

Normative Significance of Tax Procedural Law: Reconstruction of the Principle of Legality*

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Abstract

Tax procedural law has an inherent normative significance in terms of realizing the substantive law of taxation; it should handle disputes based on differences in the recognition of each party regarding the existence or nonexistence of tax liabilities and their contents. The principle of legality requires a tax agency to determine and enforce tax claims that have been established based on the provision of substantive law when the requirements for taxation have been fulfilled, but does not prohibit the tax agency from suspending further investigation after sufficient examination in cases where it is unclear whether the requirements for taxation have actually been fulfilled. Although the principle of legality may hold a certain normative requirement with respect to the scope of sufficient examination by the tax agency, there may be a situation where the limits of the examination are defined from the perspective of tax enforcement efficiency. The administrative agency's obligation is to reconcile the accuracy and efficiency of tax enforcement on the plane of procedural law; the same issue is involved in the admissibility of settlements related to tax claims.

Keywords: Tax Procedural Law, Principle of Legality, Opportunism, Legalism, Examination Obligation, Settlement, Agreement, Efficiency

JEL Classification: H20, K34, K41

I. Introduction

I-1. Normative Implications of Tax Procedural Law

The term “tax enforcement” is loosely connected to several themes of tax law as a term that broadly refers to the actions that move the tax system, such as enacting laws and regulations, securing financial resources, and mobilizing people for the implementation of tax-re-

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lated policies.¹ On the other hand, “tax enforcement” can be regarded as a part of the process of the “realization” of tax laws based on the premise of their “establishment.”² The core of the process is the determination of tax liability and collection of tax claims, and the term “tax enforcement” is positioned to refer to this process in a narrow sense.

It has long been recognized that “tax enforcement” in the narrow sense of the term has an important meaning in realizing the fair burden of taxation. Statements such as, “if tax revenue cannot be generated reliably and accurately under tax law, it will not only hinder the financing of fiscal needs, but will also violate the principle of fairness in tax burden,”³ “no matter how broad the range of income is captured in the system, if it is not captured sufficiently in terms of enforcement, or if there is a significant difference in the degree of capture depending on the type of income, the requirement of the fair tax burden will not be satisfied after all,”⁴ “fair taxation will be realized as a result of simplifying tax procedures that contribute to improving taxpayer convenience and efficiency of tax procedures,”⁵ and so on, rightly point out the inherent significance of “tax enforcement.”

What regulates “tax enforcement” in the narrow sense, or the determination and collection of tax obligations or tax claims, is tax procedural law.⁶ If “tax enforcement” in the narrow sense of the term has an important meaning in realizing fair tax burden or fair taxation, tax procedural law should also be recognized as having an appropriate meaning. The intersection of substantive law and procedural law has been pointed out for a long time,⁷ and this article sheds new light on this relationship.

I-2. Reconstruction of the Principle of Legality

On the other hand, the purpose of tax procedural law is to realize substantive law. In other words, the purpose of tax procedural law is to accurately determine and collect tax obligations or tax claims that are supposed to be established under the provision of substantive law. In the current Japanese tax law system, such a position of tax procedural law is embodied in the so-called principle of legality, which is the “procedural aspect of the principle of statute-based taxation.”⁸

In Japan, the principle of legality has been interpreted to prohibit the reduction, exemp-

¹ Masui (2002) p.170.

² Nakazato et al. (2021) p.20.

³ Tanaka (1990) p.92.

⁴ Kaneko (1966-75) p.114.

⁵ Nakazato (2018) p.132.

⁶ Kaneko (2022) p.927, Masui (2012) p.99.

⁷ Usui (1983).

⁸ Kaneko (2022) p.86.

tion, or deferment of tax, as well as the settlement or agreement between a tax administration agency and a taxpayer concerning the content of tax liability and the timing and method of collection, without being based on legal grounds.⁹ On the other hand, many opinions recognize the usefulness and necessity of settlements in tax litigation from the viewpoints of early dispute resolution, efficiency and effectiveness of tax enforcement, and the harmonization of international rules in regards to tax dispute resolution procedures.¹⁰ In recent years, it has been pointed out that negotiations between taxpayers and taxing authorities at the stage of tax audits and appeals play a significant role in tax enforcement, and there is a trend of positively evaluating negotiations between taxpayers and taxing authorities.¹¹ The significance of tax enforcement based on the so-called “cooperation model” may vary depending on the extent to which such agreements or understandings between taxpayers and taxing authorities are allowed.¹²

Under these circumstances, it is necessary to examine the grounds for accepting such settlements or agreements and their limits within the principle of legality. Specifically, after focusing on the inherent normative significance of tax procedural law (II), confirming what exactly the principle of legality means by going back to its original intention (III), and re-reading this principle based on the normative significance of tax procedural law (IV), a few words will be given on the direction of consideration of the admissibility of settlements (V).

II. Normative Significance of Tax Procedural Law

Within the process of the realization of substantive laws, tax procedural laws have the significance of handling disputes based on differences in recognition of the existence or nonexistence of tax liabilities or their contents in each entity (II-1). This inherent normative significance of tax procedural law is not denied even if we assume arguments such as the subordination of the purpose of tax procedural law (II-2) and the distinction between the establishment and the determination of tax obligations (II-3).

II-1. *Inherent Nature of Tax Procedural Law*

Even if the purpose of tax procedural law is to accurately determine and collect tax liabilities or tax claims that are supposed to be established under the provision of substantive law, the recognition of whether a tax obligation has been established can differ among the parties

⁹ Kaneko (2022) p.87.

¹⁰ Abe (2015).

¹¹ Suto (2014).

¹² Yoshimura (2011) p.42.

concerned. From the viewpoint of concrete entities such as taxpayers, taxing authorities, and courts, the existence or nonexistence of tax claims or obligations is determined based on the facts they are aware of and the content of the law they consider themselves to be correct. If the scope and content of the facts recognized by each party and the content of the law that each party considers correct are different, their judgments on the existence or nonexistence of tax claims or obligations will also be different. Thus, the recognition of facts, interpretation of the law, and judgment of the existence or nonexistence of tax claims or liabilities based on these facts can differ from one entity to another. In other words, the role of tax procedural law is to resolve disputes based on differences in the recognition of tax claims. Even if tax claims are established under the provision of substantive law, tax procedural law has an inherent normative significance in the process of their determination and collection.¹³

II-2. Subordination of Tax Procedural Law to the Purpose of Taxation

On the other hand, tax procedural laws are said to be “subordinate in purpose” to substantive laws.¹⁴ At first glance, there seems to be an implication that the purpose of tax procedural law is to accurately determine and collect tax obligations or tax claims that are supposed to be established under the provision of substantive law.

However, the above inherent normative significance of tax procedural law is not excluded by the fact that it stands in a “purpose-subordinate relationship” to substantive law. The expression “*zweckgebunden untergeordnet*” is said to have been originally borrowed from the words of Hensel¹⁵ who said, “The establishment of taxation requirements alone cannot carry out the claims of the state arising from their realization. The fulfillment of this claim is, in the broadest sense, the task of the tax administration of the state. Tax administration law is thus subordinate to the law of taxation requirements in a pre-determined manner (*zweckgebunden untergeordnet*), but apart from this, it shows special legal features. It is the task of the theory of “tax administrative law” to clarify this point.”¹⁶ The term “tax administrative law” used here is what is considered the significance of administrative acts (*Verwaltungsakt*) by the taxing authority in the tax finalization process.¹⁷ The necessity of studying tax procedural law in Japan perhaps, according to this sentence by Hensel, has been properly emphasized with an awareness of concepts and theories in administrative law.¹⁸

¹³ Suto (2014) p.18.

¹⁴ Kaneko (2022) p.29.

¹⁵ Kaneko (1972) p.191.

¹⁶ Hensel (1933) p.3.

¹⁷ Hensel (1933) pp.3-4.

¹⁸ Kaneko (1972) p.192.

II-3. Distinction Between the Establishment and Determination of Tax Liability

In Japanese tax law, there is a distinction between the establishment and the determination of tax obligations (see Article 15(1) of the Act on General Rules for National Taxes). The obligation to pay taxes is naturally established through the fulfillment of taxation requirements stipulated in substantive law; however, for many taxes, it is necessary to confirm the specific details of the tax obligation due to the complexity of the tax base and the calculation of the tax amount.¹⁹ Therefore, a mechanism to determine the tax obligation is put in place. From this premise, the meaning of the procedure to confirm or determine the tax liability is only to faithfully realize the content of substantive law.

However, to reiterate, even if the tax liability is naturally established under the provision of substantive law, the judgment as to whether the tax liability is established or not may differ among the parties. Even in cases where the taxation requirement consists of an evaluative requirement such as “market value,” or in cases where the taxation requirement consists of facts whose existence or nonexistence should be determined objectively, as long as each party does not completely share the information and criteria to determine the existence or nonexistence of such facts, the determination of the fulfillment of such a taxation requirement may differ from person to person. Therefore, there can always be a situation in which each entity has a different judgment on the fulfillment of the taxation requirement. Because of this, a separate set of rules is necessary to resolve disputes based on differences in recognition by each party, and tax procedural law constitutes such rules. In short, even if a distinction is made between the establishment and the determination of tax liability, the inherent normative significance of tax procedural law at the stage of determination is not lost.

III. Original Intention of the Principle of Legality

If we assume the above-mentioned inherent normative significance of tax procedural law in the process of realizing tax substantive law, it is possible to clarify what the principle of legality requires in more detail. The legality principle, in addition to its well-known significance in Japan, such as the Mandatory Nature of Tax Laws (III-1) and the Denial of Discretion (III-2), also has the perspective of analogy with the *Legalitätsprinzip*, which has certain implications in tax procedural law (III-3).

¹⁹ Kaneko (2022) p.940, Mizuno (2023) pp.40-41, Taniguchi (2021) pp.125-126.

III-1. *Mandatory Nature of Tax Laws*

The principle of legality is said to be the principle that “since tax laws are mandatory laws, as long as the requirements for taxation are satisfied, the tax administration agency has neither the freedom to reduce or exempt taxes nor the freedom not to collect taxes, but must collect the tax amount as prescribed by law.”²⁰ The substantive basis for the principle of legality is the mandatory nature of tax (substantive) law. This means that the validity of agreements that are contrary to the provisions of tax substantive law is denied (tax substantive law norms are not regarded as arbitrary laws), and as a result, are not allowed to determine the scope of tax obligations or to exempt tax obligations by agreement between the parties.²¹ This principle has been taught even before the term “legality principle” was used, and it is understood that it has long been accepted as a basic principle of Japanese tax law.²² The Supreme Court has also recognized this principle, stating that “the establishment and content of the tax obligation are solely determined by the law and cannot be moved by an agreement between the taxing authority and the taxpayer or by a unilateral act on the part of the taxpayer.”²³

III-2. *Denial of Discretion*

However, the fact that substantive law on taxation is mandatory alone does not lead to the conclusion that the taxing agency “must collect the amount of tax as provided by law” as long as the requirements for taxation are fulfilled. It is understood that administrative regulations other than substantive laws on taxation, at least on the grounds of administrative acts, are not supposed to be changed by agreement in the same way, but this does not immediately mean that the administrative agency must always issue an administrative act when the requirements of the norms of grounds are met. For example, if the norm of grounds for an administrative act is a so-called “can-do” provision and the administrative agency is allowed to have discretion, it may be permissible for the administrative agency to not issue an administrative act even if the requirements of the norm of grounds are met.²⁴ Conversely, the principle of legality implies denying such discretion of the taxing agency as content distinct from the mandatory nature of tax laws and regulations.²⁵

This is supported by the fact that the principle of legality is used as a translation of

²⁰ Kaneko (2022) p.86, Kiyonaga (2013) p.31.

²¹ Kaneko (2022) p.31, 153.

²² Sugimura (1939) pp.15-16, Kaneko (1974) p.61.

²³ The Supreme Court of Japan, Judgement on September 2, 1974, Minshu, Vol. 28, No. 6, p.1033.

²⁴ Uga (2023) p.372.

²⁵ Taniguchi (2021) pp.37-38.

Legalitätsprinzip.²⁶ The principle of legality (*Legalitätsprinzip*) is “emphasized in Germany by Bühler,”²⁷ who states that the tax administration is strictly bound by law and therefore has no discretion as to whether it wishes to perform the services pre-written into the law. The “strict binding of the tax administration by law, and hence the total absence of discretion as to whether or not it wishes to perform the services pre-written into law,” is for the moment referred to as *Legalitätsprinzip*.²⁸

III-3. *Legalitätsprinzip* - Denial of *Opportunitätsprinzip*

On the other hand, the word “*Legalitätsprinzip*” originally meant the indictment statutory principle, and thus implies denying the principle of expediency (*Opportunitätsprinzip*). Bühler himself saw in the *Legalitätsprinzip* a difference with the denial of discretion.

III-3-1. Implications for Collection Procedures

Bühler states that, “The question arises whether something further, which comes to mind when we use the term statutory principle instead of the principle of administrative legal conformity and consider its function in criminal proceedings, cannot be taken out of the principle of administrative legal conformity. The taxation agency is obliged, in principle, to pursue and realize the right to claim taxation by the state in cases where there are sufficient clues to its establishment. In pursuing a claim in an individual case, a wide margin will have to be allowed, not only for the choice between several permissible means, but also for the intensity of the pursuit as a whole.”²⁹

If there is an implication in the above description that is distinct from the mandatory nature of tax laws and the denial of discretion, it is related to the collection of tax claims. If, due to the mandatory nature of tax laws and the denial of discretion, no room for independent judgment by the taxing authority is allowed at the stage of establishment and determination of tax liability, it is natural to understand that the room allowed for “choice between several permissible means” and “intensity of the pursuit as a whole” refers to the discretion of the enforcement authority in the collection phase.³⁰

III-3-2. Implications of the Determination Procedure

On the other hand, there is a possibility that the reservation “in cases where there are suf-

²⁶ Kaneko (2022) p.86.

²⁷ Kaneko (1974) p.61.

²⁸ Bühler (1927) p.65.

²⁹ Bühler (1927) pp.70-71.

³⁰ Kaneko (2022) p.84, p.1053, p.1060.

ficient clues as to its establishment” may find its meaning in procedural law in the phase of the determination of tax obligations, not in the phase of collection.

Specifically, this reservation states that the taxing authority is not obliged to pursue or realize a tax claim if there is no “sufficient clue” as to the establishment of a tax claim or the fulfillment of taxation requirements. If the requirements for taxation are not satisfied, the tax claim has not been established, and the taxing agency is not obliged to pursue or realize any tax claim that has not been established. The issue here is the sufficiency of “clues” to determine the fulfillment of taxation requirements. This “clue,” directly referring to the information held by the taxing authority to determine whether the tax requirements are satisfied and the question of how much or what kind of information is sufficient to determine whether or not the tax requirements are satisfied is a specific issue of tax procedural law.

Even if the tax agency is not obliged to pursue or realize tax claims in the absence of “sufficient clues” for the fulfillment of taxation requirements, it is a separate issue as to whether the tax agency should conduct further investigation to obtain such “clues” in such cases. Here again, one of the rules by which the tax agency determines the fulfillment of tax requirements is a matter of the rules specific to tax procedural law. It seems possible that this issue may be included in what Bühler calls the “intensity of the pursuit as a whole.”

IV. Significance of the Principle of Legality in Procedure Law

The question of whether the taxing authority should conduct further investigation to obtain such “clues” in cases where there are no “sufficient clues” for the fulfillment of taxation requirements, which we have just discussed, is important in considering the principle of legality. In the following, this point is to be further explored to clarify what the legality principle requires in a more in-depth manner. Specifically, the legality principle is not a principle that uniformly prohibits a taxing agency from settling the existence or nonexistence of tax liability after fulfilling its duty of investigation (IV-1), and although it can have several implications regarding the scope of the taxing agency’s duty of investigation (IV-2), it does not deny the balance between accuracy and efficiency in tax enforcement (IV-3).

IV-1. Obligation to Investigate the Taxing Agency

The administrative agency determines in the first place whether the requirements for the disposition have been fulfilled, and it is obliged to investigate to a certain extent whether the requirements for the disposition have been fulfilled. Conversely, if the administrative agency has fulfilled its duty to investigate but is still unclear whether the requirements have been fulfilled, the administrative agency is not prohibited from withdrawing from further investi-

gation and judgment. If these rules on dispositions in general apply equally to taxation, then the taxing authority should be allowed to not further investigate when it has fulfilled its duty to investigate.

The legality principle, at least in its original intent, required the taxing agency to collect tax “in cases where there are sufficient clues as to its establishment,” and was not required to collect in cases where such “clues” were not sufficient (III-3-2). Referring to the principle of legality, some often make a prerequisite such as “as long as the requirements for taxation are satisfied”³¹ or “as long as the facts necessary for taxation are satisfied.”³² The principle of legality, then, incorporates the above-mentioned limitations of the taxing agency’s duty to investigate. In other words, the taxing agency’s settlement regarding the existence or nonexistence of the tax liability, after fulfilling its duty of investigation, should not itself be against the principle of legality.³³

IV-2. Extent of the Obligation to Investigate

The question then is to what extent the taxation agency is obligated to investigate.

On the one hand, because the principle of legality has in its original intent the denial of the principle of expediency (III-3), it is possible to understand that the taxation agency should seek accurate taxation based on correct legal interpretation and fact-finding as much as possible and that the extent of the taxation agency’s duty of investigation should be highly developed and its scope broad. In such a case, the principle of legality also has a procedural significance in that it imposes an obligation on the taxing authority to investigate as much as possible whether the facts necessary for taxation have been fulfilled.³⁴ The “agreement on facts” in Germany,³⁵ which is considered to have provided the theoretical basis for the principle of legality, is based on the high and extensive obligation to investigate.³⁶

On the other hand, recently, there has been a view that the principle of legality belongs to the system of the tax equity principle and that the limiting principles, such as administrative precedent law, the rule of faith, or the principle of equal treatment, function more widely.³⁷ If, as in this view, the principle of legality is viewed with its axis in the tax equity principle, it may be possible to allow a wider possibility of adjustment of the scope of the taxing agency’s duty to investigate.

³¹ Kaneko (2022) p.86, Nakazato et al. (2021) p.23, Asatsuma and Sakai (2020) p.9.

³² Okamura et al. (2023) p.24.

³³ Nakazato et al. (2021) p.24, Kaneko (2022) p.87.

³⁴ Taniguchi (1995) p.851.

³⁵ Grotheer (2012) p.22.

³⁶ Suda (2018) p.130.

³⁷ Sato (2007) pp.64-71. Against, Taniguchi (2020) p.424.

IV-3. Accuracy and Efficiency in Tax Enforcement

In any case, it would not be justifiable to allow the taxing agency or enforcement agency to have an unlimited duty of investigation. The purpose of imposing a high level of investigation duty on the taxing agency and requiring it to thoroughly investigate the requirements for taxation is to accurately realize the substantive law of taxation and to accurately enforce taxation. On the other hand, however, investigation by the taxation agency requires human, material, and financial resources, and accurate tax enforcement is costly. In particular, given that the purpose of taxation is to raise financial resources for public entities, tax enforcement must be not only accurate but also efficient and effective,³⁸ and it is not justified to continue to focus on accuracy in tax enforcement in any situation.³⁹ Specifically, such a case is not justified when the taxing authority can no longer determine the fulfillment of taxation requirements under further investigation, even if the extent of the taxing agency's duty to investigate is high or the scope of the duty is broad.

It is instructive to note here that when Bühler approved the “wide margin” for “the intensity of the pursuit as a whole” (III-3), he went on to say that “the taxing authority cannot be allowed the freedom to subordinate important tax cases to less important tax cases, or to waste time and money in certain relations to the financial objectives to be achieved by the state and, consequently, to the business damage to be feared in some cases.”⁴⁰ If this is a description of the scope of the investigative duties of the taxing or executing authorities (III-3-2), then it may be stated here that inefficient tax enforcement, which harms the fiscal objectives, is not acceptable.

V. Conclusion

Tax procedural law has an inherent normative significance in realizing the substantive law of taxation, which is to handle disputes based on the difference in recognition of the existence or nonexistence of tax liabilities or their contents by each party (II). The principle of legality requires the taxing agency to determine and enforce tax claims that have been established based on the provisions of substantive law when the requirements for taxation are satisfied (III-1, III-2). However, it does not prohibit the taxation agency from canceling further investigation after fulfilling its duty of investigation when it is unclear whether or not the requirements for taxation have been fulfilled (III-3, IV-1). Although the principle of legality may have a certain normative requirement regarding the scope of the tax agency's duty to

³⁸ Tanaka (1990) p.92.

³⁹ Tezuka (2018) p.79.

⁴⁰ Bühler (1927) p.71.

investigate (IV-2), there may be a situation where the limits of this duty are defined from the perspective of efficiency of tax enforcement (IV-3).

The issue of the scope of the administrative agency's duty to investigate is an issue that reconciles the accuracy and efficiency of tax enforcement on the plane of procedural law, and is involved with the permissibility of settlements regarding tax liability. The fact that uncertainty of the fulfillment of taxation requirements is cited as a condition for permissibility of settlement in tax litigation⁴¹ may be understood to imply that the administrative agency has fulfilled its duty of investigation. It is also justifiable from the perspective of this paper that one of the justifications for settlements is the efficiency of tax enforcement.⁴² Although the permissibility of settlements and agreements regarding tax obligations should be discussed in more detail, including the institutional design of litigation settlements, this is a topic for another time.

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⁴¹ Abe (2015).

⁴² Nakazato et al. (2021) p.24.

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