

GOOD FAITH IN DOMESTIC AND INTERNATIONAL TAX LAW

The principle of good faith is a fundamental legal principle that exists both in public international law and in most domestic legal systems around the world. Irrespective of whether there is a civil or common law background, good faith plays a key role in the relationship between taxpayers and tax authorities in the domestic context, between contracting States in an international tax treaty context and between taxpayers and a contracting State in situations where the taxpayer invokes the principle of good faith under public international law. Notwithstanding its critical role in underpinning relationships, good faith can be difficult to define due to the underlying importance of subjective elements such as fairness, honesty and reasonableness. Overlapping concepts extend into different areas of law such as legitimate expectation, estoppel and acquiescence, and although the good faith requirement exists in many areas of law, it is often inherent rather than overt. These good faith based concepts often exist in both the domestic and international legal spheres applicable in a jurisdiction. The General Reporters are looking to examine the role that this good faith principle plays in both domestic and international law.

Good Faith in Domestic Law

Some states provide that good faith governs the relationship between taxpayers and tax authorities. The initial enquiry will involve an examination of the fundamental principles, rights and responsibilities of taxpayers, before focusing on aspects of good faith in the administration of tax in a jurisdiction. How does good faith affect taxpayer rights and requests for information from both taxpayers and tax authorities? How does good faith apply to the issue and implementation of tax rulings and advanced pricing agreements? What is the role and significance of advice provided through formal and informal answers by tax administrations? Are the conduct and conclusion of tax audits subject to a/the good faith requirement? How are genuine errors, made in good faith dealt with by the jurisdiction?

Other quite fundamental aspects of the role of good faith require examination. Does good faith play either an overt or implied role in the promulgation and subsequent interpretation of tax legislation? What is the approach in your jurisdiction to retroactive or retrospective legislation? Are there any principles of interpretation which require certainty and clarity (such as the rule of law)? A possible test of this is the attitude and approach of the courts and tax administrations to the interpretation of general anti-avoidance rules which are designed to be broad-based and often attempt to cover currently unforeseen types of tax avoidance. If the tax administration issues guidance or an aid to interpretation, do any of the good faith principles of legitimate expectation or estoppel apply in circumstances where the taxpayer has relied on such a legal interpretation to take on/assume a tax position?

Good Faith in Public International Law

Good faith requirements are enshrined in customary international law, the Vienna Convention on the Law of Treaties and the Charter of the United Nations. Reporters will be asked about the experience in their jurisdiction on how good faith requirements have affected or influenced courts in their interpretation of treaties. Looking through the lens of good faith, have courts tended to take an approach to support a domestic position (possibly a textual or adopting the domestic meaning of the term) rather than an international approach (possibly a contextual interpretation considering the object and purpose of the treaty or adopting the autonomous international meaning of the term)?

The extent to which a country's tax administration and its courts prioritise its domestic law over its international legal obligations might indicate a breach of the principle of good faith. Apart from the interpretation of treaties, this is perhaps most clearly illustrated by the concept of tax treaty override. Tax treaty override occurs when a contracting State refuses to carry out its treaty obligations on the basis of a conflict with domestic law. What is the approach of the jurisdiction to overriding its treaty obligations and in what circumstances can this possibly be justified? In other similar types of activities, the State may introduce new domestic law to redesign and create new taxes outside of their existing tax treaty obligations, reform domestic terms in order to use the principle of ambulatory interpretation and expand their taxing rights, introduce new taxes such as exit taxes, and generally use the domestic tax system to change an unfavourable treaty based agreement.

Another situation which may occur is that States may wish to change the application and interpretation of tax treaties by introducing in their domestic income tax laws deemed amounts of income or fictions which would – if they would be followed under the relevant tax treaty – unilaterally change the allocation of tax jurisdiction. Does such behaviour violate the principle of good faith?

The General Reporters are seeking to form a picture of the role that good faith obligations currently play in existing international tax policy and practice in order to see whether there is a case for greater reinforcement of this principle in establishing comity amongst nations.

Call for National Reporters

This topic will require reporters with an in-depth knowledge of both domestic and international tax law. They may be found in the legal profession, or in academia, or they may be experienced tax consultants with a thorough understanding of domestic and international tax cases, legislation and practice. They can be drawn from either the private sector or the public sector, but reporters should be objective about the influence of the good faith principle in the relationship between their own jurisdiction and their international tax obligations.

Timeline

All Branch reports and summaries must be submitted to the General Secretariat of IFA by 15 October 2021. It would be appreciated if draft Reports (or at least outlines) could be sent to the General Reporter by the end of July 2021. Guidelines will be made available in February 2021.