima-2013-03-14-13-25-36>.

¹⁴⁸ The United States has essentially reached this same conclusion regarding the seizure of tangible property and homes to satisfy personal tax debts.

¹⁴⁹ Ovršni zakon [OZ] [Enforcement Act] NN 112/12, 25/13, 93/14, available at <http://www.zakon.hr/z/74/Ovr%C5%A1ni-zakon>.

¹⁵⁰ OPZ art. 138.

the assessment if the taxpayer appears unable to pay the tax debt.¹⁵¹ They can take the form of liens on immobile property or preventive distraints on mobile property. No special rules for internationals apply but the general EU regulations have to be considered so that no discrimination within the EU is possible.

Taxpayers have to receive notice about their tax debt in advance even if they live abroad. Failure to at least attempt to provide appropriate notice to the taxpayer prior to taking collection action may result in the right to challenge the decision of the tax authority. However, once the decision of the tax authority has been issued, it can be used at any moment as a basis for an enforcement request issued directly to the government financial institutions agency (FINA) which then ensures that all banks in the country seize all bank accounts of the taxpayer up to the amount of the total debt.¹⁵² Once the funds are seized, the taxpayer's only choice, if he disagrees with the seizure of the funds, is to directly sue the tax authorities for refund. When all of the funds in a taxpayer's bank accounts combined do not contain enough funds to fully satisfy the outstanding tax debt, all of the taxpayer's existing bank accounts as well as any newly opened accounts in the country will stay blocked except funds for basic living expenses (if the taxpayer opens a new protected account for this purpose). If the taxpayer deposits new funds into the blocked bank accounts the bank will redirect the funds to the tax authorities' account.¹⁵³ As it is illegal in Croatia to pay a salary in cash or by check or any method other than bank transfer,¹⁵⁴ the majority of an individual's salary will be seized until satisfaction of the debt.¹⁵⁵ While individuals' accounts can stay blocked indefinitely (at least 10 years from the filing of the request), corporations will move into a (pre)insolvency procedure if their account stays blocked for 60 days.¹⁵⁶

b. *Tax Debt Forgiveness Outside of Pre-insolvency Procedures.* Debt forgiveness within the Croatian system has had a rather peculiar development during the recent years due to the steep increase of personal indebtedness in the country. The government decided to introduce various one-time measures

¹⁵¹OPZ art. 158.

¹⁵²The exact process of seizure is defined by the Enforcement of Monetary Funds Act – Zakon o provedbi ovrhe na novčanim sredstvima NN 91/10, *available at* <http://www.zakon.hr/z/346/Zakon-o-provedbi-ovrhe-na-nov%C4%8Danim-sredstvima>.

¹⁵³OZ art. 177 f.

¹⁵⁴Article 90 Pravilnik o porezu na dohodak [Income Tax Regulation] NN. 95/05, 96/06, 68/07, 146/08, 2/09, 9/09 - ispravak, 146/09, 123/10, 137/11, 61/12, 79/13, 160/13, 157/14, *available at* http://www.porezna-uprava.hr/hr_propisi/_layouts/in2.vuk.sp.propisi.intranet/propisi.aspx?id=prof6.

¹⁵⁵The effect of the ongoing bank account levy coupled with employment laws requiring deposit of wages into the bank account drives taxpayers into the underground economy.

¹⁵⁶Article 18 Zakon o financijskom poslovanju i predstečajnoj nagodbi [Pre-Insolvency Procedure Act article] NN 108/12, 144/12, 81/13, 112/13, 71/15, 78/15, *available at* <http://www.zakon.hr/z/543/Zakon-o-financijskom-poslovanju-i-predste%C4%8Dajnoj-nagodbi>.

to ease the negative effects of the accumulated tax debt.¹⁵⁷ Those measures allowed individuals,¹⁵⁸ as well as corporations,¹⁵⁹ to pay their tax debt off in installments. While the measures decreased the pressure of the tax debt for some of the taxpayers, they did not solve the overall problem because for individuals no effective institutional mechanisms exist in the tax system to enable tax forgiveness. Additionally, Croatian law does not have general insolvency procedures for individuals, so that the tax debt remains on the books until (1) the expiration of the statute of limitations, and (2) until four more years after the limitation no tax collection was possible, and (3) the tax authorities decide to remove the debt from their books.¹⁶⁰ While the tax code before the introduction of the pre-bankruptcy procedures included a provision that allowed tax authorities to compromise on tax debt, this provision has never had a large impact on the tax system.¹⁶¹

c. *Tax Debt Forgiveness in the Pre-insolvency Procedure.* The pre-bankruptcy procedure is the result of new developments in Croatia. The pre-bankruptcy procedure was enacted to increase the efficiency and optimize the chances of recovery for the taxpayer-company.¹⁶² The pre-bankruptcy procedure is only open to corporations because under Croatian law despite various reform attempts no bankruptcy procedure for natural persons exists. The pre-bankruptcy procedure allows the creditors and the taxpayer to reach an agreement on debt forgiveness, payment plans, potential debt-equity swaps or the transfer of certain property between the taxpayer and the creditors.

The tax authorities in Croatia were due to the widespread issue of tax debt forced to handle debt forgiveness on a large scale. As a result of equity considerations and also the need to prevent abuse of this rule on a local level, the Minister of Finance issued orders regarding tax forgiveness in pre-insolvency procedures. The orders distinguished between small and large debts; the larger the debt, the higher the rank of the tax official that decides the case and the higher the discretionary power for decisions in the case. While small and

¹⁵⁷ See generally Nikola Mijatović & Šime Jozipović, *Die Bedeutung des neuen kroatischen Finanzrechts für die Angleichung an die fiskalischen Standards der EU*, ZEITSCHRIFT FÜR OST-RECHT, 231- 45 (2014).

¹⁵⁸ Zakon o naplati poreznog duga fizičkih osoba [Tax Enforcement against Natural Persons Act] NN 55/13, available at <http://www.zakon.hr/z/583/Zakon-o-naplati-poreznog-duga-fizi%C4%8Dkih-osoba>.

¹⁵⁹ Zakon o naplati poreznog duga uzrokovanog gospodarskom krizom [Tax Enforcement of Debt Created due to the Economic Crisis Act] NN 94/13, available at <http://www.zakon.hr/z/658/Zakon-o-naplati-poreznog-duga-uzrokovanog-gospodarskom-krizom>.

¹⁶⁰ The time in most cases will be about 12 years after the taxable event occurred. However, the head of the tax authority has no obligation to delete the tax debt even after this time. See OPZ art. 120 (4).

¹⁶¹ See Šime Jozipović, *The Treatment of Taxpayers by Croatian Tax Authorities in the Pre-Insolvency Procedure*, COLLECTED ARTICLES OF THE LAW FACULTY OF THE UNIVERSITY OF RIJEKA n.38 (forthcoming). The same was true in the United States until 1991, when the IRS decided to start using the offer in compromise provisions that had been on the books since the 1860s.

¹⁶² Nacrta Zakona o financijskom poslovanju i predstečajnoj nagodbi [Draft of the Pre-Insolvency Procedure Act Form] 7/5/2012, Class: 423-05/12-01/02 Inumber: 5030105-12-1.

medium-size debt could not be waived but only the interest on it forgiven, large debt could be drastically reduced through the procedure. In conclusion, large businesses and businesses that have accumulated their tax debt for a long time could receive millions in tax incentives and therefore gain an unfair advantage in comparison to small businesses and diligent businesses that were really just affected by the economic crisis.¹⁶³

d. *Taxpayer Rights.* In Croatia, like in other analyzed civil law countries, the constitution provides the main source of general tax principles. However, due to the young age of both—the Croatian Constitution and the Croatian tax system—the implementation diverges from the models in Switzerland and Germany to a certain extent. In comparison to the other analyzed systems, the Croatian tax system is simpler. It aims, as one of its key characteristics, to provide a tax system its citizens can easily understand. At the same time, the Croatian Constitution, considered a modern constitution, places almost $\frac{1}{3}$ of its content into its bill of rights. As such, rights provided by the Croatian constitution grant its citizens a much more concrete statement of their rights than in other, older constitutions. Therefore, detecting taxpayer rights under Croatian law generally proves easier than in the more abstract systems of Germany, and to a certain extent, Switzerland.

The Croatian constitution has a general provision ensuring equal treatment before the law¹⁶⁴ as well as a provision that guarantees the right to challenge a decision in front of a court or other public body.¹⁶⁵ The equal treatment is a highly general rule whose application is defined by law. The right to challenge a decision is a procedural right. This right is, however, directly limited within the constitution. The guarantee of a right to challenge a decision does not apply if the challenging party was given another way of legal protection against the decision. Besides the general principles, the constitution also contains special tax principles in article 51, which guarantee equal treatment of taxpayers and taxation based on economic capacity.

Aside from the broad constitutional guarantees of rights, the Croatian General Tax Code (*Opći porezni zakon*), which regulates fundamental procedural issues for all types of taxes, contains its own bill of procedural taxpayer rights written in a manner easy for ordinary taxpayers to understand. These rights apply to the general tax code itself and the discretionary power of the tax authorities. The list is defined in the articles following article 5¹⁶⁶

¹⁶³For in-depth analysis on the above summarized issue and the equality problems, see Jozipović, *supra* note 161, at Section III.

¹⁶⁴CROATIA CONST. art. 3, 14 (2).

¹⁶⁵CROATIA CONST. art. 18 (1).

¹⁶⁶OPZ art. 5.

and contains an open list of rights.¹⁶⁷ In addition to that, two special taxpayer principles exist in regard to the enforcement procedure—the principle of appropriate measures, which guarantees that the measure must be reasonable in comparison to the tax debt, and the protection of the taxpayer's dignity. Also, the general principles of administrative law apply and therefore all administrative procedures have to comply with that catalogue of rights as well.¹⁶⁸

Besides the principles that *de facto* define taxpayer rights, the Croatian tax authorities have also issued a document containing a list with explanations of procedural rights in the broadest sense, which itself has no legal effect but rather systematizes the rights and options a taxpayer has during a tax procedure.¹⁶⁹ The Croatian system can be considered an intermediate solution between the analyzed civil law systems that do not have a separate list of rights but rely on the principles of the tax code and their constitution, and the systems of common law which do not have a strong constitutional influence on the tax principles but which therefore tend to inform the taxpayers about their rights scattered through the tax laws of the country.

From an equity standpoint, the current situation with respect to tax collection in Croatia is not optimal. Due to the fact that only corporations may receive debt forgiveness in this procedure, individuals remain a vulnerable group within the tax system which offers them the relief of deferred payments but not forgiveness. As a consequence, the current system promotes illegal work by individuals as a means of receiving their salaries and non-compliance with tax laws.

4. *United Kingdom*

The United Kingdom has a highly developed tax system with a strong emphasis on the IRS that the tax authorities offer to the taxpayer. The tax system is based around a federal agency that is responsible for the collection of all duties and which has a special department for enforcement procedures.¹⁷⁰ The UK has a rather strict tax system when it comes to collection, but this is balanced by the rather simple private insolvency procedures for individuals. Due to the historical connection between Australia and the United Kingdom,

¹⁶⁷The rights are: article 6 (1) the legality of assessment, article 6 (2) the right to an assessment that includes all relevant facts, article 6 (3) the right to be informed about your rights, article 6 (5) respect for taxpayers that are not fluent in the Croatian language, article 7 the right to protest, article 8 the right to privacy, article 9 the principle of good faith in the tax procedure, article 10 the economic approach of the tax authorities. However, those rights are complemented by the general administrative principles and, wherever the constitution grants special rights, those rights will apply as well.

¹⁶⁸For a detailed analysis of this issue see Jožipović, *supra* note 161, at Section II.

¹⁶⁹See *Prava Obveze*, PORENZA UPRAVA, last accessed Dec. 12, 2015, http://www.poreznaprava.hr/HR_publicacije/Prirucnici_brosure/156_PravaObveze.pdf.

¹⁷⁰See MALCOLM JAMES, *THE UK TAX SYSTEM: AN INTRODUCTION* 78 (2009).

many similarities can be observed in the structure of the tax system and the taxpayer rights.

a. *Enforced Tax Collection.* The existence of a fixed and determined tax liability serves as a prerequisite for enforced debt collection. Additionally, the collector must mail demand for the tax debt (and the taxpayer must refuse to pay) before collection begins.¹⁷¹ The demand does not have to be delivered to the taxpayer in person. Delivery to the taxpayer's last known address meets the requirement of this provision.¹⁷² Under UK law, enforcement actions include the seizure of earnings and pension income, the seizure of property, and initiation of a bankruptcy procedure. The seizure of movable property is made based on distraint.¹⁷³ Alternatively, the tax authorities can enter court proceedings for enforcement purposes.¹⁷⁴ Also, the tax authorities are authorized to assign private debt collectors with the collection of the tax debt.¹⁷⁵ In practice there is no guarantee that the collection will be made in the least invasive way just a protection of certain property under the collection manual is ensured.¹⁷⁶ A special regime applies to tax debt settlements as they are considered to produce a civil law claim and are therefore only enforceable under private law enforcement rules.¹⁷⁷

b. *Tax Debt Forgiveness and Deferral.* The tax authorities can offer a taxpayer to either get a deferral of the obligation to pay or to make an installment plan and pay off the debt over a longer period of time. Debt relief can generally occur only under through a bankruptcy proceeding. In exceptional cases the tax authorities can consider administrative relief from tax debt. A taxpayer can file for special relief if he considers that the debt assessment was excessive and if he is able to prove that: (1) it would be completely unreasonable, from the tax authorities perspective, to recover the estimated tax, (2) special relief has not been claimed before, and (3) the individual's tax affairs are up to date or will be under a special arrangement.¹⁷⁸

The deferral and installment plans are considered, from the perspective of the fiscal interest, so that the payment period will still be rather short due to the time that alternative enforcement would take and the problem that new tax obligations will come up for the next year.¹⁷⁹ Bankruptcy procedures are possible for both corporations and private individuals. After the bankruptcy

¹⁷¹Taxes Management Act, 1970, § 60 (1) (Eng.) [hereinafter TMA].

¹⁷²TMA § 60 (2).

¹⁷³TMA § 61 (1).

¹⁷⁴TMA § 65 (1), 66 (1).

¹⁷⁵ Even though the tax authorities can seize property independently, they will often for practicability/security reasons prefer to transfer this duty to a bailiff. See ROBERT W. MAAS, GUIDE TO TAXPAYERS' RIGHTS AND HMRC POWERS 215 (2d ed. 2009).

¹⁷⁶*Id.* at 216 f.

¹⁷⁷*Id.* at 215.

¹⁷⁸TMA ¶ 3A.

¹⁷⁹ See Maas, *supra* note 175, at 230 f.

procedure, corporations will be wound-up, but private individuals will generally receive a discharge of their tax debt.¹⁸⁰

c. *Taxpayer Rights.* The constitution of the UK is composed of various sources. For the area of civil liberties and human rights, especially in the context of this Article, the Human Rights Act of 1998 and the European Convention on Human Rights have to be considered. However, both have a very narrow impact in the area of tax law and tax procedure. Taxpayer rights are therefore listed in the UK's Charter of Taxpayers' Rights.¹⁸¹ The current Charter of Taxpayers' Rights in the UK was not that relevant due to innovativeness of its content *per se*, but rather because of its innovative approach of presenting the rights that belong to taxpayers in one central, easily understandable document.¹⁸²

The list of taxpayers' rights contains, amongst others,¹⁸³ the right to be treated even-handedly.¹⁸⁴ This right guarantees the taxpayer will receive fair and equal treatment in accordance to the guidelines of the tax authorities and the taxpayer's personal circumstances. The right to appeal is not separately mentioned, but the right to "be respected" includes the right to be informed of the right to appeal and the right to have the taxpayer's personal circumstances considered. The right to help and support to get things right also includes a broad right to information about which taxes are owed and why.

C. *Conclusions of the Comparative Analysis*

The analysis of five different civil law and common law jurisdictions both inside and outside of the EU as well as the supranational law of the European Union itself have shown that a high importance of taxpayer rights protection is a common phenomenon in countries with a developed tax system. All jurisdictions handle intrusion into the taxpayers' sphere of rights with special respect and usually view any limitation of the freedoms or the property of taxpayers through its proportionality with the fiscal interests of the state. However, while acknowledging the idea of a fair tax system that protects taxpayers' rights solutions for certain issues vary considerably depending on differences in the general structure of the legal systems of the analyzed countries.

The enforcement phase in all jurisdictions requires first the issuing of a decision of a tax authority, which states the amount of tax debt owed and

¹⁸⁰ Insolvency Act, 1986, § 281 (Eng.).

¹⁸¹ GOVERNMENT OF THE UNITED KINGDOM, last accessed Feb. 28, 2016, <https://www.gov.uk/government/publications/your-charter/your-charter>.

¹⁸² James, *supra* note 170, at 78.

¹⁸³ (1) Respect the taxpayer, (2) Help and support the taxpayer to get things right, (3) Treat the taxpayer as honest, (4) Treat the taxpayer even-handedly, (5) Be professional and act with integrity, (6) Tackle people who deliberately break the rules and challenge those who bend the rules, (7) Protect taxpayers information and respect taxpayers privacy, (8) Accept that someone else can represent the taxpayer, (9) Do all we can to keep the cost of dealing with the tax authorities as low as possible.

¹⁸⁴ See *Taxpayers' Rights List*, GOVERNMENT OF THE UNITED KINGDOM, last accessed Feb. 28, 2016, <https://www.gov.uk/government/publications/your-charter/your-charter>.

the time frame to pay the debt. Only in exceptional cases when the taxpayer's actions jeopardize collection of the tax debt may tax authorities proceed with preventive measures. The analyzed civil law countries have clear mechanisms for this procedure that require the tax authorities to establish whether certain conditions are met which usually have to go beyond mere financial issues of the taxpayer before they can enter the enforcement phase. In detail, however, the prerequisites and extent of these measures vary. Switzerland allows for a very broad basis for advancing tax collection, especially in cases foreign taxpayers. Germany closely follows the Swiss rules, prohibiting, however, discrimination of foreigners on the mere basis that they are not German citizens or corporations. Croatia, on the other hand, has a more abstract rule, which does not differ largely from the general rules of Germany and partially Switzerland. The United Kingdom is like Germany and Croatia bound by the limitations of European law. Australia has very wide-ranged measures relating to the protection of revenue loss. The tax authorities can either use an extensive withholding system or enter preventive enforcement even before making an assessment.

All European jurisdictions have in common that a discrimination of EU corporations or citizens violates EU law and that through the Tax Claims Recovery Assistance Directive countries can enforce tax debt collection throughout the EU. The cross-border enforcement rules show that in today's time ensuring an effective enforcement in an international environment through multilateral rules serves as a viable option. The fact that the OECD model treaty also contains enforcement rules could therefore be a good step closer to a multinational tax enforcement system, which would not only ensure a better protection against revenue loss but, even more importantly, make the highly invasive preventive measures of tax collection in international cases unnecessary. To date, the United States only has collection language in treaties with five countries—Canada, France, the Netherlands, Denmark, and Sweden. The absence of collection language in the treaties with the United States limits cross border collection by the United States and by countries whose citizens go to the United States and appears out of step with modern trends in cross border tax collection. The inability to effect cross border collection, in turn, can impact fairness of tax systems in a world where movement of money occurs with such ease.

In the next step, after issuance of a tax assessment, all analyzed tax systems have a notification rule that closely connects to the right to be informed or the right to protest against a decision made by a public (tax) authority. While the basis may vary based on the human rights and taxpayer rights system of each country, each system essentially reaches the same result: A taxpayer has the right to know what he owes and the right to protest against the decision of the tax authorities if he disagrees with it. In conclusion, it therefore does not matter whether the basis of the rule is a constitutional tax procedure rule like in Switzerland, or just a taxpayer right under the bill of rights which is interwoven in the tax rules like in the common law jurisdictions or a combination

of abstract general procedural rights and special taxpayer rights as it is the case in Germany.

The same notification and protest right which applies to the general assessment does not necessarily carry over to the enforcement phase. The historical reasons for the different treatment may be partially doctrinal. The wording of the analyzed civil law constitutions usually includes a rule that only guarantees that a way to protect the rights of individuals has to be ensured, without a clear definition of what it has to look like. In practice, the main reason for such an approach exists in the urgency and the fiscal interest, which countries must protect after making an assessment. The German argumentation, however, may have played a role in most jurisdictions even outside of the doctrinal analysis, as the protection on the assessment level already grants the taxpayer an option to protest against the merit of the tax authorities' actions.

In the enforcement phase, most countries have the option to seize funds on bank accounts, seize property, block bank accounts for further use or monetize property that has been acquired through preventive measures. Only the Croatian system, as one of the less developed tax systems, does not strictly enforce all possible measures on natural persons due to policy and efficiency reasons. However, one big difference amongst the analyzed systems is the use of bankruptcy procedures for enforcement purposes. While especially the common law systems do include this option in their enforcement rules, civil law countries seem much more reluctant to grant their tax authorities such rights. Germany and Croatia both do not force private individuals into bankruptcy for tax debt, albeit for different reasons. Germany's rules about personal bankruptcy seek the long-term relief of the debtor and therefore a forced personal bankruptcy would not fit into the general logic of the system. Croatia simply does not have a personal bankruptcy law, so that such a procedure cannot exist. Switzerland goes even further and explicitly forbids its tax authorities from initiating bankruptcy proceedings, as the legal system is based on the belief that the state should not instigate a debtor's bankruptcy under ordinary circumstances. This variety of solutions shows that states take very different standpoints on bankruptcy issues and that these issues closely connect to the purpose of the respective insolvency procedures, to the position of the state in private activities and of course to national economic considerations.

In the area of debt forgiveness different approaches also exist. The Swiss and German systems have large similarities in their procedures and include equity considerations as well as economic hardship in their evaluation. These considerations spring from their constitutional and legislative requirements to treat taxpayers equally. Both common law countries have shown a strong commitment to treat taxpayers equally, especially by defining some guidelines but still granting the tax authorities discretionary power to decide on a case by case basis. However, the approach of the UK is especially due to the importance of the insolvency procedure rather limited. A big difference, however, exists between more developed tax systems and less developed tax systems. In

practice, the German system has a relatively limited reach but applies it very equitably towards all taxpayers, while the Croatian system primarily targets large debtors with its more sophisticated procedures. Moreover, the Croatian tax system shows in this regard a big emphasis on regulation and structuring in order to create a unified system across the country and avoid potential abuse. In general, therefore, the choice of tax forgiveness is often also a matter of belief in the neutrality and qualification of local tax authorities to come to an equitable result.

In relation to the basis and presentation of taxpayer rights, different approaches also exist. Australia, having no extensive bill of rights, puts a large emphasis on the Taxpayers' Charter, which contains a list of rights taxpayers have when interacting with tax authorities. Similarly, the UK, which does not have a single-document written constitution, has a well-structured charter of taxpayers' rights easily accessible to all taxpayers. On the other hand, Germany and Switzerland have nothing similar to a taxpayer bill of rights. They fully rely on the rights granted to taxpayers through the constitution and ordinary law, without the need for a codification in one place. This, of course, has the negative effect for the taxpayer that it becomes difficult to access all rights in procedural matters. However, it has to be considered that taxpayer rights, at least in Germany stem from long development, which was strongly influenced by the case law of the constitutional courts and courts responsible for tax matters.

As shown in the German segment, general constitutional rules such as the equality principle were the basis for the development of many taxpayer rights. German legal doctrines have created highly developed principles regarding taxpayer rights and do not need more concrete definitions of taxpayer rights from a purely legal perspective. From the perspective of taxpayer information, however, an overview would be helpful. The Swiss system weaves taxpayer rights into its constitutional and general federal law. However, the precision of the constitutional taxpayer rights shows the importance those rules have within the system.

Like the other civil law countries, the Croatian system does not have a separate bill of rights; however, it has in its Duties Act a list of tax law principles, which resemble some of the taxpayers' rights in the charters of Australia or the UK. While those rights are easily accessible and in line with the principle of simplicity of the tax system, the rights created by the Croatian system closely follow the German tax system without the same historical context as the German system because of the recent passage of Croatia's constitution. Due to the constitutional practice and the need for general systematization, the Croatian taxpayer rights in procedural matters split themselves between the Duties Act, the Administrative Procedure Act and the Constitution. As those abstract rules directly influence the legal system, it is not easy to pull them out of their natural environment and list them within one document. Therefore, it seems that tax systems of the civil law countries though strongly

based on legal principles have more difficulty with the creation of a document similar to a taxpayers' bill of rights.

Content-wise, a big overlap among all tax systems can be found, especially regarding the rights to information, protest and equal treatment. Equal treatment of taxpayers and the consideration of their economic capacity are generally accepted principles in all jurisdictions. Access to information and the right to protest are, albeit present in all jurisdictions, to a certain extent handled differently. Especially due to the strong fiscal interest in enforcing tax debt collection, many jurisdictions like those in Germany and Croatia do not deem it necessary to give taxpayers strong rights in the enforcement phase, as they have already had a chance to act after the assessment. As this question basically is a trade-off between efficiency and taxpayer protection without a clear delineation, the diversity of solutions and practices presents few surprises.

IV. The Future of U.S. Taxpayer Rights

Despite the rather complex solutions for both tax debt collection and debt forgiveness, the U.S. tax system remains flawed. The protection of taxpayer rights for low-income taxpayers has proven a significant problem in the current system which seeks impersonal solutions and remains characterized by its complexity. The legislation in this field aims to create a fair and equal system that effectively allows a well-informed taxpayer to challenge the decisions of the tax authorities. However, as presented above, such a system requires more than the plain statement of rights. Only a system based on actions that follow the defined policy goals can achieve the necessary fairness considerations.

One way to achieve the targeted level of practical implementation of taxpayer rights is the presented civil law model, which grants the taxpayers in most civil law countries a direct remedy against statutes or actions by tax authorities. The long constitutional tradition of protecting taxpayers in Germany supports this as a valid solution. However, the Swiss model, which does not rely on such a mechanism yet still provides support for taxpayers in collection matters, shows that even in a civil law system the German model does not provide the exclusive remedy for supporting taxpayer rights. The Croatian system shows that even a broad array of substantive taxpayer rights does not guarantee effective enforcement.

The enforceability of certain elements of the taxpayer bill of rights could influence many issues, which taxpayers currently face under the U.S. system. The procedural inequality faced by low-income taxpayers demonstrates the challenges in implementation. While a direct discrimination of a taxpayer would under most civil law constitutions be considered unconstitutional, and therefore such an approach as illegal, the problem in the United States does not lie with the case-by-case discrimination of taxpayers. It rather lies in the inherent discrimination of low-income taxpayers who do not have the same access to information and legal advice, and who therefore depend much more on an efficient tax authority for direction. The funding of a public body and

its problems would, however, in most cases not qualify as a legal problem of taxpayer rights but rather an administrative issue. Therefore, enforceable taxpayer rights would most likely just for themselves not be a sufficient solution for the problem.

As a result, it should rather be considered which elements of enforced tax collection could be included in the system to make it more transparent and enable a direct solution of the problem. One solution could be a fast-track insolvency procedure which would allow taxpayers to start over after just a few years similar to the solution in the UK. Such a mechanism would require a broad inclusion of existing and potential tax debt to be efficient. One big problem of such a solution would however be again the lack of information of low income taxpayers which would have to make a life changing decision about entering an insolvency procedure with insufficient information about alternatives and consequences. Therefore, it would be necessary to grant taxpayers at least in the phase of such a decision a sufficient insight into their obligations and a complete overview about their options at hand.

If such a solution is not achievable¹⁸⁵ or would have a too large impact on the system in general, different mechanisms could be possible to achieve a similar result. A bigger focus on the collection in the regular procedure without entering enforcement mechanisms or the shift to a more accurate withholding system could prevent numerous cases of enforcement from even happening. The fact that even well-developed western tax systems cut taxpayer rights in the enforcement procedure down shows that those countries most likely have avoided social issues in tax collection. The only other analyzed country that had stunningly similar issues with tax collection as the United States was Croatia. Here the tax collection issues were rather a result of the inefficiency of the regular collection system than the enforcement procedures. Therefore, a solution for the issues in the United States could be found in a reform of the procedures which take place before enforcement. Such a solution would also make sense if one takes into account the complex system of debt forgiveness, information distribution, enforcement and taxpayer protection which certainly is not without a reason so much more developed than the systems of many other analysed countries.

¹⁸⁵For example, such a solution may not work due to other debt. The United States has a large problem of debt which does not receive a discharge during the insolvency procedure. The debts excepted from discharge could have an influence on the effectiveness of such a measure.