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Real Guarantees as a Condition for Obtaining a Deferment of Payment under Article 74 of the Code of Tax Procedures: A Comparative Study

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Abstract
Taxation is one of the foremost manifestations of state sovereignty and an essential source of state revenue; its collection continues notwithstanding an administrative or judicial challenge to the basis of assessment. To strike a balance between taxpayers' rights and the powers of the tax administration, the Algerian legislature has provided for a system of deferment of tax payment until the challenge has been determined. The Finance Act 2017 strengthened this system by permitting real guarantees to be provided alongside financial guarantees, thereby extending the protection afforded to taxpayers. This study examines the concept, conditions, significance, and effect of these guarantees on the deferment of collection, as well as the role of the tax collector in accepting or rejecting them and the possibility of challenging the collector's decisions before an administrative judge in interim-relief proceedings.
Keywords: tax; deferment of tax payment; real guarantees; tax administration; administrative judge in interim-relief proceedings.

Introduction

Taxation is a manifestation of state sovereignty and one of the principal sources of revenue on which the state relies to maintain the balances necessary to preserve its existence and continuity.[1] Through taxation, financial resources are supplied to the Public Treasury regularly and continuously to cover public expenditure. The importance of taxation is reflected not only in the annual Finance Act, which provides for and regulates taxes within the state's general budget, but also in separate legislation governing each tax individually.[2]

A tax may be defined as a compulsory financial levy imposed by a public authority on a taxpayer in accordance with the taxpayer's financial capacity, definitively and without consideration, for the attainment of public purposes. The parties to the tax relationship are the

[1] These balances relate primarily to the economic and social dimensions on which the objectives of the modern state are based, given their effects on individuals' circumstances.

[2] These statutes comprise the Code of Direct Taxes and Similar Levies, the Code of Indirect Taxes, the Turnover Tax Code, the Stamp Code, and the Registration Code.

tax administration and the taxpayer, who is legally required to pay the tax imposed.[3] Tax is immediately payable, and the legislature has conferred broad powers on the tax administration to secure its collection, including compulsory enforcement against a taxpayer who fails to pay. Such enforcement may extend to seizure of the taxpayer's property and its sale at public auction, as well as criminal prosecution.[4]

Continued tax collection by the administration may cause serious financial harm to the taxpayer, particularly if the basis of assessment is subsequently found to be unlawful. It is therefore necessary to establish a legal mechanism that strikes a balance between protecting taxpayers' rights and safeguarding the Public Treasury's right to collect the revenue required to finance public expenditure.[5]

Under the Code of Tax Procedures, a taxpayer may challenge the basis of assessment by lodging an administrative complaint with the tax administration. However, such a complaint does not suspend payment, and the taxpayer remains required to discharge the tax debt.[6] This rule is not absolute. When enacting the Code of Tax Procedures, the Algerian legislature created an exception through the mechanism known as deferment of payment,[7] which constitutes a temporary remedy. In its purpose and effects, deferment of payment resembles a stay of execution of an administrative decision, as it derives from procedures applied in administrative disputes and originating in French case law.[8] It nevertheless has features specific to the nature of the dispute, which centres on payment of the contested tax.[9] Deferment of payment is administrative rather than judicial in character because, as a general rule, the application is made initially to the competent tax administration rather than to the administrative judge.[10] Moreover, it concerns assessment disputes rather than collection disputes.

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[3] Scholarly disagreement persists as to the legal justification for the imposition of taxation, particularly in relation to limiting tax-evasion practices by certain taxpayers.

[4] See Articles 143–152 of the Code of Tax Procedures and Articles 303–308 of the Code of Direct Taxes and Similar Levies.

[5] Two distinct interests are involved: first, the state's interest in ensuring the financing of the Public Treasury through various tax revenues; and, second, the taxpayer's interest in protecting the taxpayer's patrimony. This entails a conflict between the public and private interests.

[6] See Article 80(2) and Article 82(4) of the same Code.

[7] See Article 74 of the Code of Tax Procedures.

[8] M.-J. Redor, "When the Conseil d'État intervenes between the administration and the ordinary citizen to settle their dispute in the same manner as the judicial courts intervene between private individuals to adjudicate their disputes, the governed person may then have the illusion of dealing on equal terms with public authority; the power relationship thus assumes the appearance of a relationship of equality under the guise of a legal relationship," *De l'État légal à l'État de droit: L'évolution des conceptions de la doctrine publiciste française, 1879–1914*, 12th ed. (Economica), 269.

[9] P. M. Gaudmet and Joël Molinier, *Finances publiques*, vol. 2, 5th ed. (Montchrestien, 1992), no. 1015.

[10] By contrast, a stay of execution of an administrative decision is judicial in character: the matter is brought before the administrative court, and the administrative judge orders the stay in accordance with the conditions prescribed by law.

Deferment of payment is defined as "the set of procedures that allows a taxpayer to defer payment of a tax whose basis the taxpayer disputes".[11] The taxpayer is therefore entitled to postpone payment of the tax due when lodging the complaint.

Thus, deferment of payment concerns the payment of a tax that is due and payable.[12] If a taxpayer refuses to discharge an outstanding tax debt, the competent tax administration must issue a decision requiring payment.[13] It follows that the procedures governing deferment of payment cannot arise unless a monetary tax liability is due for payment.

Article 74 of the Code of Tax Procedures sets out the formal and substantive conditions that a taxpayer must satisfy to obtain deferment of payment.[14]

This study does not examine deferment of payment as a whole; rather, it focuses on one condition for its acceptance: the guarantees that a taxpayer must provide when applying for deferment of payment. In this context, reference should be made to the amendment introduced by the Algerian legislature to Article 74 through Article 46 of the Finance Act 2017, which introduced what may be described as new guarantees to be provided by a taxpayer seeking deferment of payment.[15] The taxpayer must provide real guarantees covering the value of the disputed tax, or at least 20 per cent of the value of that tax, whereas previously only financial guarantees were required.[16]

Although this amendment serves the interests of the tax administration by strengthening the tax collector's capacity, as a public accountant, to secure collection of the tax, it also eases the obligations imposed on a taxpayer who does not have sufficient liquidity to pay 20 per cent of the amount claimed by allowing real guarantees to be provided instead. Previously, the legislature required only financial guarantees.[17] It should also be noted that, under the former

11 Michel Douay, "Deferment of payment is the legally conferred right of a taxpayer from whom an additional assessment is claimed to postpone payment until the Administration or the tax judge has ruled on the complaint," *Le recouvrement de l'impôt* (L.G.D.J., 2005), 161.

12 This is the stage at which funds are transferred from the taxpayer's patrimony to that of the state and enter the Public Treasury.

13 Direct taxes and similar levies are collected through the issuance of a tax roll (rôle), which is made enforceable by the Minister of Finance or the Minister's delegate. Indirect taxes, by contrast, are collected by means of a collection order (titre de perception) if the taxpayer fails to pay them.

14 Article 74 of the Code of Tax Procedures provides: "1) A taxpayer who, by means of a complaint lodged under the conditions laid down in Articles 72, 73, and 75 of this Code, disputes the validity or amount of the taxes imposed on the taxpayer may defer the disputed portion of those taxes if, before the decision on that complaint is issued, the taxpayer requests the benefit of the provisions of this Article, provided that real guarantees are furnished to secure recovery of the contested liabilities. In the absence of guarantees, the taxpayer may defer payment of the disputed portion by paying an amount equal to 20 per cent of the disputed taxes to the competent tax collector. 2) This measure applies only to complaints arising from tax audits, excluding complaints relating to taxes subject to surcharges imposed in cases of tax fraud."

15 Finance Act 2017, Official Gazette of the People's Democratic Republic of Algeria, no. 77, 30 December 2016.

16 Before amendment, Article 74 of the Code of Tax Procedures provided: "A taxpayer who, by means of a complaint, disputes the validity or amount of the taxes imposed on the taxpayer may defer payment of the disputed portion of those taxes by paying an amount equal to 20 per cent of those taxes to the competent tax collector, provided that the taxpayer requests such benefit in the complaint."

17 Elias Ouadah, *Deferment of Payment in Tax Matters: A Comparative Study*, doctoral thesis, academic year 2014–15, 103.

Code of Direct Taxes and Similar Levies, a taxpayer seeking deferment of payment was required to provide real rather than financial guarantees.[18] The amendment therefore amounts to a return to the earlier approach. The legislature also distinguished between real and financial guarantees: real guarantees were required to cover the disputed tax in full, whereas financial guarantees were required to cover only 20 per cent of its value. This distinction may make administration of the procedure more difficult for the tax administration than for the taxpayer.[19]

The application of Article 74 raises several issues. What types of guarantees must the taxpayer provide, and how are they to be valued? Who has authority to assess their sufficiency? If a dispute arises between the parties concerning valuation, may proceedings be brought before the administrative court? If the value of the guarantees subsequently decreases, may the tax collector require them to be supplemented? Conversely, if their value increases, may the taxpayer recover the excess? The Algerian legislature should clarify amended Article 74 so that leaving the determination of guarantees to the tax administration does not upset the balance between the taxpayer and the administration, while drawing on the framework established by the French legislature in Article R. 277 of the Book of Tax Procedures.[20]

The issue is not confined to identifying the types of real guarantees; it also extends to their valuation. The French legislature therefore established an interim-relief procedure concerning guarantees (référé garantie) to determine disputes between the public accountant and the taxpayer regarding the nature and value of the guarantees offered. Hence, Section One examines the types of real guarantees, while Section Two addresses their valuation.

Section One: Types of Real Guarantees

As noted above, the Algerian legislature has not specified the types of real guarantees that a taxpayer may offer when applying for deferment of payment, leaving the matter to the tax administration's discretion. By contrast, the French legislature has identified several forms of guarantee. The list is not exhaustive, and a taxpayer may therefore offer other guarantees.[21] In such cases, the public accountant bears full responsibility for assessing and accepting the

[18] The legislature had previously adopted this solution under Article 446 of the Code of Direct Taxes and Similar Levies of 9 December 1976. It was derived from Law No. 59-1472 concerning tax reform, which remained applicable until 1977 and provided that a taxpayer seeking deferment of payment had to furnish guarantees without specifying their nature.

[19] The Algerian legislature did not determine how the value of the guarantees should be calculated. Should they be calculated on the basis of the disputed tax alone, excluding financial penalties and surcharges, or should those penalties and surcharges also be included? The issue remains unresolved. In our view, the guarantees should be calculated on the basis of the disputed tax together with the applicable financial penalties and surcharges, by analogy with the approach adopted for administrative deferment of payment.

[20] Article R. 277 of the LPF provides: "The competent accountant invites the taxpayer who has requested deferment of payment of the taxes to provide the guarantees prescribed by Article L. 277. The taxpayer has a period of fifteen days from receipt of the invitation issued by the accountant to specify the guarantees that the taxpayer undertakes to provide."

[21] Article R. 277-1(2) of the Book of Tax Procedures provides that guarantees may take the form of a cash payment, claims against the Treasury, a surety, transferable securities, goods deposited under a warehouse warrant, mortgages, or pledges over a business undertaking.

guarantees. This study examines the guarantees recognised under French law that remained applicable in Algeria until 1977, when Algerian tax legislation was enacted.[22]

Subsection One: Real Guarantees Specified by Law

Cash Deposit into a Treasury Suspense Account[23]

Under this form of guarantee, the taxpayer deposits a sum equal to the disputed tax in a temporary account with the Public Treasury. The amount may not be withdrawn or otherwise disposed of until the dispute has been determined. This mechanism safeguards the rights of the Public Treasury while requiring it to return the deposited amount, together with interest, if judgment is given in the taxpayer's favour.

Claims against the Treasury

In some cases, the taxpayer is a creditor of the Public Treasury, for example where the taxpayer is entitled to a refund of tax or value-added tax. This permits set-off between the two debts. The Algerian legislature recognises this mechanism under Article 297 of the Civil Code, provided that the debt is monetary, capable of disposal, and due and payable.[24]

Provision of a Surety

A surety consists of an undertaking by a third party to pay the disputed tax if the taxpayer fails to discharge it, thereby providing a legal safeguard for the rights of the Public Treasury. The Algerian legislature regulates suretyship in Article 644 of the Civil Code. It is regarded as one of the simplest and most practical forms of guarantee and is therefore frequently used by taxpayers seeking deferment of tax debts.[25]

The surety may be either a natural or a legal person with the capacity to pay. Where the proposed surety is a bank included on the list of authorised banks, the public accountant must accept it. If the surety is not a bank, real security must be provided to secure performance of the guaranteed obligation.[26]

A surety may be limited either in duration or in amount. If the surety expires before the dispute has been finally determined, the public accountant must require the taxpayer to provide new guarantees. If the surety covers an amount lower than the disputed tax, the accountant must require the taxpayer to supplement the guarantee by the amount of the shortfall.[27]

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22 Article 97 of the Law of 28 December 1959 requires the taxpayer to provide guarantees sufficient to secure recovery of the disputed taxes, in particular by means of a deposit with the Treasury, claims against the Treasury, guaranteed bonds, transferable securities, goods deposited under a warehouse warrant, mortgages, or pledges over a business undertaking.

23 This form of guarantee was introduced by the French legislature under Article 97(2) of the Law of 28 December 1959, which applied in Algeria until the tax legislation was repealed in 1976. It was added to the guarantees that had previously existed.

24 Article 50 of the Turnover Tax Code.

25 A suretyship is a contract by which a person guarantees performance of an obligation by undertaking to the creditor to perform that obligation if the debtor fails to do so.

26 Michel Douay, *Sursis de paiement*, *Juris-Classeur national*, fasc. 540 (2010).

27 T.A. Versailles, 24 May 1994, S.A. Midland Bank, R.J.F. 1995, no. 786.

Transferable Securities[28]

The conditions governing the acceptance of transferable securities as guarantees were laid down by the orders of 26 April 1928 and 15 October 1987 and further clarified by the instruction of 23 January 1990. That instruction classified transferable securities into three categories and determined their guarantee value according to their classification and market price at the time of purchase. The taxpayer was also required to attach a financial newspaper dated no more than eight days before submission.

In this context, the French Conseil d'État held, in a decision of 25 April 2001, that transferable securities must be listed on a French stock exchange. Foreign securities must be accompanied by a bank guarantee securing payment of the disputed tax.[29]

Transferable securities must be deposited with the accountant's cash office (la caisse du comptable) to prevent their loss or theft.[30] The taxpayer must submit to the accountant a written, signed, and dated declaration assigning the securities as security for the disputed tax. The accountant then sends a copy of the declaration to the issuer of the securities or to the financial intermediary so that the pledge may be recorded and, upon maturity, the value of the securities paid into the account designated for their owner.

Warehouse Warrant

A warehouse warrant is a security document evidencing the deposit of goods owned by the taxpayer in a public warehouse or a warehouse approved by the state, with those goods serving as security for the disputed tax. For the guarantee to be accepted, the goods must be deposited in an approved warehouse, and the public accountant must verify that they are insured and that the particulars stated in the warrant correspond to their nature and value.[31]

Mortgage

Immovable property, ships,[32] and business undertakings may be subject to a mortgage. The mortgage process raises two principal issues: valuation and form.

Valuation of the Property to Be Mortgaged. The valuation of a guarantee varies according to its nature. In the case of immovable property, the public accountant relies on indicators such as the sale price or rental value of the property and comparable properties. In the case of a business undertaking, the accountant relies on information supplied by the

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28 Article R. 277-6 of the LPF provides that an order of the minister responsible for the budget determines the conditions under which transferable securities may be constituted as guarantees, particularly their nature and amount, calculated on the basis of the latest quoted price on the date of deposit.

29 C.E., 25 April 2001, société PARFIVAL v. ministre de l'économie, des finances et de l'industrie: "Transferable securities that are not listed on a French stock exchange . . . may be accepted only if they are accompanied by a bank guarantee subscribed for the difference between the assessed value of the securities and the amount of the disputed taxes." Dr. Fisc.; RJF 7/01, no. 1012, chron. J. Maïa, 61.

30 According to Olivier Fouquet, a taxpayer who provides transferable securities as a guarantee under Article L. 277 must deposit them with the cash office of the accountant responsible for collection. Authorised credit institutions may, however, at their own request or at the taxpayer's request, retain those securities in a deposit account opened in the taxpayer's name. See www.etudes-fiscales-internationales.com.

31 The warehouse warrant was regulated by the decree of 1 August 1928, and the Algerian legislature referred to it in Article 543 bis and the following provisions of the Commercial Code.

32 Only seagoing vessels and inland-waterway vessels of more than 20 tonnes may be subject to a mortgage. Circ. C. P. no. 2746, 1 August 1928, 92.

taxpayer and confirmed by the tax authorities, including the purchase price, realised profits, and other indicators relevant to its value.[33]

Form of the Mortgage. The tax administration resorts to a statutory mortgage because it is exempt from land-registration fees and advises public accountants to inform taxpayers of this advantage. For the mortgage to be valid, it must be executed by authentic instrument before a notary; otherwise, it is void.

Subsection Two: Other Guarantees

Under French practice, the list of guarantees set out in Article R. 277-3 of the LPF is not exhaustive. A taxpayer may therefore offer other guarantees with the approval of the accountant responsible for collection and the Treasury agent or the director of tax services, depending on the type of tax. The Algerian legislature may draw on this approach when applying Article 74 of the Code of Tax Procedures, while the public accountant (tax collector) remains responsible for assessing the sufficiency of the guarantees. In the event of a dispute, the matter may be referred to an interim-relief judge for determination in tax interim-relief proceedings.

Section Two: Valuation of Guarantees and Disputes Concerning Them

The legislature has entrusted the tax administration with responsibility for assessing the value of guarantees without regulating disagreements between the public accountant (tax collector) and the taxpayer concerning their acceptance or sufficiency. This raises several questions: may a taxpayer challenge a decision rejecting the guarantees; may the tax administration require the guarantees to be supplemented; what consequences follow from such a decision; which judicial authority has jurisdiction; and what procedure applies? The author considers that these issues will arise in the application of Article 74, as amended by Article 28 of the Finance Act 2017, and proposes drawing on French law by establishing interim-relief proceedings concerning guarantees to resolve disputes over their valuation or acceptance. Such proceedings would protect taxpayers' rights without prejudging the merits of the underlying right, while safeguarding the interests of the Public Treasury.

Subsection One: Valuation of Guarantees

The Algerian legislature has not specified how guarantees are to be submitted and valued or what procedures govern them, even though the underlying dispute concerns the basis of assessment rather than collection. The author considers that an application for deferment of payment should be referred to the public accountant (tax collector), as the authority responsible both for assessing the guarantees and for collecting the tax debt. Drawing on the procedure applied under French law, the assessment of guarantees proceeds through the following stages:

- The public accountant requests, by registered letter, that the taxpayer provide guarantees to obtain deferment of payment.
- The taxpayer submits the guarantees to the public accountant, who decides whether to accept or reject them or requires them to be supplemented.

[33] Case law in this field has held that turnover for the preceding three years is, by its nature, sufficient to assess the value of a business undertaking, as are the operating assets located in that undertaking. T.G.I. Amiens, 12 November 1985, req. 13.432.

- The public accountant must respond within a specified period; failure to respond constitutes acceptance of the guarantees.
- Express or implied acceptance of the guarantees suspends collection proceedings until the complaint has been determined.
- The public accountant may require insufficient guarantees to be supplemented, while the taxpayer may request their replacement during the period of deferment.

Under French law, the taxpayer is granted fifteen days to provide the guarantees, while the public accountant must determine their acceptability within forty-five days. Failure to respond after expiry of that period constitutes implied acceptance.[34]

The Code of Tax Procedures does not address disputes that may arise between a taxpayer and the tax collector concerning the value of guarantees. This raises the question of whether the collector's decision may be challenged and whether the rules governing administrative disputes under the Code of Civil and Administrative Procedure apply. The author answers in the negative because such a dispute does not concern the basis on which the tax is imposed, but rather whether the guarantees are sufficient to cover the tax debt. It is therefore a dispute of a special nature requiring distinct procedural rules.

Legislative intervention is therefore necessary to regulate such disputes, particularly because the tax collector may reject the guarantees or determine that they are insufficient, thereby compelling the taxpayer either to pay the tax or to face compulsory collection proceedings. The author accordingly proposes that tax interim-relief proceedings fall within the jurisdiction of the administrative court, with the interim-relief judge's role confined to determining whether the guarantees are proportionate to the disputed tax, without examining the lawfulness of the tax debt or the basis of its assessment.

The legislature should lay down specific requirements governing tax interim-relief proceedings, including formal requirements concerning the time limits for bringing the action and the particulars of the application, as well as substantive requirements concerning the content of the action and the basis of the judicial request. It should also prescribe a period within which the administrative judge must determine the application, together with the effects of the resulting order, the manner and time limits for appealing it, and the judicial authority competent to determine the appeal.

Subsection Two: Changes in the Value of Guarantees

The application of Article 74 raises several questions after guarantees have been accepted and deferment of payment granted. May the taxpayer be required to supplement the guarantees if their value decreases? May the taxpayer replace the guarantees already provided? May the taxpayer recover any increase in their value? In addressing these issues, guidance may be drawn from French law, which grants taxpayers broad freedom to provide

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[34] C.A.A. de Paris, 9th Chamber, 27 March 2014. Article R. 277-1 of the same Book provides: "The competent accountant invites the taxpayer who has requested deferment of payment of the taxes to provide the guarantees prescribed by Article L. 277. The taxpayer has a period of fifteen days from receipt of the invitation issued by the accountant to specify the guarantees that the taxpayer undertakes to provide. . . . If the accountant considers that the guarantees offered by the taxpayer cannot be accepted because they do not satisfy the conditions prescribed in the second paragraph, the accountant notifies the taxpayer of the decision by registered letter." www.juricaf.fr.

guarantees and to replace them with guarantees of equal or greater value, thereby reinforcing the flexibility of the deferment-of-payment procedure under Article 74.[35]

As regards changes in the value of guarantees after deferment of payment has been granted, the taxpayer may not claim an increase in their value. If their value decreases, the public accountant may, by registered letter, require supplementary guarantees to secure collection of the disputed tax debt. The taxpayer is granted one month to provide them, failing which the accountant may adopt conservatory measures to secure collection of the disputed tax.[36]

Conclusion

In light of the foregoing, the Algerian legislature has taken a step forward in developing the rules governing deferment of payment in tax matters through the amendment introduced by the Finance Act 2017. Although the amendment is positive, its practical application remains affected by numerous deficiencies and shortcomings, as the preceding analysis demonstrates. There can be little doubt that the provisions governing deferment of payment will require further amendment in a manner that safeguards the interests of the Public Treasury without sacrificing taxpayers' rights.

Such amendments should principally concern the powers of the public accountant, namely the tax collector, to accept or reject guarantees and, correspondingly, the limitation of those powers by conferring jurisdiction on the administrative judge to review the collector's decision. That review should not concern the lawfulness of the decision as such, but rather the proportionality between the guarantees provided by the taxpayer and the value of the disputed tax.

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[35] *Bulletin Officiel des Finances Publiques*, no. 85, 28 September 2009: "The accountant may at any time, where the guarantees provided have depreciated or become insufficient, request the liable person, by registered letter with acknowledgement of receipt, to provide supplementary security in order to secure recovery of the disputed amount." bofip.impots.gouv.fr.

[36] Articles L. 277 and L. 279 of the Book of Tax Procedures.

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