THE TAX DISPUTES AND LITIGATION REVIEW

SIXTH EDITION

Editor
Simon Whitehead

THE LAWREVIEWS

THE TAX DISPUTES AND LITIGATION REVIEW

SIXTH EDITION

Editor
Simon Whitehead

THE LAWREVIEWS

PUBLISHER
Tom Barnes

SENIOR BUSINESS DEVELOPMENT MANAGER
Nick Barette

BUSINESS DEVELOPMENT MANAGERS
Thomas Lee, Joel Woods

ACCOUNT MANAGERS
Pere Aspinall, Sophie Emberson,
Laura Lynas, Jack Bagnall

PRODUCT MARKETING EXECUTIVE
Rebecca Mogridge

RESEARCHER
Arthur Hunter

EDITORIAL COORDINATOR
Gavin Jordan

HEAD OF PRODUCTION
Adam Myers

PRODUCTION EDITOR
Martin Roach

SUBEDITOR
Anna Andreoli

CHIEF EXECUTIVE OFFICER
Paul Howarth

Published in the United Kingdom
by Law Business Research Ltd, London
87 Lancaster Road, London, W11 1QQ, UK

www.TheLawReviews.co.uk

ISBN 978-1-912228-16-4

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: 0844 2480 112

THE LAW REVIEWS

THE MERGERS AND ACQUISITIONS REVIEW

THE RESTRUCTURING REVIEW

THE PRIVATE COMPETITION ENFORCEMENT REVIEW

THE DISPUTE RESOLUTION REVIEW

THE EMPLOYMENT LAW REVIEW

THE PUBLIC COMPETITION ENFORCEMENT REVIEW

THE BANKING REGULATION REVIEW

THE INTERNATIONAL ARBITRATION REVIEW

THE MERGER CONTROL REVIEW

THE TECHNOLOGY, MEDIA AND TELECOMMUNICATIONS REVIEW

THE INWARD INVESTMENT AND INTERNATIONAL TAXATION REVIEW

THE CORPORATE GOVERNANCE REVIEW

THE CORPORATE IMMIGRATION REVIEW

THE INTERNATIONAL INVESTIGATIONS REVIEW

THE PROJECTS AND CONSTRUCTION REVIEW

THE INTERNATIONAL CAPITAL MARKETS REVIEW

THE REAL ESTATE LAW REVIEW

THE PRIVATE EQUITY REVIEW

THE ENERGY REGULATION AND MARKETS REVIEW

THE INTELLECTUAL PROPERTY REVIEW

THE ASSET MANAGEMENT REVIEW

THE PRIVATE WEALTH AND PRIVATE CLIENT REVIEW

THE MINING LAW REVIEW

THE EXECUTIVE REMUNERATION REVIEW

THE ANTI-BRIBERY AND ANTI-CORRUPTION REVIEW

THE CARTELS AND LENIENCY REVIEW

THE TAX DISPUTES AND LITIGATION REVIEW

THE LIFE SCIENCES LAW REVIEW

THE INSURANCE AND REINSURANCE LAW REVIEW

THE GOVERNMENT PROCUREMENT REVIEW

ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following law firms for their learned assistance throughout the preparation of this book:

BUSTAMANTE & BUSTAMANTE LAW FIRM

CHEVEZ RUIZ ZAMARRIPA Y CIA, SC

DDTC CONSULTING

DLA PIPER

FLICK GOCKE SCHAUMBURG

GARRIGUES PORTUGAL, SLP

GORRISSEN FEDERSPIEL

GUZMÁN ARIZA, ATTORNEYS AT LAW

JOSEPH HAGE AARONSON LLP

KPMG LAW ADVOKATFIRMA AS

LENZ & STAEHELIN

LEWIN & WILLS

LOYENS & LOEFF

MACHADO, MEYER, SENDACZ E OPICE ADVOGADOS

MAISTO E ASSOCIATI

MASON HAYES & CURRAN

MORRISON & FOERSTER LLP

NORTON ROSE FULBRIGHT CANADA LLP

OLD SOUTH BRITISH CHAMBERS

PHILIPPE DEROUIN

PHILIPPI PRIETOCARRIZOSA FERRERO DU & URÍA

PHOENIX LEGAL

PWC LEGAL

SELE FROMMELT & PARTNER ATTORNEYS AT LAW LTD

SOŁTYSIŃSKI KAWECKI & SZLĘZAK

STAVROPOULOS & PARTNERS LAW OFFICE

STREAMSOWERS & KÖHN

TMI ASSOCIATES

VAN CAMPEN LIEM

WASELIUS & WIST

WITHERS KHATTARWONG

CONTENTS

PREFACE

The objective of this book is to provide tax professionals involved in disputes with revenue authorities in multiple jurisdictions with an outline of the principal issues arising in those jurisdictions. In this, the sixth edition, we have continued to add to the key jurisdictions where disputes are likely to occur for multinational businesses.

Each chapter provides an overview of the procedural rules that govern tax appeals and highlights the pitfalls of which taxpayers need to be most aware. Aspects that are particularly relevant to multinationals, such as transfer pricing, are also considered. In particular, we have asked the authors to address an area where we have always found worrying and subtle variations in approach between courts in different jurisdictions, namely the differing ways in which double tax conventions can be interpreted and applied.

The idea behind this book commenced in 2013 with the general increase in litigation as tax authorities in a number of jurisdictions took a more aggressive approach to the collection of tax; in response, no doubt, to political pressure to address tax avoidance. In the UK alone we have seen the tax authority vested with broad new powers not only of disclosure but even to require tax to be paid in advance of any determination by a court that it is due. The provisions empower the revenue authority, an administrative body, to compel payment of a sum, the subject of a genuine dispute, without any form of judicial control or appeal.

Over the past year, the focus on perceived cross-border abuses has continued with action by the European Commission on past tax rulings in Ireland, Luxembourg and Belgium and the BEPS reaching a crescendo in the announcement of a 'diverted profits tax' to impose an additional tax in the UK when it is felt that a multinational is subject to too little corporation tax even in an EU context. The general targeting of cross-border tax avoidance now has European legislation behind it with the passage this year of the second Anti-Tax Avoidance Directive. The absence of much previous European legislation in direct tax has always been put down to the need for unanimity and the way in which Member States closely guard their taxing rights. The relatively speedy passage of this legislation (the Parent–Subsidiary Directive before it took some 10 years to pass) and its restriction of attractive tax regimes indicates the general political disrepute with which such practices are now viewed.

These are, perhaps, extreme examples, reflective of the parliamentary cycle, yet a general toughening of stance seems to be felt. In that light, this book provides an overview of each jurisdiction's anti-avoidance rules and any alternative mechanisms for resolving tax disputes, such as mediation, arbitration or restitution claims.

We have attempted to give readers a flavour of the tax litigation landscape in each jurisdiction. The authors have looked to the future and have summarised the policies and approaches of the revenue authorities regarding contentious matters, addressing important questions such as how long cases take and situations in which some form of settlement might be available.

We have been lucky to obtain contributions from the leading tax litigation practitioners in their jurisdictions. Many of the authors are members of the EU Tax Group, a collection of independent law firms, of which we are a member, involved particularly in challenges to the compatibility of national tax laws with EU and EEA rights. We hope that you will find this book informative and useful.

Finally, I would like to acknowledge the hard work of my colleague Ibar McCarthy in the editing and compilation of this book.

Simon Whitehead
Joseph Hage Aaronson LLP
London
February 2018

Chapter 1

TAX APPEALS TO THE EUROPEAN COURT OF JUSTICE

Paul Farmer[1]

I THE EUROPEAN COURT

i Access through national courts and preliminary rulings

European Union law has primacy over the national law of EU Member States. This applies to both primary EU law, in particular the Treaty on European Union and the Treaty on the Functioning of the European Union (TFEU), and secondary law, such as the EU legislation on VAT and excise duties.

For most tax cases involving EU law, access to the Court of Justice of the European Union (CJEU) is via the national courts. A tax appeal brought in the national courts of a Member State may raise a question concerning the interpretation of the provisions of EU law. This arises most commonly in cases where a taxpayer claims that national tax provisions are contrary to superior rules of EU law; for example, a claim that a corporation tax provision is contrary to Article 49 TFEU on freedom of establishment, or that a VAT provision is contrary to the EU VAT legislation. National courts, as courts of EU law as well as national law, have the obligation to ensure proper application of EU law in disputes falling within their jurisdiction. Under Article 267 TFEU a lower national court may, where a question of EU law is raised before it, refer the case to the CJEU to obtain a preliminary ruling on that question if it considers that it needs to be determined in order for the court to be able to give judgment. A national court may refer the matter to the CJEU at the request of the parties or on its own motion.[2] Lower courts have wide discretion about whether to refer, and may do so even where they would otherwise be bound by a decision of a superior national court, including in connection with decisions given in the same proceedings.[3] Moreover, the lower courts' right to refer remains notwithstanding any decision of a superior court quashing a reference that they have made.[4]

Under Paragraph 3 of Article 267 TFEU, a national court against whose decision there is no judicial remedy under national law (i.e., the highest appellate court), is obliged to refer to the CJEU any question concerning the interpretation of EU law that is necessary to enable it to render judgment. Where a national supreme court has a discretion whether to hear an appeal from the lower courts, the Supreme Court acts as the final court for the purposes of Article 267 TFEU in hearing the application for permission to appeal.

1 Paul Farmer is a founding partner at Joseph Hage Aaronson LLP.
2 Case C-210/06 *Cartesio* [2008] ECR I-9641, Paragraph 88.
3 Case 146/73, *Rheinmühlen – Düsseldorf v. Einfuhr-Und Vorratsstelle für Getreide und Futtermittel* [1974] ECR 139, Paragraph 3.
4 See C-210/06 *Cartesio*, Paragraphs 88–98.

The only cases where the obligation to refer does not apply are where the CJEU has already ruled on the question or on a materially identical question in a similar case, or where the correct application of EU law is so obvious as to leave no scope for any reasonable doubt (*acte clair*).[5] The threshold for *acte clair* is a high one. The national court 'must be convinced that the matter is equally obvious to the courts of the other Member States and to the Court of Justice'.[6]

Where a supreme court fails to make a reference, it may be open to a taxpayer to bring a case in damages in respect of that failure.[7] However, such a case must again be brought in the national courts and will succeed only if it is found that the failure to refer constitutes a manifest breach of EU law.

The obligation to refer is imposed on national supreme courts because, in most cases, individual taxpayers do not have direct access to the CJEU. Tax appeals against decisions of national tax authorities must be brought in the national courts using domestic remedies and procedures. It is for the national courts to apply EU law to the facts of the case after, where necessary, seeking guidance from the CJEU. Where they do so, the interpretative guidance given by the CJEU is binding on them.

An order for reference must meet the requirements of Article 267 TFEU. If it does not, the CJEU will lack jurisdiction and will decline to provide a response other than on the question of jurisdiction.[8] An important requirement for Article 267 to be engaged is that the reference must be from a court or tribunal that requires a ruling to determine a genuine dispute. Thus, the Court of Justice does not accept references from a body that does not meet the necessary standard of impartiality and independence from the decision-maker whose decision is challenged. Under many continental systems, the first level of tax appeals is to a higher administrative authority that is not a court or tribunal for the purposes of Article 267. A reference can only be made when a further appeal is made to the courts. In order to determine whether the body making the reference is a court or tribunal which may make such a reference, the Court will consider a number of factors including, 'whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is interparties, whether it applies rules of law and whether it is independent.'[9]

While the CJEU largely leaves the national court to determine whether it needs a ruling, it will refuse to provide a ruling in extreme cases where the reference manifestly has no relevance to the facts or the dispute is clearly hypothetical.[10] It is nevertheless possible for the Court to rule upon a reference where on the facts EU rights are not engaged at all, provided that guidance on the interpretation of EU law is required by the national referring court to give its judgment. This will arise, for example, where a national provision applies in both a domestic and an EU context, and the correct interpretation of EU law will inform the interpretation to be given in a domestic context.[11]

The order for referral from the national referring court must be accompanied by sufficient factual and legislative material to enable the Court of Justice to understand the

5 Case 283/81 *CILFIT v. Ministry of Health* [1982] ECR 3415, Paragraphs 16–21.

6 Ibid, Paragraph 16.

7 Case C-224/01 *Köbler v. Republik Österreich* [2003] ECR I-10239, Paragraph 30.

8 Case C-516/99 *Walter Schmid* [2002] ECR I-04573.

9 Case C-205/08 *Umweltanwalt von Kärnten v. Kärntner Landesregierung* [2009] ECR I-11525, Paragraph 35 and case law referred to therein.

10 Case 244/80 *Foglia v. Novello* [1981] ECR 3045.

11 Case C-28/95 *Leur Bloem* [1997] ECR I-4161, Paragraph 34.

context in which the issue for determination arises. However, it is only in the most extreme cases, where the absence of material would risk rendering the ruling hypothetical, that the Court will reject the order for reference for this reason.[12]

ii The CJEU: composition and procedure[13]

The CJEU comprises a higher court (the Court of Justice) and a lower court (the General Court). Referrals for preliminary rulings from national courts are heard by the Court of Justice. Although not explicitly laid down, in practice there is one judge per EU country. The Court is assisted by 11 advocates general whose job is to present opinions on the cases brought before the Court. The opinions are not binding on the Court but provide an impartial view intended to assist it in coming to its decision. Each judge and advocate general is appointed for a six-year term, which can be renewed.

A judge and an advocate general are assigned to each case that is referred to the Court of Justice. Cases are dealt with in two phases: a written phase and an oral phase. In the written phase, the parties to the dispute before the national court, any EU Member State and the European Commission all have the right to submit written observations to the Court. There is no right to respond in writing to any submissions. The oral stage is a relatively short public hearing of the case. Depending on the complexity of the case, this can take place before a panel of three, five or, very rarely, 13 judges (the whole court). Those entitled to submit written observations can also appear at the hearing, regardless of whether or not they have in fact lodged written submissions.

Oral submissions before the Court of Justice are expected not to exceed 15 to 20 minutes, although on written application the Court can grant an extension to a maximum time limit of 30 minutes. It is also possible on written application to enable more than one advocate to appear, particularly when representations are to be made on behalf of more than one party, but all submissions must in principle be made within the same 15 to 30 minute time limit. The taxpayer must deliver oral submissions in the language of the case. The order of oral submissions is first the taxpayer, then the Member States in alphabetical order of country name in the language of the country, and finally the Commission. Reply submissions are possible, but are expected to be limited to a few minutes only.

The jurisdiction of the Court of Justice in preliminary ruling cases is limited to providing guidance on the interpretation of EU law. It has no jurisdiction to make findings of fact or national law. Where there are factual disputes or disputes as to the meaning of national legislation that are material to the Court's ruling, the Court generally endeavours to provide the national court with sufficient guidance to cover the respective positions.

After the hearing, and usually a few months later, the advocate general gives his or her opinion. There is no procedure as such for commenting on opinions. If, however, the advocate general makes a material error in understanding the national legislation or facts, it is possible to alert the Court to the error by writing to the registry, and very exceptionally parties have successfully sought a reopening of the oral procedure. Where such an error

12 Joined cases C-320/90–322/90 *Telemarsicabruzzo v. Circostel* [1993] ECR I-393.

13 See further the Statute of the Court of Justice of the European Union at Protocol (No 3) to the TFEU (Consolidated version), *Official Journal of the EU* (26 October 2012) C326/01; Rules of Procedure of the Court of Justice (Consolidated version), *Official Journal of the EU* (26 June 2013) L173; Supplementary Rules of the Court of Justice, *Official Journal of the EU* (1 February 2014) L32/37.

occurs, the advocate general may revise the opinion, or where the oral procedure is reopened, give a second opinion.[14] The possibility of alerting the Court to errors is not to be used by the parties as an excuse to seek to argue the case further.

Following the opinion, the judges deliberate on the case and give their judgment. The judgment is a single judgment, if necessary arrived at by majority decision.

The Court's Rules of Procedure, which were substantially revised in 2012, allow the Court considerable flexibility in dealing with cases. It may, for example, dispense with an oral hearing or with the advocate general's opinion, and in very simple cases may simply issue a reasoned order rather than giving a full judgment.

At the request of the referring court (or exceptionally by his or her own motion), and where the nature of the case requires that it be dealt with in a shortened time frame, the President of the Court may order an expedited procedure and set the relevant time limits. However, if a case follows its normal course, then judgment can be expected within two years of the referral being made by the national court.

iii Proceedings by the Commission

In addition to the preliminary ruling procedure under Article 267 TFEU, it is open to the European Commission to institute proceedings before the Court of Justice for a declaration that a Member State has failed to fulfil its obligations under EU law. These proceedings may also be started by another EU country, although this is comparatively rare. Where the Commission brings such an action, it must follow the procedure set out in Article 258 TFEU. This provides that it must first give the Member State concerned the opportunity to submit its observations on the supposed breach of EU law and, if the Commission is not satisfied, issue a formal reasoned opinion on the matter. If the Member State fails to comply with the opinion within the period laid down by the Commission, the Commission may then institute proceedings before the CJEU.

Where the Court finds that a Member State is in breach of EU law, the latter is obliged to amend its legislation to remedy the situation. In some circumstances the legislation may have already been amended, with retrospective effect, before the Court's decision has been made.[15] If the Member State fails to amend the relevant legislation following the Court's decision, the Commission may bring a further action under Article 260 TFEU against the Member State seeking the imposition of a fine. A judgment of the Court under Article 258 TFEU may also provide the basis for claims by taxpayers through their national courts. However, while in bringing a case the Commission often acts upon complaints received by individual taxpayers or associations of taxpayers,[16] it is not directly concerned with the rights of individual taxpayers. The Commission's concern is purely with the prospective rectification of the national law. Even where the Commission brings a case, it is important for taxpayers to ensure that they make the necessary claims using domestic procedures within the time

14 For example, case C-35/98 *Staatssecretaris van Financiën v. BGM Verkooijen* [2000] ECR I-4071 (Opinions of Advocate General La Pergola of 24 June 1999 and 14 December 1999).

15 For example, case C-112/14 *European Commission v. UK*, judgment of 13 November 2013.

16 The procedure for making such a complaint to the Commission is explained on its website at http://ec.europa.eu/atwork/applying-eu-law/complaints_en.htm. An optional form for that purpose can also be found on the website.

limits laid down by national law. While Commission action is not a substitute for making a claim using domestic remedies, it may nonetheless be helpful for taxpayers litigating in their national courts.

Commission action is delimited by a letter of formal notice sent by the Commission to the Member State concerned and the reasoned opinion issued by the Commission, which cannot be extended. Subsequent changes in the law thereafter are ignored.[17]

iv Actions by Member States against the institutions

A less common form of proceedings before the Court of Justice in tax cases are actions brought by Member States to challenge acts of the EU institutions under Article 263 TFEU. An example of this is the recent challenge by the UK to the proposed financial transactions tax (FTT), which led to a CJEU judgment of 30 April 2014 in case C-209/13 *UK v. Council*. The UK sought the annulment of a decision authorising 11 participating Member States to introduce a common FTT through the enhanced cooperation procedure. The CJEU dismissed the UK's application, noting that it was premature and that the review of the decision authorising the use of enhanced cooperation should not be confused with any subsequent review undertaken in the context of an application for annulment of measures adopted for the purposes of implementing such enhanced cooperation. The FTT remains under discussion.[18] There is still no consensus between the participating Member States on the scope of the tax and how it should be levied. Nonetheless, if any FTT system does emerge, it will be interesting to see whether that system will itself be subject to challenges.

v Direct access by taxpayers to the General Court

The main tax cases that are brought directly before the CJEU are those in which the taxpayer takes action not against the decisions of national tax authorities but against the Commission to seek the annulment of a Commission decision addressed to it or directly affecting it (for example, in the field of fiscal state aid or competition). Such cases are heard first by the General Court. From there, an appeal lies on a point of law to the Court of Justice. Appeals against such a decision must be brought within the two-month time limit laid down by Article 263 TFEU. Care must be taken because if a litigant fails to bring an action in the General Court that was clearly open to it, there is a risk that it may be unable to challenge the validity of the decision in the course of national proceedings implementing the decision.[19]

II RECENT CJEU CASE LAW ON TAXATION

The numerous judgments that the CJEU gives in tax cases each year are predominantly concerned with the interpretation of the EU VAT and excise duty legislation, and the compatibility of national tax provisions with the Treaty state aid rules and fundamental freedoms.

---

17 For example, case C-38/10 *European Commission v. Portuguese Republic*, judgment of 6 September 2012.

18 See the European Commission's web page 'Taxation of the financial sector' at http://ec.europa.eu/taxation_customs/taxation/other_taxes/financial_sector/index_en.htm.

19 Case C-188/92 TWD *Textilwerke Deggendorf* [1994] ECR I-833. See also case C-222/04 *Cassa di Risparmio di Firenze* [2006] ECR I-289.

i VAT

VAT is a largely harmonised tax and unsurprisingly, therefore, accounts for many of the tax cases each year. These tend to concern the interpretation, against a particular factual background, of specific provisions of the principal VAT Directive (2006/112/EC), for example, the provisions on exemptions, definition of taxable persons and economic activity, the right to deduct input VAT, the taxable amount, special schemes such as the scheme for travel agents and so forth. In interpreting the Directive, the Court has regard in particular to the scheme of the Directive and the underlying aim of fiscal neutrality, as well as to the context in which particular provisions appear.

Two important general themes in recent VAT case law merit particular mention:

a First, following its judgment in the field of agriculture in *Emsland-Stärke*,[20] the Court received a series of references from national courts asking about the application of the doctrine of abuse of law in the field of VAT.[21] In those cases, the Court introduced the doctrine into the VAT area and set out the circumstances in which taxpayers' arrangements were to be considered abusive, with the consequence that taxpayers were precluded from relying on the Directive. The Court held that the conditions for abuse were met where:
   - notwithstanding the fact that the conditions laid down by the Directive and the national implementing legislation formally applied, the taxpayer's arrangements resulted in a tax advantage contrary to the purpose of the legislation; and
   - it was apparent from a number of objective factors that the essential aim of the arrangements was to obtain a tax advantage;[22] and

b A second recurring issue is the compatibility of Member States' implementation of the VAT Directive with general principles of EU law, such as legal certainty, proportionality effectiveness and, with VAT, the principle of fiscal neutrality. For example, in the 2015 case *Macikowski,*[23] the CJEU held that fiscal neutrality and proportionality did not preclude a national provision, under which a court enforcement officer was liable with his entire assets for the amount of VAT due on the proceeds of the sale of immovable property effected through enforcement where he did not discharge his obligation to collect and pay that tax. More generally, a number of recent cases have raised the question of whether compliance requirements and the burden of proof imposed on taxpayers are proportionate, and whether the means available to taxpayers or their customers to assert their right to repayment of unlawfully levied taxes provide an effective remedy.[24]

---

20 Case C-110/99 *Emsland-Stärke* [2000] ECR I-11569.

21 Case C-255/02 *Halifax* [2006] ECR I-1609; case C-419/02 *BUPA Hospitals* [2006] ECR I-1685; case C-223/03 *University of Huddersfield* [2006] ECR I-1751; case C-103/09 *Weald Leasing* [2010] ECR I-13589; case C-277/09 *RBS Deutschland Holding* [2010] ECR I-13805; case C-589/12 *GMAC UK plc*, judgment of 3 September 2014.

22 See, case C-223/03 *University of Huddersfield* [2016] STI 1654; the Court of Appeal judgment of 12 May 2016.

23 C-499/13 *Macikowski v. Dyrektor Izby Skarbowej w Gdánsku*, judgment of 26 March 2015.

24 See, for example, case C-94/10 *Danfoss and Sauer-Danfoss*, judgment of 20 October 2011; case C-591/10 *Littlewoods Retail and Others*, judgment of 19 July 2012; case C-588/10 *Kraft Foods Polska*, judgment of 26 January 2012; case C-107/10 *Eenel Maritsa Iztok and 3AD*, judgment of 12 May 2011; case C-302/07 *JD Wetherspoon* [2009] ECR I-1467; case C-499/10 *Vlaamse Oliemaatschappij*, judgment of 21 December 2011.

These two issues were both discussed recently in the *Surgicare*[25] case. The CJEU was asked to consider whether the Directive, in particular the principles of equivalence and effectiveness, precludes the mandatory application of a national administrative procedure, where the revenue authorities suspect the existence of an abusive practice. It held that it did not and that it was for the referring court to determine whether the national measures are compatible with those principles, having regard to all the circumstances of the case.

Other significant decisions in 2015 include the *Larentia and Minerva*[26] case, concerning the circumstances in which holding companies may deduct VAT paid on expenditure connected with the acquisition of shareholdings in subsidiaries. The CJEU held, firstly, that where the holding company involves itself in the management of the subsidiaries, it carries out an economic activity belonging to its general expenditure and that, therefore, the VAT paid on that expenditure must, in principle, be deducted in full. Secondly, it was said that, where the holding company involves itself in the management of only some of the subsidiaries, the VAT paid on the expenditure may only be deducted in proportion to that which is inherent to the economic activity, according to the criteria for apportioning defined by the Member States. The CJEU was also asked to consider whether the right to form a VAT group could be reserved exclusively to entities both with legal personality and linked to the controlling company of that group in a relationship of subordination. The Court held that it could not, unless these two requirements were necessary in order to achieve the objectives seeking to prevent abusive practices or behaviour or to combat tax evasion or tax avoidance.

The Anti-Tax Avoidance Directive

On 21 June 2016, the Ministers of the Economic and Financial Affairs Council (ECOFIN) agreed on the text of the draft Anti-Tax Avoidance Directive (ATAD) addressing tax avoidance practices commonly used by large companies. The directive addresses situations where corporate groups reduce their overall tax liability by taking advantage of disparities between national tax systems. Corporate taxpayers may benefit from low tax rates or double tax reliefs; or they can ensure that categories of income remain untaxed by making it deductible in one jurisdiction whilst in the other it is not included in the tax base. The outcome distorts business decisions and risks creating situations of unfair tax competition.[27]

The Anti-Tax Avoidance Directive covers all taxpayers, this includes subsidiaries of companies based in third countries. However, it does not extend in a particular state to transparent entities that are not subject to tax in that state.[28] The Directive sets out five key anti-avoidance measures, which all Member States should apply, to counteract some of the most common types of aggressive tax planning. These are:

a interest limitation rule: to discourage artificial debt arrangements designed to minimise taxes;

b exit taxation rule: to prevent companies from avoiding tax when relocating assets;

c general anti-abuse rule: to counteract aggressive tax planning when other rules do not apply;

25 Case C-662/13 *Surgicare – Unidades de Saúde SA v. Fadenza Pública*, judgment of 12 February 2015.

26 Joined cases C-108/14 and C-109/14 *Beteiligungsgesellschaft Larentia + Minerva mbH & Co KG v. Finanzamt Nodernham + Finanzamt Hamburg-Mitte and Marenave Schiffahrts AG*, judgment of 16 July 2015.

27 Corporate tax avoidance: Council agrees its stance on anti-avoidance rules, 21 June 2016.

28 ECOFIN agrees EU-wide rules in Anti-Tax Avoidance Directive, 29 June 2016.

d controlled foreign company (CFC) rule: to deter profit shifting to a low/no tax country; and

e hybrid mismatch rules to prevent companies from exploiting national mismatches to avoid taxation.

Member States that have started implementing the Directive, or are of the view that they are already in compliance, will need to consider any differences between the EU and OECD requirements. All Member States will either need to review their existing exit tax and GAAR rules or introduce appropriate new laws. It may be argued that many states will not be fully compliant and some will have substantial changes to make.[29]

Member States are legally required to transpose the directive into their national laws and regulations by 31 December 2018 such that they apply no later than 1 January 2019, with an exception for the rules on exit taxation for which they will have to implement by 31 December 2019 and apply from 1 January 2020, if the existing tax rules do not comply with the EU's broad template of minimum standards. However, Member States that have targeted rules that are equally effective to the interest limitation rules may apply them until the OECD reaches an agreement on a minimum standard or until 1 January 2024 at the latest.

ii State aid

In recent years the CJEU has also given judgment in a number of cases concerning fiscal state aid. Of particular note is the 2011 judgment in the *Gibraltar* case.[30] One of the difficult issues in the field of fiscal state aid is to determine whether a tax regime is to be considered as offering advantages selectively to a particular category of undertakings. In the *Gibraltar* case, the Court, overturning the judgment of the General Court, held that rules imposing payroll and business property occupation taxes on companies, although apparently generally applicable, nevertheless had the effect of giving offshore companies selective tax advantages contrary to the state aid rules. The Court held that, while a different tax burden resulting from the application of a 'general' tax regime was not sufficient on its own to establish selective taxation, selectivity existed where the taxation criteria adopted by a tax system were such as to characterise the recipient undertakings, by virtue of the properties that were specific to them, as a privileged category of undertakings.

A further issue is whether tax benefits aimed only at multinational companies fulfils the selectivity requirement *per se*. Several decisions of the Commission had previously indicated that it does.[31] However, the General Court has recently held in two cases that a requirement of being internationally active is not, of itself, sufficient.[32] There are appeals to the CJEU outstanding on these judgments and the outcome will be of great significance to fiscal state aid aimed specifically at multinationals.

29 ECOFIN agrees EU-wide rules in Anti-Tax Avoidance Directive, 29 June 2016.

30 Joined cases C-106/09 P and C-107/09 P, *Appeals by the European Commission against the judgment of the General Court in proceedings brought by the United Kingdom in respect of a state aid decision concerning Gibraltar* [2011] ECR I-11113. See also case C-452/10 P, *BNP Paribas and BNL v. Commission*, judgment of 21 June 2012.

31 See, for example, Commission Decision of 17 February 2003, 2003/515/EC, OJ L 180, 18 July 2003; Commission Decision of 13 May 2003, 2004/76/EC, OJ L 23, 28 January 2004.

32 Case T-219/10 *Autogrill España v. European Commission*, judgment of 7 November 2014; case T-399/11 *Banco Santander and Santusa Holding v. European Commission*, judgment of 7 November 2014.

In *P Oy*,[33] the CJEU considered whether a Finnish tax regime for corporate income tax which authorised the deduction of losses of certain companies constituted unlawful state aid. It held, in accordance with well established case law, that tax regimes which grant preferential treatment to some undertakings, and which would generally constitute state aid, may be justified by the nature or general scheme of the tax system of which it was a part. However, if the relevant tax authority had a discretion over whether to authorise the deduction of losses, and the criteria upon which it based such decisions was unrelated to the tax regime, then the regime would not be justified.

In the last few years, fiscal state aid has become a key focus of the European Commission and assumed a significant political dimension. In 2014 the European Commission announced that it had opened a number of investigations into the system of tax rulings in various Member States including Luxembourg and the Netherlands in relation to certain multinationals. In October 2015, the Commission concluded that rulings in Luxembourg and the Netherlands granted to Starbucks and Fiat a fiscal advantage that was not compliant with EU law. The Commission reasoned that the methods of computing their respective domestic tax liabilities, as permitted in the rulings, differed significantly from the standard regime of corporation tax and meant that Fiat and Starbucks were able to significantly lower their tax burden. This, the Commission asserts, distorts the operation of the single market. Following an in depth state aid investigation launched in June 2014, the Commission held, in August 2016, that Ireland must recover the illegal aid because it granted undue tax benefits to Apple. The tax ruling was found to be illegal under EU state aid rules, because it allowed Apple to pay substantially less tax than other businesses.[34] The rulings endorsed a way to establish the taxable profits for two Irish incorporated companies of the Apple group (Apple Sales International and Apple Operations Europe), which did not correspond to economic reality: almost all sales profits recorded by the two companies were internally attributed to a 'head office'.[35]

In continuing the line of cases,[36] the recent decision struck new ground in two ways. First, the Commission decided that all of the profits made from sales by Apple Sales International, that owned Apple's iPhone and iPad IP outside the Americas, under a cost sharing agreement with Apple Inc. in the US, and purchased Apple products from equipment manufacturers and sold Apple products to end users across Europe, should be taxed in Ireland. Second, the Commission's suggested that the amount of state aid could be reduced if other countries successfully tax Apple's sales profits. Both Ireland and Apple have indicated their intention to appeal; therefore, the Commission's decision is subject to appeal to the EU General Court, by either party. In October 2017, the Commission announced that it plans to take the Irish government to the CJEU over its failure to collect the tax.[37] Also in October 2017, continuing the trend, the Commission found that Luxembourg granted state aid to Amazon.

33 Case C-6/12 *P Oy v. Veronsaajien oikeudenvalvontayksikko*, judgment of 18 July 2013.

34 European Commission - Press release 'State aid: Ireland gave illegal tax benefits to Apple worth up to €13 billion', 30 August 2016.

35 See, European Commission – Press release 'State aid: Ireland gave illegal tax benefits to Apple worth up to €13 billion',Brussels, 30 August 2016.

36 *Starbucks* and *Fiat*.

37 European Commission – Press Release 'State aid: Commission refers Ireland to Court for failure to recover illegal tax benefits from Apple worth up to €13 billion', 4 October 2017.

The judgment of the CJEU in the joined cases of *Autogrill*[38] and *Santander*[39] is a clear indication that the Commission's transfer pricing decisions will be upheld.

iii Direct tax and the fundamental freedoms

In the direct tax field, the CJEU continues to deliver ground-breaking decisions concerning the compatibility of national tax provisions with the fundamental Treaty freedoms. Recent cases concern various aspects of Member State tax systems, including rules on interest deduction,[40] controlled foreign corporations,[41] dividend taxation,[42] loss relief [43] and exit taxes.[44]

Several general themes can be identified in the recent case law:

a Almost invariably, the key issue in the case law is whether national rules imposing a disadvantage on non-resident taxpayers or resident taxpayers in a cross-border situation are justified – and, therefore, rendered lawful – by the need to safeguard the balanced allocation of Member States' taxing powers,[45] to prevent double use of losses,[46] or to combat tax avoidance and abuse.[47] The Court has set out guidance in a variety of contexts on the extent to which those justifications apply and, in relation to avoidance and abuse, has made a link with the VAT case law mentioned above.

b A second recurring issue in this area, as in the VAT case law, is the nature of the remedies that must be made available to taxpayers seeking to assert their EU law rights to provide an effective remedy and the lawfulness of procedural obstacles to the exercise

38 Case C/20/2015.

39 Case C/21/2015.

40 Case C-524/04 *Test claimants in the Thin Cap Group Litigation* [2007] ECR I-2107; case C-311/08 *SGI* [2010] ECR I-487; case C-318/10 *Siat*, judgment of 5 July 2012; case C-565/11 *Irimie v. Administratia Finantelor Publice Sibiu and another*, judgment of 18 April 2013.

41 Case C-196/04 *Cadbury Schweppes* [2006] ECR I-7995, case C-201/05 *Test claimants in the CFC and Dividend Group Litigation* [2008] ECR I-2875.

42 Case C-446/04 *Test claimants in the FII Group Litigation (FII 1)* [2006] ECR I-11753; case C-35/11 *Test claimants in the FII Group Litigation*, judgment of 13 November 2012 (*FII 2*); case C-436/08 *Haribo Lakritzen Hans Riegel* [2011] ECR I-305; case C-310/09 *Accor* [2011] ECR I-8115; joined cases C-24/12 and C-27/12 *X BV and TBG Limited*, judgment of 5 June 2014; case C-386/14 *Groupe Steria SCA v. Ministère des Finances et des Comptes publics*, judgment of 2 September 2015.

43 Case C-446/03 *Marks & Spencer* [2005] ECR I-10837; case C-231/05 *Oy AA* [2007] ECR I-6373; case C-337/08 *X Holding* [2010] ECR I-1215; case C-18/11 *Philips Electronics*, judgment of 6 September 2012; case C-123/11 *A Oy*, judgment of 21 February 2013; case C-48/13 *Nordea Bank Danmark A/S v. Skatteministeriet*, judgment of 17 July 2014; joined cases C-39/13, C-40/13 and C-41/13 *SCA Group Holding & Others*, judgment of 12 June 2014; case C-172/13 *European Commission v. United Kingdom*, judgment of 3 February 2015.

44 Case C-371/10 *National Grid Indus* [2011] ECR I-12273; case C-64/11 *Commission v. Spain*, judgment of 25 April 2013; case C-164/12 *DMC Beteiligungsgesellschaft mbH v. Finanzamt Hamburg-Mltte*, judgment of 23 January 2014; case C-657/13 *Verder LabTec GmbH & Co KG v. Finanzamt Hilden*, judgment of 21 May 2015.

45 See, for example, case C-311/08 *SGI*. For a recent application of the principles behind the objective of ensuring the balanced allocation of taxing powers, see case C-164/12 *DMC*, Paragraphs 44–58.

46 Case C-123/11 *A Oy*.

47 Case C-196/04 *Cadbury Schweppes*. This ground cannot be relied upon independently as a justification in the public interest; see also joined cases C-39/13, C-40/13 and C-41/13 *SCA Group Holding*, Paragraphs 42 and 55.

of those remedies.[48] This issue has become increasingly important for taxpayers as tax authorities, faced with non-compliant legislation, have sought to limit claims by procedural means.

c A third issue that has arisen in this context – but that is of wider importance – is the extent to which taxpayers can rely on the free movement of capital provisions in Article 63 TFEU to resist fiscal restrictions on investments in and from non-EU countries.[49] Of particular note is the judgment in *FII 2*, in which the Court held that resident taxpayers could rely on Article 63 to resist discriminatory taxation of dividends received from holdings in companies in non-EU countries, whether the holdings involved portfolio or direct investment.

48 Joined cases C-397/98 and C-410/98 *Metallgesellschaft Ltd v. IRC; Hoechst AG v. IRC* ECR I-1727; case C-35/11 *FII 2*; case C-398/09 *Lady & Kid*, judgment of 6 September 2011; case C-436/08 *Haribo*; case C-362/12 *FII 3, case C-640/13 European Commission v. United Kingdom, judgment of 18 December 2014*.

49 See in particular *Thin Cap* and *FII 1* and *2*, footnotes 21 and 23.

Chapter 2

AUSTRIA

Franz Althuber and Stefan Holzer[1]

I INTRODUCTION

The Austrian tax administration has recently been under pressure to generate higher tax income and to fight tax evasion – especially in view of the global economic crisis. This has led to an increase in tax proceedings and criminal proceedings involving tax offences.

The main law in which tax proceedings are laid down is the Federal Fiscal Code (BAO). Besides general provisions regarding the relation between the tax authorities and taxpayers, detailed provisions regarding proceedings in matters of public taxes of the federal government, the regional states and the municipalities are laid down. Taxes are usually formally assessed using tax bills after the taxpayer's tax assessment has been checked by the tax authority. When a taxpayer believes the authority's bill to be illegal with respect to content, or unjustified, the taxpayer may appeal against such tax bill.

Tax procedural law was completely restructured in Austria, with effect from 1 January 2014. The remedy against notices of tax authorities is no longer an appeal, but is instead a notice of appeal. The Independent Tax Senate (on tax and customs law) was the appellate instance, and was competent for making remedy appeal decisions on matters of tax, tariffs and fiscal offences. Now, there is a general appellate instance for tax law – the Federal Tax Court – which is seated in Vienna and operates six additional branches in the Austrian provinces. Advice and representation regarding appellate procedures relating to tax law is also a broad field of activity for advisers. According to statistics published by the Federal Tax Court, 13,828 appeals against tax bills were filed in 2016. The taxpayer has the right to appeal against decisions of the Federal Tax Court before the Administrative Supreme Court or the Constitutional Supreme Court, but an appeal before the Administrative Supreme Court is only admissible if the Federal Tax Court explicitly mentions this in its judgment. If the Federal Tax Court does not grant leave for appeal (e.g., because no legal issue of substantial importance needs to be clarified), the only way is through an extraordinary appeal before the Administrative Supreme Court, which is only feasible under particular conditions. Only 2.12 per cent were filed with the Administrative Supreme Court or the Constitutional Supreme Court in 2016. An average of 1.27 per cent of all finished appellate proceedings judgments of the Federal Tax Court are set aside by the Constitutional Supreme Court or the Administrative Supreme Court by reason of unlawfulness or procedural irregularity.

During proceedings on appeal, it is also possible to amicably settle the dispute between the taxpayer and the tax authority. For this purpose the parties to the proceedings are summoned to appear, either officially or based on a suggestion, at a discussion meeting in

1 Franz Althuber is a partner and Stefan Holzer is a senior associate at DLA Piper.

which the facts as well as the legal situation and the settlement of the legal dispute are tried. The costs of appellate procedures depend on the individual case. The successfully appealing party has no right to claim for payment of its costs for the procedure. Hence, advisory costs and costs of representation are usually borne by each party.

II COMMENCING DISPUTES

i Cause of action of tax proceedings and tax disputes

In Austria, taxes are basically assessed and invoiced in the form of tax notices. A notice is an individual, sovereign, external administrative act issued by the tax authority. These tax notices are issued in writing and must meet certain requirements regarding content: for example, they must be duly reasoned and the main facts that the decision is based on must be clearly mentioned. If a taxpayer does not agree with the legal view and the notice's content, he or she may initiate an appellate procedure by filing an appeal. If a taxpayer does nothing within the legal time for appeal of one month (which may, however, be extended upon application), the tax notice becomes legally effective and binding.

Tax audits or other official acts may also lead to an *ex post* reopening of closed proceedings. Against such decisions to resume, and following possibly amended tax bills, appeals can be made.

ii Appellate procedures before the Federal Tax Court as appellate instance

Appeals can be made against notices of the tax authority within one month of delivery of the notice. In addition to information regarding the name of the notice appealed against, such appeal should include the issues of appeal and information to which the amendments apply. Furthermore, the reasons for notice of appeal must be set out.

Provided that the appeal is admissible, timely and free from fault regarding form and content, the tax authority that issued the tax notice is competent to use the content to make a preliminary decision on the appeal. The Federal Tax Court only decides immediately in a few exceptional cases. The taxpayer may file an application for submission with the Federal Tax Court against the preliminary decision on the appeal of the authority that issued the notice. As a consequence, the preliminary decision on the appeal ceases to be effective and the appeal is directly submitted to the Federal Tax Court for decision.

iii Appellate procedures before the Administrative Supreme Court

If a taxpayer also fails to submit to the judgment and legal opinion of the Federal Tax Court, another remedy and appellate proceedings before the Administrative Supreme Court may be initiated. This appeal needs to be filed within six weeks of the judgment of the Federal Tax Court.

There are two types of appeal: regular and extraordinary appeals. A regular appeal must be admitted by the Federal Tax Court, and must be included in the judgment of the Federal Tax Court. A regular appeal is admissible if:

a the legal question to be answered is of fundamental importance;

b the judgment derives from the adjudication of the Administrative Supreme Court;

c an adjudication of the Administrative Supreme Court is missing; or

d the legal question at issue has not been answered consistently in the adjudication of the Administrative Supreme Court.

If the Federal Tax Court does not admit such a regular appeal, the remedy of extraordinary appeal may be made against the judgment of the Federal Tax Court. In the case of an extraordinary appeal, the taxpayer must additionally state why he or she considers the appeal admissible contrary to the judgment of the Federal Tax Court.

iv Appellate procedure before the Constitutional Supreme Court

An appeal against a judgment of the Federal Tax Court may also be filed by reason of the violation of basic rights with the Constitutional Supreme Court. In connection with a respective appeal, the taxpayer must state that he or she feels violated in his or her rights granted by constitutional law, or as a consequence of an illegal regulation, an unconstitutional law or state treaty being applied by the judgment of the Federal Tax Court.

v Legal protection regarding international double taxation

Austria aims to avoid double taxation in the area of income tax by concluding tax treaties. As of 1 January 2017, Austria had concluded such double taxation conventions, often based on the OECD Model Convention, with about 100 countries.

In cases where no tax treaty applies (e.g., because no tax treaty exists or certain taxes are not included), national measures apply under certain conditions where Austria unilaterally tries to avoid double taxation. The national legal basis for such unilateral measures can be found in Section 48 of the BAO. According to this provision, the Federal Ministry of Finance may order to exclude, in whole or in part, certain taxable items from taxation, or to set off, in whole or in part, foreign taxes. The decision of the Federal Ministry of Finance is a discretionary decision, which allows the Ministry to avoid double taxation both by individual setting and by general regulations.

On the basis of this provision, the Federal Ministry of Finance has issued several regulations that concretise the provision of Section 48 of the BAO. One example of such regulation is VO BGBl II 2002/474, which takes steps to avoid double taxation in relation to income tax and corporate income tax if no double tax treaty exists with the country in question.

Section 48 of the BAO also allows the Federal Ministry of Finance an individual settlement of applications. There are also, of course, EU law provisions to be observed in which double taxation applies. In addition to Section 48 of the BAO, there are other provisions in which unilateral national measures for the avoidance of double taxation are laid down. For example, the Double Taxation Tax Act 2010 allows the Federal Ministry of Finance to avoid double taxation by general regulations for areas or countries with no legal subjectivity in relation to international humanitarian law (e.g., Palestine).

III THE COURTS AND TRIBUNALS

As from 1 January 2014, legal protection is regulated by an administrative jurisdiction on two levels. The first level is the Federal Fiscal Court and the second level the Higher Administrative Court. A possibility to file a complaint with the Constitutional Court continues to be available. The following authorities or courts may be relevant for tax purposes.

i Tax offices

Tax offices are competent for the collection of taxes, and are, therefore, the central body for most tax issues. Further competences are, for example, defined in the Act Governing the Employment of Foreign Nationals and the Gambling Act. In addition to the tax offices having general competence, there are also tax offices with a special scope of competence in Austria, for example, regarding particular subject matter, or locally for certain types of taxes or for certain taxpayers.

ii Federal Tax Court

The Federal Tax Court as appellate instance decides appeals against notices issued by tax authorities, most importantly tax offices. There are two types of decisions taken by the Federal Tax Court: decisions on the merits or rulings (i.e., decisions on procedural aspects of law). Basically, decisions are taken by judges sitting alone who are independent and who cannot be transferred or removed. Upon the taxpayer's application a senate, consisting of four members, can also rule on appeals from notices.

iii Public law courts

The Administrative Supreme Court and the Constitutional Supreme Court are the public law courts in Austria. These courts constitute the final national instance in tax law.

IV PENALTIES AND REMEDIES

i General

It is important to keep in mind that there are not only tax law provisions to be observed, but that fiscal misconduct may also have criminal law implications. Contraventions in the field of applicability of taxes laid down in federal laws and directly applicable EU laws are dealt with in the Fiscal Offences Act. Furthermore, some special laws also contain penal provisions, and regularly refer to the provisions of the Fiscal Offences Act.

The Fiscal Offences Act consists of two parts: the substantive fiscal offences law and criminal proceedings involving fiscal offences. Criminal proceedings involving fiscal offences can be subdivided further into criminal proceedings before a fiscal authority and criminal proceedings before a court. Intentional evasion of taxes is generally only punishable by court if the amount of taxes evaded exceeds €100,000. Intentional customs offences are only punishable by court if the customs duty for the goods to pay duty on exceeds €50,000.

Criminal proceedings before a fiscal authority are the responsibility of the tax offices as the functional authority competent for fiscal offences, and the collection of taxes that are evaded, unpaid or not assessed in a timely fashion. If the amount of taxes evaded is higher than €33,000, the ruling of the authority competent for fiscal offences is taken by a senate consisting of three members. Judicial criminal proceedings involving fiscal offences are decided before regular criminal courts.

ii Types of fiscal penalty

The Fiscal Offences Act defines various types of offences, and includes not only fiscal offences but also customs offences. The most important offences in practice are as follows.

Tax evasion

A person who intentionally evades taxes whereby duties of notification, disclosure or truthfulness are breached commits the offence of tax evasion. Tax evasion is also effected by knowingly omitting a VAT assessment subject to the duty to preliminarily assess VAT. The degree of penalty for committing intentional tax evasion is up to twice the amount evaded. Where tax is evaded as a business or as a group, higher penalties are threatened.

Tax fraud

The legislature has created a new fact, tax fraud, in the Fiscal Offences Act as of 1 January 2011. Massive penalties (imprisonment) for committing particular fiscal offences are provided for in the Act.

There is a tax fraud if, on one hand, one of the basic facts of tax evasion objectively and subjectively exists, and, on the other, this offence was committed by committing one of the necessary acts of fraud. Acts of fraud are listed in Section 39 of the Fiscal Offences Act as follows: use of incorrect or falsified documents, data or evidence; use of fictitious transactions or fictitious acts; and the assessment of preliminary taxes paid that are not based on delivery or other services to obtain unjustified tax credits.

Hence, tax fraud ties in with the classic acts of fraud defined in the general Criminal Code, which become manifest in the production of incorrect or falsified documents or evidence. In contrast with basic crimes, tax fraud is punished mainly with imprisonment. The threat of punishment consists of three levels to account for the penalty and the seriousness of the offence. Where taxes between €100,000 and up to €250,000 are evaded, a sentence of one to three years' imprisonment and fine of up to €2.5 million is likely. If the amount of taxes evaded is between €250,001 and €500,000, the minimum term of imprisonment is six months up to a maximum term of five years and a fine of up to €5 million. If the amount of taxes evaded is more than €500,000, imprisonment of between one and 10 years and a fine of up to four times the amount evaded is likely.

Grossly negligent evasion of taxes

A person who by being grossly negligent evades taxes commits the offence of grossly negligent evasion of taxes. Negligence is disregarding the due diligence. In contrast with an intentional act, a person who acts negligently seeks no 'success' (e.g., tax evasion). Grossly negligent evasion of taxes is set up to a maximum fine of the total tax evaded.

Financial administrative offence

Financial administrative offences, which are also laid down in the Fiscal Offences Act, constitute a catch-all clause. Financial administrative offences are, however, only liable to punishment if intentionally and not negligently committed. The burden of proof of whether such offence was committed intentionally lies with the fiscal offence prosecution authority. A financial administrative offence is, for example, an intentional late payment of self-assessed taxes. Self-assessed taxes are VAT, tax on income from employment, employer's contribution to the Family Burden Equalisation Fund and surcharge to the employer's contribution, capital gains tax and EU withholding tax. Non-payment from the fifth day following the due date of the tax is punishable. The fine is up to 50 per cent of the amount not paid.

V TAX CLAIMS

i Recovering overpaid tax

In Austria, the official tax claim comes into existence as soon as the fact to which the tax duty is bound by law is fulfilled. For example, when real property is bought in Austria, the liability to pay real estate transfer tax comes into existence upon execution of the purchase contract.

However, if a tax credit originated from the payment of taxes, this is to be refunded either upon the taxpayer's application or *ex officio* by the tax authority. 'Tax credit' means that the total amount of tax credits exceeds the total of taxes charged on the tax account.

Particularly in connection with capital gains tax and tax on income from employment, from time to time a taxpayer's taxes are withheld and paid in error without the taxpayer's contribution. In this case, a taxpayer may file an application for a refund with the competent tax office. The application may be filed until the end of the fifth calendar year following the year the taxes were withheld.

ii Facilities of payment

When taxpayers are in economic distress, they may apply for the payment of their tax sums to be made easier. Possibilities for this include deferment of tax or payment by instalments.

The granting of easier terms of payment is, however, subject to several conditions, because in addition to the taxpayer's application, the taxpayer must be in economic distress, and the collection of taxes must not be endangered by granting such facilitated payment. Furthermore, this is only possible for taxes not yet paid.

iii Suspension of tax collection

Suspending tax collection serves the factual efficiency of legal protection. This means that the complainant should not be burdened with the consequences of a potentially illegal decision issued by the authorities prior to the final decision regarding the remedies by the court of appeal. The complainant must apply for a suspension of tax collection, and the application may be filed between the filing of the complaint and the decision regarding such complaint. Collection of tax is to be suspended if the amount of such tax directly or indirectly depends on the clarification of a complaint. The suspension will only be granted up to an amount by which the relevant tax burden would be reduced in the event of the complaining party being successful with its remedy. The exact amount of the amount in dispute in an application for suspension is therefore of decisive importance. Basically, suspension is to be chosen before deferment. If, for example, both suspension and deferment are granted, payment is suspended until the period of suspension expires or is withdrawn.

iv Remitting taxes

In Austria, tax liabilities may also be remitted in whole or in part under certain conditions. However, this is only possible if the taxpayer files the necessary application with the tax authority and if the collection of such tax was unfair according to the facts of the case. There is a differentiation made between personal and factual inequality.

Whether personal inequality exists results from the taxpayer's economic situation. Collection measures that jeopardise livelihoods in particular are considered unequal by the judicature. Therefore, personal inequality usually exists if the collection of the relevant tax would put the taxpayer or his or her family in financial distress. Factual inequality of tax collection exists if the collection of tax in an individual case produces a result that was apparently not intended by the legislature, and if this led to an extraordinary burden and to an atypical interference with property. It is, therefore, to be used in cases in which tax liability accrues from exceptional facts and in which the collection of tax leads to a disproportionate financial burden of the taxpayer.

v Claimants

Taxpayers are every person that the tax authority contacts or may contact with respect to tax liability. Usually, the taxable person is also the receiver of the tax bill. A taxable person may also be somebody who is not the receiver of the tax bill: for example, the tax on income from employment where the employee is the taxpayer but the employer is liable to pay the taxes and is the primary contact.

Taxpayers may be individuals as well as legal entities. They are recognised as parties both in fiscal proceedings of first instance and in appellate proceedings; hence, they have all rights of a party to proceedings. Fiscal obligations of a partnership are to be fulfilled by the partnership's managing directors and their partners. If several persons come into consideration they have to name a joint authorised person to the tax authority. As an alternative, the authority may appoint a partner as a representative authorised to represent all.

VI COSTS

i Proceedings before the Federal Tax Court

In tax proceedings, as well as in proceedings on appeal before the Federal Tax Court, the costs of the proceedings are usually borne by the parties. In many cases there are hearings of witnesses and expert opinions. These witnesses and experts have the right to reimbursement of costs, which is usually paid by the tax authority. Where evidence incurs unreasonably high costs, the tax authority is only obliged to take such evidence if the costs incurred are fully paid by the taxpayer.

ii Appellate procedure before the Administrative Supreme Court and the Constitutional Supreme Court

Appeals to the courts of public law are subject to a fee of €240. The other costs of the proceedings are, to a large extent, fixed rates. If a case is won the costs are reimbursed by lump-sum payment.

iii Criminal proceedings involving fiscal offences

If a taxpayer is convicted of an illegal act in criminal proceedings involving fiscal offences, he or she has to bear the following costs.

First, the taxpayer must pay a lump-sum contribution to the costs in an amount of 10 per cent of the fine imposed. However, if imprisonment was sanctioned, the taxpayer must pay €5 per day of imprisonment. The lump-sum payment is, however, rather low in Austria, since it is limited to €500. The lump-sum payment is fixed in the sentence.

Secondly, the taxpayer has to bear the costs for cash expenses of the fiscal authority and for the taking of evidence as well as other costs of the proceedings: for example, travel expenses of officers, witnesses or experts. The costs imposed become payable one month after the judgment becomes final. The tax authority of first instance is competent for the collection of these costs. Furthermore, the taxpayer must bear the costs of execution of the sentence; the costs of execution of the imprisonment are to be fixed by the court responsible for the execution of the sentence after the imprisonment is over.

VII ALTERNATIVE DISPUTE RESOLUTION

i General

Arbitration and other types of settlement of disputes, for example mediation, are only of very limited importance in Austrian tax law. Mediation is often discussed in the literature, but has not yet been established in practice. This is also based on the fact that the Austrian tax administration must closely adhere to the laws.

ii Advance ruling

Since 1 January 2011, it has been possible to obtain binding advance information from tax authorities in the form of an information notice (an advance ruling; Section 118 of the BAO). The introduction of such binding legal information will increase the reliability of planning for companies in the following areas, and further strengthen Austria as a location for business: transfer prices; group taxation; and restructuring measures.

According to the legislature, it is possible for the taxpayer to be certain about the fiscal assessment of the tax authority before the fact questioned is even realised. This minimises tax law-related risks of the respective undertaking.

Binding effect

The main advantage of this regulation is the binding effect of the advance ruling. The binding effect with respect to the fiscal assessment made in a notice not only exists for the tax authority that issues the notice, but also for a tax authority that becomes competent after a transfer of competence. An advanced ruling that is not issued by a competent tax office nevertheless still has a binding effect. The advanced ruling can be taken as a basis for the levying of taxes. This is, of course, provided that the realised facts do not or only slightly deviate from the facts that the assessment of the tax authority was based on.

Content

The advanced ruling, being a written notice, must meet the general requirements of the BAO. Section 118 Paragraph 6 of the BAO further defines the necessary content that must be included. This is *in concreto*:

a the facts that the fiscal assessment is based on;
b the tax assessment;
c the tax rules the assessment is based on;
d the taxes or findings and the periods of time for which the advanced ruling shall apply; and
e the extent of the applicant's reporting obligations.

The advanced ruling can also assess the facts to be assessed in deviation from the legal view of the applicant. This is not a partial dismissal of the application. The application demands that the stated facts be assessed with respect to tax law, but not that the legal view expressed in the application needs to be confirmed.

Costs

Pursuant to Section 118 Paragraphs 10 and 11 of the BAO, the applicant has to pay an administrative fee for the processing of the application. The information necessary for the calculation of the fee should already to be included in the application for issuance of an advanced ruling.

The amount of such administrative fee depends on whether the applicant has to set up a consolidated financial statement. In these cases, the administrative fee is €20,000. If there is no group structure, the administrative fee depends on the sales revenue. For the calculation of the administrative fee, the 12 months prior to the last balance sheet date of the applicant are decisive.

VIII ANTI-AVOIDANCE

Austrian legislature provides for a central rule in tax law – Section 22 of the BAO – by which tax circumvention shall be prevented. Pursuant to Section 22 of the BAO, it is not possible to circumvent or prevent tax liability by misusing the forms and interpretation of civil law. This means that a taxpayer may basically choose freely between the forms and interpretation of civil law, yet only to the extent that such interpretation is not unusual or inappropriate with respect to the economic success being aimed at, and as long as this is not solely based on the intention to avoid taxes.

The principle of economic approach is important in this context. This means that the true economic content and not the outer appearance of facts is decisive (substance over form). According to Supreme Court case law, it should be assessed whether the chosen procedure remains reasonable if the tax-saving effect was left out or whether such procedure would become completely incomprehensible without reducing taxes. A fraudulent or abusive referral to EU law is also not admissible, according to the European Court of Justice. If there is misuse, the consequences in terms of tax law that are usually applicable are omitted; the taxes are to be collected as if a reasonable legal design was chosen.

IX DOUBLE TAXATION TREATIES

i General

In Austria, taxes from income and property are included in double taxation treaties. These taxes not only include income tax and corporate income tax, but also capital gains tax and tax on land and buildings, as well as local taxes in part. Tax treaties that are concluded with Austria do not prevent double taxation of VAT.

ii VAT

With respect to VAT, there is a European system of VAT that is based on the principle that taxes are directly attributed to the state where the place of final consumption of a good or service lies. The result for Austrian VAT is that only sales realised in Austria are subject to Austrian VAT. Hence, foreign sales revenues are not taxable in Austria.

X AREAS OF FOCUS

i Base erosion and profit shifting (BEPS)

In recent years, activities of international relevance have increasingly become the focus of tax audits performed by tax authorities in Austria. The main reason for this is the OECD report regarding BEPS published in 2013. Austria has already implemented some regulations regarding the meaning of 'BEPS' into national law (e.g., Section 10, Paragraph 7 of the Austrian Corporate Income Tax Act (KStG) regarding the tax duty of hybrid shares in profits that can be deducted from profits distributed from foreign companies; Section 12, Paragraph 1, Item 9 KStG regarding the ban on interest deduction for group internal participation acquisitions; and Section 12, Paragraph 1, Item 10 KStG regarding the ban on the deductibility of interest and royalty payments to low-taxed affiliates). The Austrian Transfer Pricing Documentation Act was officially published on 1 August 2016. Therewith, the three-tiered standardised approach to transfer pricing documentation, as proposed by the OECD, is obligatory in Austria. Depending on their total revenue, Austrian-resident entities have to generate a master file and a local file (if the total revenue exceeds €50 million) or country-by-country reporting (if the total consolidated group revenue equals at least €750 million). Furthermore, an Austrian entity is also obliged to provide the master file if a related foreign entity has to create a master file under the applicable regulations of another state. The country-by-country reporting has to be provided to the tax authorities within 12 months of the last day of the specific fiscal year, whereas the tax authorities may request the master file and local file within 30 days of the corporate income tax return of the company being filed. According to Section 49b of the Fiscal Penal Act, intentional or grossly negligent misstatements in the country-by-country report may trigger a penalty of up to €50,000. The same applies if the country-by-country report is not transmitted on time.

ii Limitation of banking secrecy

With the Bank Account Register Act, the Austrian Federal Ministry of Finance was empowered to create a federal register of bank accounts and depositories containing the bank account number and personal data of account holders. Banking secrecy was limited by means of the banking package, so that federal tax authorities have access to bank data if they have 'concerns' regarding the accuracy of tax returns. Access is also granted to bank data of other persons (e.g., suppliers or customers) if there is a reasonable assumption that such access is of relevance to tax proceedings. The tax authorities have been able to receive such information since October 2016.

iii Cash register duty

According to the newly introduced cash register duty, the cash turnover of an undertaking that earns at least €15,000 and more than €7,500 in cash must be fitted with an electronic cash register since January 2016. To protect these cash registers against manipulation, the cash registers must be fitted with an appropriate security installation. Associated with this is the duty to issue receipts. If the cash register duty and the duty to issue receipts are not complied with, this will lead to consequences in the way that a financial offence is committed, and fines of up to €5,000 may be imposed.

iv Register for ultimate beneficial owners

The Ultimate Beneficial Owners Register Act (WiEReG) was been announced on 15 September 2017 and imposes a registration obligation on Austrian corporate entities and other legal entities regarding their ultimate beneficial owners. As of 15 January 2018, all direct or indirect owners holding more than 25 per cent of the share capital have to be disclosed in the new register maintained by Statistics Austria. The registration obligation applies to all companies and legal entities with their registered offices in Austria and to trusts or trust-like structures managed from within Austria. All natural persons that ultimately own or control a legal entity (beneficial owners) are subject to registration. Failure to register or the registration of incorrect information may trigger fines up to €200,000.

XI OUTLOOK AND CONCLUSIONS

On one hand, a major step to reach the above-mentioned BEPS goals is a substantially increased number of tax audits of international companies and of international facts. Relating thereto, transfer prices will more often be focused on in tax audits. On the other hand, measures such as the limitation of banking secrecy, the new Register for Ultimate Beneficial Owners or the cash register duty will in general lead to an increasing number of findings at tax audits. All these measures will, in turn, contribute to an increasing number of tax procedures and fiscal offences procedures in the future. The aggressive tax planning of multinational companies has been the focus of public interest, particularly because of the BEPS report. Thus, it can be assumed that the Austrian legislature will continue to tighten regulations concerning those legal facts, and that this will be accompanied by other measures to prevent tax fraud and tax circumvention.

Chapter 3

BELGIUM

Caroline P Docclo[1]

I INTRODUCTION

Belgian tax procedures vary slightly depending on the type of tax. However, a common feature of Belgian tax procedures is that there is no fee or cost due to the tax authorities or to the courts. The taxpayer may defend itself before the tax authorities and the courts, and thereby avoid paying fees to counsel.

Tax procedures may be slow. The tax authorities may revisit taxpayers' files after several years, administrative appeals may take several months and the courts are under-resourced. Nevertheless, most misunderstandings are swiftly settled at the stage of an administrative procedure organised as a series of open discussions where the taxpayer has access to the tax authorities' files.

Special services have been organised within the tax authorities to serve as intermediaries between taxpayers and the services in charge of assessing taxes. The Ruling Commission was created to prevent disputes, while the Tax Conciliation Service was created to assist taxpayers in tax disputes.

This chapter focuses on income tax disputes and the procedure organised by the federal legislation.[2]

II COMMENCING DISPUTES

i Audit of the taxpayer's situation

Most taxes are assessed on the basis of tax returns filed by taxpayers.[3] Tax disputes most often commence with a review of tax returns.

In the absence of a timely return, a taxpayer subject to corporate tax is taxed on a minimum tax base of €34,000. If the infringement is repeated, the latter amount may be increased up to €68,000 (Article 342(4) CIR1992). Corporate taxpayers are expected to verify the deadline for filing their tax return in the website of the Treasury, although there is no legal provision that imposes that rule.

1 Caroline P Docclo is of counsel at Loyens & Loeff.

2 The collection of taxes by the regions is subject to regional legislation (see the Flemish Tax Code in force since 1 January 2014).

3 Income tax returns must be filed within the six-month period following the closing of the relevant period. The calendar year is the relevant period for determining liability for individual tax. The fiscal year to which the annual financial statements of companies and other separate legal entities relate corresponds to the period over which their liability to corporate tax or to not-for-profit organisation tax is determined.

The tax authorities are allowed to adjust the taxpayer's income on the basis of any means of evidence, excluding oath (Article 340 of the Income Tax Code 1992 (CIR1992)).[4] They may investigate the taxpayer's situation for a period of three years from the beginning of the assessment year.[5] This period may be extended for an additional four years, provided that the authorities first notify the taxpayer in writing about any signs of a wilful attempt to defeat or evade tax related to the period under examination (Article 333 CIR1992). The taxpayer must be notified also when the authorities request information from other persons.[6] However, the consultation of databanks does not qualify as an investigation.[7] Signs of fraud are sufficient; the authorities do not need to demonstrate the wilful attempt to defeat or evade tax at the time of this notification.[8]

If the authorities receive information from a foreign country bound by an exchange of information agreement, they are allowed to further investigate for the purposes of establishing that the taxpayer omitted to report income that should have been reported within the five-year period before the year during which the information from the foreign country has been made available to them (Article 333/2 CIR1992).[9]

The tax authorities are also allowed a one-year time extension to investigate withholding tax on income from movable property if an investigation shows that the taxpayer misapplied that tax once over the previous five years (Article 333/3 CIR1992).

If a taxpayer files a complaint against a tax bill, the tax authorities may also conduct further investigations for the purposes of deciding on the taxpayer's grievances (Article 374 CIR1992). Investigations may thus be conducted long after the seven-year period during which taxpayers must keep their books (Article 315 CIR1992 and the Act of 8 June 2008).

The tax authorities may request that the taxpayer show them any document necessary to determine its tax liability (Article 315 CIR1992). The tax authorities may require the taxpayer to supply information within one month, or may allow a time extension if necessary (Article 316 CIR1992). Taxpayers who keep data in a computerised system must allow the tax authorities to access such information in the form that they require. The tax authorities may also access the premises where the taxpayer conducts a business during business hours (Article 319 CIR1992).

The tax authorities are allowed to keep the taxpayer's books and documents that they deem necessary to determine the amount of taxable income. They are not allowed to take books that are not closed (Article 315-ter CIR1992).

Information obtained on the occasion of the audit of a taxpayer may be used for the purposes of taxing other taxpayers (Article 317 CIR1992).[10] The tax authorities may also

4 The minutes of a VAT audit may be used to make presumptions for income tax purposes (see Cass., 21 June 2012).

5 The assessment year is the year during which the tax situation of the taxpayer is determined. This is the current calendar year with respect to withholding taxes; the year following the relevant period with respect to individual tax; and the year during which the fiscal year ends if it ends before 31 December, or the year thereafter if the fiscal year ends on 31 December.

6 Cass., 20 May 2016.

7 Cass., 12 February 2016.

8 Cass., 8 May 2009; Cass., 7 April 2016.

9 Seven year in case of wilful attempt to defeat or evade tax.

10 As an exception to this rule, information collected in a bank's books on the occasion of that bank's tax situation being examined must not be used to tax that bank's customers, unless a fraud mechanism is detected (Article 318 CIR1992).

request from any taxpayer information deemed necessary to determine the tax liability of any other taxpayer (Article 322 CIR1992). They may require bulk information on transactions of persons and groups of persons directly or indirectly involved in such transactions (Article 323 CIR1992).

The tax authorities may also request information from a bank with the purpose of taxing targeted customers if they suspect fraud or intend to impose a tax on the basis of evidence of wealth, unless the taxpayer (who must be informed of the intent to proceed with bank investigations) provides the requested information within one month. For the purposes of satisfying a request from another country, the tax authorities may investigate banks' files without giving prior notification to the taxpayer if the other country explicitly requests not to inform the taxpayer or if the other country demonstrates that it has already notified the taxpayer (Article 333/1 CIR1992).

The Supreme Court held that pieces of evidence obtained irregularly cannot be set aside unless the irregularity affects the reliability of the evidence or the right to a fair trial or if compelling formalities have been disregarded.[11] The Act of 24 October 2013 has embedded this dictum. The Supreme Court has expanded its dictum to pieces of evidence obtained by the tax authorities and used to establish a tax.

Information requested by or provided to foreign countries is not disclosed to the taxpayer before the investigation by the foreign country is closed (Article 337/1 CIR 1992).

ii Debates prior to assessment

If the tax authorities intend to adjust the taxpayer's tax liability, they must send it a notice of deficiency (Articles 346 and 351 CIR1992). The notice of deficiency, which is an invitation to discussion, must mention all the elements on which the intended adjustment is based. No tax can be imposed on elements other than those in the notice.[12]

The taxpayer is allowed one month to answer the notice of deficiency (this is not applicable in respect of withholding tax or if the rights of the Treasury are jeopardised). The one-month period starts running from the third working day following the sending of the notice of deficiency. The tax cannot be assessed before the end of this one-month period.

Before assessing the tax, the tax authorities must reply to the arguments of the taxpayer (notification of assessment) [13] (Articles 346 and 352 *bis* CIR1992). Although the assessment must be justified by elements mentioned in the notice of deficiency, the tax authorities may still change their legal analysis of the same elements. They may also use the same motives in the notification of assessment as in the notice of deficiency if the taxpayer does not submit new arguments.[14]

Despite the taxpayer's disagreement, the tax may be assessed and established as a debt.[15]

11 Cass. 22 May 2015; Cass., 10 February 2017.

12 There is no threshold amount or *de minimis* rule. The tax authorities may adjust the taxpayer's tax situation even if no supplement of tax is at stake for the period under examination (e.g., adjustment of operating losses or excess dividends-received deduction available for carry-forward).

13 A mere unsigned note is not akin to a notification of assessment (Cass., 5 January 2017).

14 See Cass., 21 November 2013.

15 See Cass., 18 October 2012.

iii Limitations on assessment

When the taxpayer files an accurate tax return in a timely manner, the tax must be assessed before 30 June of the year following the assessment year or six months after the filing of the tax return, whichever is later (Article 353 CIR1992).

However, if the taxpayer fails to file its return in a timely manner, or the tax authorities determine that the amount of tax due is higher than the amount resulting from the items reported in the return,[16] the tax may be assessed within three years of the beginning of the assessment year (Article 354 CIR1992).[17] This three-year limitation period is extended for a further four years in cases of wilful attempt to defeat or evade tax (Article 354 CIR1992). If the authorities do not need to further investigate during the additional four-year period, they are not required to notify the taxpayer signs of fraud.[18][19]

The tax may be assessed within the seven-year period even if the authorities did not firstly make use of the three-year period of Article 354 CIR1992 in the absence of a timely tax return.[20]

The tax may be assessed beyond these limitations in the following circumstances (Article 358 CIR1992):

a withholding tax on movable property income and PAYE unpaid during the five preceding years may be assessed during the year following the statement of the infringement;[21]

b if it appears from information received from a foreign country bound by an agreement on the exchange of information or from further investigation lead by the Belgian authorities that items of income have not been reported when they should have been reported during one of the five years (or seven years in case of fraud) preceding the year during which the information passed on by the foreign authorities is received by the Belgian authorities, the tax on such income may be assessed during a period of 24 months following the exchange of information;

c if a case brought before a court shows that items of income should have been reported within the five years before the year of the commencement of the proceedings, the tax may be assessed on such income during the 12 months after a court decision on the case has become final;[22] and

16 The tax authorities are not requested to demonstrate that the tax return is not correct (Cass., 20 February 2014; Cass., 2 December 2016).

17 A tax that is computed on the basis of the tax return must be assessed according to Article 353 CIR1992 even if the authorities later determine a deficiency within the time limit of Article 354 CIR1992 (Cass., 17 November 2016).

18 Cass., 12 February 2016.

19 If a taxpayer liable for corporate tax is dissolved and its directors, managers or liquidators do not reserve the moneys to satisfy the Treasury, they may be sued for five years after the publication of the closing of the liquidation.

20 Cass., 17 November 2016.

21 The time extension is not subject to investigations with third persons (Cass., 17 June 2016).

22 The Supreme Court held that the same provision allowed the tax authorities to tax, during the additional 12-month period, income that has not been reported after the commencement of the proceeding (Cass., 17 October 2013).

d when evidence shows that income should have been reported during the five years before the year during which the evidence became known to the tax authorities, the tax on that income may still be assessed during the 12 months following the time that the authorities obtained the information.

There is no time limit for adjusting the value of understated assets or overstated liabilities: they are deemed to be income of the year under examination unless the taxpayer demonstrates that they have already been taken into account to determine its tax situation (Article 361 CIR1992).[23]

The tax authorities may challenge the amount of deductible previous losses when they are used to offset taxable income. This means that they can challenge the profits and burdens of previous years that resulted in the losses carried over, regardless of the year to which they relate.[24]

If the tax director invalidates a tax bill further to a complaint filed by the taxpayer (see below) on grounds other than the statute of limitations, the tax authorities may assess an alternative tax computed on the same items as those on which the invalid tax had been computed within the three-month after the tax director's decision becomes final (Article 355 CIR1992).

If the taxpayer is convicted of tax fraud by a criminal court, the tax authorities cannot claim damages amounting to the tax evaded if the statute of limitations under the tax legislation has ended. The tax authorities cannot substitute a civil demand relying on the outcome of a criminal proceeding for a timely assessment.[25] The cause of a tax debt is not the wrongful behaviour of the taxpayer but the taxable transaction.[26]

iv Limitations on collection

The Treasury is time-barred if it does not collect taxes within five years of those taxes becoming undisputedly due. The statute of limitation is interrupted by the taxpayer's acknowledgement of its tax debt or by a writ of summons served by a bailiff or registered mail (Article 443 *bis* CIR1992).

The statute of limitations on collection is suspended pending an administrative appeal or a petition filed by the taxpayer.[27]

v Tax complaints

The taxpayer may bring a complaint against a tax bill before the tax director. The complaint is an administrative appeal against the tax, and is a prerequisite before bringing the dispute before a court (Article 1385-undecies of the Judicial Code).

The complaint must be filed within six months and three working days of the tax bill being sent (Article 371 CIR1992).

If the complaint is filed in a timely manner, the collection of the contested amount of tax is restricted for the period during which the proceeding is pending (Article 410 CIR1992).

23 The principle that items of income earned during a given period must be taxed separately with the other income of the same period is set aside by Article 361 CIR 1992 (Const. Court, 124/2011, 7 July 2011.

24 Cass., 12 September 1991.

25 Cass., 8 September 1999.

26 Cass., 2 March 2016.

27 Cass., 22 September 2011; Cass., 2 March 2017.

Despite the fact that the taxpayer may retain the payment of the contested tax, it will owe interest on the amount if it is unsuccessful. If the taxpayer pays the tax assessed (or if the authorities use a tax refund to offset the contested tax), interest will be paid to it if it wins the case (Article 418 CIR1992). The legal annual interest rate in tax matters was 7 per cent (Act of 5 May 1865 on interest-bearing loans). It will range between 4 and 10 per cent in favour of the Treasury, and between 2 and 8 per cent in favour of the taxpayer as from January 2018 (Articles 77 and 79 of the Law of 25 December 2017).

Before making a decision, the tax director, if so requested in the complaint, must invite the taxpayer to argue orally the points therein, and to consult the tax authorities' file. The tax director is expected to make his decision within six months of the filing of the complaint, or nine months in the absence of a tax return filed in a timely manner or in assimilated circumstances. Usually, the tax director takes much longer than six months to review a file; he may even take several years. In the absence of a decision after this six- or nine-month period, the taxpayer may bring its case before a court (Article 1385 *undecies* of the Judicial Code). In the absence of a decision six months after the filing of the complaint, interest stops running on the disputed tax debt until the case is brought before a court (Article 414 CIR1992).

The tax director cannot impose additional tax or use relief to offset any new deficiency that he may find (Article 375 CIR1992). Nevertheless, the tax director's interpretation of the facts presented by the tax inspector may support the assessment, provided that he does not make the taxpayer's situation worse. However, the fact that a taxpayer has filed a complaint does not hamper the tax authorities from further investigating the taxpayer's situation and adjusting the tax liability within the time limits mentioned above (see Section II.iii).

A complaint against tax assessed on the basis of contested elements amounts to a complaint against any tax assessed on the basis of the same elements (Article 367 CIR1992). If the complaint relates to the deduction of expenses made during a given taxable period, and such expenses cannot be fully deducted from the profit of that taxable period, the complaint also affects the taxes relating to subsequent periods during which the excess of these expenses have been deducted.[28]

An additional tax assessed after an adjustment of the taxable basis (understated or hidden items of income) is never considered as assessed on the same elements as those taken into account when determining the initial tax bill. If the taxpayer is time-barred to complain against the initial tax bill, it cannot rely on a complaint against the additional tax bill to obtain the invalidation of the initial one. However, it may criticise elements taken into account when computing the initial tax bill to obtain the rescission of the additional tax bill.[29]

If the tax authorities base an additional tax for an assessment year on elements that have already been taxed in another assessment year, the taxpayer may file a complaint against the previous tax bill based on the same elements within three months and three working days of the sending of the additional tax bill (Article 373 CIR1992).

The tax director is not required to apply Article 6(1) of the ECHR because the tax director is not an independent jurisdiction.[30]

28 Cass., 21 September 2012.

29 Cass., 11 May 1965.

30 Cass., 29 September 2017.

vi Tax rescission

The tax director may also rescind surtaxes resulting from clerical errors or misunderstandings of facts, double taxation or evidence that could not be invoked in a timely fashion for reasons beyond the taxpayer's power, provided that the surtaxes are brought to the director's attention within five years of 1 January of the year during which the tax was assessed, and he or she has not decided on a complaint against the contested surtax (Article 376/1 CIR1992). [31]

An error that results from a standpoint of the taxpayer when filling in the tax return is not a clerical error.[32] When the reported profit appears from the financial statements, the taxpayer cannot amend the results of a choice it made when establishing those statements, as opposed to an erroneous recording of a transaction.[33]

New legislation or case law cannot be viewed as new circumstances that may lead to rescission. However, if the Constitutional Court holds that a tax law provision conflicts with the Constitution, the taxpayer may request that a tax imposed by virtue of such a provision be rescinded even if the Constitutional Court's decision has been officially released within the six-month period allowed to file a complaint, and, therefore, the taxpayer was able to file a complaint (see Section II.v).[34]

The tax authorities admit that a ruling of the European Court of Justice stating that Belgian law is in conflict with EU law may also lead to rescission.

If a Belgian legal provision is annulled by the Constitutional Court the taxpayer may file a complaint against a tax imposed pursuant to the annulled provision although ordinary time limits have expired. The ECJ has been asked whether a ruling of the ECJ stating that a national provision conflicts with EU law amounts to a ruling of the Constitutional Court annulling a notional provision and, as a consequence, the same time limits would apply to contest a tax established pursuant to a provision criticised by the ECJ or pursuant to a provision annulled by the Constitutional Court.

The tax director may also rescind surtaxes that appear on the occasion of a mutual agreement procedure organised under a double tax treaty or a procedure provided by the EU Arbitration Convention (Article 376/3 CIR1992).

III THE COURTS AND TRIBUNALS

i Appeal before the tribunal

If the taxpayer is not satisfied with the tax director's decision, it may file an appeal before the court of first instance (the tribunal) within three months and three days after the decision has been sent. The director's decision is suspended during the appeal procedure and the period during which appeal can be lodged (Article 300 CIR1992).

The director's decision is irrevocable if the taxpayer does not file a petition against it.[35] If the tax director fails to render his decision within six months of the filing of the complaint (nine months in the absence of a tax return filed in a timely manner or assimilated circumstances), the taxpayer may bring its case before the tribunal.

31 A tax on tax may be viewed as double taxation (Cass., 2 January 2017)
32 See Cass., 19 January 2012.
33 Cass., 10 March 2016.
34 Const. Court, 54/2005, 8 March 2005.
35 Cass., 21 September 2012.

If the director annuls or rescinds the tax for any reason, a petition aiming at a revision of the motives for the annulment or rescission is not admissible; the only purpose of a petition is the annulment or rescission of the tax.[36]

Tax cases are handled by independent judges specialising in tax matters. Ordinarily, tax cases are submitted to a chamber of one judge.[37] Only in very specific circumstances a case can call for a chamber of three judges.

A tax appeal is not admitted if the administrative procedure has not been exhausted when such a procedure is organised by law.[38] When the law does not provide for any preliminary administrative review, the taxpayer may submit its case directly to the tribunal. For example, if the taxpayer fears the threat of an illegal assessment, it may protest to the tribunal, and request urgent and preliminary measures to avoid further damage.

In general, the Treasury is represented by the tax director who decided on the complaint, or his delegate. In specific circumstances, the Treasury appoints attorneys-at-law, which may mean additional costs for the unsuccessful taxpayer (see Section VI).

The parties usually submit a schedule to the court stating the date on which they will file their briefs of arguments, and request a date for the oral submissions. Because the tax courts are under-resourced, hearings are severely delayed.

The ordinary rules allow the taxpayer to present new claims in its brief of arguments, provided that they are supported by the facts stated in the initial appeal. If the taxpayer has extensively described the facts in its appeal, it may use them as the basis for arguments that were not advanced at the time of filing the original appeal but that have since become apparent to the taxpayer on reviewing the tax authorities' arguments and supporting documents.

The tribunal decides on the merits of the case, having regard to the formal and substantive aspects of the assessment. Because tax law is a matter of public policy, the tribunal must decide not only on the basis of the grounds alleged by the parties, but also on the grounds that it finds relevant. The tribunal is not bound by the brief of arguments of the parties, but it cannot grant a party more than has been claimed.

The tribunal's decision may be contested before the court of appeals. Appeals must be lodged within one month after the contested judgment has been served by a bailiff.[39]

If the tribunal decides to annul the tax bill wholly or partly for a reason other than the statute of limitations, the case remains pending before the court for an additional six-month period, during which the tax authorities may submit an alternative assessment based on all or part of the same elements as the annulled tax to the tribunal. In such cases, the parties' right to appeal against the tribunal's decision is suspended. If the tax authorities submit an alternative assessment, the deadline to lodge an appeal against the tribunal's decision starts running from the time the decision on the alternative assessment is served (Article 356 CIR1992).[40] However, a taxpayer may lodge an appeal before the end of the six-month waiting period and

36 Cass., 31 January 2014.

37 Tax cases are not necessarily referred to public prosecution.

38 See, however, *Metalgesellschaft*, *Hoechst* (C-397/98, 8 March 2001).

39 An appeal against a decision to which the taxpayer previously bowed is not admissible, even if the decision has never been served (Cass., 30 June 2016).

40 The alternative tax may be linked to an assessment year other than the assessment year to which the annulled tax was related (Cass., 17 October 2013).

it will be admissible.[41] The alternative assessment is allowed to the tax authorities provided that the court did not decide on the statute of limitation or the taxable basis when dismissing the case of the tax authorities.[42]

The tax authorities are not allowed to submit an alternative assessment if the tax director fails to decide on the complaint before the taxpayer brings the case before the tribunal.

ii Right to appeal

The court of appeal has full jurisdiction and it must revisit the case. The procedural steps are the same as those before the tribunal.

Unless the First President of the court of appeal decides otherwise in specific circumstances, the taxpayer is heard by a single judge.

iii Appeal on a point of law

The court of appeal decision may be challenged before the Supreme Court, but only on the grounds that the decision would be in conflict with the law or that it would infringe an essential procedural requirement.

If the Supreme Court quashes the court of appeal decision, the case will be submitted to another court of appeal, which will have jurisdiction only to the extent to which the dictum of the earlier decision has been invalidated.

iv Preliminary rulings

Tribunals, courts of appeals and the Supreme Court may refer tax issues for a preliminary ruling before the Constitutional Court or the European Court of Justice (ECJ).

IV PENALTIES AND REMEDIES

i Administrative penalties

Any understatement of income tax may give rise to administrative fines of up to €1,250 being imposed by the tax authorities. A fine of €12,500 applies in case of bad faith or wilful conduct and the same amount 'may' (i.e., '*peut/kan*') be doubled if the taxpayer reoffends. A flat penalty of €6,250 applies if the taxpayer omits to report information relating to the Cayman Tax (Article 445 CIR1992).

If income of at least €2,500 is not reported, the tax authorities may also impose proportional surtaxes depending on the type of infringement, and increasing in the event of repetition (Article 444 CIR1992). The surtaxes range from 10 per cent to 200 per cent. An infringement is repeated only if notice of a first infringement has already been given before the subsequent infringement is committed (Article 229 AR/CIR92). If the taxpayer correctly files four returns in a row, previous infringements are ignored (Articles 227 and 228 AR/

41 Cass., 30 March 2017.

42 Cass., 5 May 2017.

CIR92). The aggregate amount of tax and surtaxes cannot exceed the amount of unreported income (Article 444 CIR1992).[43] The tax authorities must restate the facts that justify the penalty, its legal ground and the justification of the amount of the penalty.[44]

In certain circumstances, a specific tax rate (100 per cent) applies to hidden earnings and insufficiently documented expenses made by companies and not-for-profit organisations ('secret fees') (Articles 219, 225, 246 and 247 CIR1992).

ii Criminal penalties

In addition to administrative penalties, the law also provides for criminal penalties, which are applied by the courts. Besides imprisonment, a taxpayer who has committed fraud or forgery may be sentenced to a fine of up to €500,000 (Articles 449 and 450 CIR1992). The amount of the fine to which the taxpayer is sentenced is multiplied by six (Article 457 CIR1992).[45]

V TAX CLAIMS

i Recovering overpaid tax

Refund of taxes and interest

Withholding tax on movable property income or professional income and early payments of tax are creditable against the final tax calculated upon assessment, and the excess is refundable. The final tax should be assessed by 30 June of the year following the assessment year or six months after the timely filing of the tax return. If the tax bill announces a refund, interest accrues in favour of the taxpayer from the third month after the period of limitations on assessment has run until the date of payment (Articles 359, 353 and 419 CIR1992). In certain circumstances, refundable amounts are credited against other outstanding amounts instead of being paid in cash. Refundable amounts may also be used to offset tax liabilities other than income tax, unless such other taxes are contested.[46]

With respect to withholding tax, the beneficiary of the income and the debtor are entitled to claim a refund of the withholding tax in the absence of a timely assessment, or if the tax was unduly withheld (Com CIR92, 366/3).[47] Unless the tax authorities have made use of the contested withholding tax to offset a tax debt, the period allowed to the taxpayer to claim the refund of unduly paid withholding tax is five years from 1 January of the year during which the withholding was paid to the Treasury (Article 368 CIR1992). If the claim for a refund is filed by the beneficiary of the income, interest accrues in its favour. On the other hand, if the debtor of the income claims the refund of the tax that it spontaneously withheld at source, no interest accrues (Article 419 CIR1992).[48] In specific circumstances,

43 The Constitutional Court held that the judge must be allowed to give conditional sentences (Const. Court, 55/2014, 27 March 2014).

44 Cass., 19 October 2012.

45 These penalties are applicable to offences committed since November 2012. Offences committed before November 2012 could result in imprisonment and fines of up to €125,000; the amount of these fines cannot be multiplied (old Article 457 CIR1992).

46 Article 334 of the Act of 17 December 2004.

47 The complaint against a tax unduly withheld is admissible even if the taxpayer does not report the income in his tax return (Cass., 14 January 2016).

48 See Cass., 24 October 1996.

the law excludes interest accrual on refundable amounts. Nevertheless, interest should accrue where withholding tax has not been credited as a result of a mistake by the tax authorities, such as a delay in the assessment of final tax.[49]

Interest is calculated at the legal rate on the amount of overpayment. This rate was 7 per cent until December 2017 (Act of 5 May 1865 on interest-bearing loans). It will range between 2 and 8 per cent as from January 2018 (Articles 77 and 79 of the Law of 25 December 2017).

The statute of limitation on the recovery of annulled taxes is ten years from the annulment.[50]

When a taxpayer is allowed a refund of taxes, this refund may be used by the authorities to offset debts of the same taxpayer vis-à-vis social security authorities or other Belgian governmental bodies (Article 334 of the Law of 27 December 2004).[51]

ii Challenging administrative decisions

The Belgian Constitution provides that a tax can only be levied and exemption can only be granted by an act of parliament ('no taxation without representation'). The Constitutional Court has repeatedly held that the power to decide on the principle of a tax and its essential elements belongs to the legislature.[52]

Therefore, the tax authorities and the courts are not allowed to relieve a taxpayer of its liability as stated by the law. As a consequence, an agreement between the tax authorities and the taxpayer cannot be binding if it settles a legal issue. A taxpayer cannot rely on its legitimate expectations if its understanding of its tax situation deviates from the law. Even *bona fide* does not help.[53]

However, a taxpayer may invoke a rule that supersedes an act, such as the Constitution, European legislation and the ECHR. A taxpayer may even claim the annulment of an act that conflicts with the Constitution before the Constitutional Court within six months of the official publication of the act.

Ordinary courts and tribunals are willing to discuss the compliance of a Belgian act with superior international rules and to set aside a non-complying act. Belgian judges do not always refer such cases to the ECJ, and decide themselves whether a contested Belgian provision complies with EU law.[54] However, they are often reluctant to decide on the compliance of an act with the Constitution, and will rather refer the issue to the Constitutional Court.

When a Belgian tax provision is held to be contrary to a superior rule by the Constitutional Court or the ECJ, the tax authorities defer to the case law before the contested provision is amended by the legislature, and even invite the taxpayers to behave as though such a provision has been amended.

49 Const. Court, 24/2008, 21 February 2008.

50 Cass., 29 January 2016.

51 Applicable from 1 January 2019 at the latest.

52 Const. Court, 72/2005, 20 April 2005; 32/2007, 21 February 2007.

53 Cass., 14 June 1999; Cass., 20 November 2006.

54 Even the Constitutional Court refused to submit to the European Court of Justice the issue of the euro-compatibility of the fiscal deduction of anti-trust fines imposed by the European Commission (Const. Court, 161/2012, 20 December 2012).

iii Claimants

Tax complaints and appeals must be filed by the taxpayer on whom the tax is imposed.[55] A tax imposed on a taxpayer cannot be challenged by another person, unless that person has succeeded to the rights and liabilities of the taxpayer. For example, in the case of a merger or a split-up, the company that inherits the liabilities of the absorbed or split company is entitled to file a complaint or an appeal against the tax bill assessed in the name of the latter. A company validly acts through its directors or managers appointed according to company law.

If a company is wound up, the person appointed as a liquidator is entitled to act in this capacity. The liquidator is also allowed to file a complaint in the name of the company whose liquidation is closed. Bankrupt companies are validly represented by the administrator in the insolvency.

A proxy holder may file a complaint in the name of a taxpayer. Tax consultants may act as proxy holders when filing a complaint, but they are not authorised to represent their customers before the courts. The tax authorities acknowledge that attorneys-at-law represent their clients when filing a complaint, as well as before the courts, and do not need to prove it (ComIR92, 366/9).[56]

VI COSTS

i Duty for listing a case

The tax on filing a petition or a further appeal before a court is no longer applied.[57]

ii Indemnities

As a reaction to the Supreme Court holding that the winner of a case brought before a court might also obtain damages corresponding to the cost of the assistance of an attorney in certain situations,[58] the legislature has provided that a fixed indemnity is due to the winner from the defeated party, to wholly or partly cover the fees due from the winner to his or her attorney; this prevents the winner from requesting indemnities in excess of the legally fixed amount (Article 1022 of the Judicial Code).

This legal indemnity is liquidated by the court on the basis of tables. The regular indemnity ranges from €180 to €18,000 when the amount at stake is at least €1 million.

The indemnity is only due when the winner has hired an attorney to assist him or her before the court. The tax authorities are also liable for indemnities when they lose their cases.[59]

55 However, tax claims and appeals against withholding taxes may be filed either by the taxpayer that earned the income on which the tax has been unduly withheld or by the debtor of income that unduly withheld taxes on such income.

56 See however Cass., 12 February 2016.

57 Const. Court, 9 February 2017.

58 Cass., 2 September 2004, 5 May 2006, 16 November 2006 and 28 March 2007.

59 Const. Court, 68/2015, 69/2015, 70/2015, 21 May 2015.

VII ALTERNATIVE DISPUTE RESOLUTION

i Advance rulings

The Act of 24 December 2002 has organised the current 'advance ruling' procedure. This procedure seems to meet the expectations of numerous taxpayers.

The federal tax authorities release advance rulings on any question relating to a tax they are in charge of, except questions relating to collection or proceedings. As a rule, the tax authorities cannot deliver a ruling regarding transactions with a low-tax country that does not cooperate according to the standards of the OECD, or transactions that have no economic substance in Belgium.

An advance ruling is a legal act by which the tax authorities determine how the legislation in force will apply to a situation or a transaction that has not yet triggered fiscal consequences. The Ruling Commission may therefore not intrude in tax disputes.

Advance rulings are effective for five years unless the taxpayer demonstrates that a longer validity period is appropriate. In addition, the ruling is cancelled when the requirements that it states are not satisfied, when the taxpayer has not provided an accurate description of the envisaged situation, when the legislation on which the ruling relied (including Belgian and EU law and treaties) is modified, or when it appears that the ruling conflicts with Belgian, EU law or treaties. In this respect, a memorandum has been concluded between the local services of the tax authorities to ensure that the latter would not challenge the legality of an advance ruling.

The Ruling Commission allows taxpayers (represented by a counsel) to file a preliminary request on a no-name basis. If it finds that it may satisfy the taxpayer's request, it invites the taxpayer to file a formal request. If it considers that it cannot satisfy the taxpayer, the taxpayer will simply not continue the procedure.

The cost of such a procedure mainly depends on the fees requested by tax counsels to assist clients, since the tax authorities are not allowed to charge fees to taxpayers.

ii Tax Conciliation Service

The Act of 25 April 2007 created the Tax Conciliation Service (TCS) to serve as an interface between taxpayers and the federal tax authorities. The TCS has been operating since 2010. Although it belongs to the tax authorities, it is independent from other services. By the same token, it has no authority to give instructions to other services. It may decline a request for conciliation.

The TCS acknowledges receipt of requests filed in writing (even by email) or orally. Even when the TCS cannot satisfy the taxpayer's expectations, its report on a case can be useful as supporting documentation before a court.

VIII ANTI-AVOIDANCE

According to the Constitution, no tax can be levied unless the legislature so provides. A taxpayer may choose to organise its transactions in a manner that triggers little taxation. The taxpayer must, however, accept all the consequences of its acts. The tax authorities must set aside disguised transactions and adhere to the legal reality created by the taxpayers.[60] Sham is a fraud.

60 Cass., Brepols, 6 June 1961; 29 January 1988; 22 March 1990; 4 January 1991.

The tax authorities may also ignore transactions conducted by a taxpayer that infringe a non-tax legal provision of public policy if its intent is to defeat or evade tax.[61] However, the tax authorities cannot rely on the economic reality or the concept of abuse of law to adjust the situation of a taxpayer.

The Act of 29 March 2012, introduced the concept of 'tax abuse' in Article 344/1 CIR1992. The provision reads as follows (free translation):

The tax authorities may disregard the legal act or a series of legal acts composing the same transaction if the tax authorities demonstrate by presumptions (or otherwise) and in the light of objective circumstances that tax abuse has been committed.

There is tax abuse when the taxpayer realises by his legal act or series of legal acts, one of the following transactions:

a a transaction allowing it to escape the application of a provision of the Income Tax Code or the decrees implementing that code, in violation of the goals of such a provision; or

b a transaction allowing it to claim a tax benefit provided by a provision of the Income Tax Code or the decrees implementing that code, while the grant of such a benefit would be conflicting with the goals of such a provision and the main purpose of that transaction is the grant of such a benefit.

The onus is on the taxpayer to demonstrate that the choice of this legal act or series of legal acts is justified by motives other than the avoidance of income tax.

If the taxpayer does not provide any evidence to the contrary, the taxable base and the computation of the tax are restored in such a manner that the transaction is subject to a levy complying with the goals of the law, as if the abuse never took place.

The Constitutional Court has held that this provision does not conflict with the constitutional principle according to which no tax can be levied in the absence of clear legislation. The Constitutional Court held that this provision only relates to the burden and administration of evidence in tax matters and does not affect the basis and the rate of taxes. The tax authorities must demonstrate the purpose of the legislature when asserting that a taxpayer acted in a manner that they view as an abuse.[62]

IX DOUBLE TAXATION TREATIES

Belgium has concluded around 100 double taxation treaties. Belgian-resident taxpayers may initiate in Belgium the mutual agreement procedure provided by double taxation treaties, and rely on the assistance of the central tax authorities to challenge a foreign tax at source. The outcome of such a procedure is, however, dependent on the best efforts of both the Belgian and the source country's authorities.

When interpreting a double taxation treaty, the Belgian tax authorities rely on the OECD Commentary on the Model, unless Belgium has made reservations on the Model or its Commentary. The Belgian tax authorities use the ambulatory method of interpretation. They even refer to the latest version of the OECD Commentary when it can be reconciled with the text of the relevant treaty and specific commentaries made on this treaty.

The Belgian tax authorities even agree that the interpretation of undefined terms used in treaties must be found in the source country's legislation when deciding whether income

61 Cass., 5 March 1999; 16 October 2009.

62 Const. Court, 141/2013, 30 October 2013.

has been taxed abroad according to the treaty. However, they use Belgian definitions when determining which method of elimination of double taxation must be used in Belgium (Article 23(A) of the OECD Model Tax Treaty, Article 22 of the Belgian standard treaty).[63]

X AREAS OF FOCUS

Since the law of 25 December 2017, the amount of income added to the taxable basis of a corporate taxpayer further to a notice of deficiency giving rise to a 10 per cent penalty cannot be offset by deductions ordinarily available, such as carried over losses.

XI OUTLOOK AND CONCLUSIONS

The current tax procedure is the result of a reform specific to the tax procedure in 1999 and a general reform of the judicial procedure in 2007. Those reforms were intended to speed up the process, but delays remain considerable. Reasons for such delays include a shortage of judges, the recent reform of the courts' structures and the length of time required by the central tax authorities to issue clear instructions to tax inspectors.

63 Circular No. AAF/2004/0053 (AAF 5/2004), 16 January 2004.

Chapter 4

BRAZIL

Daniella Zagari and Maria Eugênia Doin Vieira[1]

I INTRODUCTION

Brazilian companies may face tax disputes whenever controversial tax issues are involved. Since there is no alternative way to solve disputes in tax matters, litigation is the legal mechanism used to not only contest levies and tax assessments that are deemed undue, but also as a proactive way to gain judicial recognition of taxpayers' rights regarding possible tax law interpretations.

The Brazilian Federal Constitution sets forth guidelines for the tax system, and allocates the right of federal, state and municipal governments to impose taxes. In addition, there are supplementary federal laws, such as the National Tax Code (CTN), Law 87/96 and Law 116/03, which are in force in the entire Brazilian territory. To fulfil the requirements laid down by these laws, the federal, state and municipal governments are able to issue laws imposing tax obligations on activities carried out in their jurisdictions.

The main federal taxes are:

a corporate income tax and social contributions on net profits;
b contributions for the social integration programme and contributions for the financing of social security, both imposed over corporate taxpayers' gross revenue;
c tax on manufactured products;
d tax on financial transactions;
e contributions for interventions in the economic domain; and
f import tax.[2]

The most relevant state tax in Brazil is the state value added tax (ICMS), which is imposed on transactions involving sales and other commercial operations involving goods (including energy supply), the rendering of inter-municipal or interstate transport services, and communication services. Supplementary Law 87/96 establishes the main features of ICMS and provides general legal standards for the states, but each state has its own local legislation.[3]

Regarding the municipalities, the most important tax is the municipal tax on services, which is imposed on the rendering of services of any nature, except those that are covered by

1 Daniella Zagari is a partner and Maria Eugênia Doin Vieira is a senior associate at Machado, Meyer, Sendacz e Opice Advogados.
2 Tax on rural property and freight surcharges for the renewal of the Merchant Marines are also federal taxes.
3 Gift and inheritance tax and property tax on vehicles are also state taxes.

the state tax, ICMS. Its main features are provided for by Supplementary Law 116/03, which is mandatory for all Brazilian municipalities,[4] and which all have their own local legislation as well.

Taking into account the existence of the many taxes and pieces of legislation, tax disputes often arise from a misinterpretation of the constitutional and legal taxation limits, and from conflicts regarding tax bodies and their jurisdiction.

The past few years have seen many changes in tax disputes in Brazil, especially because of the transformation at the federal administrative courts, which has created a trend of high amounts being discussed and not solved in administrative proceedings that will be discussed afterwards in the judicial sphere.

Moreover, the judicial procedure system was reformed by the enactment of a new Civil Procedure Code (CPC), in force since March 2016, which is also applicable for tax litigations. It aims to create a more effective, fair and dynamic procedure, and to improve the binding precedents system. Scholars, academics, lawyers and lawmakers debated this modification for several years at the Parliament.

In both the judicial and administrative spheres, the migration from a physical form (hard copy) to a digital form (electronic procedure) of tax filing is at an advanced stage, which also reduces the time involved in filing and the duration of proceedings.

Due to ancillary obligations, the tax authorities already have access to most of the relevant tax information in digital form, which improves the efficiency of the system for reviewing taxpayers' procedures.

II COMMENCING DISPUTES

Tax disputes in Brazil take place in the administrative sphere or judicial sphere.

Litigating in the administrative sphere is optional and not binding on taxpayers, meaning that taxpayers can opt to litigate directly within the judicial sphere, and an unfavourable final decision in the administrative sphere can still be challenged in the judicial sphere. However, if taxpayers choose to bring a tax dispute directly before the judicial sphere, bypassing the administrative sphere, this is legally deemed as a waiver of the right to an administrative dispute.

Litigation in the administrative sphere is usually simpler, quicker and less burdensome, because the structure of the proceeding is less complex and there is no need to present a guarantee during the proceeding. The law grants the suspension of the enforceability of the debt during the entire administrative dispute.

An administrative tax dispute usually begins with the presentation of a taxpayer's opposition against a tax assessment, or against an administrative decision denying a request for refund or offset of undue paid taxes.

The administrative procedure system is well regulated, especially by the federal and state governments, and allows taxpayers to present their initial opposition, appeal or counter arguments and, occasionally, a special or extraordinary appeal, this latter usually being conditioned on the existence of a precedent in conflict with the appealed decision.

Most of the administrative ruling authorities are skilled in specific technical tax features; as such, a taxpayer's opposition or appeal generally has a good chance of success in correcting miscalculations or mistakes in tax assessments.

4 Property tax on urban real estate and transfer tax on real estate are also municipal taxes.

It is also possible for a taxpayer to start an administrative procedure to consult with the tax authorities regarding the application of the tax law in a concrete situation whenever there is an objective doubt concerning the interpretation of the law. The administrative answer (ruling) to the consultation will be binding for both the tax authorities and taxpayers in the administrative sphere, but taxpayers can challenge within the judicial sphere in cases of disagreement.

From a judicial perspective, litigation may start in various ways.

If an administrative dispute results in an unfavourable decision for the taxpayer, or if the taxpayer chose to bypass the administrative sphere, it can litigate before the judiciary by adopting a proactive or retroactive approach.

The proactive approach means that the taxpayer can begin the judicial dispute by filing a lawsuit against a tax assessment, an unfavourable administrative decision, or both. The law provides that the full charged amount must be court deposited. However, judicial precedents temper this requirement, in the sense that the taxpayer can file the lawsuit without the deposit, but will not obtain a suspension of the enforceability of the debt. In some specific cases, the suspension of the enforceability can be granted by the court with the presentation of other types of guarantees or, exceptionally, without any guarantee.

Taxpayers may also file a judicial lawsuit to discuss a given tax burden that is deemed undue, or to recover undue paid taxes based on factual, legal or constitutional aspects.

In the retroactive approach, taxpayers will wait for the public attorney (federal, state or municipal) to file a tax foreclosure in order to present their opposition. In this case, taxpayers must present a guarantee within five days, and then plus 30 days, to file their motion to stay foreclosure.

The suspension of the enforceability of a debt or guarantee accepted by the court legally grants a tax good standing certificate, a document deemed necessary for many legal acts in the course of taxpayers' operations, such as to provide proof of commercial health, to receive payments from public entities, to transfer real estate and to be entitled to tax benefits. However, the mere existence of a guarantee does not grant the suspension of the enforceability of a debt, it being necessary that the taxpayer demonstrate good grounds for its plea and the risks that have to be obviated by the court order.

Without the suspension of the enforceability of the debt, the public attorney can request seizures or other procedures of property expropriation.

The law lists, in a preference scale format, the possible guarantees, with a cash deposit being preferred. Bank letter guarantees and insurance bonds are deemed equivalent guarantees by the law. The list also contemplates public bonds, precious stones or metals, real estate, ships, aircraft, cars, stocks and rights.

Under both the proactive and retroactive approaches, a taxpayer's plea petition should contain a written document of all the factual, legal, constitutional or other grounds relied on.

III THE COURTS AND TRIBUNALS

As taxes are due to the federal, state and municipal governments, each government level has its own administrative litigation structure, usually comprising first and second level courts.

Most first level courts do not allow taxpayers to attend hearings and present oral arguments, which are common procedures at the second level administrative courts and judicial courts.

The ruling authorities in the first level administrative courts are usually the tax authorities, members of the respective Federal, State or Municipal Treasury Affairs. The second level courts, such as the federal court, usually comprise a panel composed of appointed tax authorities, and taxpayers' representatives appointed by the Industries Union, federations or associations.

As a rule, administrative courts are not allowed to disregard the law based on an allegation that it is against the Federal Constitution.

In the judicial sphere, there are state courts responsible for state and municipal taxes and federal courts responsible for federal taxes. Both have first and second level courts. The first level courts have head or deputy judges, while the second level courts have panels formed by three or five judges, depending on the type of appeal.

i Federal Administrative Council of Tax Appeals (CARF)

The most relevant administrative court is CARF. Located in the federal capital, it is responsible for analysing all federal tax proceedings at the second and third levels, as it analyses appeals at the ordinary chambers and special appeals of its superior chamber of tax appeals (CSRF), this latter body focusing on standardising the administrative courts' understanding on matters. According to the tax involved, the proceedings are distributed to one of three sections in CARF. Each section has four chambers with eight members, and each CSRF is composed of 10 members. In both cases, half the members are appointed by the tax authorities and half by taxpayers associations' representatives. The tax authorities always appoint the chair of the chambers, including the chair of the CSRF. The chair has the casting vote in the case of a tie.

CARF has been responsible for the most relevant tax litigations over the years, and was regarded to be a highly technical and fair court, establishing relevant precedents to guide the interpretation of the tax law. This is why, in many circumstances, taxpayers have adhered to its decisions, even if unfavourable, and not challenged them before the judicial court.

However, in the past few years, the CSRF has decided many relevant issues against the taxpayers, which is why many tax disputes with significant involved amounts are now addressed in the judicial sphere.

ii Federal Supreme Court (STF)

STF is the last instance in the judicial sphere, and is focused on constitutional issues.

Considering that the Constitution lays down the guidelines for the tax system, a lot of tax issues have constitutional grounds and must be examined by STF. Nowadays, extraordinary appeals are only admitted when there is proof of a decision having general repercussions, meaning that the issue has to have economic, politic, social or juridical relevance to be analysed.

After STF decides that there is a general repercussion, the issue involved is publicly disclosed as a theme attributed to a proceeding awaiting trial. In the meantime, all other cases regarding the same theme are suspended after the second level local court's decisions, as the STF decision in the leading case will be automatically applied with binding effects to all these cases and to all future cases with the same theme.

STF comprises 11 justices appointed by the president and formally confirmed by the Federal Senate.

iii Superior Court of Justice (STJ)

STJ analyses special appeals presented from all the other courts whenever a treaty or federal law is applied in incorrectly or there is a different interpretation of the federal law between local courts (federal or state courts). The decision issued by STJ is final when there is no constitutional issue to be discussed.

Since STJ was unable to analyse the numerous cases it received, it selects some relevant and often-repeated issues to be analysed as themes. In this sense, STJ has ruled in leading cases that are known as repetitive appeals, and its solutions in these appeals should reach all other similar cases with binding effects to lower courts.

While STJ has 33 justices, tax disputes are ruled by two panels of the first section, each of which is composed of five justices. STJ justices are appointed by the president and confirmed by the Federal Senate. STJ submits a pre-approved three-name list for the president to choose from.

IV PENALTIES AND REMEDIES

The late payment of federal taxes is subject to a 20 per cent fine. In a tax assessment, the regular fine is 75 per cent over the tax debt. In the event that there are charges of deliberate misconduct, fraud or simulation, an aggravated fine of 150 per cent is imposed.

For state and municipal taxes, fines vary according to the local legislation and the time period.

In some cases, the calculation of interest is so burdensome that there are good grounds to challenge it. In the state of São Paulo, Law 13.918/09 imposes excessive interest that is far greater than the federal interest. The highest state court of São Paulo has declared illegal rates that exceed the federal rates, and only recently new assessments stopped imposing those interest rates.

Depending on the subject matter involved, some tax assessments are sent to the Public Prosecutor's Office to be evaluated for the potential existence of criminal issues. A criminal prosecution should only commence after the administrative discussion is over and results in an unfavourable result for the taxpayer.

V TAX CLAIMS

i Recovering overpaid tax

Taxpayers have five years to claim a refund of undue or overpaid federal, state or municipal taxes. The legislation and judicial precedents state that these amounts are subject to the same interest and monetary correction rates applied to tax debts.

Whenever legally accepted, offset of tax of the same nature as upcoming taxes can be the most efficient way to recover overpaid taxes. The offset procedure is usually simple, and allows the immediate use of the credit properly declared, thereby avoiding a new tax payment.

As a rule, tax authorities have five years to accept or deny the offset, with a lack of manifestation or decision considered to be as deemed acceptance of the offset procedure.

Taxpayers must be able to present all the documental evidence regarding the undue payment.

Administrative courts generally do not grant offset when there is a legal or constitutional controversy about the actual existence of an undue payment. However, they are supposed to apply the judicially binding precedents issued by the Superior Court of Justice or by the Supreme Court.

If offset is denied for federal taxes, taxpayers will have the opportunity to start an administrative dispute proceeding that will follow the same procedure model adopted for challenging tax assessments. In the case of final unfavourable result for a taxpayer in the administrative sphere, the taxes considered undue for offset will be subject to fines that may vary from 20 to 150 per cent.

In other cases, when a specific law forbids the offset or if there is no debt flow to offset, taxpayers may file an administrative or judicial claim for a refund, presenting documental proof of the undue payment.

If there are some controversial issues to be addressed regarding legal interpretations or unconstitutionality, a judicial claim for refund or event to resolve the controversial issue is recommended, considering the limitations of the administrative proceedings.

ii Challenging administrative decisions

In general, the possibility of an appeal within 15 or 30 days of a decision is applicable for most administrative decisions. One point of concern is that in some cases a reduction of fines diminishes with the appeal.

Administrative decisions rendered against tax authorities are usually submitted to an automatic review (ex-official appeal). Nevertheless, a final administrative decision against the tax authorities is final and cannot be challenged in the judicial sphere.

Taxpayers can always challenge final administrative decisions in the judicial sphere.

Whenever an undue payment is legally or constitutionally controversial, taxpayers may file a lawsuit aimed at the recognition of their right to recover the unduly paid amounts. As previously mentioned, the administrative courts are supposed to enforce the law, and are not able to declare the unconstitutionality of a tax obligation imposed by the law. Therefore, allegations involving constitutional issues must be presented at the judicial courts, unless they arise from a binding judicial precedent.

iii Claimants

The tax authorities initiate tax claims whenever their analysis of an offset or an audit indicates that taxes were not duly paid. If there is no administrative dispute, or if the administrative court confirms the tax assessment, a public attorney will file a tax foreclosure.

Taxpayers can present claims regarding taxes that were unduly paid or if there is a legitimate risk of taxes being unduly charged. Legitimacy is assured to the taxpayer considered to be the one who paid the tax and kept its burden. Therefore, in the case of indirect taxes, there must be proof that such burden was not reflected during the steps of the business chain.

VI COSTS

Administrative disputes attract no court costs and assure the suspension of the enforceability of the debt, granting the good standing certificate up to the final decision.

Initiating a judicial dispute or presenting an appeal is subject to court costs that are based on the amount involved (for federal disputes, 1 per cent of the amount involved; for state disputes, the percentage varies). Nevertheless, there is always a maximum capped value, which varies for each state but is no higher than US$25,000.[5] For federal courts, the current cap is US$600, meaning that in many cases the court costs are not significant. On the closure of a judicial proceeding, the judge will sentence the defeated litigant to reimburse the other party of all anticipated court costs, and to pay judicial attorneys' fees up to 20 per cent of the involved amount according to the progressive chart under Section 85 of the CPC. These fees are mandatory (unless a writ of *mandamus* is filed), and might represent exposure whenever significant amounts are discussed.

In the event that there is a need to present a bond or insurance guarantee in order to suspend the enforceability of the debt under discussion, this financial cost might also be relevant.

VII ALTERNATIVE DISPUTE RESOLUTION

According to the Federal Constitution, the law alone is allowed to impose and exclude tax obligations. As such, Brazilian law does not allow for alternative tax dispute resolutions. The law is binding on all public workers in all spheres of government, who have no discretionary power.

Federal tax authorities enforce the law as interpreted by the General Attorney's Office and by the Brazilian Federal Revenue Office. After a binding judicial decision, in the event that it settles a dispute against the tax authorities' interpretation, the responsible office will issue a new note informing its attorneys to submit to the decision and, if applicable, point out the attendant facts that might result in a different approach to such case.

It is worth mentioning that in some cases it is possible to have a discussion with the tax authorities with the aim of them granting a special tax regime for ancillary obligations. Although this might have a significant impact on an operation, this measure has to be put in place prior to the dispute and the tax liability, since a good standing certificate is a requirement for such proceeding.

On the past few years, the federal and state governments have legally approved periodic tax amnesty programmes that grant the payment of tax debts in instalments with reduced fines and interest.

VIII ANTI-AVOIDANCE

In 2001, Brazilian general anti-avoidance rules were introduced for both domestic and international transactions under Section 116 of the CTN. Accordingly, tax authorities may disregard transactions carried out with the purpose of concealing taxable events or of modifying the tax liability. This general anti-avoidance rule still depends on further regulation concerning the conditions, criteria and procedures to be followed by the tax authorities. Section 116 represents legal grounds for the introduction of a GAAR, but not a GAAR *per se*.

Regarding the OECD BEPS Project, Brazil is not an OECD member. Still, Brazil is one of the many non-members considered by the OECD as a strong and active partner. The Brazilian Revenue Service (RFB) has publicly expressed its intention to adopt BEPS recommendations and issued rules to implement the following measures: (1) country-by-

5 The amounts mentioned are approximate and are presented only for reference purposes. The specific legislation must be consulted on a case-by-case basis.

country declaration (RFB Normative Ruling 1681/16); (2) exchange of information regarding rulings (RFB Normative Ruling No. 1,689/17); and (3) mandatory declaration of the beneficial owner of Brazilian legal entities (RFB Normative Ruling 1.634/16).

Also focusing on international transparency, Brazil signed two agreements regarding the automatic exchange of financial information: the Foreign Account Tax Compliance Act (FATCA) with the United States and the Common Reporting Standard (CRS), within the framework of the Global Forum on Transparency and Exchange of Information for Tax Purposes.

With the above measures, a substantial amount of information on the international structure of Brazilian taxpayers will be disclosure to RFB, and as a result will affect tax inspection proceedings. Therefore, legislative changes in tax matters are expected to assure coherence and legal certainty, by aligning Brazilian rules with international standards.

Despite the lack of GAAR and, hence, legal grounds that enable tax authorities to disqualify licit operations, to disregard lawful transactions tax authorities have been adopting concepts that are not established in Brazilian law (i.e., the substance over form approach lacks legal grounds). Most cases regarding this matter are now under dispute in the administrative sphere, with a majority of losses to the taxpayers. Cases are yet to be challenged in the judicial sphere.

IX DOUBLE TAXATION TREATIES

Brazil currently has double taxation treaties (DTTs) in force with more than 30 jurisdictions. Its treaty network is small and relatively old. Notwithstanding the fact that Brazil is not a member of the OECD, Brazilian DTTs follow, to a great extent, the OECD Model Tax Convention in force at the time the DTTs were signed, mainly in relation to making Brazil more attractive in terms of offering taxing rights to the source state. For this reason, recent precedents indicate that Brazilian courts have been adopting official OECD Commentaries on the Model Tax Convention. A distinct aspect of Brazil's treaty policy, which deviates from the OECD Model Tax Convention, is the inclusion of matching credit clauses in DTTs signed with developed countries, especially with respect to the payment of dividends, interest and royalties (e.g., treaties entered into with Austria, Hungary, Italy, Luxembourg, the Netherlands, etc.). Because Brazil is primarily a capital-importer, Brazilian DTTs also generally tend to privilege source taxation as opposed to granting exclusive taxing rights to the state of residence of the beneficiary of the income.

In addition, it is important to note that the interaction between DTTs and domestic law is not entirely regulated by the Brazilian legal system. It is generally understood among Brazilian scholars that DTTs consist of an agreement of will entered into between two contracting states and may not be revoked at the discretion of one of these states without triggering a violation to the '*pacta sunt servanda*' principle that rules the applicability of such treaties.

X AREAS OF FOCUS

Recent focus has been on the ongoing dispute between taxpayers and tax authorities regarding the credits registration applicable to the industrial, commercial and services operations aiming at reducing the tax burden. Tax authorities have already indicated their concern with this situation, and are conducting specific tax audits to identify and assess these controversial credits.

Taxpayers' attention should be on the documental proof of their operations and taxable events. Bearing in mind that the most relevant tax questions tend to be analysed by the superior courts on taxpayers' proceedings with binding effects, proof is the best way to qualify a specific case.

In this sense, it is essential to review internal proceedings, documentation, invoices and contracts to ensure they are in accordance with the tax legislation and its treatment.

XI OUTLOOK AND CONCLUSIONS

The Brazilian taxation system is complex and has many controversial issues that might not be informally solved. As such, Brazil is expected to continue to see many ongoing tax disputes. Nevertheless, there is a well-developed system to allow taxpayers to address tax issues.

The expectation is that in the near future, the judicial sphere will be even more skilled in facing the most complex tax matters since many relevant issues have recently been subject to disclosure in the administrative sphere and are about to be judicially challenged by taxpayers. The need to concentrate on analysing the facts and particulars of each company's activities will demand effort and cause improvements in judicial decisions.

One focal point in the judiciary sphere regards the reduction of litigation costs. The system needs to be amended to allow taxpayers to litigate proceedings without being overburdened. This measure is particularly relevant when it is possible to expect that many complex tax matters will be ruled in the taxpayers' favour.

Chapter 5

CANADA

Dominic C Belley[1]

I INTRODUCTION

Under the Constitution Act 1867, taxation is a shared jurisdiction. The federal parliament can enact laws for the purpose of levying taxes, both directly and indirectly. Provincial legislatures can enact laws for the purpose of levying direct taxes within the province only.[2] The first income tax statute – the Income War Tax Act – was enacted in 1917 as a temporary federal measure meant to finance the expenses related to the Canadian efforts in the context of World War I. Today, the measure is permanent, and both federal and provincial governments have enacted tax measures meant to finance a variety of government services (including healthcare and education) and support targeted business and social sectors. The principal taxes are imposed on income as well as goods and services (also referred to as commodity taxes or value-added taxes).[3] Specific taxes also apply to fuel and tobacco.[4]

The principal tax authority in Canada is the Canada Revenue Agency (CRA), which has the mandate of collecting most federal and provincial income taxes (both personal and corporate) and commodity taxes. The notable exception is the province of Quebec, which is in charge of collecting its own provincial taxes, through the Quebec Revenue Agency.[5]

Although these taxes may have substantial differences in terms of, *inter alia*, base, rates, taxpayers and reporting periods, the compliance and dispute resolution process is basically the same, both federally and provincially. As described further below:

a it starts with a return that the taxpayer is required to file;

b a first (or quick) assessment is then issued;

c the return can be audited by a tax auditor who may issue a reassessment(s) within the normal reassessment;

d should the taxpayer disagree with the reassessment, he or she may object pursuant to a notice of objection; and

---

1 Dominic C Belley is a partner at Norton Rose Fulbright Canada LLP.

2 For a discussion on the distinction between direct and indirect taxes, see *Reference re Quebec Sales Tax*, [1994] 2 SCR 715. See also GV La Forest, *The Allocation of Taxing Power under the Canadian Constitution*, 2nd Ed (Toronto: Canadian Tax Foundation, 1981).

3 For example The federal Goods and Services Tax (GST), the Harmonised Sales Tax applicable in certain Canadian provinces and collected by the federal government, and the Quebec Sales Tax (QST) applicable in Quebec.

4 For further reading on the distinction between taxes and regulatory charges, see *Westbank First Nation v. BC Hydro and Power Authority*, [1999] 3 SCR 134.

5 Pursuant to a federal–provincial agreement, the Quebec Revenue Agency is also in charge of the collection of federal GST in addition to the provincial QST.

e if the matter cannot be resolved at the objection stage, the taxpayer may appeal to the Tax Court of Canada, and beyond to the Federal Court of Appeal and, with leave, to the Supreme Court of Canada.[6]

II COMMENCING DISPUTES

i Income tax returns

Canada has a self-reporting system. Pursuant to Section 150 of the Income Tax Act,[7] a return of income that is in prescribed form and that contains prescribed information shall be filed with the CRA, without notice or demand for the return, for each taxation year of a taxpayer.[8] The filing deadline will vary in accordance with the taxpayer's nature and status: for example, 30 April (individuals), 15 June (individuals carrying on a business), six months after the end of the financial year (corporations) and 90 days from the end of the year (trusts and estates). In accordance with Section 151, the taxpayer required by Section 150 to file a return of income shall, in the return, estimate the amount of tax payable. Pursuant to Section 241, any information disclosed to the CRA in this context is confidential and, except as provided by law, no official or other government representative shall knowingly provide, or knowingly allow to be provided to any person, any taxpayer information. Confidentiality in tax matters is a pillar of Canada's self-reporting system.

Shortly after the return is filed, a first assessment will be issued by the CRA (sometimes referred to as a quick assessment) in accordance with Section 152. There is no mandatory deadline for the first assessment; the CRA must assess with all due dispatch. Typically, the first assessment will be a reproduction of the numbers disclosed in the return and it will not be the result of an audit. The first assessment has, in the legal sense, the same status as an assessment or reassessment issued further to an audit. As such, it is, *inter alia*, deemed valid and subject to objection and appeal.

ii Audits and access to tax information

Once a return is filed, the CRA has vast audit powers to ensure that it has been truthfully prepared, that income has been fully declared and that taxes have been computed in accordance with the law. Under Section 231.1 of the Income Tax Act, an auditor may at all reasonable times, for any purpose related to the administration of the Act, inspect, audit or examine the books and records of a taxpayer, and any document of the taxpayer or of any other person that relates or may relate to the information that is or should be in the books and records of the taxpayer or to any amount payable by the taxpayer under the Act.[9] In *R v. McKinlay*

6 To simplify the text, this chapter will present the federal income tax litigation process.

7 Income Tax Act, RSC, c 1 (5th Supplement).

8 Taxpayers are individuals, corporations and trusts. Partnerships do not pay income tax *per se*; income is computed at the partnership level, and is attributed to the partners who are liable to tax. Partnerships must file income statements, as opposed to income tax returns.

9 Pursuant to Section 231.2, the CRA can issue a mandatory requirement to produce information and documents. A taxpayer who fails to comply with a mandatory requirement can be prosecuted before a tribunal of criminal jurisdiction pursuant to Section 238. The Crown would have to prove the failure (*actus reus*) but not the intention (*mens rea*); the taxpayer could present a due diligence defence. See *City of Levis v. Tetreault,* [2006] 1 SCR 420. Under Section 231.6, the CRA can require the production of foreign-based documents. The CRA can also obtain a compliance order under Section 231.7.

Transport Ltd,[10] the Supreme Court of Canada concluded that these powers amounted to a seizure that was acceptable under the Canadian Charter of Rights and Freedoms on the basis that the taxpayer has a very low expectation of privacy in relation to the kind of information contained in its books and records for tax purposes. The Court concluded that the Minister of National Revenue must be capable of exercising his audit powers whether or not he has reasonable grounds for believing that a particular taxpayer has breached the Act. A spot check or a system of random monitoring may be the only way in which the integrity of the system can be maintained.

This is true to the extent that audit powers are used only for the ultimate purpose of issuing a reassessment (taxes, penalties and interest) (i.e., civil matters). These powers cannot be used in the context of a criminal investigation because of the liberty interest that is at stake. In *R v. Jarvis*,[11] the Supreme Court of Canada stated that there must be some measure of separation between the audit and investigative functions within the CRA. Where the predominant purpose of a particular inquiry is the determination of penal liability (as opposed to tax liability) CRA officials must relinquish the authority to use the audit powers under Section 231.1. In such a case, evidence must be gathered in accordance with the rules applicable in criminal matters and comply with the Canadian Charters of Rights of Freedoms (including the right to remain silent, presumption of innocence and proof of culpability beyond reasonable doubt).

A notable exception to the general rule that the CRA has access to any document and information relevant to a purpose of the Act in the course of a tax audit is if the document is protected by solicitor–client privilege. In *Descoteaux v. Mierzwinski*,[12] the Supreme Court of Canada established the substantive conditions precedent to the existence of the right of the lawyer's client to confidentiality: where legal advice of any kind is sought from a professional legal adviser in his or her capacity as such, the communications relating to that purpose, made in confidence by the client, are permanently protected from disclosure by him or her or by the legal adviser, except the protection be waived. Not all communications are privileged; the communication must be made to the lawyer in his or her professional capacity to obtain legal advice. Of course, communications made to facilitate the commission of a crime or fraud will not be confidential.

In Canada, the practice of taxation is shared among two major professional bodies: lawyers and chartered professional accountants (CPA). (See the recent Supreme Court case of *Barreau du Quebec,* 2017 SCC 56, Cote J, dissenting). Although both professions have substantially the same rights in terms of the professional acts they can make, communications between a taxpayer and a CPA are currently not protected by solicitor–client privilege. Therefore, arguably, the CRA could use its powers under Sections 231.1 et seq. to access an accountant's file, but certainly not in a routine, uncontrolled manner. A recent example is the case of *BP Canada Energy Company*, 2017 FCA 61, in which the Federal Court of Appeal denied the CRA's application pursuant to Section 231.7 to get a copy of the tax accrual working papers prepared for the purpose of consolidated financial statements, which contain a list of uncertain tax positions (the issues list), on the basis that financial reporting rules

10 *R v. McKinlay Transport Ltd*, [1990] 1 SCR 627.

11 *R v. Jarvis*, [2002] 3 SCR 73.

12 *Descoteaux v. Mierzwinski*, [1982] 1 SCR 860.

protect the inherent confidentiality of the process through which CPAs obtain and analyse tax information in order to opine on the reliability of financial information disclosed to the public.

iii Normal reassessment period

The period of time within which the CRA is expected to carry out its tax audit and issue a reassessment is the normal reassessment period defined under Sections 152(3.1) and 152(4) of the Income Tax Act. The normal reassessment period starts with the issuance of the first assessment. Depending upon the taxpayer's status and the nature of the transactions under review, the normal reassessment period ends three (for an individual or private corporation), four (for a public corporation) or seven (for transactions involving a non-resident) years later. Within the normal reassessment period, the CRA can issue as many reassessments as it sees fit, and the subsequent reassessment cancels the previous one unless it is an additional assessment.

Pursuant to Sections 152(4) and (4.01), the CRA can issue a reassessment beyond the normal reassessment period only if the reassessment can reasonably be regarded as relating to either misrepresentation in the taxpayer's return attributable to neglect, carelessness or wilful default, or fraud.[13] The CRA must prove misrepresentation on the balance of probabilities, and misrepresentation must take place when filing the return, not at another time.[14] The standard of care is that of a reasonably prudent taxpayer. In other words, the CRA must prove simple negligence of the taxpayer when filing his or her income tax return. According to the Federal Court of Appeal in *The Queen v. Johnson*,[15] when it is said that the standard of care is that of a wise and prudent person, it must be understood that wisdom is not infallibility and prudence is not perfection.[16]

III THE COURTS AND TRIBUNALS

i Tax appeals to the Tax Court of Canada

Pursuant to Section 169 of the Income Tax Act, where a taxpayer has served a notice of objection to an assessment under Section 165, the taxpayer may appeal to the Tax Court of Canada to have the assessment vacated or varied within 90 days after the CRA has confirmed the assessment or reassessed. The Tax Court of Canada is based in Ottawa and can sit basically anywhere in Canada, upon request of the taxpayer. It is composed of 22 judges, including the chief justice and the associate chief justice. The Tax Court is a superior court of record the judges of which are appointed by the governor general in council (i.e., the federal cabinet). Unlike the provincial superior courts, it does not have an inherent jurisdiction; in income tax appeals, its jurisdiction is limited to Section 171, which states that it may dispose of an appeal by dismissing it or allowing it and vacating the assessment, varying the assessment or referring the assessment back to the CRA for reconsideration and reassessment.[17]

13 A reassessment can also be made beyond the normal reassessment period pursuant to a waiver signed by the taxpayer in prescribed form.

14 *Vachon v. The Queen*, 2014 FCA 224.

15 *The Queen v. Johnson*, 2012 FCA 253.

16 On the standard of prudence, see also *Balthazard v. The Queen*, 2011 FCA 331.

17 The Tax Court has no jurisdiction on interest.

The appeal is instituted by a notice of appeal prepared in accordance with Section 21 of the Rules of the Tax Court of Canada (General Procedure) (Rules).[18] The taxpayer's notice of appeal must summarise the relevant facts, state the question at issue, list the relevant statutory provisions relied upon, state the taxpayer's arguments and, finally, the reliefs sought.

Within 60 days (subject to an extension), the CRA has to file a reply to the notice of appeal in accordance with Sections 44–49 of the Rules. The reply contains the same items as the notice of appeal, in addition to a section containing the assumptions based on which the assessment was made by the CRA (the basis of the assessment). This section is of utmost importance to the whole tax litigation process, because the assumptions will determine what the taxpayer will have to demonstrate to quash the assessment.

Once the reply is filed, the parties have to agree on a timetable for the remaining steps of the litigation: the exchange of lists of documents (partial or integral),[19] the examination for discovery,[20] the satisfaction of undertakings made at discovery and the request for a date of hearing.[21] Once the date of hearing is scheduled by the hearings coordinator, the parties have 90 days from that date to serve their expert reports,[22] if they deem it necessary.

ii Burden of proof

Pursuant to Subsection 152(8) of the Income Tax Act, an assessment is deemed valid and can be vacated or varied only through the specific mechanisms provided for in the Act: objection, appeal or reassessment by the CRA. The assessment's presumption of validity is applicable notwithstanding any error, defect or omission in the assessment.

Once the assessment has been appealed to the Tax Court and the CRA has filed its reply, the debate on the validity of the assessment will focus on the assumptions specifically listed in the reply. Another facet of the assessment's presumption of validity is that the assumptions relied upon in the reply are presumed (and not deemed) valid. In the latter case, it is a simple presumption that can be countered by a *prima facie* case. The authority on this issue is *Hickman Motors Ltd v. Canada*,[23] in which the Supreme Court of Canada stated that the CRA, in making assessments, proceeds on assumptions, and the initial onus is on the taxpayer to demolish the CRA's assumptions in the assessment. The initial burden is only to demolish the exact assumptions made by the CRA but no more.[24] The initial onus of demolishing the assumptions is met where the taxpayer makes out a *prima facie* case. Where the CRA's assumptions have been demolished by the taxpayer, the onus then shifts to the CRA to rebut the *prima facie* case made out by the taxpayer and to prove the assumptions. If the CRA adduces no evidence, the taxpayer is entitled to succeed.

In *Amiante Spec Inc v. The Queen*,[25] the Federal Court of Appeal developed a little further the concept of *prima facie* case, stating that it is one supported by evidence that raises

18 The Tax Court has several rules of practice, including an informal procedure. Only the general procedure is presented herein.

19 Sections 81–82 of the Rules.

20 Sections 92 et seq. of the Rules.

21 Section 123 of the Rules.

22 Sections 145 et seq. of the Rules. In tax appeals, experts are often called upon to testify on the following questions: accounting principles, forensic accounting, valuation, foreign law. See also *Drouin v. The Queen*, 2010 TCC 94 and *R v. Mohan*, (1994) 2 SCR 9.

23 *Hickman Motors Ltd v. Canada*, (1997) 2 SCR 336.

24 For historical background, see *Johnston v. MNR*, (1948) SCR 486.

25 *Amiante Spec Inc v. The Queen*, 2009 FCA 139.

such a degree of probability in its favour that it must be accepted if believed by the judge unless it is rebutted or the contrary is proved. As such, it may be contrasted with conclusive evidence, which excludes the possibility of the truth of any other conclusion than the one established by that evidence.

IV PENALTIES AND REMEDIES

Typically, interest and penalties are directly related to the imposition of taxes and have no autonomous standing. As such, the result of the tax appeal will normally be determinative for interest and penalties as well.[26]

However, some penalties imposed under the Income Tax Act are not applied automatically when an assessment is issued; rather, these penalties require proof of a specific behaviour of the person being reassessed. Subsection 163(2) applies to the taxpayer, while Section 163.2 applies to third parties, including tax professionals.

In *Guindon v. Canada*,[27] the Supreme Court of Canada had to consider the constitutional substance of the Section 163.2 penalty, and concluded that the standard for both penalties must be at least as high as gross negligence. These penalties are meant to capture serious conduct, not ordinary negligence or simple mistakes. Applying the traditional test developed in *Venne v. The Queen*,[28] the Supreme Court said that these penalties are intended to apply to a behaviour that amounts to indifference as to whether the law is complied with and a high degree of negligence tantamount to intentional acting.

Pursuant to Section 163(3), in the case of penalties assessed under Subsections 163(2) and Section 163.2, the burden of establishing the facts justifying the assessments of the gross negligence penalties is on the CRA, on the balance of probabilities.[29]

V TAX CLAIMS

i Notice of objection

Once a notice of assessment is issued, pursuant to Subsection 165(1) of the Income Tax Act, the taxpayer has 90 days from the date of mailing (presumably, the date on the notice of assessment) to file an objection. There is no prescribed form, but the Act requires that the objection be in writing, and that it sets out the reasons for the objection and the relevant facts.

26 Pursuant to Subsection 220(3.1) of the Income Tax Act, the Minister of National Revenue may, upon request from the taxpayer, waive or cancel, partially or totally, interest and penalties applied to the taxes assessed. The Minister's discretion is exercised administratively in accordance with guidelines published by the CRA. It is subject to judicial review before the Federal Court in accordance with administrative law principles. Based on *Dunsmuir v. NB,* (2008) 1 SCR 190, the Minister's decision must be reasonable and legally correct. For a comprehensive review of the relevant case law, see *Lafarge v. Quebec*, 2011 QCCS 7391. In *Genetec Inc v. Quebec,* 2015 QCCS 4877, the Quebec Superior Court concluded that a taxpayer has no constitutional guarantee to a reasonable decision and, accordingly, the provincial legislature could enact laws to restrict the ability of the Superior Court to revisit the ministerial decision. This case is under appeal before the Quebec Court of Appeal: 2016 QCCA 444.

27 *Guindon v. Canada*, 2015 SCC 41.

28 *Venne v. The Queen*, (1984) CTC 223 (FCTD).

29 See also *Fourney v. The Queen*, 2011 TCC 520 and *Lacroix v. Canada*, 2008 FCA 241.

An important exception to this apparent flexibility in preparing notices of objection is with respect to large corporations. Pursuant to Subsection 165(1.11), a large corporation's[30] notice of objection must reasonably describe each issue to be decided, specify in respect of each issue the relief sought expressed as the amount of a change in a balance, and provide facts and reasons relied on by the corporation in respect of each issue.[31] Failure to comply with these rules may result in the rejection of the notice of objection (there is a 60-day grace period) or the legal impossibility to appeal an issue not validly raised in the notice of objection.

Pursuant to Subsection 165(3), on receipt of the notice of objection, the CRA shall, with all due dispatch, reconsider the assessment and vacate, confirm or vary the assessment or reassess. The taxpayer must be notified in writing.

The objection process is not mandatory and can be bypassed. What is required *per se* is the notice of objection, but if 90 days have elapsed after service of the notice of objection and the CRA has not notified the taxpayer that it has vacated or confirmed the assessment or reassessed, the taxpayer can appeal directly to the Tax Court of Canada, pursuant to Paragraph 169(1)(b).

ii Loss determination request

An assessment should not be confused with a notice of assessment. Pursuant to Subsection 152(1) of the Income Tax Act, the assessment is the administrative act made by the CRA pursuant to which it establishes the amount of tax payable as well as penalties and interest applicable thereto. The notice of assessment is the piece of paper intended to convey the result to the taxpayer. The separation between the administrative act and the physical support may seem trivial, except for in the situation where a taxpayer receives a notice of assessment with respect to a taxation year during which it incurred a loss. The amount of tax established under the circumstances will be nil and, legally speaking, there is no assessment under those circumstances.

Since losses can be carried back and forward to reduce taxable income for previous and subsequent taxation years, there is an incentive to confirm the quantum of the losses for each taxation year. In this regard, the notice of assessment is of no use. What is required is a notice of determination of losses that can be issued by the CRA upon a request made pursuant to Subsection 152(1.1), typically through a letter. If the quantum of the losses determined by the CRA in furtherance of this process is inaccurate, an objection can be filed in essentially the same manner as an objection to an assessment.[32]

iii Request for extension of time

Where no notice of objection to an assessment has been served within the 90-day period, the taxpayer may apply to the CRA to extend the time for serving the notice of objection. Pursuant to Section 166.1 of the Income Tax Act, the request should be granted if it complies with the following conditions: the application is made within one year of the expiration of

30 Pursuant to Section 225.1(8), a corporation is a large corporation if, at the end of a given taxation year, its taxable capital employed in Canada exceeds C$10 million.

31 For the historical background on the reason for these requirements, see *Potash Corp of Saskatchewan v. The Queen,* (2004) 2 CTC 91 (FCA).

32 It should be noted that an objection to a nil assessment can nevertheless be filed if the objection is with respect to refundable tax credits.

the deadline to serve the notice of objection, the taxpayer demonstrates that he or she was unable to act within the deadline or had a *bona fide* intention to object within the deadline, it is just and equitable to grant the application, and the application was made as soon as circumstances permitted.

The key issue in most applications for extension of time is whether the taxpayer was unable to act. In *Patterson Dental Canada Inc v. The Queen*,[33] the Tax Court of Canada confirmed that the concept of impossibility to act must be analysed subjectively and not objectively: in other words, whether this specific taxpayer in his or her specific context was unable to act, as opposed to the reasonably prudent taxpayer.

If the CRA rejects the application, the taxpayer can appeal to the Tax Court of Canada.

VI COSTS

Pursuant to Subsection 147(1) of the Rules, the court may determine the amount of the costs of all parties involved in any proceeding, the allocation of those costs and the persons required to pay them. Costs may be awarded to or against the CRA. In exercising its discretionary power to award costs, the court may consider, *inter alia*, the result of the proceeding, the amounts in issue, the importance of the issues, any offer of settlement made in writing, the volume of work, the complexity of the issues, and the conduct of any party that tended to shorten or lengthen unnecessarily the duration of the proceeding.

Unless otherwise ordered by the court, if a taxpayer makes an offer of settlement and obtains a judgment as favourable as or more favourable than the terms of the offer of settlement, the appellant is entitled to party and party costs to the date of service of the offer and substantial indemnity costs after that date, as determined by the court, plus reasonable disbursements and applicable taxes. 'Substantial indemnity' costs means 80 per cent of solicitor and client costs.

VII ALTERNATIVE DISPUTE RESOLUTION

Taxation is proverbially complex, and mistakes do happen in spite of the taxpayers' and their advisers' best efforts to comply with their obligations. When a series of transactions was intended to respect the conditions provided for in the Income Tax Act to take advantage of a specific tax treatment and unintended tax consequences are triggered by a mistake in the design or implementation of the transactions, taxpayers should consider the possibility of an application to rectify the erroneous writings.

Such applications are made before provincial superior courts and are governed by civil law in Quebec and common law in the rest of Canada. In civil law, the authority is the Supreme Court of Canada's judgment in *Quebec v. Services environnementaux AES Inc*.[34] This case stands for the principle that, as a general rule, the writing is not an autonomous act; the writing is not the contract. A contract is an agreement of wills for the purpose of carrying out juridical operations. The formation of a contract is subject to the principle of consensualism: a contract is formed by the exchange of consents. Therefore, to determine what are the *bona fide* legal relationships to which tax consequences will apply, one must go beyond the allegedly erroneous writing and focus on the parties' common intention. If a writing contains

33 *Patterson Dental Canada Inc v. The Queen*, 2014 TCC 62.

34 *Quebec v. Services environnementaux AES Inc*, (2013) SCR 838.

an error that triggers unintended tax consequences,[35] the court must, once the error is proved in accordance with the rules of evidence in civil matters, note the error and ensure that it is remedied. Most importantly, the Supreme Court ruled that the tax authorities do not have an acquired right to benefit from an error made by the parties to a contract after the parties have corrected the error by mutual consent.[36] The recent case of *Groupe Jean Coutu*, 2016 SCC 55, has expended on the conditions to be satisfied for a successful tax-driven rectification, namely (1) the unintended tax consequences were originally and specifically sought to be avoided; and (2) the obligations, if properly expressed and the corresponding prestations, if properly executed, would have succeeded in doing so. Importantly, *Groupe Jean Coutu* has specifically recognised a taxpayer's right to include the insertion of transactions into a rectification plan.

As for common law, the precedent is the Supreme Court case of *Fairmont*, 2016 SCC 56, which stands for the principle that where an error is said to result from a mistake common to both or all parties to an agreement, rectification of the instrument is available upon the court being satisfied that there was a prior agreement whose terms are definite and ascertainable; the agreement was still in effect at the time the instrument was executed; the instrument fails to accurately record the agreement; and the instrument, if rectified, would carry out the parties' prior agreement.

VIII ANTI-AVOIDANCE

i Construction of tax statutes

In Canada, as a result of the *Duke of Westminster* principle,[37] taxpayers are entitled to arrange their affairs to minimise the amount of tax otherwise payable. This principle has been consistently recognised in case law[38] as well as by the CRA.[39] In Canada, there is no substance over form doctrine pursuant to which a series of transactions could be revisited by the CRA to ignore the transactions implemented specifically to avoid or minimise taxes. The way in which taxes are applied to transactions has been developed over a series of cases, as described below.

In *Shell Canada Ltd v. Canada*,[40] the Supreme Court of Canada stated that the economic realities of a situation cannot be used to recharacterise a taxpayer's *bona fide* legal relationships. Absent a specific provision of the Income Tax Act to the contrary or a finding that they are a sham, the taxpayer's legal relationships must be respected in tax cases.

Recharacterisation is only permissible if the label attached by the taxpayer to the particular transaction does not properly reflect its actual legal effect. The authority on this question is *Continental Bank Leasing Corp v. Canada*,[41] in which the Supreme Court of Canada established the following approach. After it has been found that the sham doctrine does not

35 An error is defined at Paragraph 53 of *AES* as the erroneous expression of the parties' common intention in all the writings prepared to carry out the tax plans on which they had agreed.

36 At Paragraph 54 of its reasons in *AES*, the Supreme Court of Canada mentioned that the judicial recognition of rectification in civil law should not be viewed as an invitation to engage in bold tax planning on the assumption that taxpayers will always be allowed to redo their contracts retroactively should that planning fail.

37 Named after the English case of *CIR v. Duke of Westminster,* [1936] AC 1 (HL).

38 *Canada Trustco Mortgage Co v. Canada,* [2005] 2 SCR 601.

39 CRA, 'Third-Party Civil Penalties', IC 01-1, 18 September 2001.

40 *Shell Canada Ltd v. Canada*, [1999] 3 SCR 622.

41 *Continental Bank Leasing Corp v. Canada*, [1998] 2 SCR 298.

apply,[42] it is necessary to examine the documents outlining the transaction to determine whether the parties have satisfied the requirements of creating the legal relationships that they sought to create. Once the documents are accepted as genuinely representing the transaction into which the parties have entered, its proper legal categorisation is a matter of construction of the documents. The parties' agreement must be found, first, in the language used by the parties. However, if, when properly construed, the effect of the document as a whole is inconsistent with the terminology used by the parties, then ill-chosen language must yield to the substance.

The seminal exercise of determination of the *bona fide* legal relationships cannot be made *in abstracto*. It can only be made within the context of the laws of general application (common law, civil law, corporate law, international law, etc.) based on which the legal relationships emerge. *Markevich v. Canada*[43] recognises the principle that the Income Tax Act is not a complete code and, accordingly, it must be informed by laws of general application. In other words, the Act does not and cannot operate in a legislative vacuum; it relies implicitly on the general law. (Also see: *BP Canada Energy Company*, 2017 FCA 61) As a result, the exercise of determination of the *bona fide* legal relationships commanded by the Supreme Court of Canada in *Shell* and *Continental Bank* must take into account legal concepts that are outside the Act and that may require a reconciliation of legal concepts that have nothing to do with tax (e.g., contract law, trust law or bankruptcy law).

ii Tax avoidance

Although the *Duke of Westminster* principle is still trite law, taxpayers wishing to arrange their affairs to minimise the amount of Canadian tax otherwise payable must be aware of an important exception to the rule: abusive tax avoidance.

The general anti-avoidance rule (GAAR) enacted in 1988 in Section 245 of the Income Tax Act recognises the principle that the particularity and detail of many tax provisions have often led to an emphasis on textual interpretation and, as a result, where parliament has specified precisely what conditions must be satisfied to achieve a particular result, it is reasonable to assume that parliament intended that taxpayers would rely on such provisions to achieve the result they prescribe. However, this remains true only if the transactions entered into by the taxpayer had *bona fide* purposes (other than obtaining a tax benefit) and the series of transactions do not amount to a misuse or abuse of the Act.

According to the Supreme Court of Canada in *Canada Trustco Mortgage Co v. Canada*,[44] three requirements must be established to permit the application of the GAAR:

a a tax benefit resulting from a transaction or part of a series of transactions;

b the transaction is an avoidance transaction in the sense that it cannot be said to have been reasonably undertaken primarily for a *bona fide* purpose other than to obtain a tax benefit; and

c there was abusive tax avoidance in the sense that it cannot be reasonably concluded that a tax benefit would be consistent with the object, spirit and purpose of the provisions relied upon by the taxpayer.

42 If the documents are a sham intended to mask the true agreement between the parties, the court must disregard the deceptive language.

43 *Markevich v. Canad*a, [2003] 1 SCR 94.

44 *Canada Trustco Mortgage Co v. Canada*, [2005] 2 SCR 601.

The burden is on the taxpayer to refute the existence of a tax benefit and of an avoidance transaction (essentially, questions of facts), and on the CRA to establish the existence of abusive tax avoidance (a question of law).

This rather complex exercise must take place in accordance with the modern approach to the construction of statutes, pursuant to which the interpretation of a statutory provision must be made according to a textual, contextual and purposive analysis to find a meaning that is harmonious with the Act read as a whole.

Once it is established that the GAAR is applicable, its effects are serious. Pursuant to Subsection 245(5), the CRA can recharacterise the series of transactions so as to suppress the tax benefit.

IX DOUBLE TAXATION TREATIES

Canada currently has double taxation treaties in force with 92 countries.[45] Six treaties are signed but not yet in force.[46] Six treaties are under negotiation or renegotiation.[47]

Canada also has tax information exchange agreements with 22 countries.[48]

One treaty is signed but not yet in force (Cook Islands). Seven treaties are currently under negotiation.[49]

Canada has adopted the OECD treaty model.

X AREAS OF FOCUS

Three areas of focus should be closely watched in the coming years.

The first area is the CRA's growing appetite for tax information. In recent years, we have seen a growing number of mandatory requirements by the CRA to obtain tax information, including requests sent to tax professionals and third parties (including financial institutions and retailers). Allocation of human resources seems to be an issue, and the CRA intends to carry out its audits more efficiently. As a result, it is clear that access to planning memoranda and tax opinions prepared by professionals are prime targets and may even become road maps for tax auditors. This new trend raises important issues, including the taxpayers' legitimate

45 Algeria, Argentina, Armenia, Australia, Austria, Azerbaijan, Bangladesh, Barbados, Belgium, Brazil, Bulgaria, Cameroon, Chile, China, Colombia, Croatia, Cyprus, the Czech Republic, Denmark, the Dominican Republic, Ecuador, Egypt, Estonia, Finland, France, Gabon, Germany, Greece, Guyana, Hong Kong, Hungary, Iceland, India, Indonesia, Ireland, Israel, Italy, the Ivory Coast, Jamaica, Japan, Jordan, Kazakhstan, Kenya, Korea, Kuwait, Kyrgyzstan, Latvia, Lithuania, Luxembourg, Malaysia, Malta, Mexico, Moldova, Mongolia, Morocco, the Netherlands, New Zealand, Nigeria, Norway, Oman, Pakistan, Papua New Guinea, Peru, the Philippines, Poland, Portugal, Romania, Russia, Senegal, Serbia, Singapore, the Slovak Republic, Slovenia, South Africa, Spain, Sri Lanka, Sweden, Switzerland, Tanzania, Thailand, Trinidad and Tobago, Tunisia, Turkey, Ukraine, the United Arab Emirates, the United Kingdom, the United States, Uzbekistan, Venezuela, Vietnam, Zambia and Zimbabwe.

46 Belgium, Israel, Lebanon, Namibia, Taiwan and United Kingdom.

47 Australia, China, Madagascar, Malaysia, The Netherlands and San Marino.

48 Anguilla, Aruba, Bahamas, Bahrain, Bermuda, the British Virgin Islands, Brunei, the Cayman Islands, Costa Rica, Dominica, Guernsey, the Isle of Man, Jersey, Liechtenstein, Netherlands Antilles, Panama, San Marino, Saint Lucia, St Kitts and Nevis, St Vincent and the Grenadines, Turks and Caicos Islands and Uruguay.

49 Antigua and Barbuda, Belize, Gibraltar, Grenada, Liberia, Montserrat and Vanuatu.

expectation of confidentiality when they deal with their tax advisers, as well as the duty of loyalty in relation to one's clients. *Barreau du Quebec* and *BP Canada Energy Company*, two seminal 2017 cases, are a testament to this trend.

Secondly, a variation on the theme of access to and – most importantly – protection of tax information, the future clearly lies on treaty-based information request in the context of internationally-co-ordinated efforts to get taxpayers' information, especially when domestic laws are deemed inefficient by the local tax authorities.

Finally, we have seen a significant increase in the number of taxpayers' complaints against tax auditors' reprehensible behaviours.[50] With the passage of time, we can only hope for clear guidelines – especially from the courts – so that such behaviours are no longer tolerated.

XI OUTLOOK AND CONCLUSIONS

The Canadian tax system is a mature and equitable system for both Canadian taxpayers and the tax authorities. The system is administered by professional public servants dedicated to ensure that taxpayers file truthful returns, voluntarily. It is adjudicated by an independent and efficient judiciary that we can be proud of. In years to come, we will see further improvements in our system with the construction of a penalty system based on *Guindon*, the convergence of the rectification process inspired by *AES, Groupe Jean Coutu* and *Fairmont* and the continuing evolution of confidentiality rules consistent with *BP Canada Energy Company* and *Barreau du Quebec*. This is just an excerpt of what may happen in the coming years.

50 For example *Quebec v. Enico*, 2016 QCCA 76.

Chapter 6

CHILE

Patricio Silva-Riesco Ojeda and Arturo Selman Nahum[1]

I INTRODUCTION

The Chilean Internal Revenue Service (IRS) is the fiscal authority responsible for the implementation and monitoring of all local taxes, fiscal or otherwise; in all cases where the state has an interest in said taxes and the control of these is not specifically mandated by law to a different authority. Tax disputes were formerly also dealt with under the faculties of the IRS acting as a court of first instance through its regional directors, who not only acted as tax judges, but also as the administrative authorities from which any contested act emerged.

The second instance fell under the competence of the Chilean Court of Appeals (an ordinary appeals court), whose ruling could be challenged before the Supreme Court through an extraordinary appeal on points of law. However, dispute resolution regarding taxes has undergone great changes over the past decade. First, as the tax dispute system was formerly the responsibility of the regional directors of the IRS, they acted as tax judges; moreover, their jurisdictional faculties were commonly delegated to third parties such as lower-ranking public officers. This situation eventually led to a series of inapplicability procedures in some particular cases, as well as the subsequent declaration of unconstitutionality by the Constitutional Court. As a consequence, the delegating faculties of the IRS were eventually repealed *in toto*, reallocating the above-mentioned jurisdictional faculties back to the regional directors.

Pressure to modify the tax jurisdiction's procedures and management structure resulted in the enactment of Act No. 20,322, enforceable since 27 January 2009. Said legislation gave rise to the most significant fundamental taxation reform in Chile since 1960. This act created independent and sovereign courts, known as tax and customs courts, thus replacing the IRS' jurisdictional authority, which it held for decades, with an independent third party that no longer represents an entity capable of acting simultaneously both as interested party and judge.

Under the above-mentioned Act, 18 tax and customs courts were created, four of which were installed in Santiago. These courts rule over taxpayers' claims against any and all actions and proceedings of both the IRS and the National Customs Service. Therefore, the tax dispute system has become one in which taxpayers can fairly challenge the tax authority in terms of tax assessments and offences.

The formation of these courts was undertaken progressively in four major stages. Prior to the installation of the courts in Santiago, Congress estimated that the courts were

1 Patricio Silva-Riesco Ojeda is a director and Arturo Selman Nahum is a senior associate at Philippi Prietocarrizosa Ferrero DU & Uría.

overstaffed and, against specialists' warnings, proceeded to order staff reductions. This resulted in extremely slow judicial proceedings and overburdened courts throughout regions with very dense populations.

Meanwhile, questions regarding the IRS's use of its discretionary powers, such as criminal prosecution and remission, and its discharge faculties over taxes and penalties, has resulted in the early departure of several IRS directors and sub-directors. As a result, there is an increasing tendency among IRS officials to avoid the administrative settlement of tax disputes, and instead to opt for their judicialisation.

Notwithstanding the above, and despite the existing increase in tax judicialisation, auditing is not conducted as frequently as it once was because of, *inter alia*, employment unions-based pressure within the IRS and, additionally, the lack of stability regarding its vested authorities.

In turn, the major 2014 tax reform, which will come completely into force in 2017, has incorporated general anti-avoidance rules. The application of said rules should increase litigation, although the drafting of the rights-based rules enables us to predict that the IRS will avoid said judicialisation, and decide instead on alternative formulae.

Government Act No. 21,039 was introduced on 20 October 2017 with the intention of improving the tax and customs justice system, by creating a mechanism that will allow increasing the length of this kind of trial at first instance. This new regulation introduced conciliation as a mandatory phase of tax trials, increased the legal terms for the filing of administrative appeals before the IRS and includes the suspension of the terms to file jurisdictional claims. At the same time, this new legislation contains a minor increase in the number of members of tax and customs courts and improves the remuneration of court judges and staff.

II COMMENCING DISPUTES

Tax disputes normally arise when a taxpayer challenges a positive tax ascertainment, an IRS ruling or an offence notice. In exceptional cases, when facing conduct that constitutes a tax-related criminal offence, the IRS will choose to solely file an administrative complaint, forwarding all records to the tax and customs court for trial and ruling. Regarding offences, a dispute begins when the taxing administration, acting in its auditing capacity, notifies the taxpayer of an offence – usually sanctioned through fines or the shutting down of an establishment – regarding non-compliance of document issuance duties, the upkeep of records or other fiscal obligations. The notified offence may be sanctioned administratively should the taxpayer admit to the offence, and may also request the discharge of fines, even if done electronically. Should the taxpayer file a claim, the trial of and ruling on the notified offence will fall to the first instance court, with an or appeal being allowed before the relevant city's court of appeals.

Litigation may result from, *inter alia*, a fiscal audit resulting in a founded tax authority resolution. This is referred to as liquidation, an administrative act that is often contested before the tax and customs courts.

In turn, any taxpayer who has overpaid certain tax will be entitled to request its return from the tax administration. The ruling regarding said administrative request can also be contested. The same applies for rulings that partially or completely deny requests for refunds, whether based on special laws or laws that promote an activity, such as in the case of export VAT, a change in the VAT subject or a refund of the VAT endured in the acquisition of fixed assets, as well as requests for the return of taxing remnants formulated in income tax return forms. In turn, if an IRS audit determines that a loss claimed by a taxpayer is excessive, it will render a decision to modify said claim. All the aforementioned decisions may be contested before the tax and customs courts.

The procedure contemplated by law for said disputes is contentious and administrative, and, after an examination of a dispute's admissibility, calls for the serving of a notice to the IRS for an answer to the complaint, followed by probationary and ruling periods. Said ruling is subject to appeal before the respective court of appeals within 15 business days, and a ruling regarding an appeal may be contested through an extraordinary appeal on points of law before the Supreme Court.

The deadline to present claims against liquidations, transfers, payments or rulings of the IRS is 90 business days. Said period may be extended to a year should the taxpayer, within the 90-day period, request a transfer and pay the corresponding taxes so as to avoid readjustments, fines and interests. Taxing interest applies at a rate of 1.5 per cent per month, and fines may rise up to 60 per cent of the readjusted taxes. By making use of the allowed advance payment, a taxpayer reduces the risks associated with litigation and, should a ruling be favourable to the taxpayer, the amounts paid are to be refunded with a readjusted interest rate of 0.5 per cent per month in favour of the taxpayer.

Both the taxpayer and the IRS must be represented in court by a licensed attorney, and no consignment whatsoever is required for litigation, notwithstanding the aforementioned right. Nonetheless, in cases regarding amounts of less that 32 monthly tax units,[2] the taxpayer may appear in court without attorney representation. The general claims procedure before a tax and customs court (at first instance) will take approximately one to two years, although such period may increase if a dispute is brought before courts with competence in Santiago.

III THE COURTS AND TRIBUNALS

i IRS administrative stage

Summons

An inspection or tax audit begins with a request to a taxpayer for all his or her records. If the records are insufficient, the IRS may issue a summons,[3] after which the taxpayer must clarify, rectify, extend or confirm his or her tax filing within a month.[4]

The response to the summons must be in writing. Should the arguments and records provided by the taxpayer be deemed sufficient, the challenged entries will be reconciled, and the fiscal authority will issue an end of review notice letter. Otherwise, the IRS will dictate a liquidation or tax transfer where taxes are owed by the taxpayer, or will issue an exempt ruling destined to either deny the return requested by the taxpayer or to modify a tax loss.

Particular care must be observed in attaching all requested records when responding to a summons. Act No. 20,322 incorporated a norm of proof inadmissibility (the discovery

2 Equivalent to approximately US$2,260.

3 Although the summons is optional, and hence it would be natural to conclude that it is seldom used, the law makes it mandatory in many cases, making it a tool recurrently used by the tax authority.

4 Such deadline may be extended up to one more month upon the taxpayer's request.

effect) by virtue of which, should the taxpayer not attach to the summons response all the documents specifically requested, the taxpayer will not be able to make use of said documents during a trial.

Administrative motion for reversal

Once the liquidation, tax transfer or ruling that affects the payment of taxes is issued, provision No. 123 *bis* of the Tax Code allows the taxpayer, within 30[5] business days,[6] to file an administrative motion for reversal before the IRS. The IRS will have 90[7] business days from the filing of said motion to make a ruling and, should the motion not be resolved within this period, it will be considered denied. It is relevant to note that Act No. 21,039 as enacted on 20 October 2017, amended letter c) of Section No. 123 of the Tax Code, stating that the filing of a voluntary administrative review before the IRS suspends the term contained in Section No. 124 to file jurisdictional claims before the tax and customs courts.

This constitutes the last stage of formal review by the tax authority and, although the standing administrative regulation[8] makes the review of all records provided by a taxpayer mandatory, even allowing for conciliation, this path has not had the impact expected; nor has it served as a mechanism to avoid the judicialisation we currently face. It is possible to expect that with the modifications introduced by Act No. 21,039, administrative reviews will have institutional relevance in the future for resolving conflicts between the IRS and taxpayers, and consequently decrease their judicialisation, which prevails today.

ii Tax and customs courts

The tax and customs courts are entrusted with the jurisdictional function of ruling, in the first instance, over disputes between the IRS or the National Customs Service and taxpayers. In accordance with Act No. 20,322, said courts are independent, under the Ministry of Finance, through an Administrative Unit that is in charge of the courts' economic and administrative management (as with the judicial power, without being dependent on the latter).

The tax and customs courts are single-judge courts, and their judges are appointed through a competitive bidding process. In this process, an executive service proposes a list of candidates for judging posts to the relevant court of appeals, and the court will then propose a slate of three to the President for appointment. These judges will be fixed in their position and keep their posts until they reach the age of 75, and may only be dismissed on serious grounds.

These courts were installed throughout the country in a progressive manner that ended in February 2013. There are 18 single-judge tax and customs courts, each with a secretary (attesting minister) and resolution and administrative staff. There is one court per region and four for the metropolitan region, and they closely follow the organic structure maintained by the tax administration at a national level. Hence, these courts currently function with attorneys who are exclusively dedicated to them.

Most of these attorneys come from the taxing administration itself and, although they are not a part of the judicial power, they still exercise jurisdiction. Courts' officers are not

5 Act No. 21,039 of 20 October 2017 extends the terms from 15 to 30 days.

6 Such deadline is established under Act No. 19,880 (Monday to Friday, not including Saturdays, Sundays and legal holidays).

7 Act No. 21,039 of 20 October 2017 extends the terms from 50 to 90 days.

8 Circular Resolution No. 13 of 2010, the instructions of which are mandatory for all IRS officials.

only fixed in a ministerial nature, but also because of the non-existent possibility of their promotion or change relative to their careers within the structure. Nonetheless, these courts are subject to the directive, correctional and economic constitutional supervision of the Supreme Court.

These courts rule, in the first instance, on all claims from taxpayers against IRS actions, particularly those consisting of tax liquidations, tax transfers and payments, rulings, complaints and offences, under procedures whose central characteristics were modified to make this process one of a litigious tax nature. The following characteristics of the process are the most notable.

Deadlines to file claims before the tax and customs courts will depend on the act being contested, a situation that will also determine the procedure to be followed.

In most procedures, attorney representation is required, notwithstanding that already stated regarding cases whose amount does not exceed 32 monthly tax units.

The trial will constitute an adversarial procedure, meaning that all acts contested by taxpayers shall be defended accordingly by specialised attorneys of either the National Customs Service or the IRS.

The IRS may request a tax and customs court to issue a cautionary action consisting of a prohibition to celebrate acts or contracts over specific goods or rights belonging to a taxpayer to ensure the eventual payment of debt.

The court will call upon the taxpayer to present evidence regarding material, contested and pertinent facts, assessing said facts' probative value according to the rules of reasoned judgement.

Taxpayers may not present, as evidence in trial, records requested during the IRS audit that were not surrendered in due time.

Likewise, the courts shall try and rule over requests by the IRS for the lifting of banking secrecy, as well as over the special procedure regarding violation of rights by the taxing administration – by reason of infringement – of a taxpayer's rights or constitutional guarantees.

By virtue of the modifications introduced by Act No. 20,780 and Act. No. 20,899, the courts will try any requests made by the IRS regarding the abuse or simulation of legal transactions celebrated by a taxpayer in compliance with the procedure established by provision No. 160 *bis* of the Tax Code.

iii Courts of appeals

Rulings of the tax and customs courts are appealable before the courts of appeals as second instance collegiate jurisdictional bodies. Although the law contemplated the creation of specialised chambers for ruling tax matters in the country's main courts, during President Sebastián Piñera's administration, a bill was passed that disposed of said specialisation before it was completely carried out, keeping such chamber only in the Court of Appeals of Santiago. In the remaining second instance courts, trials and ruling over appeals against tax and customs courts' decisions fall under non-specialised chambers. The courts of appeals, in appeal procedures, may modify facts and law established and applied in the first instance.

iv Supreme Court

Rulings passed by the courts of appeals may be subject to extraordinary appeals on points of law before the Supreme Court. If a recourse is filed based on form, then it claims that there has been a violation of substantive procedural laws. On the other hand, if filed based on substance, then it claims that an error of law took place that essentially affects the operative provisions of the judgment. The Supreme Court is the country's highest court that tries and rules through chambers, each composed of five ministers of the highest hierarchical range. Currently, these remedies are resolved by the chamber specialising in criminal matters.

IV PENALTIES AND REMEDIES

In Chile, criminal tax offences are matters of private criminal prosecution; hence, actions against such offences fall exclusively under the IRS. The only way in which a judicial proceeding regarding tax criminal offences may start is through the formulation of a criminal complaint by the tax administration. This faculty keeps the IRS authorities under constant media fire, given, *inter alia*, the IRS's failure to file claims against tax crimes, its uneven responses regarding equal offences and the slow response of its authorities.

Questioning regarding the IRS always relates to the alleged political use of the above-mentioned faculty, and to the disputes that rise between the body constitutionally mandated to lead such investigation, the Public Prosecution Ministry, and the IRS, the latter enabling the former by way of filing a corresponding criminal claim.

Regarding the above, it should be noted that, in Chile, offences against tax legislation are classified into three types depending on the nature of the sanction that the law establishes for the offence: violation, crime or an offence of mixed nature. In all these situations, Chilean law does not establish sanctions consisting of deprivation or restriction of liberty.

A procedure is started before a tax and customs court, which shall sanction the corresponding fine. Within said procedure, an offender has access to diverse mechanisms for defence. Criminal tax offences are solely those found within Provision 97 No. 24 of the Tax Code. In such case, all records and information are to be turned over to the Director of the IRS, who will decide to either file the criminal claim or to archive the case. However, the cases that hold utmost interest are those of a mixed nature, being offences that the law sanctions with both a penalty payment (fine), as well as a sanction that deprives or restricts the taxpayer of his or her freedom (imprisonment, confinement or relegation). In this case, once it is established from the gathering of information and evidence that there are tax irregularities, the findings will be presented to the Director of the IRS, who will decide whether to file a criminal claim or to forward the case to the corresponding regional bureau. The latter will have to pursue the application of the corresponding penalty payment through the appropriate penal law channels, all in accordance with Provision No. 162 Section 3 of the Tax Code. In recent years, and regarding criminal matters, the IRS has increased the number of criminal claims filed before justice courts based on acts that constitute criminal tax offences. This situation has come about given the prosecution of new criminal offences that have progressively been introduced into the Criminal Code, starting in 2001, as well as due to the permanent increase of the number of attorneys within the IRS.

Likewise, the fact that investigations are carried out by the prosecutors of the Public Prosecution Ministry – under the supervision of guarantee judges[9] – has brought about the progressive shortening of the duration of investigations, as well as of dispute resolution, in many cases leading to alternative outlets (*inter alia*, such as conditional suspension, reparatory agreements, summary procedures) instead of starting an oral trial.

9 Translator's note: '*Juez de Garantía*' is particular to Chile; the closest figure in common law would be 'magistrate judge'.

In addition to traditional tax offences, such as tax evasion (intentional failure to pay taxes), credit fraud (attaching of false invoices so as to increase VAT fiscal credits) and the malicious acquisition of tax returns (such as in the case of export VAT or tax returns due to tax losses), since 2001, new criminal offences have been incorporated into the Tax Code, including the following:

a facilitating or surrendering of false invoices or other tax documents;
b surrendering of false information to the IRS;
c malicious acquisition of compensation from donation beneficiaries;
d tax fraud within systems of exemption (free trade zones); and
e intentional loss of tax documentation.

V TAX CLAIMS

i Recovering overpaid tax

Provision No. 126 of the Tax Code contemplates the possibility of requesting, before the IRS, the return of taxes based on correcting a taxpayer's errors; acquiring restitutions of sums paid twice, excessively, or in an undue manner in terms of taxes, readjustments, interests and fines; and restitution of burdens mandated by promotion laws or tax exemptions. The deadline to file return requests based on the aforementioned cases is three years after the date on which the act or event that serves as grounds for the request took place.

Should the return request be denied by the IRS, the ruling containing said rejection may be contested before the tax and customs courts in accordance with the procedure set forth by Title III, Paragraph ii, and, furthermore, should said claim also be denied, said rejection may be challenged, as appropriate, before a court of appeals or the Supreme Court.

In turn, provision No. 128 of the Tax Code establishes that amounts unduly transferred or increased, or paid in excess by taxpayers in terms of taxes, will enter the state coffers, denying taxpayers the possibility to request their return, unless it is reliably proven before the Director of the IRS that said amounts were restituted in favour of those who actually endured the undue burden.

ii Challenging administrative decisions

Provision No. 26 of the Tax Code contemplates a safeguard rule in favour of taxpayers by virtue of which, if a taxpayer performed a certain act protected by a previous decision issued by the fiscal authority, no tax chargebacks may be collected against said taxpayer. The above will apply as long as the taxpayer has acted in good faith, based on an official interpretation made by the Director of the IRS or by the regional directors, and in applying said interpretation to a comparable situation. The above stated stands as long as such interpretation is recognised in circular resolutions, judgments, reports or any other official document destined to issue instructions.

Notwithstanding the above, in the event that the IRS considers that a taxpayer acted under a declaration that does not apply to his or her particular situation, and as long as a decision is passed through which a liquidation, tax transfer or resolution is issued regarding payment of taxes, the taxpayer may file a claim before the tax and customs courts, in accordance with Title III, Paragraph ii. Furthermore, should said claim also be denied, a taxpayer may challenge the decision before the corresponding appeals court or the Supreme Court, as appropriate.

iii Claimants

In compliance with Provision No. 124 of the Tax Code, anyone with an actual interest may file a claim against a liquidation, tax transfer, payment or resolution that may affect the payment of a tax, or that affects the elements that serve to determine said payment. In general, it will be the recipient of the administrative act who shall file a claim, but this does not prevent others from filing claims, as long as they have an actual interest regarding the administrative act. However, given that the act will be notified to the affected party (the taxpayer), it is difficult for a situation to present itself in which a third party may challenge an act, even if he or she has an actual interest, given that said third party will not know about the existence and content of the act.

VI COSTS

In Chile, the challenging of an act by the fiscal authority before the tax and customs courts has no associated costs; nor are there associated costs for filing appeals before the appeals court or in filing extraordinary appeals on points of law before the Supreme Court. Nonetheless, in the first and second instance, as with the filing of recourses before the Supreme Court, the losing party may be sentenced to pay all personal legal expenses relative to attorneys' fees, as well as all procedural costs such as experts' reports requested by the taxpayer, should the taxpayer lose the trial. In Chile, procedural expenses do not include the judge's fees, but do include those of other personnel employed in the administration of justice such as process servers, whose functions, in general terms (which does not apply to tax claims), include notifying lawsuits, rulings and carrying out repossessions.

However, there are no uniform or mandatory criteria to guide judges in their fixing of attorneys' fees or court costs that the IRS, as a losing party, may be sentenced to pay (and they rarely cover taxpayers' actual expenses). The courts will usually set a very low amount for the payment of costs, which will either equate to a low percentage of the contested amount (1 per cent or, should the contested amount be of higher value, will be set by other random mechanisms.

VII ALTERNATIVE DISPUTE RESOLUTION

During the auditing stage before the IRS, the usual way in which disputes are solved is the voluntary or forcible surrendering of omitted declarations, or the rectification of surrendered declarations, so as to complete the payment of any remaining taxes. During this stage, it is possible for the auditors to partially go over taxpayers' justifications so they can end their auditing promptly, and acquire payment of the debt. The IRS has the necessary facilities to partially or completely remit interest and fines associated with the non-payment or the untimely payment of taxes, which is an efficient tool in many cases where surcharges may increase, or even double, the original debt.

However, and in administrative proceedings, should rectification or surrendering of tax declarations by taxpayers not be carried out in a satisfactory manner according to the IRS, then the IRS will have to reasonably determine what differentials to impose, whether through liquidation, tax transfer or resolutions, which, once notified to the taxpayer, may be accepted or challenged before the competent tax and customs court.

Prior to the jurisdictional claim, the taxpayer may file an administrative motion for reversal before the fiscal authority to correct errors or infringements of requirements in contested acts. This instance contemplates the possibility of carrying out a conciliation hearing.

In these hearings, the administration may partially agree to the modification of the taxpayer's claims, issue different levels of surcharge remission, agree to the surrendering of rectification declarations, as well as take any other measures.

Act No. 21,039, as far as it concerns the 'strengthening and improvement of the administration of tax and customs justice' aims to achieve its intended effect by incorporating the mechanism of conciliation in the filing of claims by taxpayers before the tax and customs courts. Conciliation, thus, becomes a mandatary procedure in which the relevant judge requires the parties to attempt to resolve their dispute in a shorter period and by consensus rather than litigation, without having to wait for a full trial and the pronouncement of a sentence. Conciliation as a process will, therefore, become mandatory for all liquidation claims, resolutions or collections of the IRS, and it will require the full commitment of both the tax authorities as well as the defending parties for it to work as intended and not become a mere irrelevant formality, and to constitute a real improvement within the anachronistic legislation that in our country regulates the relationships between the tax administration and the taxpayers.

The call for conciliation shall become the responsibility of the tax and customs judges in charge of the tax claims filed before them. The appointed magistrate shall urge, propose and promote the bases for the resolution of the dispute, and shall be the main actor, to the extent that it is the authority in charge of the process, and that should definitely resolve the case, if the conciliation fails. If a solution is found, it shall be agreed between the IRS and the taxpayer.

VIII ANTI-AVOIDANCE

In Chile, tax evasion – an offence subject to private criminal prosecution – falls exclusively under the power of the Director of the IRS. Consequently, the taxing administration is permanently questioned over the manner in which it exercises the above-stated power. Tax criminal offences are of a mixed nature, given that their sanction is both deprivation and restriction of liberty and, conjointly, of a monetary nature. Given this, and considering all the gathered elements, the tax authority may opt to deem the offence as one that warrants a criminal claim, in which case the investigation and later application of both sanctions will be carried out by the Public Prosecution Ministry; or the tax authority may choose to merely serve notice of an administrative claim, so that the tax and customs courts may trial said claim, sanctioning it solely with a penalty payment.

However, in the majority of cases, the possibility remains that the IRS may choose not to file a claim to start a criminal or administrative procedure regarding tax evasion. Instead, it may choose to merely collect the civil payment of eluded taxes. Said civil collection of payment is carried out through the issuance of a liquidation or tax transfer, as is appropriate. In any case, the collecting of taxes and the corresponding sanction carried by evasion follow separate and parallel paths.

The fact that the gathering of records and information is entrusted to the IRS, so as to subsequently denounce offences before the Public Prosecution Ministry, results in the situation faced in Chile in which the filing of tax evasion claims barely exceeds 100 claims a year, hence shifting human and economic resources from their natural auditing function to one of criminal investigation.

In recent years, the IRS has been subject to political questioning and has been seen in constant conflict with the Public Prosecution Ministry due to the committing of criminal tax offences regarding political financing. The IRS has been accused of unnecessarily omitting or delaying the corresponding filing of claims.

Notwithstanding the above, and outside the criminal scope, through the enactment of Tax Reform Act No. 20,780 a general anti-evasion rule was incorporated that has been in force since 30 September 2015. This rule radically changed the Chilean system in which, historically, if the legislator detected recurring evasive manoeuvres by taxpayers, it would call for the norm's particular correction through specific and concrete measures.

The general anti-evasion rule has brought about a change in paradigm. Therefore, even though Act No. 20,899 has cleared up certain questions that remained regarding the scope of the applicability of said rule over acts or contracts celebrated before 30 September 2015, the anti-evasion rule still poses several uncertainties in its application. For instance, there are still questions regarding whether this rule could have eventually overwritten the existing evasion criminal provision, or which criterion should be considered for an act or a contract generating relevant 'economic or legal effects' due to the broad wording used within the legal definition of the latter effects.

IX DOUBLE TAXATION TREATIES

Chile has subscribed to a considerable number of DTTs, following the OECD's model with certain deviations towards the UN's model. Currently, Chile has 32 DTTs in force, as well as two DTTs that it has subscribed to but that are not yet in force.

During 2016 and 2017, the DTTs with Argentina, Italy, the Czech Republic, Japan, South Africa and China came in force. In the cases of Japan and Italy, governmental rulings are currently being prepared to incorporate them into the internal Chilean legislation.

Interpretation issues come about through the application of the above-mentioned treaties, and, furthermore, having exhausted all mechanisms contemplated by a treaty itself, the IRS has made use of the commentaries to the OECD's model. The use of said commentaries is based on those stated in Provisions No. 31 and 32 of the Vienna Convention regarding the Law of Treaties, yet a proviso to the effect that no uniformity exists within administrative declarations regarding a treaty's binding force is in place.[10] However, the OECD's model and its commentaries are a valid source for the interpretation of DTTs in addition to the application of internal law when it is pertinent to the meaning expressed in treaties.

X AREAS OF FOCUS

As a result of recent events involving irregular financing in politics, as well as the public scrutiny suffered by the IRS given the delay in the filing of claims relative to said acts, there is

10 Administrative declarations that took away value from the OECD's model and commentaries were based on the fact that Chile was not a member of the OECD – a situation that changed in 2010 with the incorporation of Chile into the OECD.

now particular emphasis placed on all taxpayer acts or conducts that constitute tax criminal offences. Hence, a stricter attitude has been perceived regarding said conducts, unlike in the past when such offences would have merely been sanctioned with the civil collection of taxes.

From another perspective, there has been a change of criteria regarding the additional tax that taxpayers residing in Chile must retain in the case of the purchase or acquisition of broadcasting rights, or the marketing of material to be exhibited in cinemas or on television. The tax authority has recently established that said cases fall under the royalties included in Provision No. 59 Section 1 of the Income Tax Law, with a withholding rate of 30 per cent, although Section 2 of the Provision specifically regulates this situation with a reduced rate of 20 per cent.

The IRS focuses much of its efforts on the supervision of tax losses that are used by taxpayers to request tax returns, as well as on processes of investment justification in which taxpayers – during a determined period of time – concentrate a certain amount of investments that are not in accordance with their declared income.

In the past few years, an aggressive auditing plan has been set forth to fight back-to-back financing (financing made by related companies through financial institutions). Given the above, the IRS, instead of verifying proper compliance with thin capitalisation rules in force specifically for these purposes, is now focusing on directly rejecting expenses associated with this type of financing structure, a stance that openly opposes that established by the Income Tax Law.

In 2016, the IRS issued an administrative pronouncement[11] directed exclusively towards Isapres (private pension institutions) in which it stated that judicial costs that had to be paid by them as a consequence of losing lawsuits filed by their clients due to annual increases to their health plans could not be considered as accepted expenses, and therefore had to be subject to the 35 per cent sole tax stated in Article 21[12] of the Income Tax Law.

Due to this IRS pronouncement, several assessments were issued to Isapres, which, for years, had been deducting these expenses from their results without their ever being questioned by the tax authorities. As a consequence of the foregoing, this business sector is involved in a huge conflict with the IRS, which will be resolved by our courts sooner or later.

During 2017, Isapres appealed to the Constitutional Court, specifically demanding a declaration by the Court leading to the abrogation of Provisions 21, 31, Paragraph first and 33 No. 1 letter g) regarding the Income Tax Law, on the grounds of inapplicability. They deemed that the application of these rules to the judicialised cases can result in decisions that are contrary to a number of dispositions and guarantees contemplated in Chilean Political Constitution.

XI OUTLOOK AND CONCLUSIONS

Chile is currently undergoing profound changes regarding its tax legislation. These changes were introduced by Tax Reform Act No. 20,780 and perfected by Act No. 20,899, through which important modifications were introduced into the Income Tax Law, the Sales and Services Tax Act, and the Tax Code. In this sense, among many other modifications:

a alternative taxing systems were established for companies;

b the first category income tax rate (companies) was increased;

11 Ruling No. 137, 22 August 2016.

12 As consequence of the tax reform, this rate increased to 40 per cent.

c limits were established for the return of taxes resulting from loss absorbency;
d carry back was eliminated;
e a general anti-evasion rule was incorporated;
f the IRS' auditing faculties were extended;
g controlled foreign corporation rules were incorporated; and
h thin capitalisation rules were modified.

Even though Act No. 20,899 simplified several aspects of the tax reform implemented by Act No. 20,780, it has recently come into full force, so that its impact is only gradually being noted by the increase in the complexity and the related costs of tax compliance of the taxpayers, without any factual measurement of such increments, nor of their effects and importance for tax collection so far. It is, therefore, important to measure their effects in the near future.

Overall, Chile has recently experienced an electoral process during which these tax reforms have been strongly questioned and criticised, even by a number of former economic authorities and other experts, who have gone as far as to state that these reforms have had a considerable negative impact on Chile's growth and foreign direct investment. Investments have also decreased because of the uncertainty of tax-avoidance measures to be implemented by the tax administration.

In conclusion, regarding Act No. 21,039 which was intended to improve the tax and customs justice system, we do not consider that it provided an effective solution or a major improvement in the slow judicial processes of the tax and customs courts, with perhaps the exception of the newly introduced conciliation mechanism. This mechanism may prove to be of benefit and an opportunity for all the affected parties; namely (1) the tax and customs courts in helping to resolve the disputes brought before them fairly and in a shorter period of time; (2) the IRS, as an opportunity to overcome the distrust of the taxpayers through a proactive, uniform and transparent approach to its duties leading to the establishment and consolidation of a modern and specialist tax collection institution in the country; and (3) the Chilean taxpayers in general, as it gives the right to have access to an efficient process of resolution of their disputes with the IRS before a judge, quickly and justly. We believe that only by overcoming the fear of being proactive, the IRS can become an actor that enhances its reputation, otherwise, were it to continue to act with the same level of distrust that the legislator exhibited in the drafting of the Act – which evinces a desire for an excessive level of control – it will prove to be not an improvement or perfection of the prevailing conditions, but just another failed attempt to modernise the provision of administration and delivery of justice in our country.

Chapter 7

COLOMBIA

Adrián Rodríguez and Isabella Giraldo[1]

I INTRODUCTION

Colombia is litigation-prevalent. The litigation proceeding normally lasts between eight and 10 years as from the beginning of the tax audit until a final ruling is issued by the highest tax court on appeal. Per statistics, taxpayers usually win the tax controversies subject to litigation. However, the costs and expenses accrued by the taxpayers in litigations are non-recoverable (whether they win or not). So matters normally subject to litigation by taxpayers are the ones where significant amounts are under discussion. Note that no fee must be paid by the taxpayer to file for litigation. An insurance policy or a guarantee is also not required. The only condition is that the representation is carried out by a licensed attorney.

Per legal regulations, the tax authorities are not entitled to resolve tax controversies through less adversarial mechanisms. However, there have been certain occasions in which the Colombian Lawmaker has enacted temporary settlement facilities for tax controversies. In these events, usually the taxpayer had to pay the total higher tax in discussion plus a reduced amount of the penalties and the interest accrual. Such amounts: (1) were established by the law; (2) were non-negotiable; and (3) depended on the phase/stage of the tax controversy.

There is no permanent less adversarial way of resolving a tax dispute. But it is likely that on the next tax reform issued by the Congress, a similar temporary settlement facility to the one explained, will be permitted.

II COMMENCING DISPUTES

Regardless of the tax or return under discussion, the proceedings explained below will be the same. Local tax authorities are also obligated to follow such when executing audits for the collection of their local taxes.

i Challenging tax returns

The Colombian tax authorities are entitled to challenge tax returns only during the statute of limitations of such returns. In Colombia, the period of the statute of limitations varies depending on the return and other circumstances.

As general rule, the statute of limitation of a tax return is three years as from the last permitted filing day, or as from the date the return was actually filed when filed late. However, if the taxpayer requested a reimbursement refund of a balance in its favour, said

1 Adrián Rodríguez is a partner and Isabella Giraldo is an associate at Lewin & Wills.

three years will be counted as from the filing for the refund. If the taxpayer must comply with the transfer pricing regime, the period of the statute of limitations will be increased to six years as from the deadline to file the tax return.

If the tax return assessed tax losses, the statute of limitation will be between 12 or 15 years depending on when such tax loss was offset. A tax return where tax losses were offset (not assessed) will have a statute of limitation of six years.

The proceeding that the Tax Office carries out when challenging a tax return is as follows.

Challenge brief[2]

The Tax Office issues a challenge brief proposing the challenges to the tax return. In this document, which is not yet an official assessment, the tax authorities may question any aspect of the tax return (i.e., income, costs, expenses, deductions, tax benefits, tax credits, etc.) and propose a penalty for inaccuracy equal to 100 per cent of the assessed lower balance in favour or the higher tax.

Response to the challenge brief

Three months as from the notification of the challenge brief, the taxpayer is entitled to file a response. This response can be filed by the legal representative of the legal entity, or by the person subject to audit: no licensed attorney is needed at this stage. In responding, the taxpayer should present its arguments and claims, and may file the proof and evidence that supports its position. Note, however, that filing a response to the Service's challenge brief is not a requirement to further subject the controversy to litigation.

The taxpayer also may accept the Tax Office's proposal at this stage. In this event, it will have to pay the proposed higher tax or reimburse the lower balance in favour, plus any lateness interest accrued. The penalty for inaccuracy will be reduced to 25 per cent.

Official assessment

Six months as from the deadline to file the response to the challenge brief, the Tax Office is obligated to notify to the taxpayer the official assessment. This document can confirm entirely or partially what was proposed in the challenge brief. At this stage, the Tax Office is not allowed to propose challenges not originally included in the challenge brief.

Motion for reconsideration

Within the two months after the official assessment has been notified, the taxpayer is entitled to file a motion for reconsideration. This motion will be decided by the legal division of the Tax Office. At this stage, proof and evidence can also be requested by the taxpayer.

In case the taxpayer did not file a response to the challenge brief, this motion becomes obligatory to be able to file for litigation in the future. In the event such response was filed, the motion for reconsideration is voluntary and instead the taxpayer can directly file for litigation.

If the taxpayer accepts the Tax Office's challenges at this stage, it will also have to pay the higher tax in discussion or reimburse the lower balance in favour assessed, plus the delay interests accrued. The penalty, however, will only be reduced to 50 per cent.

2 In Spanish *'Requerimiento Especial'*.

Decision of the motion for reconsideration

The tax authority has one year to decide the motion for reconsideration filed by the taxpayer. If the decision to the motion is not properly notified to the taxpayer within the year, the controversy is deemed to be ruled in favour of the taxpayer. In Colombia, this situation is called *silencio positivo*. Note that although there is a deemed *silencio positivo* the taxpayer must sue for a court to recognise it.

A situation of *silencio positivo* is likely to be recognised by a tax court. So national tax authorities are very careful that they do not have that situation. Local tax authorities are not so aware of avoiding said *silencio positivo*, and they commonly notify the motions filed after the deadlines.

Litigation

As from the notification of the decision that decides the motion for reconsideration or as from the notification of the official assessment,[3] the taxpayer has four months to sue before the lower tax court. In this phase, representation by a licensed attorney is mandatory. The judicial proceeding has the following stages.

Lawsuit admission

The tax court analyses if the lawsuit complies with the general formal requirements for lawsuits, such as the filing date, the power of attorney, its jurisdiction, a proper representation, etc. If it considers that such requirements are met, it will admit the lawsuit.

In the event it considers that a requirement was not met, it will order the plaintiff to file an amendment to the lawsuit. This amendment must be filed 10 working days as from the notification of the decision that required such.

Because of the current backlog in the tax court, as from the filing of the lawsuit until a decision is issued by the tax court concerning its admission, may take approximately two to six months.

Hearings

After both parties have filed their claims, the tax court will schedule an initial hearing. In such, with the parties' consent, the tax court will decide what will be the main aspects in discussion and also will determine which evidence will be considered for the judicial process. This hearing is always mandatory and it is commonly scheduled approximately one year after the filing of the lawsuit.

If there is evidence to be shown, another hearing will be scheduled. This will not be mandatory, and if it is not executed it will speed up the judicial process. Also, the parties' concluding arguments can be presented through a hearing whenever the judge considers it necessary. If not, it will require the parties to present such in written form, which will also speed up the process.

3 In case the taxpayer filed the response to the challenge brief and it is not interested in filing a motion for reconsideration against the official assessment.

First instance ruling

Approximately 1.5 years after the closing arguments have been presented by the parties, the lower tax court will issue a first instance ruling. From the initial filing of the lawsuit until a first instance ruling, two to three years may have passed.

Appeal

Ten working days as from the date the first instance ruling has been notified, parties are entitled to file an appeal. Such appeal will be decided by the Higher Tax Court of Appeals, approximately in two to three years. The decision over the appeal will be the final one.

ii Auditing taxpayers that did not file tax returns

The Tax Office is entitled to audit the taxpayers that did not complied with its obligation to file tax returns. This proceeding can be executed by the tax authority within five years of the final due date to file the tax return. The main stages of the proceeding will be as follows.

Notice requesting the filing of the return

The Tax Office will issue a notice requesting the taxpayer to file the tax return. In this stage, it will propose a late filing penalty that will depend on the return in discussion and on the taxpayer's situation (e.g., it can be calculated according to the tax due, the gross income, the balance in favour, and the days of delay, etc.).

Response to the notice

The taxpayer has one month as from the date the notice was notified to file the return or file a response explaining the reasons is not obligated to such filing. If the taxpayer files the return at this stage, it will have to pay the total tax assessed, the interests and the penalty assessed.

Resolution that imposes penalty and official assessment

If the taxpayer does not file the return, the Tax Office will begin two separate proceedings: (1) one imposing the penalty for not executing such filing; and (2) another assessing the tax obligation. These proceedings will be carried out as follows.

Imposing the penalty

After the deadline to respond the notice, the Tax Office has six months to issue a resolution confirming the penalty for not filing the return. Against this resolution, the taxpayer is entitled to file a motion for reconsideration also two months as from the date said resolution has been notified. The proceeding from then on until a final ruling is issued, is the same one explained in Section II.i under the headings 'Decision of the motion for reconsideration' and 'Litigation'.

Assessing the tax obligation

The tax authority will issue an official assessment determining the tax obligation due. In such, the Tax Office will indicate the taxpayer's tax liability, but it will impose no penalty since such is executed through the proceeding explained under the previous header.

Here, the proceeding carried out until a final ruling is issued, will be the same one as explained in Section II.i under the headings 'Motion for reconsideration', 'Decision of the motion for reconsideration' and 'Litigation'.

iii Imposing additional penalties

Regulations also provide other tax-related penalties that can be imposed by the Tax Office. Some examples of such are penalties for the unfair recognition of a balance, not filing the information required by the Tax Office, committing tax abusive conducts, not issuing invoices and the reduction of tax losses, etc.

The proceeding to impose such penalties can be the one explained in Section II.i or Section II.ii under the heading 'Imposing the penalty'.

iv Amending tax returns after the due date

Taxpayers in Colombia may amend their tax returns after they have been filed. However, there are specific deadlines to execute such. Once such deadlines have expired, the only possibility to carry out an amendment, will be if the taxpayer accepts the Tax Office's proposals in the proceeding described in Section II.i.

But note that instead of beginning the proceeding in such Section, the Tax Office can issue a notice (instead of a challenge brief) claiming the amendment of the return. Here, the penalty proposed will lower as of such proceeding: 20 per cent of the higher tax due or the lower balance in favour assessed.

v Amendment of tax returns within the due dates

In Colombia, the process and deadlines to amend the returns, are as follows.

Amendment to increase the tax due or reduce the balance in favour

This amendment can be executed electronically within two years as from the final due date to file the return. Penalties and interest will be triggered. The penalty will be equal to 10 per cent of the higher tax due or the lower balance in favour. Delay interest will be calculated at a 30 per cent annual effective rate (approximately).

This amendment replaces the first tax return filed, but the initial period of the statute of limitations will not be modified.

Amendment to reduce the tax due or increase the balance in favour

This amendment can also be executed electronically. The deadline is one year as from final due date to file the return. However, the statute of limitation will be modified: it will not be counted as from the final date to file the return but from the date the amendment was filed. No penalties will be triggered.

vi Requesting tax exemptions

In Colombia, tax reliefs can only be claimed through tax returns. Notwithstanding, some tax reliefs need to be granted by government authorities before they can be claimed by taxpayers in their returns.

III THE COURTS AND TRIBUNALS

In Colombia, only in the capital city are there specialist tax tribunals. Outside the capital city, the tribunals are not tax-focused since they deal with all types of controversies against government entities. To determine the jurisdiction in which a tax lawsuit should be filed, two main rules need to be considered: (1) the amount under discussion, and (2) the place where the tax return was filed.

The highest-level court for tax purposes is the Supreme Tax Court. Below there is the State Administrative Tribunal and, finally, the court of the lowest rank is the administrative judge. If the amount in discussion is lower than 100 statutory salaries,[4] the lawsuit should be filed before the administrative judges, and the court of appeal will be the State Administrative Tribunal. If the amount in discussion is greater than 100 statutory salaries, the lawsuit should be filed before the State Administrative Tribunal, and the court of appeal will be the Supreme Tax Court.

In each level/instance, the judicial process lasts approximately three years, so litigation can take around six years as from filing the tax lawsuit until a final ruling is issued by the court of appeals. Note that it is likely that tax controversies are not concluded with issuing the first ruling. Parties usually file for appeals. Actually, the Tax Office will always file an appeal, otherwise it might be investigated by the National Controller.

Courts in Colombia are independent of the Tax Office and any other government entity. Although, sometimes tax officers have been appointed as tax judges and magistrates. Tax experts from private corporations have been also chosen as tax judges or magistrates.

The rulings issued by a tax court are limited to: (1) the claims of the plaintiff; and (2) the Tax Office's allegations filed. However, if the judge considers that fundamental rights are being violated, he or she can go beyond his or her jurisdiction and decide over a matter not proposed or claimed during the judicial process. The decision over the appeal is also limited to what was claimed in such motion.

IV PENALTIES AND REMEDIES

As a general rule, tax offences in Colombia are not punished by criminal, civil or administrative regulations. If a tax penalty is imposed on a taxpayer because of an audit or of a litigation, for that sole reason it likely will not be liable for criminal, civil and administrative purposes.

Notwithstanding, the Criminal Colombian Code establishes two penalties related to tax offences. If a taxpayer obligated to collect withholding taxes does not transfer said taxes to the Tax Office within two months of their collection, it will be deemed as liable for criminal purposes. Also, if a taxpayer when filing its income tax return omits assessing its assets or includes non-existent debts for an amount equal to or greater than (approximately) US$1,783,000, will also be punished with a criminal penalty. Both criminal liabilities involve prison time and fines. Note that under certain circumstances, the taxpayer could not be deemed as criminally liable when it: (1) pays the taxes due (with the delay interests); or (2) amends its tax return.

4 In 2017, a statutory salary in Colombia is equal to US$220 (approximately).

V TAX CLAIMS

i Recovering overpaid tax

Taxpayers in Colombia are entitled to the reimbursement of the overpaid taxes. The process to recover an overpaid tax is the same regardless of where the taxpayer is located (in Colombia or abroad).

The procedure to be executed to recover such is as follows.

Filing a reimbursement application

Five years as from the date the payment was executed, the taxpayer must file an application for reimbursement before the Tax Office. This application does not have special legal requirements; it is just necessary to explain to the Tax Office the facts that caused the overpaid tax.

Decision over the reimbursement

Within 50 working days of the application being filed, the Tax Office must decide over the reimbursement. However, the Tax Office is entitled to reject such petition requiring an amendment. The 50 working days will be again computed as from filing the amended application, and the Tax Office can extend the 50-day period an extra 90 days if it considers there is evidence of inaccuracy.

Challenging the decision

If the Tax Office denies the reimbursement, the taxpayer is entitled to move for reconsideration against that decision. The proceeding from here on to challenge that decision will be the same as the one explained in Section II.i under the headings 'Motion for reconsideration', 'Decision of the motion for reconsideration' and 'Litigation'.

ii Challenging administrative decisions

By the proceeding described in Section II.i, any decision issued by a tax authority can be challenged. Note that the existence of a legitimate expectation does not change the challenging process of the decisions issued by the Tax Office. That situation will be an argument only within the proceeding to be claimed by the taxpayer.

iii Claimants

In Colombia, only taxpayers who filed the returns are the ones entitled to file tax claims. Also, the taxpayer subject to audit is the one authorised to enter into litigation. The collector of an unlawful tax will be the one entitled to request the Tax Office for a refund. This can be executed by amending the return through the proceeding described in Section II.iv or by filing a reimbursement application as explained in Section V.i.

The taxpayer subject to the unlawful tax can request reimbursement from the collector of the tax.

VI COSTS

In Colombia, regulations provide that the amounts disbursed by a party during a litigation are recoverable if the final ruling is favourable to such party. The defeated party will be the one obligated to reimburse those amounts. Legal rules also determine that in processes where a public interest is in discussion, such order to reimburse is prohibited. Under this legal provision, the tax courts have always ruled that in tax litigations it is impossible to condemn the defeated party to reimburse the costs to the winning party. This has been the case law of past years.

On 20 September 2017, the Tax Supreme Court[5] issued a ruling where it determined that the tax authorities, whenever defeated, can also be condemned to reimburse the costs accrued by the taxpayer. In opinion of the Court, it is unconstitutional to conclude that a tax authority can never be ordered to reimburse the costs accrued by a taxpayer unlawfully audited. This ruling differs from the case law of past years.

According case law, it is impossible for a taxpayer or the tax authority to recover the costs accrued during tax litigation. However, owing to the ruling issued on 20 September 2017, a possibility has been open for both.

VII ALTERNATIVE DISPUTE RESOLUTION

In Colombia, tax controversies cannot be resolved through alternative dispute resolution systems. The law expressly prohibits the negotiation of taxes and the settling of tax disputes. However, through the last tax reforms, the Congress has allowed the settling of tax controversies under very specific conditions: (1) the amounts due by the taxpayer were determined by law and could not be reduced nor increased; (2) it was for short while; and (3) usually only destined for taxpayers in an audit or in litigation.

Such settling of tax controversies is not available. Yet it is likely that in the next tax reforms issued, a similar alternative dispute resolution system will be introduced.

VIII ANTI-AVOIDANCE

As from 2013, the Colombian tax system adopted a General Anti-avoidance Rule (GAAR):

> *A transaction or transactions will be deemed abusive for tax purposes when such involve the execution of artificial acts, contracts or legal transactions, that in appearance do not have an economic or commercial purpose, and that only seek to reduce the tax burden, regardless any other subjective intention.*

The Tax Office may recharacterise for tax purposes a transaction executed by taxpayers that is deemed abusive. Said entity could assess higher taxes, interest and penalties. Recharacterising an operation for tax purposes, should be understood as '[t]he Tax Office's power to determine the real nature, form and characteristics of an operation executed by a taxpayer and assessing new tax effects'.

5 File No. 20560.

The GAAR also clarifies that an operation:

… would be deemed as artificial and that lacks economic or commercial purpose, when it is demonstrated, among other circumstances, that:

1. *The act or operation is executed in such way that under economic or commercial terms is not reasonable.*
2. *The act or operation generated an elevated tax benefit that does not reflect the economic or corporate risks taken by the taxpayer.*
3. *The structure of the act or operation executed seems apparently correct, but its substance hides the real will of the parties.*

Since the GAAR is relatively new in Colombia, the tax authorities have not yet enforced it. Notwithstanding, it is expected that soon audits will be performed under such scope. The tax courts have also not ruled considering the GAAR; however, there are judicial tax precedents where taxpayers have been questioned for the misuse of legal forms for tax purposes.

A similar situation as the one described above, has happened with the rules about controlled foreign corporations (CFCs) and the Base Erosion and Profit Shifting (BEPS) Action Plan. Such were mainly introduced on 2016, enforceable as of 2017, thus neither the Tax Office nor tax courts have yet enforced them. Regarding CFC rules, there is evidence that the tax authorities are carrying out investigations seeking their enforcement.

The execution of information exchange agreements to prevent or identify tax avoidance has become an institutional policy of the government. Colombia has executed the Multilateral Instrument and also has adopted the rules about common reporting standards (CRS). Recently the Tax Office exchanged tax information with the 36 countries on the basis of the CRS rules and also under FATCA. The purpose was to obtain information regarding assets possessed abroad by Colombian tax residents. It is expected that in financial year 2018, the CTC will be able to exchange tax information with approximately 62 countries.

All the above is anchored on the desire of the Colombian government to become a member of the OECD. Meeting international standards has been part of public agenda for the past six years. It is expected that soon, the tax authorities will be reinforced and trained for such standards to be met.

IX DOUBLE TAXATION TREATIES

The execution of double taxation treaties (DTTs) has also been on the public office agenda. The DTTs enforceable in Colombia are the ones executed with: Canada, Chile, the Czech Republic, India, South Korea, Mexico, Portugal, Spain and Switzerland. Colombia has also executed DTTs with France, the United Arab Emirates and the United Kingdom, although they are not yet enforceable. These have been adopted according to the OECD Model Tax Convention.

Neither tax authorities nor the tax courts have yet enforced such treaties. There is no ruling, case law or administrative decision that can provide guidelines for their application. Taxpayers, however, on a day-to-day basis have adopted the DTTs as legitimate tools for tax planning purposes.

X AREAS OF FOCUS

Although no ruling has yet been issued on the matter, there is a trend of the tax officers of 'accusing' taxpayer of tax avoidance during the execution of the audit as a way of convincing them to accept the challenges. Regulations establish that the Tax Office must demonstrate and explain the reasons to accuse of tax avoidance; however, taxpayers are particularly concerned regarding the proceeding carried out by the Tax Office. On the next few years, this will be an area of focus that will be interesting to analyse in the Colombian tax system.

The Tax Office has been interested in the compliance of the transfer pricing regime. Audits about this matter have increased during the past years. The area of the Tax Office focused on challenging the compliance of such regime has been reinforced. Taxpayers are facing audits based on substantial and qualified grounds. As a defence strategy, taxpayers have hired recognised experts to issue opinions supporting their position regarding the arm's-length principle. It is likely these discussions are subject to litigation since, normally, significant amounts are under discussion.

XI OUTLOOK AND CONCLUSIONS

The system for resolving tax controversies in Colombia is not efficient. Tax officers are overworked and so are the tax courts. The taxpayer must wait approximately 10 years for its tax situation to be resolved through a final ruling, and it cannot recover the costs incurred during those 10 years.

The Colombian legal system has a challenge to amend the above situation. Permanent alternative mechanisms to resolve tax controversies are an option that could be considered. But, the Constitutional Court's case law has ruled that such alternative mechanisms are not sustainable from a constitutional standpoint.

Over the next few years, it is expected that the Tax Office's challenges will be based on information obtained via international treaties. In addition, tax officers will be focused on identifying tax avoidance since this represents a higher tax collection.[6]

6 The penalty for committing a tax abusive conduct is equal to 200 per cent of the higher tax or the lower balance in favour officially assessed when recharacterising the operation.

Chapter 8

DENMARK

Jakob Skaadstrup Andersen[1]

I INTRODUCTION

According to Danish law, the starting point for tax dispute resolution is an administrative appeal. The taxpayer can appeal decisions made by the Danish administrative authorities to the courts, once a taxpayer has exhausted all possibilities of administrative appeal and a final decision has been made. A case must be brought before the courts no later than three months after the administrative appeal board or tribunal has issued its decision. However, there is an exception. The taxpayer can file an appeal before the courts in situations where a board of appeal has not issued a decision within six months of the case being brought before the administrative board of appeal. Additionally, a tax dispute resolution can be filed to the Danish Parliamentary Ombudsman (the Ombudsman).

The Danish administrative tax appeal system consists of four separate appeal boards:

a the National Tax Tribunal;
b the national tax boards of appeal;
c the valuation boards of appeal;
d the motor vehicle boards of appeal.[2]

All administrative appeals to one of the said appeal boards shall be submitted to the Tax Appeal Agency,[3] which then decides which of the said appeal boards shall decide the appeal case at hand. The Tax Appeal Agency can also decide certain categories of appeal cases. Submission of a case triggers a fee of 400 kroner to be paid by the claimant.

Statistics proved by the Tax Appeal Agency[4] show an increase in the number of cases submitted to the Danish tax appeal boards. Consequently, the processing time has increased. The processing time varies depending on the specific appeal authority handling the case. In 2016, the processing time was in general between six and 27 months. Generally, 30 per cent of the decisions made in 2016 by the appeal boards were in favour of the taxpayer.[5]

These appeal boards will be described further in Section III.

There is no special tax court in Denmark, and, therefore, an appeal to the courts will be processed as an ordinary civil case. A tax dispute case will be processed according to the civil law procedure rules with the necessary adjustments. In 2016, the average processing time in

1 Jakob Skaadstrup Andersen is a partner at Gorrissen Federspiel.
2 In Danish: *Landsskatteretten*, *Skatteankenævnet*, *Vurderingsankenævnet* and *Motorankenævnet*.
3 In Danish: *Skatteankestyrelsen*.
4 Annual Report 2016.
5 Ibid.

civil cases before the Danish district court was 16.5 months and 13.1 months in appeal cases before the High Courts. For cases brought before the Supreme Court, the average processing time was 12.7 months in 2016.[6]

The processing time for cases submitted to the Ombudsman is highly dependent on the circumstances of the case, but has an average processing time of about six months.

Submission of a case before the High Courts triggers a court fee. The fee cannot exceed 2,000 kroner as a tax case concerns an administrative decision. The taxpayer will be obligated to pay the same amount prior to the start of the hearing of the case.

In cases of appeal before the Supreme Court, the submission fee is 3,000 kroner.

II COMMENCING DISPUTES

A tax dispute will usually be initiated as a result of the SKAT's (the Danish Tax Authority) amendment of and disagreeing with a taxpayer's assessment of income. Additionally a dispute can be triggered if the taxpayer wants to challenge an advance tax ruling from the Danish Tax Authority.

This Section explains the following aspects:

a access to amend a former assessment of taxable income;
b the process of administrative appeal;
c the process of appeal before the courts;
d expert survey and valuation; and
e a taxpayer's possibility of postponement of contested payable taxes.

i Access to amend a former assessment of taxable income

Taxable individuals and companies have a duty to self-assess their taxable income and submit it to the Danish Tax Authority. It is possible to amend a former assessment of taxable income. However, there is a statute of limitation. As a starting point a tax assessment can be amended by the taxpayer or the Danish Tax Authority until 1 May in the fourth year following the relevant income year. If the Danish Tax Authority intends to adjust a taxpayer's assessment, the Danish Tax Authority is obligated to notify the taxpayer no later than 1 May in the fourth year after the relevant income year. The notification must be followed by a final assessment no later than 1 August in the fourth income year following the relevant income year.

In case of controlled transactions, the notification period is extended to 1 May in the sixth income year following the relevant income year. The extension is a consequence of the complexity of tax assessments when dealing with controlled transactions.

If the taxpayer has acted with intent or with gross negligence, the statute of limitation is 10 years. There are also other special circumstances that can prolong the mentioned notification periods.

If the Danish Tax Authority initiates an amendment of a taxpayers' assessment the authorities must send a notification to the taxpayer. The notification must contain an outline of the basis for the intended amendment including the new facts or circumstances underlying the amendment. Once the taxpayer receives the notification, the taxpayer will be granted a certain period of time to submit remarks to the intended amendment.

6 Report – key performance indicators for the Danish courts 2016.

In case the taxpayer wants to initiate an amendment of a tax assessment the taxpayer must within the same time limit of four years notify the Danish Tax Authority with a request. The request must contain the basis for the intended amendment. The Danish Tax Authority will, after having reviewed the request, make its proposal for a decision. Hereinafter, the taxpayer is granted a certain period of time to submit remarks to the proposed decision. The Danish Tax Authority will then determine the case once it has received the taxpayer's potential remarks.

In order to strengthen the taxpayer's legal position and for the purpose of legal certainty a taxpayer can make use of certain administrative rules. One of them provides the possibility to make use of a tax reservation in relation to private law transactions, for example, a sales agreement or a deed of gift. The tax reservation serves as a guarantee. As an example, if the Danish Tax Authority does not accept the anticipated tax consequence of the terms in an agreement the parties can with the tax reservation amend or annul the agreement with retrospective affect. The tax reservation is only valid if certain conditions are fulfilled. For instance, the tax reservation must be clear in writing and notified to the Danish Tax Authority at the latest at the time when the Danish Tax Authority is informed about the content of the transaction.

Additionally, a taxpayer can request an advanced tax ruling from the National Tax Board in cases where the taxpayer is unsure about the fiscal consequences of an intended disposition or transaction. The tax authorities will be bound by their ruling and, consequently, the advanced tax ruling can serve as binding promise from the tax authorities of the fiscal consequence of the intended transaction.

In general, the advanced tax ruling will be binding for the authorities in the following five years. If the advanced tax ruling concerns valuation the ruling will only be binding for a six-month period. Depending on the circumstances, the Danish Tax Authority can set out a shorter period for which it is bound.

The taxpayer is required to pay a submission fee of 400 kroner (2018) to obtain an advanced tax ruling.

A taxpayer can contest an advanced tax ruling by administrative appeal.

ii The process of administrative appeal

Once all administrative appeal options have been exhausted, a tax case can be brought before the Danish courts. However, a taxpayer may also bring a case before the courts if the appeal boards have not issued a decision within six month of the submission of appeal. It is a requirement that the appeal boards have not issued a preliminary decision.

Anyone with a significant, direct and individual legal interest in a tax decision may submit a complaint about a tax decision to the Tax Appeal Agency.

An appeal must be submitted no later than three months form the date the taxpayer received the decision from the Danish Tax Authority. There are a few requirements that a complaint must meet. The complaint must be in writing, and it must explain the reasons for the appeal. There are no formal requirements for submission of an administrative appeal, but the appeal should be submitted electronically by using the website of the Tax Appeal Agency. Submission of a case triggers a fee of 400 kroner for the taxpayer. The process of the preparation of the case in the Tax Appeal Agency is rather informal. Both parties – namely the taxpayer and the Danish Tax Authority – will be granted the opportunity to provide additional remarks during the process.

Once the preparation of the case is finished, the Tax Appeal Agency will issue a preliminary opinion. This preliminary opinion will be forwarded to the relevant appeal authority and to the parties involved. Hereinafter the parties are granted the opportunity to comment on the preliminary opinion. Prior to the preliminary opinion the taxpayer may also request a meeting with the responsible caseworker. It is as a general rule an advantage to request a meeting. However, it will most likely prolong the time of the process. During this meeting, the facts of the case and the legal arguments can be discussed with the caseworker in a relaxed atmosphere.

The taxpayer can also ask for a meeting with the members of the relevant appeal authority deciding the tax case. Following such meeting, the appeal authority will issue a decision based on the preliminary opinion, the party's comments and the information and arguments presented in the eventual meeting with the parties. The processing time is generally between six and 27 months depending on the complexity of the case and depending on the Tax Appeal Agency handling the case.

If a dispute concerns stamp duties a claim must be submitted to the Registration Court. If a taxpayer wants to appeal a decision issued by the Registration Court, it must be appealed directly to the Danish Western High Court.

iii The process of appeal at the courts

According to the Constitution, all decisions issued by a public authority can be brought before the courts. The Danish court system is based on a two-instance principle. All cases will begin in the district court, which is the first instance. If a taxpayer wants to appeal a decision the case can be brought before the High Court, which is the second instance. If the case is fundamental, it is possible to apply to the Ministry of Justice for a third instance permission. In order to gain a third instance permission it is a requirement that the case raises fundamental questions or other special circumstances are present. If the request is granted the taxpayer may bring the case before the Supreme Court.

A case can also, with permission from the first instance court, be transferred to the High Court. In this event, the case can be brought before the Supreme Court, which is then the second instance.

A case must be brought before the courts within three months of the date the appeal authority issued its decision.

A tax dispute will be processed according to the Danish procedural rules for civil cases with a few necessary modifications. For instance, the taxpayer is limited to bringing a claim or a part of a claim that originally was part of the initial decision from the appeal authority. However, the taxpayer can involve new questions if the court grants permission. New questions can be processed in the dispute if it can be considered excusable that the question has not been dealt with previously or it will imply a disproportionate legal loss for the individual if the question is not involved in the case.

In 2016, 433 taxpayers submitted a tax case to the Danish courts.[7]

7 Annual Report 2016.

iv Expert survey and valuation

According to the Danish Tax Administration Act, both the claimant and the Danish Tax Authority have a right to request an expert opinion in tax disputes. This right is also available to the parties in a dispute processed by the courts.

An expert opinion is admissible when the parties disagree of factual circumstances, for example, when the parties disagree on the correct valuation of real property, shares, etc. The decision to procure an expert opinion is formally decided by the court and the expert opinion is submitted to the court. The opinion is admissible in all tax appellate authorities.

Neither the courts nor the administrative appeal boards can decide on the procurement of an expert opinion if none of the parties have requested such procurement. Further, an expert opinion cannot be provided to clarify legal disagreements between the parties.

The procedural rules regarding tax disputes in civil litigation are applied *mutatis mutandis* to the application of expert opinions. The request for the expert opinion is filed with the relevant district court. Expenses are intermediately held by the requesting party. The court decides ultimately at its discretion which part that must bear the expenses based on, *inter alia,* which party the opinion favours. The administrative appeal boards can, however, decide that the Danish Tax Authority shall cover all expenses relating to the procurement of the expert opinion. Such decision will be taken when it is decided to ask for an expert opinion.

The court can decide to appoint more than one expert if requested to do so by one or all the parties and the case at hand requires more than one expert to be fully examined.

Further, the court can allow additional expert opinions to be provided on the same subject if this is deemed appropriate or necessary owing to any party having relevant objections to the first expert opinion.

v Taxpayer's possibility of postponement of contested payable taxes

A taxpayer can apply to the Danish Tax Authority for a postponement of the contested payable taxes. The Danish Tax Authority usually grants postponement. However, the Danish Tax Authority tends to reject the application if there is a reasonable risk of the taxes not being paid, for example, if the taxpayer is moving abroad. The Danish Tax Authority can also require collateral for payable taxes as a condition for granting a postponement.

In the event the appeal lasts longer than four years, the postponement period of four years can be extended. The postponement will always lapse when the appeal board delivers its decision. If the administrative decision is brought before a court, the taxpayer must file a new application for postponement.

Additionally, there is a possibility to file a complaint to the Ombudsman and the courts.

III THE COURTS AND TRIBUNALS

The Danish administrative tax appeal system consists of four separate appeal boards, namely the National Tax Tribunal, the national tax boards of appeal, the valuation boards of appeal and the motor vehicle boards of appeal.

i The Tax Appeal Agency

The Tax Appeal Agency is an independent authority and functions as secretariat for the above-mentioned four tax appeal boards. Once a taxpayer wants to contest a decision from the Danish Tax Authority the appeal must be submitted to the Tax Appeal Agency. The Tax

Appeal Agency will after receiving a complaint gather all the relevant information. After the preparation of the case is finished, the Tax Appeal Agency refers the case to the relevant appeal authority.

ii The National Tax Tribunal

The National Tax Tribunal is not a court but an administrative appeal board. The National Tax Tribunal is organisationally a part of the Danish Ministry of Taxation, but the board is independent in its case process. Consequently, the National Tax Tribunal cannot be ordered to issue a specific decision in a specific case by the Minister for Taxation. The National Tax Tribunal consists of a leading presiding judge, a number of other judges, 30 ordinary members and four members with special motor vehicle inspectors. The presiding judge shall have a legal degree. The Danish parliament appoints 11 members out of the 30 members, and the rest of the 30 members are appointed by the Minister for Taxation.

The tribunal is competent to decide in the following cases:

a appeal of a decision issued by the Danish Tax Authority in the event the appeal has not been decided by any of the other appeal boards (or the Tax Appeal Agency if the case is within the special category of cases that are decided by the Tax Appeal Agency);

b appeal of a decisions issued by the National Tax Board;

c appeals brought to the National Tax Tribunal by Ministry of Taxation regarding decisions concerning EU law interpretation issued by the National Tax Board; and

d other cases that according to other law shall be decided by the National Tax Tribunal.

In 2016, the average casework time was 26.1 months. In 40.7 per cent of the cases, the decision was in favour of the taxpayer.[8]

iii The national tax boards of appeal

Denmark is divided into 19 local boards that are located different places in Denmark. The members of the boards of appeal are all appointed by the Minister for Taxation. The boards of appeal are competent to decide in tax disputes concerning: taxable income, property value tax, advance registrations, deductibility, advanced tax rulings and certain other types of taxable income.

In 2016, the average casework time was 18.1 months, and in 25.4 per cent of the cases the decisions were in favour of the taxpayer.[9]

iv The valuation boards of appeal

The valuation boards of appeal are divided into 10 local boards that are located different places in Denmark. The members of the valuation boards of appeal are all appointed by the Minister for Taxation or by someone authorised by the Minister. The valuation boards of appeal are competent when the disputes concern valuation of properties and appeal of decisions issued by the Danish Tax Authority regarding the taxation of land. However, the valuation boards of appeal may choose to refer the case to the National Tax Tribunal if the case has fundamental importance for other taxpayers.

8 Annual Report 2016.

9 Ibid.

In 2016, the average casework time was 26.6 month, and in 32.7 per cent of the cases the decisions were in favour of the taxpayer.[10]

v The motor vehicle boards of appeal

In Denmark there are four local boards of appeal. The members are appointed by the Minister for Taxation; however, at least two members must be elected by a central organisation for car owners. One member must be a technical expert and another member must have business knowledge. The remaining members are appointed on the recommendation of the dealerships organisation for the automobile industry. The boards of appeal have competence to processing disputes regarding registration fees and related matters.

In 2016, the average casework time was 20.3 months, and in 12.1 per cent of the cases the decisions were in favour of the taxpayer.[11]

vi The Ombudsman

The Danish parliament has appointed the Parliamentary Ombudsman. The Ombudsman is independent of the Danish parliament. The Ombudsman is a 'watchdog' and accepts complaints about public authorities including the tax authorities.

The task of the Ombudsman is to review maladministration, violation of applicable law in the form of an unlawful administrative decision, unfair decisions and failure to comply with procedure requirements, for instance, complaints regarding overly long process time.

The Ombudsman is competent to handle complaints concerning all parts of public administration with a few exemptions. For instance, the Ombudsman is not competent to handle complaints concerning the courts. As a side effect, the Ombudsman is not competent to handle cases in which the court has issued a ruling. A complaint has to be submitted no later than one year after the administrative actor behaviour that gave rise to the complaint has been made.

A compliant to the Ombudsman has suspensory effect provided that: (1) the complaint is a complaint about a decision made by one of the appeal boards; (2) the complaint is filed to the Ombudsman within three months of the decision of the relevant appeal board; and (3) the decision of the relevant appeal board is appealed to the civil courts within one month of the Ombudsman closing the case. Otherwise, the complaint does not have suspensory effect.

After investigating a case, the Ombudsman may state criticism and recommend a public authority to amend a decision. The Ombudsman is not competent to render a decision; however he or she can request an administrative authority to review a case with a view to reconsidering the case.

Because of the complexity of the Danish tax legislation, the Ombudsman has opened a tax office in order to strengthen the taxpayer's legal position as of 1 January 2017.

In 2016, there were 42 complaints to the Ombudsman regarding tax disputes.[12] It is presumed that the amount of complains will increase as a consequence of the new tax office.

10 Ibid.

11 Annual Report 2016.

12 Ibid.

IV PENALTIES AND REMEDIES

i Administrative sanctions

In the event of intentional tax evasion or gross negligence, the tax authorities may impose a fine.

The Danish Tax Authority's units for criminal actives are competent to rule in cases where the penalty for a violation of a tax act is a fine. The Danish Tax Authority can issue a fine without involving the police or the courts. However, there are some limitations, for instance, in cases with intentional tax evasion where the tax evasion amount exceeds 250,000 kroner.

Then schedule below illustrates the minimum limits for raising a criminal case when a taxpayer has acted with intention (and not only with gross negligence).

In case of a deliberate violation regarding . . .	When it is . . .	The avoidance is minimum . . .
tax, VAT, payroll, labour market contribution	a first time of offence	10,000 kroner
duty	a first time of offense	5,000 kroner

The schedule below illustrates the minimum limits for raising a criminal case of gross negligence.

In case of a gross negligent violation regarding . . .	When it is . . .	The avoidance is minimum . . .
tax, VAT, payroll, labour market contribution	a first time of offence	20,000 kroner
duty	a first time of offence	10,000 kroner

In violations of the legislation concerning tax, VAT, payroll tax and labour market contributions, the fine is calculated as two times the total tax evaded when the evasion is deliberate and the evasion does not exceed 250,000 kroner. Above this amount, the starting point is a jail sentence (which the Danish Tax Authority does not have competence to decide, and hence the case will be referred to the courts).

In the event of gross negligence, the fine constitutes at least the total tax evaded. There is no upper limit.

For tax evasion that does not exceed 60,000 kroner, the fine is calculated as once the amount of the tax evaded in the event of a deliberate act, and in the event of gross negligence the fine is calculated as half of the amount.

V TAX CLAIMS

i Recovering overpaid tax

As a starting point, the Danish Tax Authority will automatically repay overpaid taxes. Before a repayment, the tax authorities will offset any outstanding amounts in respect of the individual or entity receiving the overpaid taxes.

In the case a requirement for repayment of overpaid taxes is granted, the refunding cannot be paid before the expiration of the income year to which the claim relates.

Certain taxes, for example, withholding taxes, require an application to the Danish Tax Authority before the overpaid taxes are repaid.

ii Challenging administrative decisions

See Section III.

iii Claimants

Anyone with a significant, direct and individual legal interest in a tax claim may initiate legal proceedings. An individual or a company that is only affected indirectly by a decision is not entitled to submit a claim. An economic effect may only be an indirect interest.

If an individual or a company is a party of the tax dispute it triggers applicable legal effects, for instance, a hearing of the involved parties and right of access to documents in accordance with the specific rules for party access.

In the case the claimant is a company, the management must take the necessary decisions regarding tax disputes on behalf of the company.

According to a ruling from the European Court of Justice in the case *Danfoss and Sauer Danfoss*, companies can raise a claim directly against the Ministry of Taxation, irrespective of the fact that it is the company's suppliers that have paid duties to the Danish Tax Authority.

VI COSTS

The expenses associated with an appeal to the appeal boards are significantly lower than the expenses associated with a case before the courts. If an individual or a company is part of a tax dispute it is possible to obtain cost reimbursement from the Danish Tax Authority. In order to obtain cost reimbursement, the taxpayer must apply by submitting an electronic application to the Danish Tax Authority. An application must be submitted no later than three years after the date the decision became final.

In case the ruling is fully in favour of the taxpayer, the reimbursement will be 100 per cent of the costs. If the ruling only is partly in favour of the taxpayer or the ruling is in favour of the Danish Tax Authority, the cost reimbursement is 50 per cent for the taxpayer. Generally, the cost reimbursement covers expenses connected to legal counselling, expert valuation and expert report and the gathering of evidence. The cost reimbursement, however, does not cover the submission fee of 400 kroner.

VII ALTERNATIVE DISPUTE RESOLUTION

Currently there is no possibility for alternative dispute resolution in tax disputes. However, as mentioned above, there are several remedies to avoid disputes, for instance, the possibility to require an advanced tax ruling, the possibility of using a tax reservation in a private law transactions and the access to require an amendment of a previous tax assessment.

VIII ANTI-AVOIDANCE

The European Council has adopted the Anti-Tax Avoidance Directive 2016/1164 of 20 June 2016. The member states must implement the Directive no later than 1 January 2019. The Directive is fully implemented in Danish law. Moreover, Denmark has over the last couple of years focused on anti-avoidance regulation. Consequently, many of the principles in the directives are already part of Danish taxation law, for instance, Denmark has a general anti-avoidance rule disallowing advantages from the Parent–Subsidiary Directive, the Interest and Royalties Directive and the Mergers Directive in situations where the sole purpose of an arrangement is to minimise or eliminate the tax base. Furthermore, for instance, Denmark has anti-avoidance rules in respect of hybrid instruments and entities, 'pass through' companies and rules deeming capital gain on shares to be dividend amounts, where relevant.

Additionally, the arm's-length principle is implemented in Danish law. According to the provision, the parties to controlled transactions must use prices and terms equivalent to price and terms that could have been achieved in the event the transactions had been concluded between independent parties.

IX DOUBLE TAXATION TREATIES

Denmark has concluded double tax treaties with a number of jurisdictions including the following: Argentina, Australia, Austria, Bangladesh, Belgium, Bermuda, Belarus, Brazil, the British Virgin Islands, Bulgaria, Canada, the Cayman Islands, Chile, China, Croatia, Cyprus, the Czech Republic, Egypt, Estonia, the Faroe Islands, Finland, Germany, Georgia, Ghana, Greece, Greenland, Guernsey, Hong Kong, Hungary, India, Indonesia, the Isle of Man, Ireland, Israel, Italy, Jamaica, Japan, Jersey, Jordan, Kenya, Kuwait, Kyrgyzstan, Latvia, Lebanon, Lithuania, Luxembourg, Macedonia, Malaysia, Malta, Mexico, Morocco, Montenegro, New Zealand, the Netherlands, Norway, Pakistan, Poland, Portugal, the Philippines, Romania, Russia, Serbia, Singapore, Slovakia, Slovenia, Sri Lanka, South Africa, South Korea, Sweden, Switzerland, Taiwan, Tanzania, Thailand, Trinidad and Tobago, Tunisia, Turkey, Uganda, Ukraine, the United Kingdom, the United States, Venezuela, Vietnam, Yugoslavia and Zambia.

The double taxation treaties concluded by Denmark are generally based on the OECD Model Treaty. Generally, the treaties cover taxes on income or on capital, or both.

i VAT

The Danish VAT Act is based on the EU VAT Directive 2006/112. The Danish VAT rate is 25 per cent.

Corporations selling goods or rendering services liable to VAT must register for VAT if their annual revenue exceeds 50,000 kroner.

The length of the VAT period varies according to the registered person's annual turnover. In the event the annual turnover is less than 15 million kroner, VAT is usually to be reported and paid quarterly. If the annual turnover exceeds 15 million kroner, the VAT period is one month. The registered person is then obliged to report any outgoing and incoming VAT in the period and pay any VAT liability no later than the 25th of the month following the relevant VAT period.

Holding companies that do not supply goods or render services are not subjected to VAT and are consequently not entitled to VAT deductions. However, a holding company may recover VAT of the transaction cost on the acquisition of subsidiaries if the holding company is an 'active' holding company. An 'active' holding company is a company that supplies services liable to VAT to the said acquired subsidiaries. A typical example is management and administration services provided to the holding company's subsidiaries.

X AREAS OF FOCUS

The National Tax Tribunal has recently issued rulings concerning the burden of proof in transfer pricing disputes. The rulings have to a wide extent set aside the tax authorities' decisions. According to the decisions, the burden of proof passes from the company to the tax authorities once the company has provided the sufficient transfer pricing documentation. If the burden of proof is passed, the tax authorities either have to prove or render probable that the transfer pricing valuation is subject to a significant level of uncertainty. In addition, the tax authorities have to provide a truer method of valuation.

XI OUTLOOK AND CONCLUSIONS

The following significant developments can be mentioned.

In January 2017, The Danish Parliamentary Ombudsman established a new tax office. The purpose of this new office is to strengthen the citizen's legal rights in tax cases. It is expected that the new tax office will cause an increase in the numbers of claims to the Ombudsman.

Additionally, the parliament has passed a bill regarding the binding effect of an advanced tax ruling concerning valuation. As from 1 July 2015 binding evaluations has not been binding if, *inter alia*, the value of the assets is subsequently different compared to the assumptions the advanced tax ruling was based on. According to the tax authorities, a subsequent difference was a 30 per cent difference and at least 1 million kroner higher or lower than stated in the advanced tax ruling. This rule has contributed to uncertainty about the tax implications of valuation in connection with, *inter alia*, generational succession or in trade between group companies. As of 1 January 2018, the rule is no longer in effect.

Further, the parliament has adopted a new and modernised version of the Tax Control Act. The modernisation implies, among other things, that a number of provisions on reporting information from third parties are moved and collected in a new tax reporting Act.

The tax administrative system is currently undergoing major changes. The administration before consisting of a single unit known as SKAT is to be divided into seven new agencies, each with their own specific tax administrative area of operation. The agencies will have their own management and director. The change follows a legislative decision to transform and optimise the tax administrative system. The new agencies consist of:

a the Debt Management Agency (for debt collection on behalf of the public sector);
b the Valuation Agency (for assessment of public property and land);
c the Tax Agency (for payment of taxes, duties and VAT);
d the Customs Agency (for settlement of customs);
e the Motor Agency (for registration and tax calculation of all motor vehicles);
f the Development and Simplification Board (for IT systems and data across taxation systems, as well as development and simplification projects); and
g the Administrative and Service Agency (for support functions such as recruitment, HR, accounting and cross-agency procurement).

The seven new agencies will be in operation no later than 1 July 2018.

On a concluding note, it can be mentioned that Directive (EU) 2017/1852 of 10 October 2017 on tax dispute resolution mechanisms in the European Union will apply for complaints submitted from 1 July 2019 onwards relating to questions of dispute relating to income or capital earned in a tax year commencing on or after 1 January 2018. The Directive is at the time writing not yet implemented in Danish law.

Chapter 9

DOMINICAN REPUBLIC

Christoph Sieger and Fabio J Guzmán-Ariza[1]

I INTRODUCTION

The Dominican Republic is a unitary state with a central government. Taxes can only be levied by the Congress of the Dominican Republic,[2] and collected by the Bureau of Internal Revenue (DGII) under the supervision of the Ministry of Finance (Law 227-06). Taxation is governed by Law No. 11-92 of 31 May 1992, commonly known as the Tax Code, as amended, by regulations issued by the Executive Branch, and by resolutions adopted by the DGII. The Dominican Tax Code establishes the general rules for all the administrative and judicial procedures, and establishes the main taxes – income tax, capital gains tax, value added tax, property tax, luxury tax, corporate asset tax – based on a simple, territorial system where the taxes are levied at the source.

The Constitution of the Dominican Republic establishes an equal protection clause for non-Dominican citizens and investors:[3] Article 25 of the Constitution expressly states that foreign nationals are entitled to the same rights and duties in the Dominican Republic as Dominican nationals, except – understandably – for the right to take part in political activities.[4] Article 221 of the Constitution sets forth that the government will ensure equal treatment under the law for local and foreign individuals and companies.

Tax compliance has been steadily on the rise owing to the invoicing system established for the collection of VAT:[5] any expense can only be claimed and deducted if supported by an official invoice with an official number registered and granted by the DGII. This system was introduced in 2007 and has revolutionised the Dominican tax system, providing the tax authorities with a powerful tool to detect evasion of VAT and income tax, both for individuals and entities. Due to this and many other procedures, the DGII is considered by many to be the most modern and organised of all the public offices in the Dominican Republic.[6]

1 Christoph Sieger is a partner and Fabio J Guzmán-Ariza is the managing partner at Guzmán Ariza, Attorneys at Law.
2 There are some exceptions; for example, municipalities impose or collect taxes for construction or advertising. The Dominican Congress is bicameral: it is composed of a Senate and a Chamber of Deputies.
3 Individuals or entities.
4 Based on this principle, the Dominican Constitutional Tribunal struck down an old statute that established a higher inheritance tax for non-resident foreigners.
5 The Code establishes the ITBIS, the Dominican VAT, at an amount of 18 per cent on most services and transfer of goods.
6 The official website of the DGII (www.dgii.gov.do) is one of the most visited websites in the Dominican Republic, containing the most relevant information for taxpayers and also allowing them to file their tax returns online.

Under the Dominican Tax Code, tax evasion was only sanctioned with criminal penalties in cases of intentional tax fraud. This all changed on 1 June 2017, when the new anti-money laundering law, Law 155-17, was enacted as well as its enabling regulations on 16 November 2017. The new law was approved in record time based on the recommendations from The Financial Action Task Force of Latin America (GAFILAT), a G7 regional organisation. This law establishes a long list of illegal activities with very stiff criminal penalties and fines, including all tax offences contained in our Tax Code, which it has classified as predicate offences for money laundering purposes (predicate offences are those whose proceeds may become the subject of prosecution under our new anti-money laundering statute). Since tax fraud and offences are on the listed illegal activities, therefore, any activity to legitimise an asset that resulted from tax fraud constitutes money laundering. In other words, not declaring the proceeds that resulted from tax fraud will now almost automatically constitute money laundering under these new rules. Furthermore, the law establishes very strict and complex rules for any financial institution, professionals such as lawyers and accountants and others that need to be followed in accepting and handling customers or clients. The Ministry of Finance is currently working on additional regulations for each sector to specify its obligations and rules of compliance. There is no doubt that this new law and its regulations are already revolutionising how business will be conducted in the Dominican Republic, and it remains to be seen what impact these new rules will have on the overall economy and on tax compliance. The general expectation is that, as occurred in Spain or France, the legislator will enact an amnesty law in 2018, allowing the taxpayer to become fully tax-compliant before these very strict rules will be applied. An initial middle ground has already been reached for tax fraud purposes, as the new enabling regulation established that in order for tax offences to be classified as predicate offences for money laundering the amounts involved would have to surpass at least 700 minimum salaries (roughly US$137,000), per fiscal year. The benefit of this new threshold will not apply if the person has already received a warning or been given notice by the Tax Office.

Tax disputes are usually avoided for the following reasons: any taxpayer can request from the DGII a formal and binding opinion for his or her particular case beforehand;[7] the fines and interest for late payments can very often be negotiated with the DGII;[8] and before starting litigation, there is a mandatory administrative procedure that suspends the possible tax obligations and gives both parties the opportunity to explain their positions and settle the dispute. In general, only cases that involve fundamental legal questions[9] or that are clear-cut[10] end up in court: taxpayers are well aware that litigation does not stop interest and fines from accumulating, although it does prevent the tax authorities from collecting while it is pending.

7 This can serve as an advanced clearance.

8 The capital gains taxes for the sale of Verizon Dominicana were negotiated directly between the Dominican President, Leonel Fernandez, and the Minister of Foreign Affairs of the US, Condoleezza Rice.

9 For example, collecting taxes on dividends from the shareholders of free zone operators or upholding the US$200 threshold for internet purchases from abroad.

10 For example, imposing taxes by Presidential Decree.

II COMMENCING DISPUTES

The process usually starts without any prior warning with a written notice by the DGII to the taxpayer assessing the taxpayer's liability under a particular statute.[11] The liability could arise from not filing a specific tax return – such as the yearly income tax return, monthly tax return for VAT or a specific declaration in regards to transfer pricing rules[12] – from not paying a specific tax, such as the property tax, corporate asset tax, VAT, capital gains tax, etc., or from the DGII disputing a filed return. The notice establishes a new deadline for the pending tax return or the specific amount of tax that is due, assessing the taxpayer with the corresponding fines for the non-compliance.

Upon receipt of this notice, the taxpayer can immediately either start to negotiate a settlement with the DGII or file an objection within 20 days,[13] attaching all the necessary documents and evidence. Once the objection is filed, the payment of the taxes and penalties is suspended until the DGII has ruled on the objection. Upon request by the taxpayer, the DGII can grant an additional 30 days to the taxpayer to substantiate the objection. The DGII has to decide on the objection within three months. After this internal administrative ruling, the DGII can start the collection procedure and attach the assets of the taxpayer.[14]

This procedure applies to all taxpayers and all taxes. The general statute of limitations for tax collection is three years,[15] starting one day after the filing or the payment was due.[16]

III THE COURTS AND TRIBUNALS

If the DGII rejects the objection filed by the taxpayer, a recourse can be filed in the tax court against the administrative ruling within 15 days. The decision of the tax court, composed of a minimum of three judges, is subject to review as follows: review by the same tax court under specific circumstances;[17] cassation procedure at the Third Chamber of the Supreme Court;[18] and review by the Constitutional Court.[19]

In cases of excessive delays of the DGII to resolve certain matters, a taxpayer can file a writ of *amparo*, a quick and inexpensive remedy for the protection of constitutionally protected rights. In tax matters, this is filed at the same tax court as other matters; the decision by the tax court is subject to appeal before the Constitutional Court.

In the case of urgency when no constitutional issue is involved, the taxpayer can seek an injunction in the tax court.

All cases in Dominican courts are decided by judges, not juries. Judges rule based on the texts of the Constitution and existing statutes, the precedents of the Constitutional Court

11 Article 64 of the Tax Code.

12 The Dominican Republic has extensive transfer pricing rules, and there is a coordinated effort to crack down on transfer pricing schemes, especially in the hotel and tourism industry.

13 Article 57 of the Tax Code.

14 Article 57 of the Tax Code.

15 Article 21 of the Tax Code.

16 Article 22 of the Tax Code.

17 Decision based on false documents or new documents becoming available after the ruling, etc. (Article 168).

18 The Third Chamber of the Supreme Court, as the other two chambers, is composed of five judges. Three of them have to rule on each case.

19 In cases of constitutional issues. The Constitutional Tribunal consists of 13 judges; cases are adjudicated with a super majority of nine or more members.

(which are binding) and the precedents of other courts (which are not binding). They do not rule in equity, as in some common law countries, but the principle of good faith is recognised by statutory law, which grants courts some discretion.

IV PENALTIES AND REMEDIES

The Tax Code distinguishes between fines, for simple non-compliance, and criminal sanctions, in cases of intentional tax fraud. According to Article 46 of the Tax Code, the DGII can impose fines on a taxpayer without prior authorisation from the courts. As previously mentioned, non-compliance notices usually contain a fine: for example, a fixed amount of 25,790 Dominican pesos for a pending income tax return, or a percentage of the taxes owed per month (11.1 per cent for the first month and 5.1 per cent for each following month). In cases of tax evasion, there can be an additional fine of up to twice the amount of taxes owed.

Only in cases of intentional tax fraud[20] are criminal penalties triggered. They consist of penalties between two and 10 times the amount of the evaded tax and imprisonment of between six months and two years. These penalties must be imposed by a court following criminal proceedings.

V TAX CLAIMS

i Recovering overpaid tax

The Tax Code provides a specific procedure for the return of any amount paid in excess or paid without an obligation to do so. The Tax Code actually obligates the executive branch to set up a special fund to reimburse the taxpayer in these cases.[21] The taxpayer can file for the refund at the DGII in an administrative procedure, provided that he or she is up to date with all his or her fiscal obligations. The DGII has to rule on the request within two months. In the normal course of events, the DGII either rejects the request, which can then be appealed before the tax court, or just does not respond. In this latter case, the amount of the requested refund automatically becomes a tax credit, allowing the taxpayer to compensate it against future taxes.

ii Challenging administrative decisions

The same procedure applies as described above.

iii Claimants

The persons liable for the tax obligation, the corresponding possible fines and criminal penalties are, in addition to the taxpayer, their legal representatives, their assistants, their withholding agents and the persons who acquire assets from them in transactions subject to taxation.[22]

20 For example, having two sets of books.

21 Article 265 of the Tax Code. The amount is 0.5 per cent of the total amount of taxes collected each month. In reality, this fund does not exist, and refunds in cash are very rare.

22 Article 11 of the Tax Code.

VI COSTS

The costs of any dispute, administrative or judicial, consist basically of the legal fees for the attorney. These fees usually cannot be recovered from the opposing party, no matter the outcome of the administrative or legal procedure. With the exception of the general procedures at the tax court against a ruling of the DGII, all other legal procedures (*amparo*, cassation, reviews) do not generate court costs for any of the parties involved.

VII ALTERNATIVE DISPUTE RESOLUTION

There is no alternative dispute resolution in tax matters in the Dominican Republic. Law 489-08 on Commercial Arbitration explicitly prohibits arbitration in public matters such as tax matters.

VIII ANTI-AVOIDANCE

The Tax Code includes a general anti-avoidance provision whereby the tax authorities may ignore the existence of legal entities or certain transactions when used to secure a tax advantage, based on the substance over form doctrine.[23] However, the provision has been applied only in high-profile cases, such as the sale by Verizon of the largest phone company in the country. Verizon argued that no capital gains taxes were due since the transaction was done through the sale of shares in an offshore company, outside of the territory of the Dominican Republic, that controlled the Dominican subsidiary. The DGII countered that the only purpose of the transaction was the acquisition of the local telecom business of the company, and that, therefore, capital gains taxes had to be paid, the real purpose of the offshore corporate structure being to artificially locate the capital gains in an offshore jurisdiction. The case was settled, and Verizon paid a substantial amount of the original sum demanded by the DGII. As a result of this case, the Tax Code was amended and now expressly states that the sale of shares of foreign companies having assets, directly or indirectly, in the Dominican Republic are to be considered as taking place in the Dominican Republic, and therefore subject to Dominican capital gains taxes.[24]

With the tax reform of 2012, much more extensive transfer pricing rules were established and, for the first time, rules on thin capitalisation. The latter have not yet become an area of focus for the DGII. Transfer pricing instead has become one of its priorities.

IX DOUBLE TAXATION TREATIES

The Dominican Republic has signed and ratified two double taxation treaties: with Canada, in 1977, and with Spain, in March 2014. The treaty with Canada only covers income taxes, and has become obsolete with regard to taxes on dividends since the 2012 tax reform abolished the provision to avoid double taxation on company profits and introduced a 10 per cent

23 Article 2 of the Tax Code.

24 From a legal perspective, it is questionable whether this amendment was really necessary. In our opinion, the general anti-avoidance rule was and is sufficient.

dividend tax. The new treaty with Spain deals with all the possible taxes on income, but not with VAT. Considering that many hotel owners and operators in the Dominican Republic are Spanish, the treaty with Spain has much more relevance than the one with Canada.

X AREAS OF FOCUS

The main focus of the DGII is on collecting VAT taxes and income taxes through the invoicing system described in Section I. Since only expenses supported by an official invoice can be deducted for tax purposes, businesses are forced to use these official invoices, which are then automatically subject to VAT and income tax. In addition, services rendered by foreigners in the Dominican Republic – for example, in the tourism or mining industry – can now easily be identified and taxed correspondingly. Furthermore, the DGII has widened the application of VAT taxes, attempting to collect 1 per cent on imports from members of Proindustria, the Centre for Industrial Development and Competitiveness, as an advance on the VAT tax. Most likely, this will be disputed soon, since these members have been exempt from advancing any VAT taxes.

Capital gains are also being targeted by the DGII in corporate transactions, such as sales of shares, contributions in kind, and mergers and acquisitions. Very often, the necessary approval of the transaction by the DGII already provides an assessment of the capital gains taxes due.

In the area of tax avoidance, the most targeted scheme is transfer pricing. There has been a coordinated effort to crack down on transfer pricing schemes, especially in the hotel and tourism industry. The Dominican Republic now has extensive rules on this matter, and the DGII is determined to find and eliminate any possible schemes. Other schemes of tax avoidance, such as treaty shopping, dividend stripping or controlled foreign corporation schemes to park dividends abroad, are still not targeted by the DGII, mainly because no specific rules exist in this regard.

Another target is the collection of the transfer tax for real estate and vehicle sales. In the past decade, the DGII has established minimum fiscal values for these transactions to eradicate the old habit of using two sets of contracts: one with the true price and one with a lower price for tax purposes. There is also now a six-month deadline to pay the tax, and fines in the case of non-compliance.

The final area of focus is the collection of taxes on dividends (10 per cent) from free zone operators for any dividends generated after 5 October 2016.

XI OUTLOOK AND CONCLUSIONS

There is no doubt that the authorities in the Dominican Republic are focused on increasing tax compliance and collection. Considering the growing debt of the country, the International Monetary Fund has been pressuring for better results in both areas, and has tried to convince the Dominican Republic to abolish tax exemption laws, especially the ones benefiting the tourism industry (Law 158-01). Considering that the Dominican Republic recently extended these incentives, the pressure by the IMF and the international community to collect taxes is higher than ever. There is still a large part of the economy that is operating in the shadows and outside the official invoicing system. There have been many suggestions and ideas to change that through an extensive tax reform, but so far nothing concrete is on the table.

It is likely that the Dominican Republic will negotiate new double tax treaties in the future, especially with the United States and European Union countries.

The new anti-money laundering law and its regulations are shaping the future of doing business in the Dominican Republic, with the expectation that a general amnesty law will be offered in spring 2018 as a last opportunity for the taxpayer to become tax-compliant and to avoid the application of the strict penalties of the new law for activities related to tax fraud.

With these possible developments, tax planning and tax consulting will become more and more important for anyone doing business in the Dominican Republic, confirming once more that tax law shapes the nature of almost every important business transaction and has a significant impact on the way corporations behave.

Chapter 10

ECUADOR

Juan Carlos Bustamante[1]

I INTRODUCTION

As a way of introduction, the Ecuadorian Internal Revenue Service (IRS),[2] which was created in 1997 as an autonomous technical entity, has been in charge of administering and collecting taxes for the past two decades. In accordance with the Constitution, Ecuador is a country that enforces rights and applies justice. Therefore, the tax administration and its officers are responsible for correctly enforcing the rights and guarantees established in the Constitution, as well as in international instruments ratified by Ecuador such as the double taxation treaties executed by the state and regional multilateral agreements, and Andean Tax Decision No. 578.

As a young tax entity, the Ecuadorian IRS has always been under pressure to generate higher tax revenue and implement regulations and other secondary legislation to improve tax collection and combat tax avoidance.

Furthermore, the tremendous challenge the tax administration now faces is to optimise taxpayer compliance with, and confidence in, tax administration procedures. Unfortunately, boosting confidence in taxpayers has not followed the same path as the increase in tax collection. In recent decades, the tax administration has sent, and the executive branch has enacted, several tax reforms; however, the excessive number of compliance regulations, application circulars and resolutions issued, plus the taxpayer's normal reporting obligations, have undermined initial efforts to transform the tax administration into a technical and autonomous entity for creating a tax culture and raising tax revenue.

Finally, the tax administration is coming to terms with the oral judicial procedural system implemented as of the second half of 2016. The oral procedure poses a challenge for both taxpayer and tax procurement officials in terms of understanding and having to process lengthy assessments in very short period of time.

II COMMENCING DISPUTES

The IRS assesses most taxes based on the tax returns filed by taxpayers. It may also rely on its own database containing information provided by third parties (other taxpayers) or information obtained from previous tax assessments performed on taxpayers' related parties, where applicable. The tax authority may exercise its auditing powers within three years of the

1 Juan Carlos Bustamante is the head of the tax division at Bustamante & Bustamante Law Firm, Quito.

2 'SRI' in Spanish, which stands for *Servicio de Rentas Internas* (Internal Revenue Service), was created as an autonomous technical entity by Law 41 of 2 December 2017.

deadline to file the taxpayer's income tax return; and, in six years from the tax return filing due date, when the taxpayer failed to file a return or did file, but the return is incomplete or missing information. For this purpose, the tax administration will serve notice of the tax assessment order on the taxpayer. It is understood that said order, by which the auditing procedure begins, does not bear any legal effects if the control acts are not initiated within 20 working days of the date of notification of the tax assessment order or if, initiated, are suspended for more than 15 consecutive days. In such case, the tax administration will have to issue a new order. The terms are interrupted only when the tax assessment order has been legally served and auditing activities initiated.

Moreover, if the tax assessment order is notified under one year from the date of expiration of the tax administration's auditing powers, the administration must issue a tax assessment act before one year has passed from the date of the assessment order. In the case of failure to issue and serve notice of the tax assessment act within said period of time, it will be understood that the statute of limitations for the tax authority to exercise its tax auditing powers has run out.

Article 173 of the Ecuadorian Constitution provides that, 'Administrative acts by a State authority can be challenged through administrative channels as well as before the appropriate entities of the Judicial Branch.' Therefore, anyone interested in challenging a tax authority's decision may do so at both the administrative and judicial levels. Taxpayers wishing to challenge an assessment act issued by the tax authorities can bring their case directly before Ecuadorian courts without having to exhaust administrative remedies.

Administrative procedures begin with a tax assessment, which may arise in the different channels mentioned above. Subsequently, a term is provided for filing claims and, lastly, a resolution is issued by the tax administration.

Personal taxes (such as income tax, money outflow tax, and inheritance and donation tax) and corporate taxes[3] (income tax and money outflow tax) are governed by the same administrative procedure for filing administrative claims and remedies. Furthermore, indirect taxes, such as value-added tax and excise tax, apply to both individuals and companies. These taxes are subject to the same treatment described in this section, without any variation in the administrative procedure.

III THE COURTS AND TRIBUNALS

i Tax disputes – structure, powers, and competence

In the public administration structure of Ecuador, the tax administration is independent from the judicial branch.[4] The IRS is competent to review the claims and remedies, described above, at the administrative level. In contrast, the judicial branch has competence to resolve disputes.

3 The following definition of company for tax purposes should be taken into account. Article 98 of the Organic Law of the Internal Tax Regime sets forth that the term company includes legal persons, *de facto* companies, commercial trusts and independent or autonomous equities, whether or not legal persons (except for those created by state institutions and the beneficiaries are such institutions), consortiums of companies, holding companies, investment funds or any entities that, even if not legal persons, constitute an economic unit or equity independent of the equity of its members.

4 Constitution, Article 177: 'The Judicial Branch is composed of jurisdictional, administrative, auxiliary, and autonomous entities.'

Within this context, Article 218 of the Organic Code of the Judicial Branch[5] establishes the competence of tax litigation tribunals to process tax disputes, while Article 185 ascribes competence to the Specialist Tax Division of the National Court of Justice for reviewing and resolving remedies for cassation. Their competences do not cover tax violations, which are discussed later in this section. The Judiciary Council[6] has the power to decide on the number of divisions, headquarters, and territorial areas to allow for the exercise of the competence of tax litigation tribunals. Currently, there are six tax divisions in different jurisdictions: (1) Quito; (2) Guayaquil; (3) Cuenca; (4) Portoviejo; (5) Ambato; and (6) Loja.

The competences of tax litigation tribunals are listed in Article 219 of the Organic Code of the Judicial Branch. These include the competence to review and process the following matters and actions: (1) disputes between tax administrations and taxpayers; (2) disputes of taxpayers or directly interested parties against tax assessment acts, resolutions denying requests for compensation, easy payment terms, claims for overpayments or acts denying review appeals or imposing sanctions; (3) the statute of limitations for actions concerning tax credits, interest or fines; and (4) action for payment by deposit and complaints, as well as defences and exceptions against enforcement procedures.

As a rule, tax claims follow the regular procedure and are filed with the district court of the taxpayer's tax domicile. Once the tax claim has been answered (30 working days), the court must process the case in two hearings: the first is a preliminary hearing for the parties to present their arguments, define the subject matter of the litigation and state their evidence. In practice, this hearing takes place within three months of the claim being filed. Then, the final hearing, which takes place approximately one to two months after the preliminary hearing, during which evidence is exhibited and a judgement is issued.

As mentioned above, the only remedy for challenging a resolution passed by a tax litigation tribunal is the 'special remedy or remedy for cassation'. This competence has been assigned to the Specialist Tax Division of the National Court of Justice. Nonetheless, that division also has the competence to review and process challenges against regulations, ordinances, resolutions, and other general norms or rules ranking lower than the law.

Constitutional special protection action

Constitutional special protection action is provided for safeguarding constitutional rights and due process, and, consequently, it can be brought only in the case of failure to observe such rights established in the Constitution.[7]

The time for processing a case is considerable, with terms ranging from approximately one to two years.

5 Supplement to Official Gazette 544 of 9 March 2009.

6 The Judiciary Council is the organ of government, administration, surveillance and discipline of the Judicial Branch, as stipulated in Article 178 of the Constitution.

7 Organic Law of Jurisdictional Guarantees and Constitutional Oversight.

Criminal matters: tax crimes

When a tax crime expressly listed in Article 298[8] of the Organic and Comprehensive Penal Code is committed,[9] the Prosecutor's Office has competence to hear the case. Subsequently, criminal judicial authorities have competence in the following order:

a criminal guarantees judges;

b criminal guarantees tribunals, in the case of a subpoena;

c remedies of appeal and nullity are heard by the criminal division of the provincial court; and

d lastly, remedies for cassation and review appeals are heard by the specialist criminal division of the National Court of Justice. Forum cases are not included and are subject to other rules.

ii Tax litigation procedures

Direct and special[10] dispute actions are processed at tax litigation tribunals when they deal with the following matters.

a dispute actions: A dispute action can be filed against regulations, ordinances, resolutions and general circulars on tax matters; administrative acts derived from tax assessments, administrative silence, administrative decisions issued in review appeals, final decisions by the administration denying all or part of a claim, resolutions placing sanctions for non-compliance with formal tax obligations, in addition to defences and exceptions in the forced collections procedure, as provided under Article 316.10. These actions are processed in regular proceedings;

b direct actions: Through this channel, direct actions can be filed for undue tax payments or overpaid taxes; and

c special actions: Special actions apply for defences and exceptions against forced collections and other procedure, as provided under the law. The committal procedure applies to these cases.

The timing in this case will depend on the procedure followed and the judiciary's workload. The approximate time in regular proceedings is three to five months, and in committal procedures three to four months.

Rulings issued in review processes[11] can be the object of a remedy for cassation, which is processed at the National Court of Justice.

Special remedy at the National Court of Justice

Once a remedy for cassation is filed, the judge writing the ruling will state whether the remedy is admitted for processing or otherwise dismissed.

---

8 Contains acts of simulation, concealment, forgery or deceit in relation to the tax administration for failure to comply with obligations or refraining from paying taxes due.

9 Supplement to Official Gazette 180 of 10 February 2014.

10 Article 319 of the General Organic Code of Processes.

11 Article 266. Justification. A remedy for cassation is justifiable when filed against rulings and court decisions that put an end to cases heard by provincial courts of justice or by tax litigation and administrative litigation tribunals.

Remedy admitted

When a remedy is admitted to trial, the division of the court will call the parties to a hearing to state their arguments for the remedy and subsequently issue its resolution. The approximate time for processing the case is three to four months.

Remedy dismissed

If the remedy for cassation is dismissed, the process will end. The approximate time of this phase is two months from the filing of the remedy.

IV PENALTIES AND REMEDIES

i Administrative penalties

Within a purely administrative scope, Ecuadorian legislation divides violations into two categories: contraventions and failure to comply with regulations.

Subject to Article 315 of the Tax Code, tax contraventions are defined as the failure to comply, or lack of compliance, with legal rules established therein and in other Laws. Furthermore, a tax contravention also occurs when taxpayers obstruct tax verification or audits, or when public officials prevent or delay the processing of administrative claims, actions, or remedies. While failure to comply with regulations is defined as a violation of a regulation or secondary rule that bears general effects. Elements like guilt or wrongdoing are not determined for the occurrence of either one.

The sanctions provided under the Tax Code vary depending on the severity of the violation and must be imposed through a tax administrative act. Following is a list of the most frequent penalties:

a fines;
b closing of the establishment or business;
c suspension of activities;
d permanent seizure;
e suspension or cancellation of registrations in public registers;
f suspension or cancellation of authorisations; and
g suspension or removal from office in the case of public officers.

All the sanctions mentioned above will apply besides applicable interest and surcharges that may be charged. With respect to fines, these range between US$30 and US$1,500 per violation. Failure to comply with regulations cannot exceed US$1,000 per fine. The payment of these sanctions does not release the taxpayer from complying with the tax obligation in full.

ii Criminal penalties

All illicit tax acts entail imprisonment. The table below lists all tax crimes defined in the Organic and Comprehensive Penal Code (COIP). Such crimes are understood as conduct (conduct previously set forth under the criminal law) that is unlawful (damage or threat to a legally protected good or interest) and entails guilt (knowledge and intention to engage in such conduct).

As far as guilt is concerned, the description of conduct included in Article 298 of the COIP implies the knowledge and intention to not comply with tax obligations and to obtain a tax benefit for oneself or third parties. Such conduct includes simulation, concealment, omission, falsification, and deceit with respect to the Tax Administration.

Conduct	Sanction
Using a false identity or identification in requests for registration, updating or cancellation of registrations kept by tax administrations.	One to three years' imprisonment.
Using false or altered data, information or documentation in requests for registration, updating or cancellation of registrations kept by tax administrations.	
Carrying out activities at an establishment even when known that the establishment has been shut down.	
Printing or using sales or withholding vouchers or like documents not authorised by the Tax Administration.	
Submitting to the administration tax reports, reports containing merchandise, data, numbers, circumstances or background that are false, incomplete, modified or altered.	
Stating false, incomplete, modified or altered data on tax returns, so long as the taxpayer has not asserted the right to file a substitute return in the manner stipulated in the law, within one year of the date of filing of the original return.	
Falsifying or altering permits, waybills, invoices, records, marks, labels or any other kind of control for manufacture, consumption, transportation, importation and exportation of taxable goods.	
Altering digitised accounts or records, notes, entries or transactions regarding economic activities, as well as the bookkeeping of accounts or falsifying names, quantities or data.	
Keeping double accounting with different entries in digitised accounts or books for the same business or economic activity.	
Destroying all or part of digitised accounts or records of accounting or the like required by tax rules or the supporting documents thereof, for avoiding payment or reducing the amount of tax obligations.	
Selling liquor or unbottled alcohol and falsely declaring alcohol volume or proof of the product subject to tax, beyond the tolerance limits established by INEN (Ecuadorian Standardisation Institute), as well as selling ethyl alcohol for use in the manufacture of alcoholic beverages, pharmaceutical products and toilet waters, beyond the quota established by the Internal Revenue Service.	
Issuing, accepting or submitting to the tax administration sales or withholding vouchers or the like for non-existent transactions or for amounts that do not match the actual transaction.	Three to five years' imprisonment.
Issuing sales vouchers for transactions with shell, non-existent or dummy companies.	
Submitting to the tax administration sales vouchers for transactions with shell, non-existent or dummy companies.	
Omitting income or including false or non-existent or overpriced costs, expenses, deductions, exoneration, discounts or withholdings than legally justifiable, to avoid payment of taxes due.	Five to seven years' imprisonment.
Giving third parties the benefit of a right to subsidies, discounts, exemptions, tax incentives or benefiting from a right without being entitled.	
Simulating one or more acts or contracts to get or give benefits from subsidies, discounts, exemptions or tax incentives.	
Withholding agents' deliberate non-delivery of all or part of withheld or received taxes within 10 days of the due date established in the relevant law.	
Unlawfully obtaining a refund of taxes, interest or fines.	
Using individuals as an intermediary or shell or dummy companies residing in Ecuador or in another jurisdiction to avoid compliance with tax obligations.	

V TAX CLAIMS

At the administrative level, the administration has competence in tax matters, including tax assessments, tax collections, claim resolution and answers to tax consultations.

A tax obligation[12] arises when the conditions established in law are met for a tax to apply (tax-producing event). The law also states when a tax is payable. For instance, income tax is payable as of the due date to file the annual tax return, and that obligation is satisfied when the tax is paid.

Therefore, two situations can occur during the first phase: (1) the tax obligation is satisfied by the taxpayer and, therefore, the obligation is extinguished; or (2) after conducting control and verification, the tax administration detects that payment was not made or was made only in part. In that case, the tax authority will follow the internal procedure for assessing and quantifying the taxable event. Hence, a tax assessment act (administrative act) will be issued, but may be challenged at the administrative level and judicial level.

If, as a result of the tax audit, the tax administration establishes a tax obligation, it will impose a 20 per cent surcharge.[13]

Article 87 of the Tax Code provides: '[t]ax assessment is an act or a set of acts by a taxpayer or by the tax administration, directed at declaring or establishing the existence of a tax-producing event, taxable base, and tax amount'.

There are three ways to assess a tax obligation:

a declaration by the taxpayer;

b action by the administration; and

c combined method (combination of the two above).

Troya,[14] an Ecuadorian tax author, summarises this point as follows: 'When a tax is assessed by the administration, whether directly when checking tax returns or through the information obtained by the same taxpayer and third parties, the assessment will become an administrative act that could be challenged.' This means that the first step is the tax assessment by the administration, which is calculated based on information furnished and in application of tax rules.

When discussing international doctrine, authors such as Villegas[15] coincide with the definition provided by Ecuadorian tax legislation for tax assessment: 'Act or set of acts for determining whether a tax debt (*an debeatur*) exists and who is obligated to pay the tax to the authority (taxpayer), as well as for calculating the amount of the debt (*quantum debeatur*)', in each case.

Decisions issued through administrative acts must be grounded[16] in writing, which means that the legal rules or principles used as the grounds must be stated. In addition, the relevance of their application to the factual grounds when resolving taxpayers' requests, claims or remedies must also be informed.

12 Article 18 of the Tax Code.

13 Article 90 of the Tax Code.

14 Troya Jaramillo, José Vicente, *Manual de Derecho Tributario*, Corporación de Estudios y Publicaciones, Quito, 2014, p. 250.

15 Villegas Belisario, Héctor, *Curso de Finanzas, derecho financiero y tributario*, Astrea, ninth edition, 2005, Buenos Aires, p. 395.

16 Article 81 of the Tax Code.

In that sequence, a tax assessment will end with the issuance of a tax assessment act, which is simply an administrative act entailing the power to impose and enforce the tax through a tax collection order,[17] if not challenged before the tax court. The order paves the way for the initiation of forced collections or enforcement procedures.

i Recovering overpaid tax

As mentioned under tax litigation procedures, a taxpayer may seek to recover any unduly paid tax or tax paid in excess, by filing a direct action before the Tax Tribunal. Taxpayers, frequently, resort to the tax administration to recover unduly paid or overpaid tax. This may be done by filing either a tax claim or some specific administrative procedures. Tax claims will be dealt, in further detail below, while the specific administrative procedures will be mentioned at this point. Ecuadorian tax law and regulations provide the following specific administrative procedures for recovering overpaid taxes: (1) excess of income withholding tax; (2) excess of VAT withholdings; and (3) capital outflow tax when levied on exempt transactions, such as imports meeting requirements set forth under COPCI (the Organic Production, Commerce and Investment Code). The tax regulations also provide for a specific procedure for non-resident foreign beneficiaries of double tax treaties, which will be discussed in Section IX.

ii Challenging administrative decisions

Tax claims

A wide array of matters can be the subject of tax claims. Tax claims can cover discrepancies about the scope and construction of a substantive rule and even consist of requests for the refund of an unlawful tax or overpaid taxes and so on. In general, any kind of decision by the tax administration that bears legal effects for an individual may be disputed, in accordance with the Constitution.

Tax claims must be submitted to the same authority that issued the act, within 20 days of the day after service of notice. This will be the start of the procedure. In general, a resolution must be issued within 120 business days. If that time runs out and the authority does not issue a resolution, administrative silence will come into play. Therefore, it will be understood that the tax claim has been tacitly accepted in the absence of an answer by the administration.

Once it is verified that the legal requirements for a tax claim have been met, the tax claim will be admitted for processing. The claimant will have up to 30 days to submit proof. In addition, the ritual in this procedure also includes the possibility of the authority setting, at its discretion, a date for a hearing within 20 days of the end of time to issue a resolution. During the hearing, the interested party may present his or her defence.

The resolution of the claim must decide on all matters raised by the interested parties.

17 Includes unpaid tax obligations, fines, interest, and other administrative expenses.

Review appeal[18]

This remedy may be started by the tax administration[19] *ex officio* or by the taxpayer should he or she believe himself or herself to have been affected by the legal effects of a final tax administrative act or final tax resolution. In any case, the Tax Code lists the cases in which this remedy is available: when there are evident factual or legal errors, when documents that are transcendental for the decision have been ignored, when fake documents have been submitted and other cases mentioned in the Code.

When the tax authority becomes aware of a cause for this remedy to become available, it will hold a committal hearing within five to 20 days, if necessary, to produce or submit evidence; this hearing is omitted when purely legal matters are involved.

This remedy ends with a resolution that either confirms, invalidates, modifies or replaces the appealed act. Once this instance has been exhausted, the only option left will be to file a tax litigation action at the judicial level.

Tax binding opinions

At the tax administration level, the law allows taxpayers to consult the administration on lawful methods for certain specific situations or with regard to the commencement of economic activities. The answer to the consultation will be binding on the tax administration.[20] A 30-day term is stipulated for answering consultations and is counted from the time the consultation is submitted, except when the claim implies the issuance of a generally applicable regulation or rule.

Tax collection order and tax payment order[21]

As stated above, tax assessment implies the issuance of a tax collection order by the authority after a tax obligation has been assessed and calculated. The tax collection order must contain the formal requirements to be met by the taxpayer as well as precise information regarding the reach and effects thereof for the taxpayer.[22]

Once a tax collection order is issued, the taxpayer will be served notice thereof and will have eight days to pay. Within the eight-day term, the debtor may file a claim with his or her observations related strictly to the tax collection order and it issuance right. Until such observations are resolved, it will suspend the effects of the tax collection order. In any case, if the tax debt is accepted, easy payment terms can be granted with prior approval.

If the eight-day term elapses without the obligation having been paid or easy payment terms proposed, the tax authority will issue a tax payment order. The debtor will be ordered to pay in cash or otherwise surrender goods within three days of service of notice of the order. The debtor will be warned that if he or she fails to comply, his or her property will be seized to cover the principal of the debt, plus interest and court costs. Furthermore, precautionary measures, such as the debtor's arrest or prohibition on the debtor to leave the country, as well as the seizure, withholding, or prohibition to sell goods, may be placed to secure payment.

18 Article 143 of the Tax Code.

19 The director general of the Internal Revenue Service, within the central tax administration, or provincial prefects and mayors, as the case may be, in the section tax administration and the maximum authorities of the tax administration as an exception.

20 Article 135 of the Tax Code.

21 *Auto de Pago*.

22 Article 150 of the Tax Code.

Forced collections action

This procedure is followed by the tax authority's collectors when the taxpayer fails to satisfy the payment obligation stated on the tax collection order. This does not entail a lawsuit, since the tax collector in this procedure is not a judge. Although the procedure shares certain rituals inherent to lawsuits, the objective here is to complete a procedure and to give the taxpayer an opportunity to defend himself or herself.

iii Claimants

Under Ecuadorian tax law, remedies to obtain unduly or overpaid taxes are available to the party that bore the economic burden or to the person in whose name the undue tax payment or excess tax was paid. If the payment refers to another's debt and is paid by a person or company without the obligation to do so pursuant to legal rules, then the party concerned can demand a refund only from the tax administration that received the payment, so long as it is proven that the payment was made by mistake. The statute of limitations for filing actions concerning a wrongful payment or overpayment runs out after three years as of the date of the payment. That period is interrupted when either a complaint or claim is filed, depending on the case.

In any event, a party that pays another's debt shall not forfeit its right to demand a refund from the legally obligated party before the regular courts, in accordance with Article 26 of the Tax Code.

VI COSTS

Under the Ecuadorian tax law, there is no right to claim compensation or cost for claims brought before the tax administration following administrative proceedings. However, Article 322 of the Tax Code does discuss tax litigation costs, though limiting them to court costs, which are to be paid by the claimant whenever the action brought before the tax tribunal has been declared void or when it is evident that the action was brought without legal grounds or when the taxpayer's action is deemed to have delayed the enforcement of the judgment.

VII ALTERNATIVE DISPUTE RESOLUTION

There are no alternative dispute resolution procedures for tax matters available under Ecuadorian legislation.

VIII ANTI-AVOIDANCE

During the past decades, the Ecuadorian tax administration has made extensive use of the anti-avoidance general provision set forth in Article 17 of the Tax Code, giving prominence to the principle of economic approach (known also as substance over form doctrine). Though no specific anti-avoidance set of rules has been enacted, the tax administration has directed its efforts at preventing tax evasion and base erosion, as well as at combating unjustified enrichment and the use of tax havens or lower tax jurisdictions. It has inserted some anti-avoidance provisions in different parts of the tax law.

More and more, tax authorities are focusing on establishing economic groups of taxpayers and studying their economic relations (intra-company transactions), tax efficiency ratios with respect to global annual revenue and other aspects of tax compliance.

Economic substance over form has given the tax administration an analytical tool to disregard the legal forms used by taxpayers in their transactions, and basically limit the deductibility of expenditures. In this respect, in December 2016 the Plenary of the National Court of Justice (CNJ) issued a resolution formalising the criterion of the Tax Litigation Division with respect to the requirements that taxpayers must meet to be entitled to deduct expenses when calculating income tax. In addition to providing their accounting records, taxpayers must present material evidence of payment. This is in compliance with Articles 184.2 and 185 of the Constitution, as well as Articles 180.2 and 182 of the Organic Code of the Judicial Function, which direct the CNJ to develop a system of legal precedents based on the concept that when there are three judgements ruling the same way, they set a precedent. Resolution 007-2016[23] stipulates that taxpayers who wish to exercise the right to deduct an expense must submit material proof of payment, besides providing accounting records and meeting other formal requirements. In accordance with the resolution, the record of payment must be in consecutive formal and material order, allowing the authority to verify that the object of the transaction was transferred or the contracted service provided.

With this decision, the CNJ provides an important service to the tax administration in the fight against tax avoidance and tax evasion, while making it easier for taxpayers to know the scope of their rights and obligations regarding their income tax returns.

IX DOUBLE TAXATION TREATIES

Ecuador has concluded a considerable number of DTTs,[24] following the OECD model with certain deviations towards the UN model.

Since last year, all benefits provided under taxation treaties are subject to specific limits set by Resolution No. 204 issued by the IRS. The resolution provides that automatic treaty benefits exceeding the limit equivalent to a maximum twenty times the zero-rate base fraction of income tax for individuals[25] will be subject to the regular withholding. Foreign companies benefiting from an exemption or reduced tax treatment under the treaty, will be subject to Ecuadorian source withholding (22 per cent) upon receiving payments from Ecuador exceeding the annual limit indicated above.

To obtain a reimbursement of withheld amounts, as provided under IRS Resolution No. 388 of 27 September 2016, non-resident taxpayers must submit their application on the form published on the IRS website www.sri.gob.ec. All foreign documents must be translated into the Spanish language, when required, and meet the necessary formalities to be valid in Ecuadorian territory. The reimbursement procedure takes 60 working days.

23 Supplement 1 to Official Gazette 894 of 1 December 2016.

24 Bilateral DTT: Argentina, Belgium, Brazil, Canada, Chile, China, France, Germany, Italy, Mexico, Qatar, Romania, Spain, Singapore (pending confirmation by National Assembly), South Korea, Switzerland and Uruguay. Multilateral DTT: CAN Decision 578 (Bolivia, Colombia, Peru and Ecuador).

25 Zero-rated base fraction for individuals is US$11,290 for 2017, meaning that the limit is US$225,800.

X AREAS OF FOCUS

Undoubtedly, tax litigation is the major area of focus. Nonetheless, another area is tax compliance, since the IRS has increasingly imposed more and more tax reporting obligations for corporate, non-corporate taxpayers, and even individuals. In recent decades, taxpayers' compliance with their reporting obligations constitutes a stable source of information for tax audits. The pressure to raise revenue has directed the efforts of the tax administration to a rise in tax audits. Finally, one last area of focus is whether the IRS will in fact process tax refunds to non-residents beneficiaries of the rules of double taxation treaties provisions.

XI OUTLOOK AND CONCLUSIONS

Although the IRS has been actively implementing tax reforms and regulations, it has not been able to achieve taxpayers' trust and confidence in the system as in the initial stages. 2018 will bring about the announced tax reforms, which in the view of tax practitioners, will not pose substantial changes to taxpayers.

Litigation still raises many questions and tax practitioners remain sceptical about the way tax courts are handling complex tax cases under the new judicial procedure.

Chapter 11

FINLAND

Jouni Weckström[1]

I INTRODUCTION

The courts in Finland are divided into general courts dealing with criminal cases, civil cases and petitionary matters, and administrative courts adjudicating administrative acts such as tax decisions issued by the Finnish Tax Administration (FTA). Further, the specific feature of tax litigation in Finland in comparison with other administrative appeal proceedings is its particular focus on the rectification of a decision issued by the FTA. As another feature, the taxpayer is required to file a claim for adjustment to a special administrative body, namely the Board of Adjustment (the Board) before entering into court proceedings. Only if such claim for adjustment is dismissed or rejected by the Board, can the decision be appealed further to administrative court.

Even though oral hearings may be requested and applied for, litigation in tax matters is mainly carried out through written proceedings. Further, as the resources of the courts and other authorities engaged in appellate proceedings are often limited, one should prepare for long processing times and prolonged uncertainty. In general, tax litigation proceedings may take several years, which can lead to excessive costs and practical complications for taxpayers.

Tax assessment decisions may in general terms be negotiated in advance with the FTA. For example, taxpayers can enter preliminary negotiations with the Large Taxpayers' Office, which is part of the Corporate Taxation Unit within the FTA. Corporate taxpayers may discuss a variety of tax issues with the authority (e.g., the taxation of certain transactions). The guidance and instructions provided by the Large Taxpayers' Office during these negotiations are binding, however, only if specific requirements set out in the Act on Tax Assessment are met. In practice, whenever the issues negotiated with the FTA are controversial, they end up being resolved in formal tax litigation proceedings. Therefore, a great majority of the complex tax disputes are resolved through extensive tax litigation.

The Finnish legislation governing the appeal proceedings in tax matters was subject to some significant changes as of 1 January 2017, which not only extend the above-mentioned mandatory adjustment procedure to all tax types, but also harmonise the time limits and appeal periods.

The new legislation provides for extended time limits for corrective measures initiated by the FTA, which may cause additional dissatisfaction on the taxpayers' side in the future. In addition, one of the essential elements of the amended legislation is the inclusion of VAT

1 Jouni Weckström is a specialist partner with specific focus on taxation at Waselius & Wist.

and transfer tax matters as subject to the mandatory adjustment procedure, in accordance with the new legislation, the primary appeal authority will always be the Board regardless of the type of tax against which the taxpayer is appealing.

The amended provisions are applied to the taxation of tax year 2017, and the preceding provisions will continue to apply to the taxation of previous tax years, up to and including tax year 2016. However, the new provisions apply also to appeals that relate to tax decisions first issued by the FTA after 1 January 2017, even if the decision concerns previous tax years.

II COMMENCING DISPUTES

As of 1 January 2017, a tax dispute is initiated in all tax matters by filing a claim for adjustment against a first-stage tax assessment decision issued by the FTA on 1 January 2017 or later. The request of a taxpayer is addressed in writing, and in some exceptional cases also orally. A claim for adjustment is then investigated by the Board. However, regarding the FTA's decisions issued in 2016 or earlier, the scope is more limited, applying only in matters relating to, *inter alia*, income taxation, heritance and gift taxation and taxation on real estate.

As an example, in VAT decisions issued by the end of 2016, the appeal is filed directly with an administrative court. However, the FTA then assesses such appeals as rectification matters at the first stage. In the event the FTA accepts the claim, the appeal is considered annulled. If, on the other hand, the FTA rejects the claim entirely or partly, the matter is further processed as an appeal matter in the administrative court.

Furthermore, in petition proceedings, the decision by the FTA is always appealed directly in an administrative court assuming the decision is issued on or before 31 December 2016. Petition proceedings are applicable in matters relating to, *inter alia*, exemption order decisions regarding tax losses and tax relief decisions regarding non-profit corporations. It is important to note that as of 1 January 2017, the appellate body will also be the Board in petition proceedings.

Taxpayers may also, on their own initiative, amend or correct tax returns filed with the FTA as long as the final tax assessment for the tax year is still open.

As of 1 January 2017, the statute of limitations periods were largely harmonised. Accordingly the general statute of limitations governing a taxpayer's right to appeal in tax matters is three years. The three-year period is, as a general rule, counted as of the end of the tax year assessed, for example, for tax year 2017 the three year period will end on 31 December 2020. The former time limit of five years will, however, still be primarily applied to tax decisions and appeal proceedings concerning tax years up to and including 2016. Further, appeal proceedings regarding first-stage tax decisions issued 1 January 2017 or thereafter, based, for example, on tax audits concerning previous tax years, are assessed in accordance with the new legislative regime.

The former general statute of limitations of five years was counted from the beginning of the calendar year following the tax assessment of any given tax year. For example, the date of completion of tax assessment for tax year 2016 was 31 October 2017. The period of appeal for tax year 2016 will expire on 31 December 2022. This is the last day of the appeal period, and the last day for any appeal under the former regime.

Further, the tax recipients (the state, local municipalities, the church, etc.), represented by the Tax Recipients' Legal Services Unit (the Unit), an autonomous entity within the FTA, are also entitled to appeal a tax assessment of any given taxpayer. The statute of limitations for the Unit's appeal is four months as of the completion of the tax assessment of a tax payer for any given tax year. As an example, for tax year 2017, ending on 31 December 2017, tax assessment shall be completed by 31 October 2018 and accordingly the appeal of the Unit shall be filed by the end of February 2019. For tax years 2016 and earlier, the Unit's appeal is to be filed within a year of the end of the year of tax assessment of a taxpayer. As an example, for tax year 2016 the tax was assessed in 2017, and accordingly the Unit may file an appeal by the end of 2018.

It is also possible that the FTA will seek to reassess a taxpayer's taxation on its own initiative (reassessment). As of 1 January 2017, the reassessment concerning tax years 2017 and onwards shall, as a general rule, be accomplished within three years of the end of the relevant tax year. The three-year limit of the FTA may be extended by one year, however, for example, where the tax assessment is considered to be impeded by the taxpayer, or if the matter requires the FTA's cooperation with other officials. In addition, an 'extended time limit' of six years may be applied in matters concerning, for example, transfer pricing or financing arrangements between related companies.

Under the former regime, the FTA's income tax reassessment for tax years 2016 and earlier has to be accomplished in one, two or five years as of the year of tax assessment of a taxpayer. As an example, with a five-year period the reassessment for tax year 2016 has to be completed by the end of 2022. The time limit applied depends on the degree of guilt addressable upon a taxpayer, for example, the maximum time limit of five years is applicable in cases where the taxpayer has failed to properly file a tax return, or if the tax return or other document filed with the FTA has been false, incomplete or misleading.

As of 1 January 2017, for tax years 2017 and onwards, the reassessment by the FTA may be carried also to the benefit of the taxpayer within three years of the end of the tax year assessed. For tax years 2016 and older, however, the maximum time limit of five years applies; the time limit is two years in cases where there has been a calculation or typing error by the FTA, or the incorrect taxation has been based on incorrect or incomplete information received from third parties. In other situations for tax years 2016 and older, the statute of limitations is one year.

The statute of limitations for tax years 2016 and earlier have, however, varied depending on the tax matter in question. For instance, in VAT matters a taxpayer must appeal within three years of the end of the financial year in question. Furthermore, a taxpayer may appeal a tax assessment decision or a decision issued by an appellate body within 60 days of receiving notice of the decision, irrespective of whether the statutory limitation is exceeded.

In many cases the taxpayer may seek to obtain certainty with regard to a specific tax question subject to interpretation by applying for an advance ruling from the Central Tax Board or the FTA. The Central Tax Board is an autonomous body within the FTA with the specific purpose of issuing advance rulings in tax matters. However, unambiguous or less important matters may be examined by the FTA itself. An appeal against an advance ruling by the Central Tax Board is filed directly with the Supreme Administrative Court, whereas an appeal against an advance ruling by the FTA is filed with an administrative court. The time limit for filing the appeal to both instances is 30 days. An advance ruling application may also be rejected, in which case no advance ruling is issued. A decision rejecting an advance ruling application may not be appealed.

A taxpayer has the right to file a complaint to the chancellor of justice of the government or to the parliamentary ombudsman if the taxpayer considers a civil servant (fiscal agent) to have conducted an unlawful action. The chancellor and the ombudsman generally inform the authority of their view on the matter. Additionally the said authorities may recommend that the decision is amended, but they do not have the power to overturn a decision.

III THE COURTS AND TRIBUNALS

The Board is an independent body within the FTA. The Board functions in different units, each of which resolve appeals relating to various tax matters. As mentioned above, as of 1 January 2017, the primary appeal authority will be the Board regardless of the type of tax against which the taxpayer is appealing.

The Board consists of members representing taxpayers' organisations, municipalities and the FTA. Much like in administrative courts, proceedings in the Board are mainly written, and in many cases, the tax dispute is finally resolved by the Board, without ever entering court proceedings.

The FTA may, however, resolve an appeal addressed to the Board in the event the matter is so unambiguous that it does not require further examination. Such a decision issued by the FTA may also be appealed to an administrative court.

As explained above, the decision of the Board (adjustment decision) may be appealed to an administrative court. The appeal period is determined in accordance with the general statute of limitations, and in cases where the general statute of limitations has expired, the appeal period is no less than 60 days from the decision by the Board. Administrative courts consist of independent professional judges. In general, all matters are resolved through written proceedings, even though the courts have the possibility to hold oral hearings. Oral hearings may be initiated either at the request of a party or on the court's own initiative.

Decisions by the administrative court may be appealed further to the Supreme Administrative Court, which is the highest court of appeal in all tax matters in Finland. The period of appeal is 60 days from the decision by the administrative court. Appeals to the Supreme Administrative Court require a leave to appeal. Leave to appeal may be granted on the basis of precedential importance, a manifest error in the matter or weighty economic or other reasons.

The judges of the Supreme Administrative Court include the president and 20 justices, as well as a few temporary justices. As in any other instance, the proceedings are primarily written, oral hearings being even rarer in the highest court instances. The most significant decisions are published annually in the Court's yearbook. Additionally, some decisions are published as short summaries. Instead of granting a final judgment in the matter, the Supreme Administrative Court may also remit the matter to the administrative courts or the FTA for a new hearing.

In exceptional situations, it is possible to appeal a decision by the Board directly to the Supreme Administrative Court. This procedure is available upon decisions made on 1 January 2014 or later. Accordingly, the Supreme Administrative Court may grant leave to a direct appeal in cases considered important in order to establish a precedent for similar cases in the future, or for the uniformity of legal praxis. In cases where a direct appeal to the Supreme Administrative Court is sought, the Unit shall be reserved an option to issue its statement in the matter before referring it to the Supreme Administrative Court.

As mentioned above, the Central Tax Board acts as an autonomous advance ruling forum within the FTA, and makes significant tax-related decisions in Finland. It may issue advance tax rulings in matters having significant precedential value, many of which are published.

The Central Tax Board consists of members representing the FTA, taxpayers' organisations and tax recipients. Rulings by the Central Tax Board are ordinarily issued within a couple of months from the date of the request. The rulings are considered binding only on those tax questions to which they relate. Therefore, it is important for the taxpayer to consider that the ruling for a previous tax year may not be applicable after the tax year in question.

Advance rulings made by the Central Tax Board are appealed directly to the Supreme Administrative Court, and the appeal period is 30 days from receipt of the Central Tax Board's decision. In these appeals, no leave to appeal is required. It should be noted that matters relating to inheritance and gift taxation as well as transfer tax are excluded from the Central Tax Board's jurisdiction.

IV PENALTIES AND REMEDIES

In income tax matters, the FTA may impose a punitive tax increase on the taxpayer if the taxpayer has failed to fulfil his or her obligations. The administrative tax penalties may reach a maximum of 30 per cent of the unreported income, ranging typically between 5 and 10 per cent of the unreported or erroneously reported income. The tax increase may be adjusted in cases where it is deemed to be at a notably high level. Additionally, if the taxpayer's level of negligence is only minor, the tax increase may be reduced or dismissed.

Imposing a percentage-based tax penalty should, in principal, require wilful or grossly negligent conduct by the taxpayer (i.e., tax evasion). However, the scope of application of tax increase has been significantly increased in Finnish tax practice, and the FTA frequently applies percentage-based tax penalties in tax disputes concerning large corporate taxpayers.

It should also be noted that, from a human rights perspective, a punitive tax increase is considered a criminal penalty in Finland. The European Court of Human Rights has, on numerous occasions, considered punitive tax increases to be comparable to criminal sanctions. This notion naturally affects the discussion relating to the *ne bis in idem* principle. According to the said principle, the defendant cannot be prosecuted repeatedly on the basis of the same offence. The Finnish Supreme Administrative Court has stated, however, that the *ne bis in idem* principle only applies to individual taxpayers (natural persons) since only physical individuals can be sanctioned for tax crimes. The principle therefore does not apply to companies.

In VAT and payroll withholding-related disputes, percentage-based penalties are available regardless of wilful or grossly negligent conduct, and in cases of wilful or grossly negligent conduct, the penalties may cover the amount of the tax multiple times over. For example, the tax may be increased by 10 per cent in cases where the taxpayer's tax return or other such document contains a minor deficiency and the taxpayer has not complied with the request to correct said deficiency. Furthermore, in cases where the taxpayer has completely failed to carry out due reporting, fulfilled said reporting obligation substantially late or where the tax return or other such document is manifestly insufficient, the standard maximum penalty is 20 per cent of the amount of the tax. If the above-mentioned dereliction or erroneous report is considered to have taken place for the purposes of committing tax fraud, the tax may be increased by no less than 50 per cent and no more than three times the amount of the tax.

Certain significant tax penalties may also be payable regardless of whether there are any unpaid taxes claimed by the FTA. For instance, a failure to present due transfer pricing documentation in a given time frame may be sanctioned with a tax penalty amounting to a maximum of €25,000.

In addition to actual tax penalties, penalty interest may be payable on unpaid tax amounts. In income tax matters, the general late payment interest is 7 per cent per annum (2017). Furthermore, penalty interest is payable for non-reported taxes in the electronic VAT and employer payroll withholding and reporting system at the rate of 7 per cent.

Lastly, criminal sanctions may be imposed on the taxpayer in cases relating to severe tax evasion. Tax fraud occurs when an individual or business entity wilfully and intentionally falsifies information on a tax return in order to limit the amount of tax liability. Tax fraud essentially entails cheating on a tax return in an attempt to avoid paying the entire tax obligation. Aggravated tax fraud, being the most serious form of tax-related crime, is sanctioned with imprisonment for a term of at least four months and a maximum of four years. For non-aggravated tax fraud, the sanctions vary from fines to imprisonment for a maximum of two years. As for minor tax offences, they are generally sanctioned with fines. It should be noted that the monetary threshold for aggravated tax fraud is relatively low in Finland. According to legal praxis, monetary interests of some tens of thousands of euros have been considered sufficient for the tax evasion to qualify as aggravated tax fraud.

The statute of limitations applicable in criminal proceedings can be longer than the ones applied in tax matters. For instance, aggravated tax crime becomes time-barred after 10 years. Also, a taxpayer found guilty of a tax crime may be ordered to pay damages to the tax recipients in respect of all the years that are not time-barred according to the statute of limitations applicable in criminal proceedings. It should be noted that in criminal matters, taxpayers have no responsibility to provide any evidence of their innocence, but the prosecutor has to fulfil its burden of proof.

V TAX CLAIMS

i Recovering overpaid tax

The overpaid income tax is generally refunded to a taxpayer as a tax refund if the taxpayer's tax withholdings or tax prepayments exceed the final amount of tax payable for the tax year in question. The refund is made approximately one year after the end of the relevant tax year or financial period. A refund of overpaid taxes may be possible even before the regular tax refund payment date upon a specific application.

A separate refund application should expressly be filed to the FTA when a non-resident taxpayer has been charged withholding taxes in Finland that exceed the maximum level allowed under an applicable tax treaty and EU principles. A similar refund process also exists in matters relating to transfer taxes.

Additionally, overpaid VAT may be refunded automatically to the taxpayer from the electronic VAT and employer payroll withholding and reporting system based on the periodic tax return filed by the taxpayer. The FTA issues a separate decision on the refund application only if it rejects the periodic tax return partially or entirely. This decision is subject to a separate appeal.

ii Challenging administrative decisions

In Finland, the vast majority of administrative appeals in tax matters relate to the interpretation of the technical tax rules applicable in the case at hand. In recent years there have been number of significant tax disputes dealing with tax avoidance, transfer pricing and whether certain transactions could be recharacterised based on a specific transfer pricing rule in Finnish tax legislation. The FTA has adopted approaches and interpretations deviating from the ones adopted by taxpayers in general. The matter is further discussed below.

Additionally, there are a number of examples from case law that relate to, for example, the protection of the taxpayer's legitimate expectations in cases where the taxpayer has relied on an established tax practice or advice issued by the FTA. The protection of legitimate expectations secures the realisation of the binding foundations of the Finnish tax system, and, as an established norm, must be taken into consideration by the FTA in its decision-making. A claim based on the protection of legitimate expectations may succeed in the event that a decision by the FTA conflicts with its earlier advice or an established practice.

Further, the rules on the taxpayers' obligation to provide information to the FTA are currently being broadly discussed, and there are significant pending disputes addressing that issue.

iii Claimants

The taxpayer and anyone whose taxation is directly affected by an assessment decision issued is entitled to plead the case in the appellate proceedings. In practice, this requires an actual tax impact in the specific case at hand upon the appellant. For example, the spouse of an individual taxpayer may have a right to appeal on this basis, and similar cases may arise in relation to partnership and bankruptcy estates. In these cases, a question of consequential change may be applicable. In the event a tax decision of a taxpayer affects the taxation of another, the FTA may reassess the latter's taxation accordingly.

In VAT matters, a person subject to VAT may file an appeal in the tax process in relation to a VAT matter reported by him or her. Specific conditions may apply upon a seller and a buyer in sales transactions and should be considered on a case-by-case basis and accounted for in entering transfer agreements. Applicability of a specific set-off possibility as per the Finnish Value Added Tax Act should be considered in cases where the VAT has been executed erroneously between the parties of a sales transaction.

In general and as explained above, the tax recipients (the state, local municipalities, the church, etc.) are represented by the Unit. The Unit is not bound by the decisions and guidelines of the FTA, and has a right to appeal tax assessment decisions as well as act on behalf of the tax recipients in all tax appeal matters. The Unit is divided into three groups: personal taxation and preliminary taxation; corporate taxation; and VAT matters.

It should be noted that the Unit has the right to appeal tax decisions to the benefit of a taxpayer as well. Respectively, taxpayers may request the reassessment of a tax decision on their own initiative on the basis of not having paid sufficient amount of taxes.

VI COSTS

Taxpayers have the right to claim compensation for their tax litigation costs. It should be noted, however, that the right only applies to court proceedings; administrative proceedings leading up to the court proceedings, including proceedings in the Board, are excluded from this rule. In addition, a successful claim for compensation usually requires that the taxpayer succeeds in his or her principal claim, the matter has significant value relating to the interpretation of law, or that granting such compensation can be based on another special ground. Tax litigation costs are therefore, in practice, rarely compensated even in cases where the final decision is in favour of the taxpayer.

This situation stems directly from administrative procedural legislation according to which a party should be held liable for the other party's legal costs only if, in view of the resolution of the matter, it would be unreasonable to make the latter bear his or her own costs. The interpretation of this standard has been strict, and any possibility to recover legal costs has typically required an obvious error by the FTA. Even in these cases, the compensated costs are often limited to a nominal amount.

Respectively, the chances of the FTA recovering any costs from the taxpayer are extremely slim. Under current procedural rules, a private party should not be held liable for the costs of a public authority, unless the private party has made a manifestly unfounded claim. The starting point is understandable and pertains directly to the fact that the tax authority is always in a stronger position in such proceedings.

These rules have, however, caused administrative litigation, especially tax disputes, to significantly differ from civil litigation as the principle of full compensation does not materialise.

VII ALTERNATIVE DISPUTE RESOLUTION

Currently, means of alternative dispute resolution, such as arbitration or mediation, are not utilised in tax disputes in Finland. It is noteworthy, however, that the Commission's proposal for a Council Directive on Double Taxation Dispute Resolution Mechanisms in the EU has received positive feedback as an instrument that would increase the range of taxpayers' effective remedies in international tax disputes, which seems to echo the sentiment and aim of the OECD/G20 Base Erosion and Profit Shifting (BEPS) project to improve dispute resolution mechanisms and minimise risks of uncertainty and unintended double taxation. The said Directive is currently in the process of being implemented.

In the light of the multilateral instrument (MLI) implementing the OECD measures and transposing the results from the BEPS project and the mandatory binding arbitration provision therein, even though Finland signed the MLI, there are number of reservations upon the arbitration proceedings made by Finland. It should be noted, however, that arbitration may also be carried out in accordance with the EU Arbitration Convention.

VIII ANTI-AVOIDANCE

Finnish tax legislation includes a general anti-avoidance rule for the purpose of preventing tax avoidance. According to the rule, the legal form of a situation or a measure that does not correspond to the true nature or purpose of the matter shall be taxed as if the correct form had been used. In order to avoid the application of the anti-avoidance rule, the arrangement in question must have legitimate business-related justifications instead of mere tax-related reasons (i.e., business reasons). When applying the anti-avoidance rule, the legal form of an action may be disregarded for tax purposes, in which case the amount of tax will be assessed as if the transaction had been carried out using the correct form.

The FTA and the courts apply the principle of substance over form as stated in the tax legislation. If the FTA concludes that there is no or no adequate business reason underlying a transaction between related companies, or that a transaction has been given a legal form that does not correspond to its true nature, it may consider the transaction to be null and void for tax purposes, and assess the amount of tax as if the real form had been used. Disregarding form for tax purposes does not affect the validity of the transaction as such, but it may still be regarded as valid under company law and for other legal purposes.

If it is evident that a company has paid its shareholder more than a reasonable amount as salary, housing benefit, entertainment or insurance, or if the company pays its shareholder interest, lease payments, commission or other such benefits, and the amount exceeds what the company would ordinarily pay to third parties, the amount of tax may be assessed based on the amount that the tax authority deems to be in excess of the reasonable amount. This type of conduct is referred to as hidden profit distribution.

If the FTA concludes that the arm's-length principle has not been observed in transactions between related companies, the taxation of these companies may be corrected and reassessed to reflect the arm's-length conditions (transfer pricing). This reassessment does not require any evidence of tax-avoidance. Finnish subsidiaries and branches of non-resident companies are treated similarly to resident companies.

IX DOUBLE TAXATION TREATIES

Finland has an extensive network of double taxation treaties in the areas of income and capital taxes. The treaties are based on the OECD Model Convention. Finland's tax treaties are based either on the resident state principle or the source state principle, which is in line with Finnish domestic tax legislation.

Finnish domestic law does not include any special rules concerning the interpretation of tax treaties, but the interpretation is based on the Vienna Convention, the OECD Model Convention as well as basic domestic principles governing the interpretation of Finnish tax legislation. The Supreme Administrative Court acts as the final forum to interpret tax treaties in Finland.

It should be noted that the Supreme Administrative Court has effectively applied the OECD Model Convention in its rulings, because of which the Convention should be considered a source of interpretation for the Court. The role of the OECD Transfer Pricing Guidelines (the OECD Guidelines) and its commentaries is more unclear, however, and the question of the relevance of these guidelines as a source of interpretation in Finnish taxation proceedings remains ambiguous. For instance, the FTA has drawn rather far-reaching conclusions in transfer pricing cases from relatively vague statements in the OECD Guidelines, whereas the Supreme Administrative Court has in its 2014 ruling stated that the OECD Guidelines cannot extend the scope of national legislation to the detriment of the taxpayer. This statement is currently applied as the general rule in transfer pricing matters.

There have been a number of significant decisions by the European Court of Justice regarding tax matters in Finland, which ultimately serves as proof of the influence that EU principles have on Finnish tax regimes.

It can be noted, however, that there is some reluctance in adopting the EU principles or decisions by the European Court of Justice. For instance, in its 2002 ruling the Supreme Administrative Court rejected an appeal regarding a tax assessment where a Belgian subsidiary of a Finnish company had been treated as a controlled foreign corporation for Finnish tax purposes without referring the matter to the European Court of Justice. Based on a later ruling by the European Court of Justice in the matter C-196/04, *Cadbury Schweppes*, the Supreme Administrative Court finally annulled its decision in 2011.

The European Court of Justice ruled in July 2013 in its decision in the case C-6/12 *P Oy* that the Finnish tax loss carry-forward system, whereby the FTA has its own discretion based on its own guidelines to decide which companies get the permission to use the tax losses forfeited due to an ownership change, was not against the illegal state aid provisions provided by EU law. After the ruling by the European Court of Justice the Supreme Administrative Court has issued two published decisions on the loss carry-forward system in favour of the taxpayer. First, the Supreme Administrative Court has ruled that the Finnish loss carry-forward system is not prevented by the state aid in question. Second, the Supreme Administrative Court held that a loss carry-forward permission could be granted in a case where the tax-related criteria were fulfilled even though the criteria unrelated to the tax regime were not fulfilled. For the time being, the FTA has not issued any new guidelines on whether loss carry-forward permission decisions should be based on tax-related criteria only. Hence, the future developments in this matter remain to be seen.

As a Member State of the European Union, Finland has implemented the VAT Directive in the Finnish Value Added Tax Act. In principle, all resident entrepreneurs who are engaged in the commercial supply of goods or services are subject to VAT and are required to register for VAT purposes. However, suppliers of selected goods and certain services are exempt. The system is based on self-assessment by registered entrepreneurs. Entrepreneurs are required to pay VAT even when their products are used for private purposes or given as free gifts. The general VAT rate is 24 per cent. Reduced rates of 14 per cent and 10 per cent apply to, for example, restaurant services and transport services. There are a large number of exemptions from VAT, such as financial services and the sale of real property. In addition, a VAT threshold system has been incorporated into the Finnish tax system according to which there is no obligation to register for VAT purposes, and no VAT is levied on the taxpayer if the annual turnover of the taxpayer's business activity does not exceed €10,000. When this threshold is exceeded, the taxpayer receives a relief that gradually decreases with the increase in turnover. The full amount of VAT is levied if the annual turnover is currently €30,000 or more.

X AREAS OF FOCUS

Following the relatively aggressive approaches taken by the FTA in past years in focusing on transfer pricing matters, there has been somewhat of a change towards the assessment of various procedural rules and regulations. The means applied by the FTA in its aim to intensively collect revenues are increasingly questioned by the taxpayers.

Transfer pricing and allocation of income in a group structure continue to be topical in the Finnish tax practice. Also various holding structures, including reinvestments in acquisitions structures in connection with mergers and acquisitions are actively scrutinised by the FTA. Further, in private equity, traditional carried interest arrangements are very much in the focus of the FTA and should be carefully considered both looking back as well as going forward to assess and prepare for the potential approaches to be taken by the FTA.

XI OUTLOOK AND CONCLUSIONS

The Supreme Administrative Court issued two important rulings in 2016[2] that relate to structuring and financing arrangements applied in corporate structures with Finnish branches as well as tax planning questions therein. The rulings concerned the deductibility of interest expenses on group internal loan financing, allocated to a Finnish branch of a non-Finnish corporate entity, based on a shareholding by the branch in a group subsidiary. In the first case, it was ruled that the shares did not constitute assets allocable to the branch, and, therefore, as a result the interest on the loan was not deductible. In the second case, the Finnish GAAR was applied, and it was ruled that the underlying series of arrangements were, when considered constituting a whole, artificial, and thereby there was no deductibility of interest admitted.

Further, the Helsinki administrative court ruled in its interesting case of August 2017 on the FTA's request to access the Panama papers. In brief, the FTA requested a full surrender of, and access to, the documents leaked by an anonymous source, handing the material over to German newspaper *Süddeutsche Zeitung*, analysing the data thereafter in cooperation with the International Consortium of Investigative Journalists. Eventually, two Finnish journalists from the Finnish national public service broadcasting company were given access to the documents, and the FTA went after them. The matter was in essence about weighing of the freedom of speech and the protection of journalistic sources as constitutional rights against the specific obligation to surrender third party information upon a request of the FTA for the purposes of tax assessment. The court ruled that FTA had no right to demand the data for the tax assessment purposes. This case has been appealed upon and is, therefore, still pending.

The Supreme Administrative Court recently issued two precedential cases (2017:145 and 2017:146) concerning transfer pricing of intragroup services. The first ruling referred, *inter alia*, to the principle according to which the specific Section in the Act on Tax Assessment concerning transfer pricing adjustments does not authorise a recharacterisation of a transaction, and, therefore tax assessment shall first and foremost be based on the legal form of a transaction. The second case also concerned the pricing of intragroup services and whether a margin was to be charged under the circumstances. It was concluded that there was margin to be added and that margin was to be based on the value added to the group companies being served. Further, based on SAC, in terms of group internal services like the ones scrutinised, there are no comparables available.

The rulings continue the discussion revolving around transfer pricing and tax planning, as well as the substance-over-form tool applied by the FTA in these matters. Contrary to the approach adopted by the FTA, the Supreme Administrative Court has stated that recognising a transaction should be based on its civil law form, disallowing some of the interpretations made by the FTA. Nevertheless, it is likely that even more transfer pricing related tax disputes will arise in the near future as the most recent cases would suggest.

In the light of future challenges in tax matters, it should be noted that the factual implementation measures of the MLI, implementing the OECD measures and transposing the results from the BEPS project into tax treaties worldwide will take time, however, and it is considered unlikely that it would be applicable before year end 2018. This causes, however, somewhat unpredictable expectations and insecurity in terms of taxation in Finland.

2 Rulings SAC 2016:71 and. SAC 2016:72 relate to the allocation of shares and interest deductibility by a Finnish branch of a non-resident company. In the latter ruling, the Supreme Administrative Court also took a stand on the arrangement's artificial nature under the anti-avoidance provision.

Further, it should be noted that the scope of application of the specific Finnish interest deduction limitation rules are subject to change due to the EU Anti-Tax Avoidance Directive (2016/1164/EU), which is likely to be applied also with respect to activities such as real estate investments and the related structures currently not within the scope of the application of said rules. Accordingly, as Finland is in the process of implementing the most recent BEPS reforms. This will likely give rise to divergent interpretations in the relatively near future, which could lead to an increasing amount of tax disputes.

Chapter 12

FRANCE

Philippe Derouin[1]

I INTRODUCTION

The French system for assessing, auditing and challenging taxes has been extremely constant over the past few decades. The major changes essentially reflect progress in technology (use of digital data and equipment in tax audits, tax filings, tax payments and dispute procedures), the growing influence of international instruments of human rights and European Union law, and a tendency of both the tax authorities and taxpayers to be more aggressive than they used to be. Alternative dispute resolution methods have not developed, and a very effective method was terminated in 2010.

The French tax system is largely based upon self-assessment, with taxpayers filing their tax returns, and often assessing their own tax, on the basis of their assessment of the facts and interpretation of the law. In recent years, the filing and reporting obligations of taxpayers have been increased substantially, especially with respect to their cross-border assets and activities. Likewise, the French tax authorities have been granted easier access to widened means of information by the legislator in domestic situations and by international instruments in matters containing a foreign element.

Statutes of limitation have been successively amended to reduce limitation periods for certain taxpayers' claims, and to extend the periods available to the tax authorities for making reassessments or initiating criminal procedures. The criminal periods of limitation have been doubled, and no effective limitation applies to money laundering of the proceeds of tax fraud.

Statistics published by the French tax authorities in their annual report show that the overall number of tax reviews by the French tax authorities remains stable. A vast majority consists of unilateral reviews by a tax auditor of documents available to the authorities both for individuals (close to 1 million of them in total) and businesses (close to 300,000 of them in total). Taxpayers must be informed of the outcome of such reviews and may comment before the tax is assessed. More formal audit procedures are more inquisitive, and involve both a discussion with the taxpayer and counsel and access to an internal review. Their numbers are tending to slowly decline: in 2016, 45,314 audits with accounting checks were carried out with businesses, and 3,557 thorough audits of personal situations took place with individuals.

The amounts of reassessments and penalties slowed down to €19.5 billion in 2015, partly because of the voluntary disclosure programme for individuals holding assets abroad. Corporation tax reassessments also went down to €4 billion. The total amount of taxes and

1 Philippe Derouin, a member of the Paris Bar, runs his own law firm, Philippe Derouin.

penalties assessed in serious frauds (defined as triggering 40 per cent penalties or more after a tax audit) also went down to €4.9 billion, although this represents the same 31 per cent proportion of tax and penalties assessed in formal tax audit procedures over preceding years.

The amount and proportion of tax and penalties effectively collected over a period remain at approximately 55 per cent of the assessed amounts. This relatively stable proportion slightly increased to 57 per cent in 2015 and 2016 as a result of the voluntary disclosure programme. A 55 per cent proportion tends to confirm that a substantial amount of the taxes and penalties assessed after a tax audit are effectively reduced, by approximately €8 billion in total per year, as a result of internal reviews by, or negotiations with, the French tax authorities resulting in pre-litigation settlements; and also in pursuance of court decisions upon disputes.

II COMMENCING DISPUTES

Although there can be many steps, or administrative decisions, before a tax is assessed, taxpayers are generally barred from initiating any action until a tax is assessed. Only few exceptions enable an actual or potential taxpayer to start an action before a tax deed has been issued.

i Petitions for judicial review of administrative guidelines

Taxpayers, and certain taxpayers' associations, may file petitions for a judicial review of administrative guidelines that may be declared illegal on any point where they give an interpretation of the tax law that differs from the decision of an administrative judge on the relevant point. Such procedures have been used, successfully at times, to shortcut the lengthy administrative and judicial process of a tax controversy. Some of these petitions may be the basis for the administrative court to refer a preliminary question either to the Constitutional Council on certain matters where a legislative provision is challenged against any fundamental human rights enshrined in the French Constitution, or the European Court of Justice (ECJ) where a question of EU law is involved.

The recent challenge to the 3 per cent corporation tax surcharge on distributed amounts provides such an example where petitions were filed by certain taxpayers and by AFEP, the French association of large businesses, before the Council of State in 2016. Both categories of petitioners claimed the administrative guidelines were illegal because they commented upon a piece of legislation that was against the principle of equal rights on certain points and contrary to the EU Parent–Subsidiary Directive on other points. The Council of State decided in June 2016 to refer the equal treatment point to the French Constitutional Council, and the Directive points to the ECJ. The Constitutional Council found the law to be discriminatory and unconstitutional in a ruling of 30 September. The law was amended accordingly by the Finance Act of 29 December 2016, which extended the benefit of an exemption for intragroup dividends to domestic, European and most third-country corporate relationships. The EU case was decided by the ECJ in May 2017 after which the French Council of State further referred the case to the French Constitutional Council, which finally decided in October 2017 that the 3 per cent surcharge on dividends was entirely unconstitutional. The cost to the government approximated €10 billion and required an extraordinary surcharge to partly finance it.

Other parallel procedures are less radical, and have both narrower scope and lower chances of success.

Petitions for judicial review could also be introduced with respect to individual decisions, such as an unsatisfactory ruling, notified to a taxpayer. The French tax courts have been excessively restrictive upon the admission of such petitions on the ground that, except in very special circumstances, the decision was not separable from the taxation procedure.

ii Pre-audit search warrants

Prior to a tax audit, the tax authorities may apply to a civil judge for a warrant to search premises and attach documents that could be used as evidence that a business is carried out in France and should be taxable in France. Approximately 200 searches are performed on that basis each year. Many undisclosed permanent establishments of foreign entities are being the purpose of such warrants. As a result of an European Court of Human Rights (ECHR) ruling in *Ravon*, French law was amended to the effect of allowing the potential taxpayer and the tenant of the searched premises to immediately appeal from the warrant to the president of the court of appeals and challenge the basis for the authorities' suspicions. They may also challenge the validity of the search on grounds of breach of confidentiality. Such appeals and challenges are commonly introduced shortly after the searches have been made and before the tax assessments are established. They seldom succeed in court. However, challenging the warrant may often be useful as it enables the potential taxpayer to access the documents supplied by the French tax investigators in their application for the warrant and bring forward certain points of defence to be considered, if not by the court, by the French tax authorities at a later stage.

After the search, the French tax authorities may use the collected documents against the potential taxpayer only after carrying out a full audit of its accounts with the assistance of a counsel and a discussion in person. The French tax authorities simultaneously send a request for omitted tax returns. Although the non-resident entity may claim it has no taxable presence in France, where it maintains no corporate accounts and consider that it has no tax return to file in France, it is generally advisable to cooperate with the French tax authorities.

Under French tax law, any audited business must supply its accounts and supporting documents for inspection, in their original digital format where applicable. Where cross-border transactions occur with related parties, the audited entity must also make its transfer pricing policy available to the French tax auditors. As a result, the French tax auditors would expect, and generally require, to review such documents, failing which they are entitled to formally record that they were not presented and to draw certain conclusions.

A non-resident entity that considers that it has no taxable presence in France presumably would not have separate accounts, or a transfer pricing policy, with respect to its operations in France, especially where these operations are carried out by a French subsidiary or other related entity. As a matter of law, there is no requirement for a foreign entity to have separate accounts for its French operations, even where carried out through a permanent establishment. Business entities established outside France and doing business in France from abroad accordingly are entitled to indicate that they did not maintain separate accounts but should be prepared to provide the relevant documents to French tax auditors. The accounting documents could be their full set of accounts in their original digital format and any relevant transfer pricing policy.

Depending upon the circumstances, these documents may support the position that the entity had no, or a limited, presence in France, with no or limited tax consequences. This may be true especially where the deemed permanent establishment in France can be seen as merely supplying support functions to the head office and principal activities abroad. In such a situation, no VAT would apply, especially within the European Union, and the corporate income tax implications would not substantially differ from a transfer pricing adjustment, if any.

In anticipation of such possible outcomes, the potential taxpayer may defer to the request of the French tax authorities and file the corresponding tax returns within 30 days of the request to do so. In these tax returns, the foreign entity may indicate why there was no reportable VAT transaction in France or how the transfer pricing policy would result in no or limited taxable income attributable to the hypothetical French permanent establishment. If a reassessment occurs, the entity may claim treaty benefits where applicable and access the mutual agreement procedure.

This scenario implies that, at some stage, the investigated taxpayer makes the decision to either challenge the existence of the permanent establishment, including before the court, or to negotiate with the French tax authorities, concede the establishment and mitigate the French tax consequences.

As a means to press the non-resident entity for such admission, the French tax authorities may take the position that the permanent establishment was not only undisclosed but hidden or concealed. Such an ugly characterisation would result in an extended period of limitation (10 years instead of three or four) and the risk of a severe penalty (80 per cent instead of 10 per cent). Depending upon the circumstances, and the country of origin of the taxpayer, defences may be available either on both grounds or in relation to the penalty only.

iii Tax claims and challenges

French tax disputes commence when a tax is assessed or paid and the taxpayer either challenges the administrative reassessment or claims for a tax refund.

Under French tax procedure, the first step for challenging a tax assessment or for claiming a tax refund is a petition to the head of the relevant tax department whatever tax is involved and even where the tax was assessed according to the taxpayer's return. Around 3 million petitions are filed, and decided upon, each year, mainly with respect to income taxes assessed by the authorities on individuals or to local taxes. Businesses file approximately 50 to 56,000 such petitions on corporation tax and a similar number on VAT.

The petition must be filed, before any referral to any court, to the head of the tax office that has jurisdiction over the relevant tax. It must:

a specify the tax that is being challenged;
b provide a summary of the facts, pleas and arguments;
c be signed by the taxpayer or an authorised agent; and
d be accompanied by a copy of the Treasury claim concerned (assessment notice, collection notice or withholding document, in the case of withholding taxes).

Generally, the claim must be filed by 31 December of the second year following that of the assessment, collection notice or payment. An extension applies after a tax audit.

Submitting a claim does not exempt the taxpayer from the obligation to pay the taxes and penalties imposed. However, the taxpayer may request that payment be suspended. Suspension of payment is granted in exchange for the provision of guarantees (e.g., mortgage or pledge up to the amount of the principal taxes; penalties need not to be secured). The suspension remains until a lower court decision on the dispute is issued.

If the lower court rules in favour of the tax authorities, the suspended tax and penalties become payable, and the taxpayer would be liable to pay a 5 or 10 per cent surcharge plus interest on the arrears. The rate of interest was 0.4 per cent per month or 4.8 per cent per annum up to 31 December 2017 and has been reduced to 0.2 per cent per month or 2.4 per cent per annum since 1 January 2018. Conversely, if the court finds for the taxpayer who has already paid the taxes claimed, the taxpayer is entitled to interest on arrears at the same rates. Considering the prevailing market rates, it has been and still could be financially advantageous for taxpayers to pay and not to apply for suspension.

The authorities must decide on a claim within six months. Failing a formal decision after six months or if the claim is totally or partially rejected, in writing or implicitly, the taxpayer is entitled to bring an action before the administrative or civil courts, depending on the case.

III THE COURTS AND TRIBUNALS

Where the taxpayer is not satisfied by a decision, the dispute may be brought before the courts. There are no special tax courts in France, and tax cases are heard by the common administrative, civil or criminal courts, depending upon the tax that is challenged or the penalty applied.

i Types of court

Administrative courts have jurisdiction over income tax, corporation tax, VAT and local taxes, and over the related tax penalties. Each year, approximately 20,000 tax cases are introduced in the lower administrative courts. In 2016, 3,879 appeals were recorded with administrative courts of appeals, and 440 further appeals were lodged with the Council of State, the supreme administrative court. Overall, the administrative courts decided partly or totally in favour of the taxpayers in approximately 12.4 per cent of the cases (13.6 per cent on VAT matters, and 14.8 per cent on income and corporation tax matters) in 2015.

Civil courts have jurisdiction over stamp duties, gift and inheritance taxes, annual wealth taxes and some excise duties, together with the related tax penalties. In 2016, 868 cases were filed with the lower civil courts, 220 with the courts of appeals and 58 with the Court of Cassation, the supreme court of the judiciary. Civil courts decided in favour of the taxpayers in approximately 33 per cent of the cases.

Criminal prosecutions may be initiated at the request of the tax authorities on any matter of tax fraud, which is widely defined, whatever the tax involved. Approximately 900 such procedures are held each year. Around 80 further procedures are investigated by the 'tax police', a special department of the prosecutor's office with tax auditors The criminal procedure for money laundering of the proceeds of tax fraud (no public statistics, so far) or for tax swindles (around 133 cases on VAT carousel and other tax credit cases) may be initiated by the public prosecutor without request from the tax authorities. Criminal sanctions such as fines and imprisonment may be applied on top of the tax penalties.

Each type of court comprises three levels: the first level consists of the administrative courts and the courts of first instance; the second level consists of the courts of appeal and the administrative appeal courts; and the highest level consists of the Court of Cassation and the Council of State, which generally rule only on points of law and not fact.

Each court may, and in certain situations must, refer certain questions either to the Constitutional Council or the ECJ. The Constitutional Council has exclusive jurisdiction to decide upon the conformity of French legislative provisions with the human rights protected by the Constitution, including the Declaration of Human and Civic Rights of 1789. Several dozens of tax provisions have been reviewed accordingly upon the request of taxpayers. Referrals to the ECJ are commonly ordered by the Council of State or the Court of Cassation, including for tax matters. Lower courts are much more restrictive or reluctant to do so, and some, like the administrative courts of Paris, have never referred a tax case to the ECJ.

ii Proceedings

Before French courts, and particularly in relation to tax matters, the procedure is conducted primarily in writing, and results in an exchange of briefs and pieces of evidence between the taxpayer and the authorities.

The taxpayer must petition the court within a prescribed time following the formal rejection of its claim by the tax director. The time limit is generally two months. The petition must be reasoned and attach the tax deed, plus any piece of evidence the taxpayer would rely on, even where previously submitted to the tax authorities, since these are not expected to forward any of these to the court.

The assistance of a registered attorney is not legally required in the first instance. Before the appellate courts, representation by a registered lawyer is mandatory. Before the Council of State and Court of Cassation, the taxpayer must be represented by one of the 60 barristers admitted to represent clients before these supreme courts. This restriction does not apply before the Constitutional Council or the ECJ, where any registered lawyer may assist the parties, and the government is generally represented by its own agents.

No more than two briefs are commonly exchanged by each party, but this is not a hard rule. Following these exchanges, the court may, and often does, pronounce the closure of the period for submissions (also named 'instruction') and schedules a date for the hearing.

Administrative and civil courts conduct hearings differently and have different views of their own missions. Civil courts recognise taxpayers' right to a fair trial before them, in line with Article 6 of the European Convention of Human Rights.[2] Administrative courts have taken the opposite view on the grounds that Article 6 applies only to civil obligations and criminal charges, and would not apply to tax matters except where the tax penalties are equivalent to a criminal sanction. This position was not altered after the European Charter of Fundamental Rights, which does not distinguish between these positions, obtained treaty force in December 2009.

In practical terms, these differing views entail certain consequences, the most important of which are that the administrative courts consider that it is part of their mission to challenge the petition of the taxpayer, including on points of law and points of fact that are not discussed by the French tax authorities; and that in doing so, they are not raising a plea of their own motion, and accordingly can forgo from informing the parties (i.e., the taxpayer) and inviting them to submit their comments.[3]

Before both types of courts, a reporting judge summarises the case at a hearing. Witnesses and experts are not heard. Both parties are entitled to present oral arguments and plead their case (however briefly).

Before the administrative courts, a public reporter, who is a member of the court that does not participate in the decision-making, delivers an opinion that is based upon a draft judgment, and may raise issues that were not addressed by the parties. At this point, the parties are informed of such issues. They may then make very brief observations and,

2 C cass; Ass plén 14 June 1996 *Kloeckner*, bull civ AP No. 5.

3 Council of State 2 June 2010 No. 318014 *Fondation de France*.

where appropriate, file a 'post-hearing brief' to clarify any points that have been raised, or overlooked, by the public reporter. The court must consider this post-hearing brief and decide whether it reopens the case before reaching a decision.

iii Effectiveness of the system

The costs of such procedures are fairly limited and are not an obstacle for taxpayers to put their case. However, the length of the proceedings is a weakness that may dissuade taxpayers from initiating them. One reason is that the tax authorities often take a long time to reply to briefs filed by taxpayers, and taxpayers do not really have any way to compel the administration to issue a response.

It is not uncommon for the administrative courts of first instance to take up to three years to rule on a matter brought before them. Regarding appeals, it can take up to 10 years to resolve a tax dispute, which penalises the taxpayer more than the tax administration.

A taxpayer who has been unsuccessful before the national courts may apply to the ECHR where fundamental rights are at stake. However, this is extremely rare, even though, in certain cases, the judgments delivered by the ECHR have had a real impact on French tax procedures.[4]

IV PENALTIES AND REMEDIES

i Tax penalties

Default interest

Tax increases set by the tax offices are systematically increased through default interest of 0.2 (0.4 until 2017) per cent each month, that is, 2.4 (4.8 until 2017) per cent per annum. This default interest is not considered a penalty as such, but rather as fair compensation for the damage incurred by the Treasury owing to late payment of taxes by the taxpayer.

Since the default interest is not considered a penalty, it is applied automatically and does not have to be motivated by the tax authorities.

In practice, and for the same reason, it has become very difficult to obtain a total or partial exemption from default interest even when taxpayers act in good faith.

Surcharges

Assessments for back taxes are often accompanied by surcharges, the rate of which varies depending on the circumstances of the case and on whether the taxpayer is deemed to have acted in good faith.

A 10 per cent surcharge applies in cases of delay by the taxpayer in satisfying his or her declaratory obligations, plus default interest. A 40 per cent surcharge applies to unpaid taxes either where the taxpayer did not file its tax returns after a second formal request or where the authorities consider that the taxpayer's dissimulation of declared amounts was deliberate. This latter surcharge is raised to 80 per cent in the event of fraud and 'abuse of the law'. The deliberate nature of offences (*mens rea*) must be demonstrated by the tax authorities, who

4 See in particular ECHR, 21 February 2008 No. 18497/03 (*Ravon*) in connection with house searches, and ECHR 30 June 2011 No. 8916/05 (*Jehovah's Witnesses*) in connection with the retroactivity of tax measures.

apply the above penalties in approximately 30 per cent of reassessments following full audits, and who bear the onus of proof in the case of a challenge before the tax courts. Tax penalties may be, and often are, mitigated by the tax authorities to reach out-of court settlements.

ii Criminal penalties

On top of tax surcharges, criminal penalties may apply in a wide range of situations.

Legal and natural persons may be found guilty of tax evasion where they fraudulently evaded or tried to fraudulently evade the assessment or collection of tax. The French equivalent of deferred prosecution agreements now is available to legal entities, and the first such agreement was made with HSBC Private Bank Swiss to settle the criminal charges against it, including laundering of the proceeds of tax fraud. The agreement was approved by the president of the Paris court on 14 November 2017. It provides for a total payment of €300 million, made up of a criminal fine of €158 million, reported to be the maximum in the circumstances, and a €142 million indemnity to the French tax authorities, reported to have been based upon an average tax rate applied to the amount of managed assets less the sums recovered or to be recovered from the taxpayers.

Criminal penalties for 'ordinary' tax evasion include a fine of €500,000 and a prison sentence of up to five years. The fine is increased to €750,000 if the evasion was carried out or facilitated by means of purchases or sales without invoices, or where invoices do not relate to real transactions.

'Aggravated' tax evasion may be subject to a €2 million fine or seven years' imprisonment in situations where it was carried out or facilitated by using foreign bank accounts or entities such as trusts located in third countries, false identities or any false documents, fictional or artificial acts or entities, or abusive tax residence in another state. The same penalties would be applicable in cases of tax fraud carried out in organised groups. Any accessory to such offences may be charged with the same penalties.

The Constitutional Court found the French system to be compatible with the '*non bis in idem*' principle on the basis that criminal prosecutions are dedicated to the most serious offences, which may be selected by the tax authorities upon a favourable opinion from the Tax Offence Commission. As previously mentioned, the tax authorities file around 1,000 tax evasion complaints each year.

The statute of limitations applicable to the offence of tax evasion has been extended from three to six years by the Tax Fraud Act, which also introduced a 'repentance provision' according to which the offender may benefit from a reduction of a prison term on the condition that he or she helps the tax authorities to identify his or her accomplices.

V TAX CLAIMS

i Recovering overpaid tax

Taxpayers who believe they have paid too much tax and wish to claim it back must follow a procedure similar to that for challenging a tax reassessment. The procedure applies to a taxpayer residing abroad who has incurred French withholding tax at the statutory rate, and who wishes to invoke a bilateral tax treaty to benefit from a reduced rate of withholding tax and to claim back the excess tax paid. Both the non-resident taxpayer and the paying agent may lodge a claim with the relevant office (in this example, the tax office for non-residents) within the legal time limit. If the claim is implicitly or explicitly rejected, the taxpayer or the withholding agent may bring the case to the competent courts.

In the particular case where it is claimed the tax in question breaches EU law, taxpayers are entitled to demand an exemption from or a reduction of the taxes and the repayment of any excess based on the fact that the texts applied are contrary to EU law; and compensation for the damage incurred. The amount of tax repayment, plus interest, is assessed each year in the Finance Bill. Currently it stands at approximately €21 billion.[5]

The remedy follows the tax claim procedure described above, particularly as regards the time in which to file an action.

ii Challenging administrative decisions

Taxpayers and certain other persons may ask an administrative judge to review certain administrative decisions that they deem illegal within the framework of an abuse of power contest.

When examining an abuse of power contest against an administrative act upon which a tax is based, the administrative judge who finds the act to be illegal may declare it null, but may not decide upon the corresponding tax charges.

iii Claimants

Tax claims may be brought only by the taxpayer, or the withholding agent in the case of withholding taxes. Group actions are not allowed in tax disputes.

VI COSTS

Costs are limited to counsel and other fees, as the French administration of justice is free of charge.

Within the framework of court action, the losing party may be ordered to pay the successful party a sum intended to cover 'irrecoverable' costs.

A taxpayer whose action was unsuccessful may be ordered to compensate the Treasury for its legal costs.

Regardless of which party brings the action, incurred costs are almost never refunded in full. Compensation seldom exceeds a few thousand euros.

VII ALTERNATIVE DISPUTE RESOLUTION

Strictly speaking, in France there are no alternatives to the tax dispute resolution procedures described in this chapter.

However, at any time during the procedure, and even when the dispute is before the courts, the taxpayer can reach a settlement with the tax authorities to end the dispute.

In the context of such settlements, the parties generally agree on a tax base. Quite often, the authorities grant a partial or total exemption from penalties. It has been the French tax authorities' policy not to settle when they contemplate filing a criminal complaint or when the taxpayer has tried to delay the procedure in bad faith. In this respect, it was recently observed that the tax authorities tended to 'inflate' the amount of the penalties in the adjustment notices sent to taxpayers to retain some room for negotiation in the event of a settlement.

5 National Assembly, Report on Finance Bill 2017, No. 4125, Annex 41, by Dominique Lefevre.

VIII ANTI-AVOIDANCE

French law contains both general anti-avoidance rules, namely '*abus de droit*' (or abuse of the law) and 'act of mismanagement' theories, and specific anti-avoidance rules.

Special administrative procedural rules apply to '*abus de droit*'. Article L64 of the tax procedure code (LPF) provides that the tax authorities are entitled to reject as inapplicable to them acts that constitute fraud, and to restore the true character thereof where those acts either are shams that are fictitious ('fictitiousness' theory) or that comply with the letter of the law but are contrary to the purpose of its authors and inspired by no other reason than to elude or reduce the tax burden ('fraudulent evasion' theory). A special 80 per cent surcharge applies on the evaded tax where the taxpayer was the principal instigator or principal beneficiary of such a scheme. A surcharge of 40 per cent applies where the taxpayer was neither.

Where the tax authorities have notified a reassessment based upon abuse of law, the taxpayer may refer the matter to the Abuse of Law Committee and present its observations in a written statement. It is then summoned to a Committee session to present its oral observations and answer the questions of Committee members. Prior to the meeting, and in the absence of the taxpayer or its counsel, the Committee members hear a reporter, generally appointed from the French tax authorities. The Committee decides in favour of the applicant taxpayer in approximately one case in three.

IX DOUBLE TAXATION TREATIES

France has one of the largest networks of international tax treaties. Currently, it has concluded 126 treaties for the avoidance of double taxation.[6]

Most of these treaties conform to the OECD or UN models, and when interpreting them the courts pay close attention to the OECD Comments. France also signed the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting on 7 June 2017 with certain reservations on Articles 3, 4, 5, 10, 11. Eighty-eight tax treaties are covered.

Recent controversial decisions on the implementation of double taxation treaties have held that tax-exempt parties are not regarded as residents of the other contracting state and must be denied treaty benefits. This applies to both offshore activities[7] and pension funds,[8] including in situations where the foreign entity provided a certificate of tax residency from its country of origin. Arguably the question should have been referred to the mutual agreement procedure under double taxation treaties before being referred to the national tax courts. Similar issues arise where the French tax authorities deny a French taxpayer the tax credit for a foreign withholding they deem inappropriate, sometimes with reason. The French tax department reports that 212 procedures were opened in 2016, 238 were completed and 794 procedures were outstanding at year end.

France recently concluded 25 treaties in conformity with Article 26 of the OECD Model Convention, the purpose of which is limited to the exchange of information.

6 bofip.impots.gouv.fr, BOI-ANNX-000306.

7 Council of State, 20 May 2016, No. 389994 *Easy Vista*; and Administrative Court of Appeal of Versailles, 29 November 2016, No. 16VE01537.

8 Council of State, 9 November 2015, No. 371132 *Santander pensiones*; and Administrative Court of Appeal of Versailles, 29 November 2016, No. 14VE01266.

On the other hand, certain foreign states or territories have not concluded any agreement with France for the exchange of fiscal information. Under French domestic law, they are regarded as 'non-cooperative' and are the subject of specific tax provisions (e.g., an increase in the withholding tax on income paid to companies that are established in such states). The short list of these states and territories is updated annually.[9] Pursuant to Constitutional Council decisions, the presumption of tax avoidance attached to transactions with such territories may be rebutted.

X AREAS OF FOCUS

To defend their rights, taxpayers can of course rely on the law, as voted by Parliament, as well as regulatory measures taken by the government that are codified in the General Tax Code and the LPF. Moreover, the administration's own doctrine, consisting of its guidelines, instructions, ministerial replies to questions from members of Parliament or the administrative decisions on questions put to it by taxpayers (rulings), may be invoked by taxpayers in the same situation, and are binding both for the tax authorities and the tax courts.[10]

XI OUTLOOK AND CONCLUSIONS

French authorities regularly emphasise the need to combat fraud and tax avoidance, especially in cross-border contexts.

Proposals regularly submitted to Parliament aim at reinforcing the means available to the authorities and increase the obligations placed on taxpayers, as well as impose tougher penalties for breaches. More often than not, these specific measures need to be, and effectively are, checked by the fundamental rights protected by the Constitution and international instruments.

9 Currently, an order of 8 April 2016.

10 Article L80A of the LPF.

Chapter 13

GERMANY

Michael Hendricks[1]

I INTRODUCTION

Germany has a long-standing and well established system and practice of disputes and litigation in tax matters. Where a taxpayer deems a tax claim asserted against him or her by the tax authorities to be unlawful, he or she is constitutionally entitled (under Article 19, Paragraph 4 of the German Constitution) to have the governmental action in question reviewed by the courts. It is common practice for German taxpayers to exercise that right. As a rule, such disputes are handled in a solution-oriented and constructive manner by all persons and authorities involved. Tax officials do not take it personally if a tax claim asserted by them is submitted to the courts for review. Only very rarely does such a dispute escalate into a heated confrontation.

Importantly, when faced with a potentially unlawful tax assessment notice, a taxpayer is not obliged to immediately turn to the courts for assistance. Rather, the taxpayer is entitled (and usually legally required) to first challenge the assessment before the authority that issued the notice. This out-of-court remedy is referred to as an administrative appeal. The administrative appeal procedure, which precedes any actual litigation, has a dual function: to relieve the courts and to afford the tax authorities a chance to double-check their own tax assessment notices.

It is very common for taxpayers to exercise their right to challenge a tax assessment notice or other action of a tax authority. According to statistics published by the German Ministry of Finance, between 3.32 million and 5.24 million administrative appeals were lodged annually over the past few years (from 2009 to 2016). These administrative appeals were often successful, thus eliminating the need for court proceedings. In more than two-thirds of cases, the administrative appeal prompted the tax authorities to amend the action challenged (e.g., the tax assessment notice) as requested. Generally speaking, administrative appeal proceedings take three to 12 months.

If the taxpayer's administrative appeal is not fully granted, the tax authority needs to issue a formal decision of refusal (the administrative-appeal decision). The taxpayer may then submit this decision to a tax court for review. Organisationally, the tax courts are entirely separate from and independent of the tax authorities; they are also fully independent and not in any way subject to instructions when adjudicating on the lawfulness of measures taken by the tax authorities. Germany has a total of 18 lower (first-instance) tax courts. Over the

1 Michael Hendricks is a partner at Flick Gocke Schaumburg.

past few years (2009 to 2016), an average total of about 38,500 new legal actions were filed annually with these courts. In 2006 and 2016, 48,606 and only 35,169 legal actions were filed respectively, thus reducing the number of new actions by 27.6 per cent.

While tax court proceedings take two years on average, this varies significantly depending on the workload of the relevant court division, and also on the question of to what extent the court first needs to establish the facts of the case before it. As one might expect, if the facts of a case prove difficult to establish, this will delay proceedings.

As a rule, the tax courts adjudicate by way of a judgment that upholds, reverses or amends the administrative appeal decision rendered by the tax authority. Given the amount of work involved in drafting a judgment, judges are keen to terminate proceedings in a way that eliminates the need for a formal judgment. If, upon closer examination, the court considers a case to be clear-cut, the parties are told about the decision the court is contemplating. Frequently, the court suggests that the tax authority amend the administrative action challenged (e.g., the tax assessment notice) in favour of the taxpayer to prevent a judgment against the tax authority. In other cases, the court might advise the taxpayer to withdraw his or her action. About two-thirds of all proceedings are terminated in one of the above ways, without any judgment being passed.

Of those cases in which a judgment has been passed, only about 20 per cent are (in whole or in part) in favour of the taxpayer. The latest statistics show that this percentage stabilised after a slight decrease in 2015 at approximately 20 per cent in 2016. One important reason why taxpayers have such a low rate of success before the tax courts would seem to be the fact that there is no legal requirement to be professionally represented before the tax courts, unlike in proceedings before the German Federal Tax Court. As a result, many taxpayers take legal action without the involvement of an experienced German qualified lawyer or German qualified tax consultant.

If the losing party deems a judgment rendered by a court of first instance to be incorrect, that party may lodge an appeal with Germany's Federal Tax Court in Munich. As a rule, however, this option is subject to the lower tax court having granted leave to appeal ('revision': a judicial appeal restricted in scope to questions of law). Revision proceedings before the Federal Tax Court take an average of 20 months. More than 41 per cent of these cases are decided in favour of the taxpayer.

Proceedings before both the lower tax courts and the Federal Tax Court are subject to court fees. The amount of these fees depends on the value of the matter in dispute. By way of example, a legal action involving a value of €500,000 triggers fees of €14,144 for proceedings before the tax courts and €17,680 for revision proceedings before the Federal Tax Court. However, these fees are to be borne by the taxpayer only if and to the extent that he or she loses; a taxpayer that wins does not have to bear any court fees. Administrative appeal proceedings before the tax authority never trigger any fees. By contrast, the costs for professional advisers in tax matters (lawyers or tax consultants) are, in principle, to be borne by the taxpayer. However, if and to the extent that the taxpayer wins in court (i.e., the action before the lower tax court or the revision proceedings before the Federal Tax Court), the tax authority has to bear such advisers' costs, albeit capped at the relevant statutory amount of advisers' fees.

II COMMENCING DISPUTES

i Subject matter of the dispute

Usually, disputes between a taxpayer and the tax authorities are about the lawfulness of a tax assessment notice. In certain constellations, however, a tax assessment notice is preceded by preparatory administrative decisions that constitute a binding basis for the subsequent tax assessment notice. More specifically, from a German tax perspective (under what is known as the transparency principle), partnerships are not themselves subject to income tax or corporate income tax but rather – and solely – their partners are, whether they are natural persons or corporate bodies. The profits attributable to the individual partners are determined by the tax authority that is competent for the partnership and are included in a formal assessment (or declaratory notice of assessment) that, in turn, is binding for the purposes of the personal tax assessment notices of the individual partners. If a partner regards the declaratory notice of assessment as unlawful, he or she may not challenge the (subsequent) personal tax assessment notice but must contest the underlying declaratory notice of assessment. Statute provides for such declaratory notices of assessment in numerous constellations. One such group are cross-border scenarios: for example, those involving the German controlled foreign company rules, also referred to as add-back taxation. In the context of local taxes – for example trade tax – similar preparatory assessment notices are provided for (e.g., assessment notices fixing the tax base for the relevant type of tax). Any unlawful declaratory notice of assessment must be challenged before the issuing authority (and normally within one month). It is imperative not to wait until the subsequent tax assessment notice, which is based on the declaratory notice of assessment, has been issued.

ii Tax dispute resulting from a tax audit

The German tax authorities normally accept the statements and data provided in the taxpayer's tax return. It is usually only later tax audits that spark tax disputes. The tax authorities are entitled to use their findings from tax audits by amending existing notices (tax assessment notices but also declaratory notices of assessment). Thus, to the extent that the findings from a tax audit lead to a higher tax burden, existing notices may be amended to the detriment of the taxpayer. Before amending the notices, the tax auditor completes the audit by preparing an audit report on his or her findings. Such audit reports, however, may not be challenged. Rather, it is only the notices (tax assessment notices or declaratory notices of assessment, respectively) issued in the wake of the audit report that may be submitted by the taxpayer to the courts for review.

The question of whether, and if so in what intervals, a tax audit is carried out regarding a taxpayer normally hinges on the size and level of turnover or profits of the enterprise concerned. The legal default is for large enterprises as well as groups of companies to be subject to tax audits in relation to each fiscal year. Very small enterprises and taxpayers with a low income are audited only exceptionally. Extraordinary transactions or anomalies, however, may trigger tax audits even where lower levels of turnover of profits are involved (e.g., in the case of inconsistencies in the tax return or in the context of restructurings).

iii Administrative appeal procedure

Before a judicial review of the lawfulness of a declaratory notice of assessment or of a tax assessment notice may be sought, the administrative appeal procedure before the tax authority must be completed. This procedure serves the dual purpose of the tax authorities double-checking their own decisions and the caseload of the tax courts being reduced. The administrative appeal must be lodged by the taxpayer with the issuing authority within one month of the taxpayer having been notified of the tax assessment notice. The taxpayer is not, however, required to provide the grounds of his or her appeal within that one-month period; these may be submitted later. An administrative appeal may also initially be lodged as a precaution; for example, if, as the one-month time limit is about to expire, it remains unclear whether or not a notice is lawful. As mentioned earlier, administrative appeal proceedings usually take three to 12 months. In certain circumstances, however, the administrative appeal procedure is excluded. In these cases, the taxpayer has to take legal action directly against the assessment notice. Practically speaking, these cases are rather rare (e.g., in the context of certain mistakes contained in trade-tax assessment notices).

iv Judicial proceedings

If the administrative appeal fails, the tax authority rejects it by way of a formal decision referred to as an administrative appeal decision. The taxpayer is entitled to have the lawfulness of any such administrative appeal decision reviewed by the courts. In general, the tax courts are competent to hear such cases. In rare cases, the measure adopted by the tax authorities needs to be challenged before the general administrative courts.

As a rule, any legal action challenging an administrative appeal decision needs to be filed with the competent tax court within one month of the taxpayer having been notified of the tax assessment notice. The question of which of the 18 lower tax courts is competent to hear the case hinges on which tax authority issued the administrative appeal decision being challenged. The specific decision challenged must be able to be inferred from the complaint. Moreover, the plaintiff must indicate which rights he or she deems breached. It is not obligatory to substantiate the complaint within the one-month time limit.

Once the complaint has been filed, the competent division of the tax court sets a time limit within which the legal action must be substantiated; this is usually within four to six weeks from the filing of the claim. In complicated cases, the time limit for substantiation may be extended upon application.

Once the claim has been substantiated, the tax authority is given the opportunity to submit its comments in writing. Any such comments by the tax authority may, in turn, be commented on by the taxpayer. Usually, the exchange of written pleadings between the parties is completed within about six months of the claim having been substantiated. The further course of judicial proceedings very much depends on the nature of the questions at the heart of the legal action. If the focus is on establishing questions of fact, the court will take evidence. Predominantly, evidence is taken by hearing witnesses and examining documentary evidence; in some cases, experts are consulted. Evidence is taken during a hearing. As a rule, judicial proceedings are completed more quickly if the dispute exclusively involves questions of law. Upon completion of the hearing, the court passes judgment on whether the legal action is admissible and successful on the merits.

Courts are usually keen to bring proceedings to a conclusion without the need for a judgment. The two reasons for this are that drafting a formal judgment involves a significant amount of effort, and judgments do not necessarily truly settle disputes in the sense of creating a lasting legal concord.

If the court has formed its opinion and estimates a case to be clear-cut, it will often indicate to the parties the decision they are to expect. If the judges consider the legal action to be justified, they will invite the tax authority to amend the administrative action challenged (e.g., the tax assessment notice) in favour of the taxpayer to prevent a judgment against the tax authority. Conversely, if the judges do not consider the case to have merit, they will invite the taxpayer to withdraw his or her action in order to avoid its dismissal. About two-thirds of all proceedings are terminated in one of these ways, without any judgment being passed. As mentioned earlier, average judicial proceedings take about two years.

v Revision proceedings before the Federal Tax Court

If the judicial proceedings before the court of first instance conclude with a judgment that the losing party deems to be incorrect, it may appeal such judgment before Germany's Federal Tax Court. As a rule, however, this option is subject to the lower tax court having granted leave to appeal. If such leave to appeal (revision) has been granted, the losing party can appeal to have the lawfulness of the judgment reviewed by the Federal Tax Court. As mentioned earlier, arguments before the Federal Tax Court are restricted to asserting that the lower tax court erred in its assessment of questions of law. Moreover, the norms allegedly breached must be federal ones (as opposed to ones forming part of the law of the 16 individual German states). In other words, the appellant in revision proceedings is barred from asserting that the facts relied upon by the lower tax court in its decision were inaccurate. Where a losing party believes the facts as assumed by the lower tax court to be inaccurate, that party may achieve a reversal of the judgment rendered by the court of first instance only by successfully asserting before the Federal Tax Court that said judgment had been reached in violation of procedural norms (plea of procedural error). If the Federal Tax Court concurs, it normally refers the legal dispute back to the lower tax court. The first-instance proceedings must then be conducted anew.

Any revision needs to be filed with the Federal Tax Court within one month of the appellant having been notified of the judgment rendered by the lower tax court, and normally needs to be substantiated within two months thereof. Revision proceedings currently take about 18 months on average.

vi Complaint against refusal of leave to appeal with the Federal Tax Court

If the judicial proceedings in the first instance conclude with a judgment with regard to which the lower tax court has refused to grant leave to appeal, the losing party may lodge what is known as a 'complaint against refusal of leave to appeal' with the Federal Tax Court. Such a complaint will be successful if the losing party is able to show that the lower tax court should in fact have granted leave to appeal (revision).

More specifically, the party lodging this complaint must demonstrate that the legal dispute hinged on a question of law that the Federal Tax Court either has not yet ruled upon (thus rendering the matter admissible as being of fundamental significance) or has judged differently from the lower tax court (making the matter admissible on the grounds of divergence).

A complaint against refusal of leave to appeal will also be successful if, before the Federal Tax Court, the judgment by the lower tax court can be shown to have been passed in violation of procedural norms (plea of procedural error). Like other remedies, a complaint against refusal of leave to appeal needs to be filed with the Federal Tax Court within one month of the appellant having been notified of the judgment by the lower tax court, and normally needs to be substantiated within two months thereof. On average, the Federal Tax Court decides on the complaint within six months of it being filed.

vii Jurisdiction of Germany's Federal Constitutional Court

If the remedies taken by a taxpayer have proven unsuccessful, and provided all remedies for administrative or judicial review have been exhausted, the taxpayer may file a complaint of unconstitutionality with Germany's Federal Constitutional Court in Karlsruhe. Such a complaint will, however, only be successful if the taxpayer can show that the Constitution has been violated. The complaint needs to be filed and substantiated within one month of the complainant being notified of the final judicial decision. Complaints of unconstitutionality regarding judgments by lower tax courts or by the Federal Tax Court have occasionally been successful in the past. For example, the Federal Constitutional Court found certain instances of tightening of statutory rules (e.g., in the German Income Tax Act) to be in violation of the constitutional prohibition on retroactivity; or that the courts violated the right to a hearing enshrined in the Constitution.

The time involved in proceedings brought before the Federal Constitutional Court fundamentally depends on the specifics of an individual case. Some complaints of unconstitutionality are decided upon in a matter of months; complaints with a particularly broad impact often take several years.

viii Injunctive relief

The procedures outlined so far are aimed at conclusively resolving matters in dispute. A separate question is whether the amount of tax assessed by the tax authority needs to be paid despite a pending legal challenge. As a rule, any tax assessed becomes due and payable even if an administrative appeal has been lodged with the tax office against the underlying tax assessment notice. The same applies if the tax assessment notice (or, more precisely, the adverse administrative appeal decision confirming it) is challenged before the tax courts.

Therefore, to keep from owing the assessed tax, a taxpayer needs to file (simultaneously with his or her administrative appeal or legal action) an application for suspension of enforcement. Such application should be addressed to the tax authority that has issued the notice in question. The authority is obligated to grant the application if a summary examination yields serious doubts about the lawfulness of the notice challenged; in other words, if there are doubts as to the lawfulness of the notice. A suspension of enforcement may also be granted where the payment would cause inequitable hardship for the taxpayer (Section 361 of the German General Tax Code (GTC)).

If the tax authority rejects an application for suspension of enforcement, the taxpayer may submit that decision to the competent lower tax court for review (Section 69 of the German Code of Procedure for Fiscal Courts).

The lower tax court, for its part, likewise determines whether a summary examination yields serious doubts about the lawfulness of the notice challenged, or a particular hardship warrants the suspension sought by the taxpayer.

The decision of the lower tax court may, in turn, be submitted to the Federal Tax Court for review, provided the lower tax court has granted leave to lodge a complaint against its decision with the Federal Tax Court. Applications for suspension of enforcement are decided upon particularly quickly. Normally, decisions by the tax authorities on such applications are a matter of a few working days. If a lower tax court is called upon to review such a decision by a tax office, the court usually reaches its decision within three to six months of the complaint having been filed. The tax authorities will, however, not proceed to enforce assessed taxes while an application for suspension of enforcement is pending.

ix Legal protection in the context of international double taxation

The remedies outlined (in particular administrative appeal and judicial proceedings) are also available to taxpayers who seek to challenge any double taxation arising in international scenarios. Cases in which it proves impossible to conclusively ascertain which of the two states is failing to correctly apply the pertinent double taxation treaty (DTT) bear the danger that legal proceedings at a national level will be unsuccessful (because the national courts in each of the two states will uphold the relevant tax assessment notice as lawful). In these cases, the taxpayer is well advised to apply – simultaneously with remedies on a national level where appropriate – for an intergovernmental mutual agreement procedure, or (to the extent possible) for an intergovernmental arbitration procedure to be initiated.

All DTTs entered into by Germany provide (as a minimum) for an intergovernmental mutual agreement procedure to be conducted. Under most treaties, the taxpayer needs to apply for the initiation of such mutual agreement procedure no later than three years from the double taxation having occurred (only a few treaties contain application time limits of two or four years, respectively). Upon application by the taxpayer, the competent authorities of the states involved will attempt to eliminate any double taxation by way of mutual agreement. In Germany, the relevant application normally needs to be filed with the Bonn-based Federal Central Tax Office. The mutual agreement procedure, however, does not afford any entitlement to an actual elimination of double taxation. Nonetheless, in most cases involving Germany, intergovernmental agreements are reached that eliminate or at least mitigate double taxation.

The risk that any existing double taxation will continue unchanged may be minimised by affording the taxpayer a legal right to also apply for the initiation of intergovernmental arbitration proceedings. If such arbitration proceedings are provided for, the taxation conflict is settled by the arbitral award of an independent body. The arbitral award is binding upon both states. Such proceedings ensure that any taxation in violation of the DTT is always eliminated. To date, arbitration proceedings have been provided for in only a few German DTTs. With regard to the allocation of profits among related persons and the attribution of profits between head office and permanent establishment, the EU Arbitration Convention provides for arbitration proceedings to be conducted (upon application by the taxpayer) if it has proved impossible to eliminate, by way of mutual agreement proceedings, taxation that is in violation of the DTT. Within its scope of application, the Convention serves as an important legal basis for combating double taxation in the context of intra-European scenarios. The Convention has consistently proved itself in practice.

III THE COURTS AND TRIBUNALS

i Decisions on administrative appeals

If a taxpayer lodges an administrative appeal against a notice (i.e., a tax assessment notice or a declaratory notice of assessment), he or she must do so with the authority that issued the relevant notice. Within that authority, the administrative appeal is initially dealt with by the official responsible for the notice in question. If that official regards the administrative appeal as unsuccessful on the merits, it is forwarded to a specialised department within the authority that is exclusively tasked with deciding on administrative appeals (the legal redress department). This ensures that the final decision is not taken by the official who was responsible for the challenged notice.

ii Decision on legal actions

If the tax authority rejects the taxpayer's administrative appeal by way of a formal decision, he or she may apply to the competent lower tax court for a review of the lawfulness of that decision. Within the lower tax courts, the organisational divisions entrusted with adjudicating legal actions are referred to as 'senates'. Each senate consists of a total of five judges: three professional judges and two lay judges. In practical terms, the lay judges' influence on the decision is very limited. While they do enjoy equal voting rights, they generally let themselves be guided by the professional judges' vote. Among the three professional judges, it is the presiding judge who is particularly influential. The presiding judge is responsible for the organisation of the senate and presides over hearings. Presiding judges regularly shape the line of decisions taken by their senate.

If the legal dispute is particularly clear-cut in terms of both the questions of fact and the questions of law to be determined, it may be assigned to a sole judge (Section 6 of the German Code of Procedure for Fiscal Courts). Only professional judges are eligible to act as sole judges. The assignment of a case to a sole judge is designed to speed up the judicial proceedings.

iii Decisions on judicial appeals limited to questions of law and complaints against refusals of leave to appeal

The Federal Tax Court, and more specifically the competent senate in each case, decides on judicial appeals limited to questions of law and complaints against refusals of leave to appeal. In both the lower tax courts and the Federal Tax Court, each senate consists of five judges; at the Federal Tax Court, however, there are only professional and no lay judges. Similarly to the lower tax courts, the line taken by a senate in its decisions is shaped, in particular, by its presiding judge.

IV PENALTIES AND REMEDIES

i Criminal penalties

Penal sanctions, if any, are not imposed within the framework of disputes on tax matters. Rather, if the tax authorities believe that a taxpayer has committed a tax offence, they will initiate, or cause to be initiated, (separate) criminal proceedings on tax matters against the taxpayer. If the allegations are corroborated, a penalty may be imposed on the taxpayer. Such proceedings are, however, handled by the public prosecutor's office rather than the tax authorities. Likewise, any possible penal sanctions are imposed by general penal courts rather than tax courts. If a taxpayer is proven to have evaded taxes, he or she is usually fined an amount at least equal to the tax evaded. As a rule, tax evasion in excess of €1 million triggers imprisonment.

ii Administrative penalties

Administrative sanctions, by contrast, may be imposed as part of a dispute in tax matters. German procedural law in tax matters provides for such sanctions in the event that the taxpayer fails to meet certain obligations to cooperate, either in time or at all. The most important administrative sanctions in tax matters are as follows:

a imposition of a late-filing surcharge of up to €25,000 (if the taxpayer files his or her tax return late or not at all);

b imposition of a non-compliance fine (obstruction fee) of between €2,500 and €250,000 (if the taxpayer fails to comply with reasonable demands for clarification made by the tax auditor, either in time or at all); and

c imposition of a surcharge of up to €1 million (either if the taxpayer fails to prepare any transfer pricing documentation, or any such documentation prepared proves inadequate).

Administrative sanctions are imposed by way of an administrative act whose lawfulness can be reviewed by way of an administrative appeal and subsequent judicial proceedings (see Section II).

V TAX CLAIMS

i Recovering overpaid tax

A taxpayer is obliged to pay taxes only upon having been formally required, by way of a tax assessment notice, to do so. German tax authorities usually refund to the taxpayer any payments made in the absence of an underlying tax assessment notice. The same applies if and to the extent that any tax is reduced by a subsequent tax assessment notice: a possible overpayment is refunded to the taxpayer.

If, in light of the existence of several tax assessment notices, there is uncertainty regarding the amount of tax imposed and the payments made thereon, the taxpayer may request a special notice in which the tax authority is required to detail any tax amounts assessed and any payments made (Section 218(2) of the GTC). That special notice is referred to as statement of account. If the taxpayer deems the statement of account to be inaccurate, he or she may challenge it by lodging an administrative appeal and subsequently bringing a legal action, where necessary (see Section II). The overpayment by the taxpayer (if any) shown in the 'statement of account' will be refunded to him or her by the German tax authority.

ii Challenging administrative decisions

Administrative acts may only be challenged on the grounds that they are (allegedly) unlawful. The unlawfulness may result from the administrative act being incompatible with the Constitution or with specific tax law provisions. In some cases, the unlawfulness may flow from the fact that the administrative act is not in line with a general instruction of a supreme administrative authority (e.g., a decree by Germany's Federal Ministry of Finance). In other cases, the unlawfulness may result from the taxpayer in question being discriminated against in relation to another taxpayer. For this to apply, the discrimination would need to qualify as an infringement of the fundamental right to equal treatment (Article 3, Paragraph 1 of the Constitution). If, against this yardstick, an administrative measure proves unlawful, it can normally be challenged by lodging an administrative appeal or bringing a legal action (see Section II).

iii Claimants

In Germany, the focal point of tax court litigation aimed at enforcing a tax refund claim is the respective underlying tax assessment notice (or declaratory notice of assessment, as the case may be). Given that the administrative appeal procedure as well as judicial proceedings almost always concern the administrative appeal or the declaratory notice of assessment in question, both the administrative appeal and legal action must, as a rule, be brought by the very taxpayer to whom the relevant notice had been addressed by the tax authority. For example, if the VAT assessed by a tax authority is excessive, then it is the addressee of the VAT notice who may apply for a reduction of the VAT in the context of lodging an administrative appeal or bringing a legal action.

This also applies where several taxpayers are taxed jointly in the context of group taxation (also referred to in Germany as fiscal unity). In group taxation scenarios, the tax authority must address its tax assessment notice exclusively to the group's parent company (not the subsidiaries). That tax assessment notice also needs to take into account the profits or turnover of the other group members. If the profits or turnover of any one group member – as taken into account in such a tax assessment notice – are too high, then it is not that group member company that is entitled to lodge an administrative appeal or bring legal action, but the company to which the relevant tax assessment notice was addressed (usually, the group's parent company).

Only in exceptional cases may a tax assessment notice be challenged (by way of an administrative appeal or legal action) by someone other than that notice's addressee. For example, a taxpayer may bring legal action against a tax assessment notice that exempts one of his or her competitors from taxation. Such an option for third parties to bring legal action requires, however, that the relevant tax statute applied is relevant to competition (which is only rarely the case).

VI COSTS

Proceedings before both the lower tax courts and the Federal Tax Court are subject to court fees. The amount of these fees depends on the value of the matter in dispute. However, such court fees are to be borne by the taxpayer only if and to the extent that he or she loses. If the taxpayer wins the case, he or she does not have to bear any court fees. For illustration purposes, the following table shows the amount of court fees due for a legal action involving a value of the matter in dispute of €300,000 (or €3 million or €30 million, respectively):

Value of the matter in dispute	Fees for administrative appeal proceedings before the issuing authority	Fees for legal action before the lower tax court	Fees for revision proceedings before the Federal Tax Court
€300,000	No fee	€9,848	€12,310
€3 million	No fee	€50,144	€62,680
€30 million	No fee	€438,944	€548,680

By contrast, the costs for taxpayers' professional advisers in tax matters (lawyers or tax consultants) are, in principle, to be borne by the taxpayer. If and to the extent, however, that the taxpayer wins in court (i.e., the legal action before the lower tax court or the revision proceedings before the Federal Tax Court), the tax authority has to bear such advisers' costs, albeit capped at the relevant statutory amount of advisers' fees.

VII ALTERNATIVE DISPUTE RESOLUTION

As far as tax disputes involving exclusively national (German) scenarios are concerned, dispute settlement instruments have not acquired any significance to date. More specifically, mediation proceedings in tax matters have been discussed by experts but have failed to be introduced. At the same time, there is a widespread use among practitioners of instruments aimed at avoiding tax disputes from the outset (preventive avoidance of disputes).

i Binding ruling for the purposes of settling questions of law

To the extent that conflicts in terms of diverging positions regarding certain legal issues are anticipated, the taxpayer may apply to have the matter clarified in advance by way of a binding ruling. Binding rulings are only issued, however, provided the underlying scenario has not yet been (fully) realised. In other words, a binding ruling cannot be issued with regard to fact patterns that occurred in the past (Section 89 of the GTC). Accordingly, it is important to apply in good time for any binding ruling to be sought. The GTC expressly restricts the scope of binding rulings to questions of law; accordingly, binding rulings may not be sought in relation to questions of fact. Thus, a taxpayer may not ask a tax authority to specify the fact pattern on which it intends to base its decisions; binding rulings are not available to achieve clarification of uncertainties as to the facts of a particular case. Similar to court fees, the fee due (if any) for the issuing of a binding ruling depends on the amount of tax involved. More specifically, a binding ruling is subject to fees if the tax effect of the underlying legal issue amounts to €9,999 or more. If the tax effect amounts to, say, €10,000, the fee is €241; if it amounts to €30 million, the maximum fee of €109,736 is levied.

ii Binding commitment for the purposes of settling questions of law

Rulings applied for by and provided to the taxpayer in the course of a tax audit are not subject to any fees (Sections 204 et seq. of the GTC). This type of ruling is referred to as a binding commitment. This instrument, too, is expressly restricted to questions of law by the applicable statute; binding commitments may not be sought for questions of fact. What is more, when seeking a binding commitment, it is compulsory to delineate the relevant underlying fact pattern.

Furthermore, the fact pattern for which a binding commitment on questions of law is sought needs to form part of the subject matter of the tax audit and possess relevance for the future (i.e., beyond the tax audit).

iii Advance pricing agreements (APAs) regarding transfer prices

APAs are a useful instrument to prevent disputes regarding transfer pricing matters. The tax authorities have been prepared for more than a decade to participate in APAs. Since 2006, APAs have been subject to fees. The basic fee is €20,000 (Section 178a of the GTC).

The German APA programme is designed to resolve actual or potential transfer pricing disputes in a systematic and cooperative manner.

APAs are about agreements to be reached beforehand, and thus for the future; between affiliated companies (and thus taxpayers) and the tax authorities of the relevant states; and on the transfer prices to be applied for a certain period.

Transfer prices are usually agreed in advance for a future period of three to five years.

From a German perspective, APAs involve two distinct relationships: the intergovernmental level, which exclusively concerns the tax authorities of the states in question; and the domestic level, which concerns the relationship between the national German tax authority and the relevant taxpayer.

On the intergovernmental level and in the context of a mutual agreement procedure, the tax authorities of the states concerned agree upon specific transfer prices as binding for defined future periods. In Germany, the binding effect (domestically) of such an intergovernmental agreement is brought about by a separate agreement between the German tax authorities and the taxpayer resident in Germany.

The Bonn-based Federal Central Tax Office is competent for handling the APA procedure. If a German taxpayer wishes to initiate an APA procedure, he or she needs to set out the proposed transfer prices in the context of a preliminary discussion (pre-filing) with the responsible official of the Central Tax Office. If this official deems the proposed (or an amended) transfer price achievable on an intergovernmental level, the taxpayer is invited to formally apply for an APA procedure to be conducted regarding this transfer price. That application then becomes the basis of the intergovernmental part of the APA procedure, which solely involves the tax authorities of the states concerned. Once the participating authorities have agreed a specific transfer price, the taxpayer is notified accordingly.

For the agreed transfer price to become binding domestically (i.e., in Germany), the taxpayer needs to consent to this transfer price in writing to the German tax authorities and formally undertake not to challenge any corresponding tax assessment notices in the future.

The tax authorities may then base future tax assessments on a different transfer price only where certain crucial assumptions integral to the APA fail to materialise during the relevant period, thus making it reasonable for a different transfer price to be applied.

For the most part, German taxpayers' experience with the handling of APA procedures by the German tax authorities is very positive. The APA procedure has its merits, especially where other procedures fail to afford adequate protection against double taxation.

The APA procedure is particularly helpful in constellations in which transfer prices cannot easily be determined, and there is a simultaneous lack of intergovernmental arbitration procedures in relation to the states concerned.

iv Dispute resolution regarding questions of fact

Once a tax dispute is pending, the German tax authorities are barred from accepting any compromise regarding questions of law. As far as such questions of law are concerned, the fundamental principle of lawfulness of taxation (enshrined in the Constitution) is interpreted as obliging the tax authorities to strictly apply the law. That is also why amicable agreements on questions of law are bound to fail.

By contrast, if a dispute is not about questions of law but questions of fact (i.e., about the precise facts that have occurred in a particular case), the tax authorities may reach a settlement agreement (understanding on questions of fact), thus establishing the facts on which taxation should be based in a particular case.

Such understandings on questions of fact very frequently enable the parties to amicably settle existing tax disputes. The responsible tax officials will, however, consent to such a settlement only provided it can be made very clear that the compromise exclusively extends to questions of fact (as opposed to questions of law). In practice, this is feasible in a large number of cases. While such understandings on questions of fact are usually reached in the context of a tax audit, they are also employed in the course of judicial proceedings before the tax courts.

VIII ANTI-AVOIDANCE

The German legislator has introduced special anti-abuse rules targeting certain specific constellations. Anti-abuse rules are also contained in some German DTTs. In cases that do not fall within the scope of the special anti-abuse rules, the tax authorities seek to rely on the general anti-abuse rules codified in Section 42 of the GTC.

That umbrella provision stipulates that a structure is deemed abusive if it involves an inappropriate legal structure or, when compared to a (hypothetical) appropriate structure, it leads to a tax advantage not contemplated by statute.

That umbrella provision further stipulates that, conversely, no abuse is deemed to exist where the taxpayer can demonstrate that his or her structure was motivated by non-tax reasons. There is a host of case law regarding the question under which circumstances an abuse is to be assumed to exist.

IX DOUBLE TAXATION TREATIES

Generally, the DTTs entered into by Germany are limited to income tax, corporate income tax, trade tax and inheritance tax. These DTTs are thus of no assistance in eliminating double taxation in the area of VAT. Avoidance of double VAT taxation is, however, effectively ensured by a uniform application of the VAT Directive as overseen by the European Court of Justice. As a result, at least in scenarios within the EU, the risk of double VAT taxation is low.

Over the past few years, the Federal Tax Court has repeatedly found elements of German taxation to be incompatible with the relevant DTTs. These judgments mainly concern income tax, corporate income tax and trade tax, and often involve the taxation of individuals.

In several cases, the Federal Tax Court has clarified the enormous importance of clauses in DTTs that – congruent with Article 9(1) of the OECD Model Tax Convention – allow for income adjustments based on the 'dealing at arm's-length principle' in relations between associated enterprises. The Court has ruled that such clauses do not aim at the immediate correction of profits but at their bilateral demarcation, and that profit corrections under domestic law are therefore limited to elements affecting the amount of the transfer price. If, however, the tax authorities bring forward purely formal objections to the handling of the business relationship between the associated enterprises, the provision of the DTT has an overriding effect.[2] In other words, the treaty-based 'arm's-length' principle only allows an income adjustment based on a domestic rule where the price agreed between associated enterprises is inappropriate as to the amount. For this reason, the tax authorities are not entitled to adjust the depreciation of a loan merely because the domestic parent had issued the loan to its foreign subsidiary without any security and, therefore, in a way that would have to be considered 'unusual' among unrelated parties.[3]

A 2011 judgment was the first to expressly address the tax treatment of private equity funds. It dealt with the taxation of two corporations resident in Germany that had invested in a private equity fund set up as a UK limited partnership. In that specific case, the Federal Tax Court held that, under the DTT between the UK and Germany, the German investors were

2 *Sperrwirkung*, judgment of 11 October 2011, Case No. I R 75/11, and judgment of 17 December 2014, Case No. I R 23/13.

3 Judgment of 24 June 2015, Case No. I R 29/14.

not subject to tax in Germany on their income from the fund. Simultaneously, that income was exempted from taxation in the UK under the provisions of UK law. The Federal Tax Court emphasised that the DTT has to be respected even where the income is not taxed by the other state either.[4] This principle was confirmed by the Federal Tax Court in a judgment of 11 January 2012.[5]

X AREAS OF FOCUS

Given that most disputes in tax matters originate from arguments in the context of tax audits, the tax audits currently underway allow a fairly accurate forecast of which issues are likely to become the subject of judicial proceedings in the future. Looking at current tax audits and taking into account the most recent important statutory amendments, transfer pricing issues in particular are likely to be fought out before the courts. This applies especially to the area of relocation of functions, as the pertinent rules have been tightened in recent years. Other areas in which a significant number of disputes is to be expected in the future include the secondment of employees and (national and international) restructuring.

XI OUTLOOK AND CONCLUSIONS

No major changes are anticipated that might affect the German system and practice of disputes and litigation in tax matters. A recently introduced act is expected to accelerate judicial proceedings in the medium term, as it enables taxpayers to challenge excessively lengthy proceedings more efficiently. Another improvement for taxpayers expected in the medium-term concerns their protection against double taxation, as the German tax authorities are undertaking considerable efforts to negotiate new DTTs with arbitration clauses, which would extend taxpayers' protection beyond mere mutual agreement procedures. Together, these measures should ensure that Germany's level of legal protection in tax matters, which is already fairly good, will be further improved.

4 Judgment of 24 August 2011, Case No. I R 46/10.

5 Case No. I R 27/11.

Chapter 14

GREECE

Ioannis Stavropoulos[1]

I INTRODUCTION

Tax disputes in Greece are common and occupy a considerable part of the administrative and judicial procedures. The right of judicial protection, enshrined in Article 20, Paragraph 1 of the Greek Constitution, covers acts and omissions of organs of the state, including those of the tax administration.

The financial crisis and the corresponding need for increased public revenues have led to significant changes in the administrative taxation procedure arising from the memoranda signed between Greece and its international lenders. In 2010, there was a major reform in the administrative courts procedure with a particular focus on tax disputes with a view to discouraging exercise of unnecessary legal remedies and make the allocation of court competences more efficient. This reform has so far proven fruitful at least in terms of figures. For instance, the number of pending judicial recourses before the Administrative Court of First Instance with regards to tax disputes has fallen from 142,852 in 2012 to 30,365 in 2016, and the number of tax cases pending before the Council of State (i.e., the supreme administrative court) has fallen from 5,663 in 2012 to 5,007 in 2016. (Pending appeals before the Administrative Court of Appeal have slightly increased from 11,322 in 2012 to 13,279 in 2016, largely due to transfer of competence to the Court of Appeals to judge, as a first instance court, on major tax cases).[2]

Moreover, fundamental steps were taken in the tax procedure with the introduction of a uniform Tax Procedure Code[3] (TPC), in force since 1 January 2014. This legislative initiative aimed to codify the previously dispersed provisions on all aspects of the administrative taxation procedure, including, *inter alia*, the submission of tax returns, the tax audit procedure, and the collection of taxes and penalties.

Significant changes were incorporated into the new TPC as regards the procedure for challenging acts and omissions of the tax administration. A tax dispute is now initiated by a mandatory administrative recourse before a special directorate of the Ministry of Finance, the Dispute Resolution Directorate, as a prerequisite to seeking judicial recourse before the administrative courts. The effect of this major change in the dispute resolution procedure as well as of the other provisions of the TPC remains to be evaluated in the near future when the new system will mature.

---

1 Ioannis Stavropoulos is a managing partner at Stavropoulos & Partners Law Office. The author would like to recognise the contribution of Elina Stavropoulou, formerly an intern at Stavropoulos & Partners to this chapter.

2 www.ministryofjustice.gr.

3 Tax Procedure Code, L4174/2013.

II COMMENCING DISPUTES

i The tax assessment act

In general terms, the process of tax disputes commences with the receipt of an assessment act, which constitutes a personal administrative act. The assessment act is issued based on either the tax return or data filed by the taxpayer or, in the case of a tax audit, the report of the audit.

Under the TPC, a taxpayer may file an initial tax return (Article 18, Paragraph 1), or an amending tax return if he or she becomes aware of a mistake or an omission in his or her initial return (Article 19, Paragraph 1). The TPC also provides for a tax return 'with reservation', when the taxpayer has doubts as to the existence of a tax obligation for a certain item of his or her return (Article 20, Paragraph 1). The reservation can either be accepted or rejected by the General Secretary for Public Revenue within 90 days from the filing of the tax return.

Under the TPC, a tax assessment act may be categorised as follows:

a direct tax assessment act (Article 31), known also as self-assessment: it results directly from the filing of a tax return by a taxpayer;

b administrative tax assessment act (Article 32): may be issued by the tax administration based not only on a tax return, but also on other data available at the administration;

c estimated tax assessment act (Article 33): may be issued when a taxpayer has failed to file a tax return. Upon filing of a tax return, even an overdue one, the estimated tax assessment ceases to apply and a new one is issued based on the filed return;

d corrective tax assessment act (Article 34): may be issued if, following a tax audit, a tax return is proven mistaken or inaccurate. Once a corrective tax assessment act is issued, a new corrective tax assessment act may be issued based only on the existence of 'new elements' (i.e., elements that could not have been known by the tax administration during the initial tax audit); and

e preemptive tax assessment act (Article 35): may be issued before the lapse of the deadline for submission of a tax return when there are specific indications that the taxpayer intends to leave the country, thus jeopardising the collection of the tax, especially through the transfer of assets to third parties. The preemptive tax assessment act is followed by a corrective tax assessment act within one year from the date of issuance (Paragraph 3).

The right of the tax administration to issue a tax assessment act must be exercised within five years of the lapse of the year during which the deadline for submission of the tax return expires (Article 36, Paragraph 1 TPC). This time limit might be extended under certain circumstances. In cases of tax evasion, the time limit is 20 rather than five years (Paragraph 3).

The law allows the tax administration to conduct tax audits to assess the correctness of the facts declared by taxpayers and to assess their tax liability in general. In particular, the tax administration possesses extensive powers during audits, such as the lifting of professional and tax secrecy. Following a tax audit, the tax administration serves a notice to the taxpayer containing the results of the audit and a provisional corrective assessment act. The taxpayer can state his or her views on the provisional tax correction in writing within 20 days, and the tax administration issues the final corrective tax assessment act within one month of the filing of the taxpayer's views.

Disputes can also arise from omissions of the tax administration. An omission exists where the administration, although obliged by law, fails to issue an individual administrative act to regulate a particular legal relationship. Such omission occurs with the lapse of the deadline provided for in the legislation for the issuance of the relevant act. When an omission takes place following a petition from the taxpayer for the issuance of a particular act, it constitutes a tacit rejection of the petition challengeable by the petitioner. In practice, a large number of disputes are generated by omissions of the administration.

ii Challenging the acts of the tax administration

Acts and omissions of the tax administration can be contested by the taxpayer before the Dispute Resolution Directorate, as provided in Article 63 TPC. As mentioned above, this is a mandatory internal review procedure (quasi-judicial action) established as a prerequisite before referring the dispute to the administrative courts in an effort to alleviate the burden of accumulated cases before the latter.

Exceptionally, the taxpayer can challenge directly before the competent administrative courts only an estimated tax assessment act without the prerequisite of the quasi-judicial action (Article 35, Paragraph 1 TPC). The exception also applies to disputes falling within the competency of the President of the Administrative Court of First Instance (see Section III.i).

The quasi-judicial action must be submitted before the competent tax administration within 30 days of the notification of the act or the tacit rejection, and is forwarded to the Dispute Resolution Directorate within seven days. The decision of the Dispute Resolution Directorate must be issued within 120 days of the day of submission. Non-issuance of a decision within the relevant time limit is considered tacit rejection of the action (and the lapse of the time limit constitutes a notification of the rejection). Although not explicitly provided for in Article 63, it is accepted that the tax administration is obliged to inform taxpayers in writing on any administrative act of the right to file a quasi-judicial action and the inadmissibility of a direct recourse to the administrative courts. An omission of the aforementioned notification means that a direct recourse might be admissible.[4]

Upon filing of the quasi-judicial action, payment of 50 per cent of the disputed amount is suspended, provided that the remaining 50 per cent is paid to the tax administration. Depending on the outcome of the case, the tax administration either refunds to the taxpayer any excess amount paid in advance or any additional payment that becomes due. A payment suspension petition may be filed for the former 50 per cent (which is immediately payable), but such suspension may be granted only on the grounds of 'irrevocable damage' to the payer. Non-issuance of a decision on the suspension application within 30 days of its submission constitutes tacit rejection.

III THE COURTS AND TRIBUNALS

i Composition and role of each tribunal – competent courts

Tax disputes fall within the competency of the ordinary administrative courts, which are made up of two degrees, the Administrative Court of First Instance and the Administrative Court of Appeal.

From 2016 onwards, tax disputes up to the amount of €60,000 fall within the competency of the single-member Administrative Court of First Instance.[5] Its decisions are

4 Pol 1069/4 March 2014.

5 Article 6, Paragraph 2 Code of Administrative Courts Procedure (L2717/1999), as amended by Article 18, Paragraph 2 L4446/2016.

subject to appeal before the single-member Administrative Court of Appeal. Tax disputes ranging between €60,000 and €150,000 fall within the competency of the three-member Administrative Court of First Instance. Its decisions are subject to appeal before the three-member Administrative Court of Appeal. Tax disputes exceeding €150,000 fall within the sole competence of the three-member Administrative Court of Appeal, and hence taxpayers in these disputes are limited to one level of jurisdiction; this has been heavily criticised in theory. The object of the tax dispute is determined on the basis of the amount of the main tax and not the total imputed amount.

Furthermore, non-pecuniary tax disputes (e.g., the non-issuance of a tax clearance certificate, the refusal of approval of tax books and records) as well as tax disputes stemming from the application of conservatory measures in urgent cases (under Article 46 TPC) fall within the competency of the President of the Administrative Court of First Instance, whose decisions are irrevocable.

A basic principle of Greek constitutional law is the separation of powers (Article 26, Constitution). This means that the administrative courts are totally independent to rule upon any decision falling within their competence.

ii Judicial recourse

Upon an explicit negative decision or tacit rejection (due to the lapse of the deadline for issuance of a decision) by the Dispute Resolution Directorate, the taxpayer has the right to file a judicial recourse before the competent administrative courts (Article 63, Paragraph 8 TPC) in accordance with the Code of Administrative Courts Procedure.[6] The judicial recourse must be filed within 30 days of the notification of the decision or the lapse of the 120-day time limit for the issuance of a decision by the Dispute Resolution Directorate. The deadline is extended to 90 days if the taxpayer resides abroad and the time limit is suspended from 1 to 31 August.

iii Right to appeal

A decision of the Administrative Court of First Instance, if the relevant dispute exceeds €5,000, may be subject to an appeal before the Administrative Court of Appeal filed either by the taxpayer or the tax administration. An appeal must be filed within 60 days of the day that the decision of the Administrative Court of First Instance is served to the party entitled to appeal. In any case, the appeal cannot be filed after three years as from the publication of the first instance decision.

The decision of the Administrative Court of Appeal may be subject to a petition for the cassation of the case before the Council of State. A petition for the cassation of the case may even be filed in respect of cases that are resolved at first and only degree by the three-member Administrative Court of Appeal (i.e., disputes exceeding €150,000 that fall within the sole competence of the three-member Administrative Court of Appeal). The relevant dispute for such a petition to be admissible must exceed €40,000.

iv Scope of judicial control

The competence of the administrative courts is not limited to a legality control of the contested act, but they review the contested acts both in relation to substance and legality,

6 Ibid.

within the limits of the judicial recourse (Article 79, Paragraph 5 Code of Administrative Courts Procedure). The limits of the judicial recourse are determined by the claim as well as the grounds set out in it. In relation to the review of the substance of the contested act, the court is limited by the judicial recourse and is prohibited from worsening the position of the claimant (*non reformation in pejus*). In relation to the review of the legality of the contested act, the court has the authority, on its own initiative, to examine infringement of '*res judicata*' even if such a request is not included in the recourse. In the framework of a petition of cassation, the Council of State may examine grounds related solely to the legality of the act.

IV PENALTIES AND REMEDIES

Infringements of the tax legislation can result in administrative and criminal penalties.

i Administrative penalties

Administrative penalties mainly consist of fines and are provided for in the TPC (Chapter 10). In some cases, the legislator provides for penalties in the form of deprivation of rights, such as the right to file a lawsuit in the case of failure to declare income from real estate.

The TPC distinguishes between penalties relating to procedural infringements (Articles 54 and 56) and penalties relating to substantive infringements (i.e., non-compliance with substantive obligations stemming from the tax legislation that result in the non-payment or late payment of tax (Articles 58, 58A and 59)). In addition, if any amount of tax is not paid by the due date, the taxpayer is obliged to pay interest on such amount for the period from the due date to the date the tax is actually paid. The interest rate is currently set at 8.51 per cent annually (Article 53).

Procedural infringements include, *inter alia*, non-filing or late filing of tax returns, non-compliance with the bookkeeping requirement and non-issuance of a receipt. Penalties for procedural infringements can range between €100 and €2,500, and can be quadrupled in cases of repetition. Penalties are also provided for procedural transfer pricing infringements (Article 56). These include late, incomplete or inaccurate filing, or non-filing of the summary information memorandum or the transfer pricing file, and the relevant fines range between €500 and €2,000.

If, following a tax audit, the amount of tax shown on the tax return understates the amount of tax required to be shown as per a corrective tax assessment performed by the tax administration, then the taxpayer is subject to a fine ranging from 10 to 50 per cent of the understated amount according to the size of the understatement as compared with the total tax due by the tax return. There is a special provision for the calculation of such fine on the understated amount in relation to VAT and withholding taxes (Articles 58A and 59). Further, in cases of failure to file a tax return, the fine amounts to 50 per cent of the amount of tax not paid. If following the audit, more than one fine is applicable pursuant to procedural as well as substantive infringements, the larger fine is imposed.

The imposition of administrative penalties falls within the competence of the General Secretary for Public Revenue and the relevant tax administration upon authorisation. The administrative act imposing the relevant penalty can also be contested by the taxpayer before the Dispute Resolution Directorate by filing a quasi-judicial action (see Section II.ii).

The tax administration has the authority, in urgent cases and in cases where the collection of tax is at risk, to take all necessary measures on the basis of a title provided for in the TPC, even before the debt maturity, to secure the collection of taxes. Such measures include the imposition of a seizure of movable assets, real estate, property rights and claims, and in general all assets of the debtor, either held by the debtor or held by third parties on behalf of the debtor.

The tax administration may proceed with enforced collection methods provided for in the Code of Collection of Public Revenue[7] 30 days after notification to the taxpayer that he or she is in default of tax obligations or tax fines. The notification obligation does not apply in cases of seizure of money or monetary claims held by the debtor or any third party. In cases of suspicion that the taxpayer is transferring assets to another person or preparing to flee the jurisdiction, or take any other action that will jeopardise the collection of the tax, the tax administration is entitled to proceed with enforced collection methods or to write a mortgage prior to the deadline for the payment of taxes or the notification of default or the lapse of the aforementioned 30-day period from the notification of default.

ii Criminal penalties

Pursuant to the provisions of the TPC, liabilities and criminal penalties may be imposed for the following acts or omissions:

a wilful tax evasion of income tax, special real estate tax (EFA) and unified real estate possession tax (ENFIA) by concealing net income or revenue from any source, especially by failing to file tax returns, filing inaccurate tax returns or making false registrations of transactions in the accounting books (Article 66, Paragraph 1(a));

b wilful tax evasion by failing to pay VAT, withholding taxes, duties and contributions, by not paying the correct amounts or offsetting amounts due, or making false returns in relation to the amount of the above taxes and as a result receives a refund (Article 66, Paragraph 1(b));

c wilful tax evasion by failing to pay shipping tax (Article 66, Paragraph 1(c)); and

d issuing or accepting false or fictitious invoices or forging invoices, irrespective of whether payment of tax has been avoided (Article 66, Paragraph 5).

In cases of these tax evasion offences, the following criminal penalties are provided in law:

a a minimum period of two years' imprisonment for evading tax amounting over €100,000 per year, or €50,000 in the case of VAT;

b incarceration (a minimum of five years' and a maximum of 20 years' imprisonment) for evading tax amounting over €150,000 per year, or €100,000 in the case of VAT; and

c a minimum of three months' imprisonment for issuing or accepting false or fictitious invoices, or forging invoices. If the total amount of fictitious invoices exceeds €75,000, the imprisonment sentence increases to a minimum of one year, and incarceration of five to 10 years if the total amount of fictitious invoices exceeds €200,000.

The TPC provides that with the completion of the tax audit and the issuance of the final corrective tax assessment act, the tax administration shall refer to the criminal prosecutor such acts that constitute a tax evasion offence in accordance with Article 66. Further, criminal proceedings are not affected by the filing of a quasi-judicial action or judicial recourse before the administrative courts.

7 Code of Collection of Public Revenue (L356/1974).

Finally, non-payment of monetary debts owed to the state for a time period exceeding four months is considered a criminal offence, punishable with imprisonment. The relevant penalty is a minimum period of one year of imprisonment if the total amount owed exceeds €100,000 and a minimum period of three years of imprisonment if the total amount owed exceeds €200,000.[8]

V TAX CLAIMS

i Recovering overpaid tax

In cases where a taxpayer has paid tax that is not due, he or she is entitled to a tax refund after making, to that effect, a written claim to the competent tax administration. A party entitled to a refund might be the taxpayer who paid the tax, but also, in cases of withholding taxes, the third party on behalf of whom the tax was withheld (Article 42 TPC).

If the taxpayer is entitled to a refund, the tax administration first offsets the refundable amount against the taxpayer's liability for any other taxes and then refunds the remaining excess balance to the taxpayer within 90 days of the written request. Exceptionally, for claims regarding the refund of VAT payments from taxpayers not resident in Greece, the deadline is extended to four months. It should be noted that the taxpayer may agree, by a written statement included in the claim for refund, that the tax administration withholds any remaining excess balance to offset it against the taxpayer's future tax liabilities. The right to claim a tax refund lapses at the same time that the right of the tax administration to issue a tax assessment act lapses. Finally, in cases of an overpayment of tax, interest is paid to the taxpayer from the date of application for a refund to the date on which the notification of the refund is made, unless the refund is made within the prescribed 90-day period.

ii Challenging administrative decisions

In accordance with Article 9 of the TPC, public rulings (circulars) issued by the tax administration that set out the administration's interpretation of the application of tax legislation are binding on the tax administration itself until revoked or superseded by legislation. However, such rulings are not binding on taxpayers.

With the exception of public rulings, other statements or interpretations concerning a taxpayer's liability made by an officer of the tax administration are not binding.

iii Claimants

The persons entitled to submit a quasi-judicial action based on Article 63 TPC (see Section II.ii) include the person against whom the tax assessment act has been issued, and any third parties being jointly and severally liable with the liable person.

With regard to judicial recourses, in accordance with the Code of Administrative Courts Procedure (Article 64), the right to file recourse is granted to those having a direct, personal and existing legitimate interest or being entitled to such a right by a special provision of the law. This provision covers primarily the persons and legal entities against whom the tax assessment act was issued, but persons with joint and several liability for the payment of the disputed amount, including directors and administration liquidators, are also granted the *locus standi* to challenge the tax administration's act (Article 50 TPC).

8 Article 25, L1882/1990 as amended.

VI COSTS

Proceedings before the administrative courts are subject to fees that must be paid for the action to be admissible.

In the case of pecuniary disputes, for the filing and hearing of a case, the applicant must pay a fee equal to 1 per cent of the disputed amount, with a ceiling of €15,000 (Article 277, Paragraph 3 Code of Administrative Courts Procedure, as amended by Article 37, Paragraph 5 L4446/2016). One-third of this fee must be paid upon filing of the recourse, and the remaining two-thirds by the day of the hearing, otherwise the recourse is rejected as inadmissible. If the amount of the fee exceeds €3,000, then by the day of the hearing €3,000 is payable, and the remaining amount, up to the ceiling of €15,000, becomes payable with the final decision of the competent court if the recourse is rejected (if the recourse is accepted, the amount already paid is refunded to the applicant). The aforementioned fee is payable both in cases of a judicial recourse as well as an appeal before the competent courts. It should also be noted that a prerequisite for the admissibility of the appeal is that the appellant has paid 20 per cent of the disputed amount before the day set for the hearing of the appeal unless the appellant has been granted a suspension of the execution of the first instance decision.

In accordance with the Code of Administrative Courts Procedure, if the judicial recourse or appeal is partially accepted, the court fee is payable in part, upon the discretion of the court (Article 277, Paragraph 9 Code of Administrative Courts Procedure). In addition, it is up to the discretion of the court to order the refund of the court fee even if the recourse is rejected based on the individual circumstances (Article 277, Paragraph 10 Code of Administrative Courts Procedure).

VII ALTERNATIVE DISPUTE RESOLUTION

In 2011, an arbitration procedure for tax disputes was introduced for the first time as an alternative to judicial recourse.[9] In that regard, provision has been made for the creation of a new independent body: the Body of Tax Arbitrators. However, the arbitration procedure remains a future aspiration, as it has not been activated to date.

Although there is no general advance clearing or ruling system in Greece, there are special provisions with regards to affiliated persons as defined in the Income Tax Code[10] (Article 22 TPC). In particular, affiliated persons may request an advance pricing agreement by the tax administration regarding the application of the tax legislation and the determination of the arm's-length condition for certain future transactions.

Furthermore, by virtue of L2216/1994, Greece has implemented the Convention on the elimination of double taxation in connection with the adjustment of profits of associated enterprises[11] (Convention 90/436/EEC) and the mutual agreement and arbitration procedures provided for therein. Through a recently voted amendment (Article 59, Paragraph 2 L4438/2016) to the TPC, the details of the procedure of mutual agreement provided for in Convention 90/436/EEC and in the majority of double taxation conventions concluded by Greece are set out. In particular, Article 63A,[12] added to the TPC, provides that such mutual

9 Article 47, L3943/2011.

10 Income Tax Code (L4172/2013).

11 Convention on the elimination of double taxation in connection with the adjustment of profits of associated enterprises (90/436/EEC).

12 Pol 1129/30 August 2017 and Pol 1049/7 April 2017 further clarify the application of Article 63A of TPC.

agreement procedure shall be conducted by the tax administration, and its outcome shall be published as a decision of mutual agreement, which is serviced to the taxpayer. The taxpayer can accept the decision within 60 days of its service; upon acceptance, the decision is not challengeable by means of a quasi-judicial action or any other recourse.

VIII ANTI-AVOIDANCE

A general anti-abuse rule was introduced in Greece with the revised TPC (Article 38), following the model of the EU Commission's Recommendation for Aggressive Tax Planning.[13] Under Article 38, the tax administration can ignore during the tax assessment any artificial arrangement or series of arrangements aiming to avoid taxation that lead to a tax benefit.

According to the wording of the provision, arrangements are considered artificial if they lack financial or commercial substance. The tax administration, in examining the potential artificiality of an arrangement shall examine whether:

a the legal characterisation of the individual steps that an arrangement consists of is inconsistent with the legal substance of the arrangement as a whole;

b the arrangement is carried out in a manner that would not ordinarily be employed in what is expected to be reasonable business conduct;

c the arrangement includes elements that have the effect of offsetting or cancelling each other;

d the arrangements are circular in nature; and

e the tax benefit is not reflected in the business risks undertaken by the taxpayer or its cash flows.

Since the Greek tax legislation was radically reformed in 2014, many of the issues arising in the context of the OECD base erosion and profit shifting (BEPS) project have already been addressed. Nevertheless, the competent authorities are in an ongoing process of reviewing and amending the domestic legislation as needed, as evidenced below.

Recent developments in respect of the OECD BEPS project involve implementation of Council Directive (EU) 2016/881, amending Directive 2011/16/EU, into domestic law by means of L4448/2017 in the context of Action 13 regarding country-by-country reporting. Specifically, L4484/2017 added Article 9AA to the provisions of L4170/2013, which had previously implemented Directive 2011/16/EU into domestic law, providing for the scope and the requirements for the filing of country-by-country reports in Greece by multinational enterprises and the automatic exchange of information received among the competent authorities. In the same context, L4490/2017 recently ratified the Multilateral Competent Authority Agreement on the Exchange of Country-by-Country Reports, which was signed by Greece in Paris in January 2016.[14] Additionally, most recently Greece signed the Multilateral Instrument (MLI) on 7 June 2017 in Paris. It should be noted that while Greece notified its intention to apply the MLI in respect of all double taxation treaties currently in force with other OECD members, it opted out of the provisions regarding hybrid mismatches

13 European Commission, Commission Recommendation on aggressive tax planning, C(2012) 8806 final (6 December 2012), Paragraph 4.2.

14 Pol 1131/24 August 2017 and Pol 1184/22 November 2017 provide further clarifications and guidelines on the procedure of filing and automatic exchange of country-by-country reports.

(Articles 3–5), dividend transfer transactions (Article 8) and the artificial avoidance of PE status (Articles 12–15). The first modifications to treaties covered are expected to become effective during 2018.

Greek tax legislation covers most of the issues raised in the Anti-Tax Avoidance Package, namely a general anti-abuse rule, as mentioned above, a controlled foreign corporations (CFC) regime, rules concerning interest deductions, rules on exit taxation and anti-avoidance measures in respect of affiliated companies. Implementation of Directives (EU) 2016/1164 and (EU) 2017/952 is expected until the end of year 2018 and 2019 respectively along with any amendments needed in the present Greek tax legislation.

IX DOUBLE TAXATION TREATIES

To date, Greece has concluded double taxation conventions with 57 states.[15] These bilateral conventions are transposed into national law by a legislative act and override domestic legislation by virtue of a constitutional provision. They are primarily based on the OECD's Model Convention on Income and Capital.

Double taxation conventions are interpreted according to the wording of the conventions as well as relevant commentary, and not according to domestic legislation. As international agreements, double taxation conventions shall be interpreted in accordance with the Vienna Convention on the Law of Treaties (1969). In relation to the double taxation conventions drafted in accordance with OECD's Model Convention, the OECD Guidance provides a useful soft law tool.

In general terms, the Greek courts respect and interpret properly the provisions of double taxation conventions. For example, in a recently issued judgment,[16] the Council of State, by taking into consideration the provisions of the commentary of the OECD Model Convention, ruled that a resident of Germany whose spouse was a resident of Greece was not required to file a joint tax return with his spouse in Greece despite the express opposite provision of the Greek law.

X AREAS OF FOCUS

Regarding business income taxation, apart from classic items such as the determination of the taxable base through the deduction of business expenses, transfer pricing is becoming a hot issue for the tax administration. Particularly from 2014 onwards, the tax administration has issued additional guidance on the application of the transfer pricing documentation rules and the implementation of the procedure of an advanced pricing arrangement. Further, there has been a large number of ministerial circulars regarding the implementation of transfer pricing legislation, and recently the new tax rules ratified on 1 August 2016[17] concerning transfer pricing compliance rules and audits. Importantly, as of 1 January 2014, the transfer pricing documentation requirements apply to all intercompany transactions, even those of an immaterial nature. Transfer pricing issues are also likely to draw more attention in corporate tax audits.

15 A list of these can be found on the website of the International Economic Relations Directorate.

16 No. 1445/2016.

17 L4410/2016.

Moreover, there has been an increasing emphasis by the tax administration on individuals, and particularly high net worth ones. In particular, extensive income tax audits have recently been conducted by the tax administration by applying indirect audit methods. The Income Tax Code (Article 28) and TPC (Article 27) make provision for the use of indirect audit methods for the calculation of the income of individuals and legal entities. To date, ministerial guidance has been provided for the use of three of the five available indirect audit methods, and only with regards to individuals. Those methods have been widely used by the tax administration in relation to audits stemming from remittances of huge amounts by Greek residents abroad, a practice widely followed in recent years due to the uncertainty created by the crisis.

XI OUTLOOK AND CONCLUSIONS

An important development in tax administration is the creation of an autonomous revenue agency. By virtue of L4389/2016, from 2017 onwards the tax administration is no longer a division of the Ministry of Finance (as has been the case in the past), but is a body with functional independence as well as administrative and financial autonomy, not subject to the control of other public bodies. Despite the complexity and length of the relevant legislative acts setting out the details of the functioning of the new autonomous body, the transition has gone smoothly.

Chapter 15

INDIA

Aseem Chawla[1]

I INTRODUCTION

The integrity and efficiency of any tax administration system hinges upon the creditability of its dispute resolution mechanism in the eyes of the taxpayers. For a developing economy such as India, where the courts and tribunals are over-burdened with disputes from every aspect of life, it becomes imperative to have an efficient and cost effective tax system for the assessment and payment of taxes so as to relieve taxpayers from the burden of vexatious tax litigations and endless disputes, and equally provide them with suitable avenues for dispute resolution.

With the intention of achieving that goal, the government, in its proposals for 2016, emphasised encouraging use of an e-assessment procedure to make tax assessment proceedings objective and less time consuming and is up and running in seven cities, Mumbai, Delhi, Chennai, Bengaluru, Ahmedabad, Kolkata and Hyderabad. The approach of the government is therefore to shift the economy towards a 'broad base, low rate' taxation regime. The emphasis on 'digital India' and a 'cashless economy' must, therefore, be seen in the same light.

Recent times have witnessed continuous efforts of the tax authorities as well as the government to improve the image of India's tax administration and tax collection, and moves are constantly being made along these lines. It is not an exaggeration to state that the Indian policy reforms are moving in a direction where India being viewed as an adversarial jurisdiction is removed over a relatively short period of time.

The chief concern of taxpayers, including multinational companies, that the tax authorities frequently adopt aggressive positions inconsistent with both international and domestic taxation norms and principles, has also been addressed by the current administration, and ensuring the ease of doing business remains the underlying objective of the government in all the policies it is formulating.

The grass-root problem of the prolonged continuation of tax disputes at various levels in India has not yet received the required attention of the policymakers. The main reason for tax litigation is a lack of clarity in the law that makes it susceptible to multiple interpretations. Further, the existence of multiple appellate levels through which a disputed issue has to pass before attaining certainty, and the existence of conflicting opinions from various appellate fora and authorities across the country, also contribute to delay and a multiplicity of proceedings. Another reason for the increasing number of tax disputes and litigation is an understaffed and inexperienced tax administration tackling the rapidly evolving tax laws and the issues arising thereunder.

1 Aseem Chawla is a tax partner at Phoenix Legal. The author would like to acknowledge the contribution of Priyanka Mongia, a senior associate at Phoenix Legal, for her contribution to this chapter.

The mechanical application of laws, arbitrary tax demands and protracted litigation coupled with the aggressive stance taken by the revenue department in the past has made India infamous for its adversarial approach, which drew criticism to such an extent that India was perceived as a non-tax friendly jurisdiction. However, the government has advocated the need for a non-adversarial tax regime, with the focus shifting towards enhancing efficiency by reducing the burden of compliance.

In addressing these concerns, a number of worthwhile measures have been undertaken to encourage a non-adversarial tax regime and to fuel growth. For example, several departmental office instructions have been issued with the overall aim of building capacity, improving the quality of assessments and encouraging the e-assessment procedure; and regarding the decision to not to pursue specific issues before the Apex body, etc., apart from the ratification of a mutual agreement procedure (MAP), and the entering into of unilateral or bilateral advance pricing arrangements (APAs) to bring clarity to the transfer pricing regime.

On the other hand, the stringent Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act 2015 has also been enacted with the objective of preventing income and assets from being illegitimately kept outside the purview of the Indian tax net. Going ahead with the idea of tapping black money within the country, the government first introduced an income disclosure scheme effective 1 June 2016, with an overall outflow of 45 per cent, including interest and penalties, to be paid on such undisclosed income, and 500 rupee and 1,000 rupee denomination banknotes were eventually withdrawn with effect from 9 November 2016. These steps are further seen in the light of the inclusion of unorganised sectors within the ambit of income, since a large segment of the country's economy works on a cash-based system, thereby evading tax assessment and payment. As a result, the government has also proposed another disclosure scheme for people to 'come clean' by paying 50 per cent of tax on junked currency deposited in banks post-demonetisation.

In terms of dispute resolution mechanisms, India already has in place an elaborate structure of dealing with tax disputes. The statute provides for a five-tier appellate hierarchy for resolving conflicts between the revenue department and taxpayers, of which the higher two in the hierarchy are only law-finding fora. In addition to this, certain alternate dispute resolution mechanisms are also provided for in certain specified cases, along with procedures for advance rulings and APAs.

Historically, in the pre-Constitution era, any interference by the high courts in revenue matters pertaining to the exercise of their original jurisdiction was prohibited. However, the revenue enactments had provisions whereby the jurisdiction of the high courts could be invoked for the limited purpose of the interpretation of statutes.

Subsequently, over the years, the bar on the high courts dealing with revenue matters was removed by the Constitution. Further, the Constitution declared that no taxes shall be levied or collected save by the authority of law. It conferred power, in the widest terms possible, on the high courts and the Supreme Court (SC) to issue writs and orders to prevent any manner of illegality or impropriety. The right was conferred on taxpayers to test in courts the very validity of the provisions of revenue law on the touchstone of the fundamental rights guaranteed by the Constitution.

As a result, the high courts and the SC are no longer mere advisers on specific points on which their opinion is sought, but have been given the role of ensuring that revenue laws are enacted in accordance with the Constitution, and that powers under the enactments are exercised in accordance with the statute with due regard to the principles of natural justice.

II COMMENCING DISPUTES

Under the current scheme of the Income Tax Act 1961 (Act), various remedies are available to a taxpayer, when he or she is aggrieved by the action or order of an assessing officer (AO): appellate, administrative and writ remedy, alternative dispute mechanism, and advance rulings and APAs.

The appellate, administrative and writ procedures available under the provisions of the Act are described below.

i Appellate remedy

Every person, including a company and a firm, is required to furnish a return of his or her income in the prescribed form. An AO examines the income return filed by a taxpayer, and frames the assessment by applying the provisions of the Act. The Act also empowers the AO to make a reassessment, within the prescribed time limit, if he or she has reason to believe that the income chargeable to tax has escaped the original assessment. Special provisions have also been enacted to assess or reassess the income of taxpayers for the preceding six years, irrespective of whether an assessment or reassessment has been concluded already, wherein 'search proceedings' were initiated.

When any tax, interest, penalty or fine is payable in consequence of any of the orders mentioned above, a notice will be served to the taxpayer demanding to pay the sum in the prescribed manner.

The Act and the general principles of natural justice mandate that the AO give the taxpayer adequate opportunity of being heard in case he or she disagrees with the quantum of income and tax declared by the taxpayer, or certain positions adopted in the return of income.

Under the provisions of the Act, the taxpayer has a right of appeal where he or she feels aggrieved by the order of the AO. However, the taxpayer has no inherent right of appeal unless the Act specifically provides that a particular order is appealable. Accordingly, to use the privilege to appeal, every person seeking to fight an appeal must ensure that he or she fulfils every condition, procedure and restriction provided under the law for his or her appeal to be considered by the appropriate authority.

There are four levels of appeal under the Act:

a first appeal, where an appeal against an order of the AO lies with the Commissioner of Income Tax (Appeals) (CIT(A));

b second appeal, where an appeal against an order of the CIT(A) can be referred by the taxpayer or by the Tax Department to the Income Tax Appellate Tribunal (ITAT);

c third appeal, where the taxpayer or the Tax Department may refer an appeal against an order of the ITAT to the high court on a substantial question of law arising out of the order of the ITAT; and

d fourth and final appeal, where an order of the high court can be challenged either by the taxpayer or by the Tax Department before the SC, which is the final appellate authority.

First appeal: CIT(A)

The first appeal against the order of the AO lies with the CIT(A) under Section 246A of the Act. The taxpayer is required to file an appeal in the prescribed form along with the requisite fee within 30 days from the date of payment of the tax in cases where an appeal is preferred to deny the liability to deduct tax at source in certain cases in terms of Section 248 of the Act, or the date of service of the notice of the demand relating to the assessment or penalty, or the date of the intimation of an order (as the case may be).

The CIT(A) functions under the administrative control of the Ministry of Finance. In an appeal against an order of assessment, the CIT(A) has the power to confirm, reduce, enhance or annul the order passed by the AO. However, the CIT(A) has no power to set aside the appeal. In an appeal against an order imposing a penalty, the CIT(A) may confirm or cancel the order to make a variation to reduce or enhance the amount of penalty. The CIT(A) may also grant a stay against the demand raised by the Tax Department in consequence of the impugned order, if it deems fit. Further, with the objective of easing the stay process, which was viewed as partisan and favouring the Revenue, the Central Board of Direct Taxes (CBDT) has standardised the requirement of an upfront payment amounting to 20 per cent of the disputed amount as a pre-condition for requesting the stay of demand disputed before the CIT(A).[2]

The CIT(A) may decide such appeal within a period of one year of the end of the financial year in which such appeal is filed.

Disputes can arise due to an incorrect or erroneous filing of an income return. To resolve these, the legislation provides a mechanism for filing a revised return within the prescribed time limit.

Similarly, the provisions of the Act empower the income tax authorities to amend their orders with a view to rectifying mistakes on record within the prescribed time limit.

The other appellate remedies relating to appeals before the courts and tribunals are discussed in Section III.

III THE COURTS AND TRIBUNALS

As previously suggested, an aggrieved taxpayer has the opportunity to file an appeal with the higher authorities against an order of the CIT(A).

Specific monetary limits and conditions have been prescribed by the CBDT, the apex direct tax administrative body, for appeals to be filed by the Tax Department before the ITAT, the high court and the SC. Accordingly, appeals are not generally filed by the Tax Department in cases where the tax effect does not exceed the prescribed monetary limits. However, the CBDT has also instructed that the monetary limits should not be the only guiding factor and filing of appeals should be decided strictly on merits.

i Levels of appeal

The mechanism under each of the above-mentioned levels of appeal is given below.

Second appeal: ITAT

A taxpayer or the Tax Department may object to any order passed by the CIT(A) by directing the AO to file an appeal before the ITAT under Section 253 of the Act. The aggrieved party is required to submit the appeal in the prescribed manner within 60 days of the date on which

2 F.No. 404/72/93-ITCC dated 31 July, 2017.

the order sought to be appealed is communicated to him or her. A recent incentive[3] provided to taxpayers, however, is that the Tax Department cannot move in an appeal to the ITAT if the pecuniary value of the case is less than 1 million rupees.

The ITAT may hear and decide every appeal within a period of four years of the end of the financial year in which the appeal is filed. The ITAT is the final fact-finding authority and, accordingly, on all questions of fact, orders passed by the ITAT shall be final and binding on the taxpayer as well as the Tax Department. The ITAT may also grant a stay against a demand raised by the Tax Department in consequence of the impugned order, if it deems fit.

The ITAT functions under the aegis of the Ministry of Law and Justice and takes the form of a judicial system. It operates across 21 cities and has 105 members. Each city has one or more benches. As of 1 January 2017, 91,537 cases are pending in ITAT.[4]

Third appeal: High Courts

Every order of the ITAT that involves a substantial question of law is appealable to the relevant High Court under Section 260A of the Act. The appeal is required to be filed in the prescribed form within 120 days of the date that the order appealed against is received by the aggrieved party. The appeal is required to be heard by a bench of not less than two judges, and should be decided in accordance with the opinion of the majority of the judges. In a recent circular,[5] the CBDT has barred the tax authorities to appeal to the High Court where the pecuniary value of the case is less than 2 million rupees.

Fourth appeal: SC

An appeal shall arrive with the SC from any judgment of the High Court under Section 261 of the Act, provided that the High Court certifies the case to be fit for appeal to the SC. The appeal may be filed by the Commissioner of Income Tax (Appeals) or a taxpayer aggrieved by an order of the High Court. When the high court refuses to certify the case to be fit for appeal to the SC under Section 261, a special leave petition (SLP) may be made to the SC against the decision of the High Court. The appeal is required to be filed within 60 days of the date of the high court judgment.

In other cases, the period of limitation is 90 days from the date of judgment or order challenged in the SLP.

ii Administrative remedy

Revision of orders

The power of revision is an exceptional power, kept on the statute book to ensure that there is no miscarriage of justice on either side owing to certain technical requirements of the appeal procedure. As mentioned above, revisions are more related to exceptional power and are not as frequent as appeals.

Since the power of revision is meant to protect the Tax Department as well as taxpayers, two sections have been incorporated under the Act for dealing with the power of revision; these are explained below.

3 Circular 21/2015 dated 10 December 2015.

4 Article published in *Business Line*, titled, 'Pending cases before ITAT has come down' dated 30 January 2017.

5 Circular 21/2015 dated 10 December 2015.

Section 263

As mentioned above, Section 263 of the Act gives the Commissioner of Income Tax the power to revise an order passed by the AO that he or she considers erroneous insofar as it is prejudicial to the interests of revenue. The Commissioner does not have the power to revise an order under Section 263 on matters that have been considered and decided in the appeal.

The revision of orders under Section 263 is confined only to orders passed by an AO and by the Deputy Commissioner of Income Tax performing the function of the AO. The Commissioner may pass suitable orders, including an order enhancing or modifying the assessment, or cancelling the assessment and directing a fresh assessment, or any other order to the detriment of the taxpayer.

Such order may be passed by the Commissioner of Income Tax within two years from the end of the financial year in which the order sought to be revised was passed. A taxpayer has the right to appeal to the ITAT against such an order. A writ can also be examined in appropriate cases.

Section 264

Taxpayers aggrieved by certain orders who feel that the remedy is of an administrative nature, or where an appeal is not possible, may invoke the provisions of Section 264 and seek revision of such orders by the Commissioner of Income Tax. An application for revision is required to be made by the taxpayer within one year from the date of communication of the order. Under Section 264, the Commissioner does not have the power to revise any order where an appeal against the order goes to the CIT(A) or to the ITAT.

The Commissioner may pass an order within a period of one year from the end of the financial year in which the application for revision is made.

However, this does not preclude the taxpayer from exercising his or her constitutional right to present a writ before the High Court or to file an SLP before the SC.

IV PENALTIES AND REMEDIES

Under the Act, penalties are imposed either by the departmental authorities or by the courts. However, the right to impose a penalty of an income tax officer does not come to an end when an appeal is filed against his or her assessment, although in certain cases he or she must obtain the prior approval of the Principal Commissioner.

The Act provides for two lines of penalties: civil penalties and criminal penalties. While the quasi-criminal proceedings intend to provide deterrence against the recurrence of default on the part of the taxpayer being assessed, and ensure compliance with the statutory requirements, there are certain offences triable by a criminal court. It can, therefore, be concluded that all penalties do not flow from an offence, as is commonly understood, but all offences lead to a penalty. Whereas a penalty flows from a disregard of strict statutory provisions, an offence is committed when there is *mens rea* and it is made the subject matter of an adjudication in a prosecution launched for that purpose in a criminal court.

Further, in its fight against tax evasion, the Indian tax regime concluded that the imposition of a monetary penalty alone was futile. The practice of evading tax for years and then getting away with it by a passing penalty fed the legislative thought to incorporate prosecution provisions into the existing law. The existing legislation also provides for the launching of prosecution proceedings for grave offences irrespective of the applicability of monetary penalties.

Furthermore, the recently enacted Black Money (Undisclosed Foreign Income and Assets) Act 2015 enhances civil and criminal liability in cases where income and assets have been illegitimately kept outside the purview of the Indian tax net.

Moreover, to rationalise and bring objectivity, certainty and clarity to the penalty provisions, with effect from 1 April 2016, the penal provisions pertaining to concealment of income or furnishing inaccurate of income have been replaced by provisions for under-reporting of income and misreporting of income.

In the ongoing exercise to curb black money tapped within the country, the Taxation Laws (2nd Amendment) Act, 2016 proposes introducing Section 271AAC of the Act, which levies a penalty of 10 per cent on a tax payable at 75 per cent (tax 60 per cent plus a surcharge of 25 per cent) on undisclosed as well as unexplained income. Further, the Bill proposes amendments to Section 271AAB of the Act to levy enhanced penalties on income unearthed during search proceedings.

i Remedies under the Act

Petitions and other applications

In rare circumstances, the taxpayer is given a right to petition the Commissioner of Income Tax or the Principal Commissioner of Income Tax for a reduction or waiver of certain penalties imposed. The primary requirements are that the taxpayer concerned should have cooperated with regard to the enquiry relating to the assessment of his or her income, should have paid or made arrangements for the payment of tax or interest payable, and should have made a full and true disclosure of his or her income and particulars relating thereto.

A similar relief is provided by way of an administrative circular to enable taxpayers who are liable to pay interest to petition for its waiver or reduction.

V TAX CLAIMS

i Recovering overpaid tax

In cases where tax has been paid in excess by the taxpayer, such excess tax can be claimed as a refund in the income tax return filed for the relevant financial year. Under the relevant provisions of the Act, a taxpayer is entitled to receive interest calculated in the prescribed manner on the amount of refund due.

ii Challenging administrative decisions

The Constitution clearly provides that no tax shall be imposed except that accorded by the authority of law. It is thus beyond the ambit of the administrative authorities to make a decision for the purposes of tax imposition in violation of the Constitutional Authority.

Where an administrative decision runs in contradiction to state policy, the courts have specifically held that the administrative policy cannot contradict the legislative policy.

Writ remedies

The high court may issue a writ of prohibition to stop the income tax authorities from acting in excess of their jurisdiction, or a writ of *mandamus* to compel the income tax authorities to perform their statutory duties or to refund moneys wrongfully recovered from the petitioner. The high court may also issue a writ of *certiorari* to quash quasi-judicial proceedings taken by the income tax authorities without jurisdiction or in excess of their jurisdiction, or to quash an order that is vitiated by an error apparent on the face of the record or that is passed in violation of the principles of natural justice, or to quash summons or orders issued that are patently illegal.

The basic principle of law is that a writ will not ordinarily be issued by the court where the impugned order, not patently erroneous, is made by an authority within the court's jurisdiction. However, where the defect of jurisdiction is apparent on the face of the proceedings, or there is an abuse of power, a writ of prohibition or another appropriate writ or order can be issued despite the existence of an alternative remedy: for example, the right of appeal. The petitioner also has the option to file an SLP with the SC against the judgment of the High Court under the relevant article of the Constitution.

iii Claimants

There is no group relief available since there are no tax consolidation rules in vogue. Every taxpayer pays tax in his or her own tax capacity. One of the notable exception is a situation where the tax assessment is made in a representative capacity.

In other words, only the person whose rights and interests are affected (i.e., the taxpayer) can make an appeal. In the case of an assessment of a representative for a foreign resident, the representative has the right to appeal on behalf of the foreign resident.

VI COSTS

Domestic tax law does not specify any mechanism for the recovery of costs. Costs are levied at the sole discretion of the courts. However, to avoid unnecessary litigation, the courts tend to levy high costs on matters involving frivolous issues.

VII ALTERNATIVE DISPUTE RESOLUTION

Options available to a taxpayer under the alternate dispute mechanism are described below.

i Dispute Resolution Panel (DRP)

The DRP was commissioned by the government as a specialised panel operating for the resolution of transfer pricing disputes and for determination of tax liabilities of foreign companies in India.

Under the provisions of the Act relating to the functioning of the DRP, in the event that an AO proposes to make any variation to the returned income or loss of a taxpayer that is prejudicial to the interest of the taxpayer, a draft order is required to be provided by the AO to the taxpayer. Pursuant to the issuance of such draft order by the AO, the taxpayer has the choice to either opt for the standard litigation process as described above and approach the CIT(A), or to file an appeal before the DRP. If the taxpayer opts for the latter, the DRP will decide the validity of the adjustments made by the AO after considering the evidence furnished and objections raised by the taxpayer, to issue appropriate directions. The directions issued by the DRP are binding on the AO. Both the taxpayer and the Tax Department are permitted to appeal against the directions of the DRP before the ITAT. The entire process is time bound, and is required to be completed within a period of nine months from the date of an application made to the DRP.

ii Income Tax Settlement Commission (the Commission)

The Commission is a quasi-judicial body and its prime purpose is to settle tax liabilities in complicated cases, avoiding endless and prolonged litigation and consequential strain on the investigational resources of the Tax Department.

An application may only be filed with the Commission at the stage of pending assessment proceedings before an AO. The application may be filed in cases where the additional tax payable on the income disclosed in the application exceeds 5 million rupees in the case of assessment or reassessment proceedings under provisions relating to search or requisition, and 1 million rupees in other cases. The order passed by the Commission is conclusive as to the matter stated therein. However, it is possible to file a writ before the High Court or an SLP with the SC against any order of the Commission. It is significant to note that, once an application for settlement has been admitted and allowed to be proceeded with, a subsequent application for settlement before the Commission cannot be preferred by the taxpayer.

iii Authority for Advance Ruling (AAR)

The Scheme of Advance Rulings has been introduced under the Act to provide a facility to ascertain the income tax liability of a non-resident, to plan income tax affairs well in advance, and to avoid lengthy and expensive litigation.

Under the AAR Scheme, a non-resident or certain categories of residents (who have undertaken or propose to undertake a transaction with a non-resident) can obtain binding rulings from the AAR on questions of law or fact arising out of any transaction or proposed transactions that are relevant for the determination of their potential income tax liability. A resident can use the 'advance ruling' facility in relation to tax liability arising out of one or more transactions valued at 1 billion rupees or more (in aggregate). It is important to note that an advance ruling is not permitted to be sought in the following cases:

a where the question is already pending in the case of the non-resident applicant before any income tax authority, the Income Tax Appellate Tribunal or any court;

b on questions relating to a determination of the fair market value of any movable or immovable property; or

c where the application relates to a transaction that is designed *prima facie* for avoidance of income tax.

The rulings of the AAR are binding on the Tax Department and the taxpayer. Although the rulings pronounced are not appealable in nature, this does not preclude the parties from exercising their constitutional right to present a writ before the High Court. In a recent decision, the SC held that a constitutional challenge against an order of the AAR, which under income tax law is final and binding, would lie with the High Court and not with the SC. The rulings of the AAR would remain in force as long as the transaction continues, and as long as there is no change in law or the facts on which the ruling was obtained. There is no limitation as to the number of assessment years for which the ruling shall be applicable, except where the law itself restricts the period of its applicability.

iv APAs

An APA is an agreement between a taxpayer and a taxing authority on an appropriate transfer pricing methodology for a set of transactions over a fixed period of time in the future. APAs offer better assurance on transfer pricing methods, and are conducive to providing certainty and unanimity of approach.

Under the provisions of the Act, the CBDT is empowered to enter into an APA with any person undertaking an international transaction. Such APAs shall include determination of the arm's-length price or specify the manner in which the arm's-length price shall be determined in relation to the international transaction. APAs are valid for such previous years as specified in the APA, which shall in no case exceed five consecutive previous years (i.e., within the period of four previous years preceding the first previous year covered in the APA). The regular APA shall be binding only on the person and the Commissioner of Income Tax (including income tax authorities subordinate to the Commissioner) in respect of the transaction in relation to which the APA has been entered into. The person entering into such APA is necessarily required to furnish a modified return within a period of three months of the end of the month in which the said APA was entered into in respect of the return of income already filed for a previous year to which the APA applies. It is important to note that India has signed its first bilateral APA with the US after eight months of continued efforts. To date, India has signed 186 APAs, of which only 15 are bilateral APAs and 171 are unilateral.[6]

v MAP

A MAP is a dispute resolution mechanism provided for resolving controversies arising out of the application of double tax avoidance agreements, and is a special procedure that is outside the scope and purview of domestic income tax regulations.

In general, Article 25 of the Model Tax Treaty Convention provides for said framework, and the OECD Convention is the one primarily used as the basis for all MAP proceedings.

The procedures relating to MAP proceedings are prescribed under Rule 44G to 44H of the Income Tax Rules 1962. To be admissible, the MAP application is required to first be presented to the competent authority of the taxpayer's state within three years of the first notification of an action (assessment notice or order, etc.). The resolution under a MAP is required to be communicated to the Chief Commissioner or Director General of Income Tax in writing, and the AO is required to affect the same within 90 days of receipt of such a resolution, if the taxpayer gives his or her acceptance to the resolution and withdraws all appeals pending on the issue that was the subject matter of adjudication under the MAP.

The MAP route can be pursued by taxpayers simultaneously with the domestic dispute resolution process. Further, it is pertinent to note that the MAP is applicable to a specific taxpayer. The details of resolutions reached are not available within the public domain and cannot be used as a precedent by other taxpayers. Within the Indian scenario, most MAP cases are with the United States, the United Kingdom, Japan and a few European countries.

In a positive development, India recently signed a framework agreement with the US under the MAP provision of the India–US double taxation avoidance agreement (DTAA). It has resolved about 100 transfer pricing disputes involving 50 billion rupees between the two countries, especially in the IT and ITeS sectors.[7]

6 CBDT Press Release, dated 1 December 2017 on Section 92CC of the Income Tax Act, 1961 – Transfer Pricing – Advance Pricing Agreement – Indian Advance Pricing Agreement Regime moves forward with signing of two more APAs by CBDT in November, 2017.

7 www.ndtv.com/india-news/india-us-resolve-tax-disputes-worth-rs-5-000-crore-1626830.

VIII ANTI-AVOIDANCE

The Indian legislature introduced the provisions of the general anti-avoidance rule (GAAR) through the Finance Bill 2012. GAAR provisions have been made effective from 1 April 2017. The GAAR regulations are aimed at targeting complex or unusual tax avoidance arrangements that take advantage of inadvertent loopholes in the tax laws. The GAAR provisions provide discretionary powers to the revenue authorities when dealing with tax avoidance arrangements. These powers include:

a the authority to disregard the entities in a structure;
b the authority to reallocate income and expenditure between parties to the arrangement;
c the authority to alter the tax residence of such entities and the legal situs of assets involved; and
d the authority to treat debt as equity, and vice versa.

Moreover, although certain terms have been explicitly defined under the GAAR provisions, significant terms such as commercial substance and *bona fide* purpose have not been defined, leaving adequate room for subjective interpretation by the tax authorities and taxpayers. The GAAR provisions are currently drafted in a manner so that they do have an overriding effect on the provisions of tax treaties. The GAAR provisions shall not apply to any income earned by any person from transfer of investments made by such person before 1 April 2017.

According to the GAAR provisions, an AO shall make a reference to the Principal Commissioner of Income Tax for invoking the GAAR, and, on receipt of said reference, the Commissioner shall hear the taxpayer. If the Commissioner of Income Tax is not satisfied by the reply of the taxpayer and is of the opinion that the GAAR provisions are to be invoked, the matter shall be referred to an approving panel. After providing the taxpayer with an opportunity to be heard, the approving panel is required to dispose of the reference within six months after any necessary examination and inquiry. The disposal entails declaring an arrangement to be either permissible or impermissible. The directions of the approving panel are binding on the AO. However, the taxpayer can appeal against a GAAR order directly to the ITAT for quick resolution of the dispute.

IX DOUBLE TAXATION TREATIES

The provisions of the Act effectively make a tax treaty part of domestic tax law that will override the provisions of domestic law to the extent they are beneficial to the taxpayer.

India is not a signatory to the Vienna Convention on the Law of Treaties, or the OECD Model Convention on Income and on Capital, but is a member of the United Nations Model Double Taxation Convention between developed and developing countries. However, the courts have acknowledged and given due credit to principles enshrined in the Vienna Convention, and have also acknowledged the persuasive value of the OECD Model Convention.

Recently, India amended its DTAAs with, *inter alia*, Belgium, Singapore and Mauritius. Provisions pertaining to source-based taxation, limitation of benefits and effective exchange of information articles have been appropriately revised or inserted *vide* such amendments to prevent treaty shopping and to strengthen the exchange mechanism.

Recently, through a notification, the CBDT amended the Income tax Rules, 1962 to provide for a separate segment in the Foreign Tax Credit Rules, 2016. The Rules provide clarity on the mechanism for obtaining a foreign tax credit in India on foreign taxes paid. The intended beneficiaries of the Rules are Indian residents that earn foreign-sourced income.

X AREAS OF FOCUS

The peril of black money both within and outside India has been in the spotlight during the past few years, and has captured public sentiment and political attention. The government has initiated several schemes to reinforce its commitment towards tackling the menace of the parallel economy and its attempt to bring money of that nature back into India. For instance, through the Finance Act, 2015, the Black Money (Undisclosed Foreign Income and Assets) And Imposition of Tax Act, 2015 was introduced to bring back to India income and assets sited overseas. Similarly, through the Finance Act, 2016 the government introduced the income disclosure scheme, 2016 as a one-time window to declare domestic undisclosed and unreported income and assets for any previous year prior to 1 April 2016 by making a down payment of 45 per cent of the undisclosed income to avoid prosecution provisions.[8]

Amid the above-mentioned initiatives, the government introduced the bold step of demonetising high-value-denominated currency notes to tackle issues including black money, money laundering and terrorism. Following such declaration, the government again unveiled another round of the income disclosure scheme, 2016, focusing on high-value deposits or cash that, if unexplained, can be voluntary offered to be taxed at a rate of 50 per cent of the unexplained cash, with a remaining 25 per cent being deposited with government-approved banks for a minimum lock-in period of four years and bearing no interest.

All these initiatives evidence the fact that the present government, led by Narendra Modi, is in no mood to allow the offenders responsible for the generation of a parallel economy to escape punishment, and that it shall leave no stone unturned to ensure that the parallel economy no longer exists. The same is witnessed by the authorities having seized an all-time high-value amount of cash and jewellery, while 33.6 billion rupees of unpaid taxes have been surrendered this year as part of its enhanced crackdown against black money holders in India.[9]

Further, the 2016 dispute resolution scheme provided a window for cases wherein tax arrears in respect of which an appeal was pending before the first appellate authority as on 29 February 2016, or, in the case of any specified tax (e.g., tax determined upon validation or a retrospective amendment of provisions of the Act) in respect of which an appeal, writ or any other proceedings are pending, taxpayers can make a tax payment and get relief in terms of the interest and penalties imposed on them. Around 300,000 tax cases are pending at the first appellate level with a disputed amount of tax of about 55 million rupees.[10]

Regarding controversial cases such as *Vodafone*, *Shell*, *Cairn* and *Nokia*, the government has been served with arbitration notices from the said taxpayers by their invoking of bilateral investment treaties or bilateral investment promotion and protection agreements with India

8 652.5 billion rupees' worth of declarations were made under the income disclosure scheme.

9 Press release, 30 August 2016: Black Money – Three Hundred Per cent Rise in Raids, Seizures.

10 Union Budget Speech of Finance Minister 2016.

for the resolution of tax disputes. The government's intent behind the introduction of the dispute resolution scheme, 2016 was to resolve such pending matters. The Revenue Secretary, Mr Adhia, has admitted that the response to the scheme is not as expected.

XI OUTLOOK AND CONCLUSIONS

Recently, the World Bank Group released its *Doing Business 2018* report where for the first time India was ranked at 100 in the list of 190 countries. Last year, India was ranked at 130 by the report, and this jump made India one of the top 10 improvers in this year's list by implementing eight out of 10 Doing Business indicators.[11] One of the indicators being 'Paying Taxes', it measures the total tax and contributed rate, the time needed to comply with the major taxes and the number of tax payments. There's an increase of 18.39 per cent in the 'Paying Tax' this year from the distance to frontier (DTF) measure.[12]

However, the biggest and the most important reform of this year, goods and service tax (GST) was not factored in by the World Bank while conducting this survey.[13] GST was implemented on 1 July 2017 whereas 1 June is the cut-off date for ranking economies on the 10 indicators, owing to which it did not get factored. Next year, when GST will be factored, India's ranking in all likelihood will improve in the Doing Business report as GST merges a large number of indirect taxes into one, making it completely electronic, bringing easy compliance and time bound approval of applications – things which the World Bank asks for in any reform.[14]

Indians are the second-most taxed people in all the G20 countries with a take-home salary of 54.90 per cent.[15] In order to review the Income Tax Act of 1961 and to draft a new direct tax in consonance with the economic needs of the country, the government has constituted a task force.[16] Lowering the rates for income and increasing the number of taxpayers is the overall aim of the new direct tax code being put up by the task force. The panel constituted in November 2017 has been given six months to submit its report.

Further, in addition to amendments in the DTAAs with Cyprus and Mauritius, India also signed a protocol amending the existing DTAA with Belgium. This Protocol broadens the scope of the existing framework of the exchange of tax-related information that would assist in curbing the tax evasion and tax avoidance between the two countries and also enable mutual assistance in collection of taxes. The government also amended the tax treaty with Singapore earlier this year under which for two years capital gains tax will be imposed at

11 http://www.worldbank.org/en/news/press-release/2017/10/31/india-jumps-doing-business-rankings-with-sustained-reform-focus.
12 http://www.doingbusiness.org/data/exploreeconomies/india.
13 http://www.businesstoday.in/current/economy-politics/ease-of-doing-business-rankings-india-rank-world-bank-100/story/262976.html.
14 https://economictimes.indiatimes.com/news/economy/policy/gst-to-have-big-impact-on-ease-of-business-ranking-next-year/articleshow/61376510.cms.
15 http://indiatoday.intoday.in/story/what-is-direct-tax-code-and-how-it-may-impact-your-income-tax-once-implemented/1/1095488.html.
16 http://www.incometaxindia.gov.in/news/misccom-constitution-task-force-drafting-new-direct-tax-legislation-22-11-2017.pdf.

50 per cent of the prevailing domestic rate and the full rate will apply from 1 April 2019. This revision will help curb revenue loss, prevent double non-taxation and streamline the flow of investments.[17]

General Anti Avoidance Rules have been made effective from 1 April 2017 in Indian tax law. The arbitrary use of GAAR will drive away investments necessary for economic growth, but there is a need to factor in this situation to ensure GAAR does not end up choking efficient tax planning. GAAR will require walking a tightrope to strike a balance between conflicting interests, like revenue collection and taxation planning.[18]

Further, to curb cross-border tax evasion, nearly 100 countries committed to adopt the OECD global standard for the automatic exchange of information, including India. With effect from 1 September 2017, India shall share information on an automatic basis with the member countries.

In its efforts to tighten provisions against domestic black money, the Indian government has made it mandatory to link Aadhaar card, similar to a social security number, with the personal bank accounts of individuals, PAN card (tax identification number) and various other services. Linking Aadhaar with PAN will enable the Income Tax department to establish an efficient and accurate surveillance system of detecting tax evasion as the Aadhaar number can give easy access to the IT returns filed sequentially as well as other details of the individual.[19]

The government's firm stand on tackling black money and its continued efforts to make India a tax-friendly jurisdiction are much appreciated and laudable. With limited resources at hand, issues affecting tax disputes are being tackled one at a time.

17 https://economictimes.indiatimes.com/news/economy/policy/india-notifies-amended-tax-treaty-with-singapore/articleshow/57793542.cms.

18 http://www.insightsonindia.com/2017/07/24/insights-editorial-gaar-deterrent-tax-avoidance/.

19 http://www.financialexpress.com/money/aadhaar-card-link-with-pan-card-last-date-5-benefits-of-aadhaar-pan-linking-you-must-be-aware-of/834282/.

Chapter 16

INDONESIA

David Hamzah Damian[1]

I INTRODUCTION

Tax disputes in Indonesia involve local government administration by the revenue authority of the province, regency and central government taxes administered by the Ministry of Finance through the Directorate General of Taxes (DGT) and the Directorate General of Customs and Excise (DGCE). Procedures for dispute resolution are governed by the Local Tax Law at the administrative level for local government taxes; by the Customs Law and the Excises Law for taxes administered by the DGCE; and by the General Rules of Taxation Law (GRT Law) for taxes administered by the DGT.

The number of tax disputes filed for resolution in the Tax Court in 2016 amounted to 10,153 applications, decreased by 17 per cent compared with the number of tax dispute applications in 2015.[2] The number of Tax Court decisions issued in 2016 was 12,852, an increase of 30 per cent compared with 2015. It seems that the large number of tax disputes filed for resolution in the Tax Court is the result of legal uncertainty in Indonesian tax laws. In this regard, 44 per cent of Tax Court decisions were fully in favour of taxpayers, 14 per cent were partially in favour of taxpayers and 28 per cent denied requests from taxpayers.

Out of a total of 3,487 cases, 1,845 tax disputes were carried over to civil review requests at the Supreme Court in 2015.[3] Typically, the increase in the number of official assessments has been caused by a high tax revenue target. In addition to the receipts from Indonesia's tax amnesty policy, a database of taxpayers and their assets profiles would provide the DGT with information for the purpose of monitoring and engaging taxpayers in better tax compliance.

Official assessments by the DGT are usually performed by tax audit. The quality of the tax audit is determined by its key indicators: high-tax revenue contribution and refund discrepancy. Official assessments by the DGT are required whenever a taxpayer requests a refund. In February 2016, the DGT issued DGT Circular Letter No. SE-06/PJ/2016, regarding its tax audit policy. The Circular Letter provides guidelines for carrying out tax audits whose objectives are monitoring tax audit procedural compliance, increased audit coverage ratio and increased tax revenues resulting from tax audits.

The Circular Letter also provides selection criteria for tax audit, which include:

a transfer pricing;
b change-of-book periods;
c mergers and acquisitions;
d business restructuring;

1 David Hamzah Damian is a partner at DDTC Consulting.
2 http://www.setpp.kemenkeu.go.id/Ind/Statistik/StatBerkas.asp.
3 kepaniteraan.mahkamahagung.go.id/images/LAPORAN_TAHUNAN_MARI_2015_FINAL.pdf.

e advance refunds;
f tax returns requesting refunds;
g tax returns carrying forward advance taxes; and
h fixed assets revaluations.

However, the tax audit policy has been held up by the issuance of DGT Instruction Letter No. INS-03/PJ/2016 on August 2016, which requires all DGT officers to promote the Tax Amnesty Law upon carrying out tax audits. The instructions given by the Director General are, *inter alia*:
a to not issue or to cancel audit instruction letters (that have not been delivered to taxpayers) until 31 March 2017, except for those concerning tax refund audit criteria or regarding tax audits related to the administrative aspects of taxpayers' rights;
b to inform taxpayers to whom tax audit instruction letters have been delivered about the tax amnesty policy;
c in the event that a taxpayer opts to implement the tax amnesty policy, an ongoing tax audit shall be stopped and shall not be subject to the issuance of any assessment; and
d tax audits that are stopped due to the implementation of the tax amnesty policy shall be considered as tax auditors 100 per cent conversion performance indicator.

Below, we provide a summary of tax dispute resolution procedures under the Indonesian tax system, focusing on the central government taxes administered by the DGT and customs duties administered by the DGCE. Since the tax dispute statistics for excise and local government taxes are relatively small, we do not provide explanations for them.

II COMMENCING DISPUTES

i Taxes administered by the DGCE

Generally, tax disputes administered by the DGCE begin with an assessment of import and export declarations, customs facilities requests or renewals, and unloading activities declared in a certain area. The DGCE assesses these, and can issue:
a a customs official assessment resulting in an import duties tariff or value assessment, and other items;
b a customs audit resulting in an assessment other than that of a customs tariff or value, and penalties; or
c a customs audit resulting in a customs tariff and duties assessment.

Assessments resulting from (a) and (b) could be opposed by filing an objection letter to the DGCE within 60 days of the assessment date. This generally requires bonds equivalent to the amount of taxes or duties assessed to be provided. The DGCE will make a decision regarding a taxpayer's objection within 60 days after receipt of the objection letter. If the DGCE has not made a decision regarding the objection within 60 days, the taxpayer's objection will be deemed granted, and the bonds will be released back. A customs tariff and duties reassessment and objection decision can only be appealed to the Tax Court within 60 days of the date of the assessment or objection decision. When filing an appeal to the Tax Court regarding a DGCE objection or customs tariff and duties assessment (resulting from an audit), the taxpayer is required to pay the full amount of assessed taxes.

ii Taxes administered by the DGT

Taxes administered by the DGT include income tax (corporate income tax and individual income tax), VAT and sales tax on luxury goods. Pursuant to Article 3, Paragraph 1 of the GRT Law, the self-assessment system must be completed by taxpayers filing tax returns and paying taxes due without reliance on DGT assessments. DGT assessments subject to dispute with taxpayers can be classified as follows: a tax collection notification letter; a tax assessment letter (and withholding tax receipt); and other tax letters (i.e., private letters).

Generally, tax collection notification letters and tax assessment letters are the result of tax audits or tax verification. Tax verification, although not standardised in the GRT Law, is included in Government Regulation (GR) No. 74 (2011). Other tax letters issued by the DGT could be subject to dispute depending on the content of such letters. Tax collection notification letters and tax assessment letters issued based on tax verification will only cover a certain area (e.g., revenue) and will not cover all areas of a particular type of tax. Although tax collection notification letters or tax assessment letters have been issued based on tax verification, the DGT can still audit taxpayers and issue such assessments again. However, some articles, including those concerning tax verification under GR No. 74 (2011), have been invalidated by Supreme Court Decision No. 73 P/HUM/2013 concerning a judicial review requested by the Indonesian Chamber of Commerce.

A tax audit is generally initiated by a taxpayer's request for a refund. Almost every tax refund request is followed by a tax audit. The tax refund audit timeline is 12 months from the date the tax return requesting a refund is filed. A taxpayer's refund request is deemed granted if the DGT fails to issue a tax assessment letter within 12 months. In a non-tax refund audit, while there is a procedural timeline, an audit exceeding such timeline cannot be invalidated. A taxpayer who meets certain criteria can receive an advance tax refund, but the DGT still has the authority to audit and issue an assessment. In the case of a tax assessment letter issued in relation to the previously administered advance tax refund, if the tax assessment letter issued shows that the taxpayer has been underpaid, the unpaid tax is added with a penalty of 100 per cent. The DGT can also audit a taxpayer based on selective criteria, according to DGT audit policy, for a certain year. The DGT has only recently focused on auditing certain transactions such as related-party transactions and corporate restructurings, and transactions in certain areas of industry, such as agriculture and mining.

During an audit, a tax audit officer will perform direct and indirect tests as governed by DGT audit procedures. In some cases, a tax audit officer will perform indirect testing such as reconciliation of tax accounts with financial accounts on a tax adjustment basis. However, tax laws require that tax adjustments by the tax officer be based on valid and competent evidence, which in our view does not include the results of indirect testing. Tax Court judges, confirmed by Supreme Court judges, also hold this view. Thus, reconciliation of tax accounts with financial accounts would not qualify as evidence.[4]

Pursuant to Article 12, Paragraph 3 of the GRT Law, the DGT can only issue a tax assessment letter if it has evidence that the tax disclosed in the tax return is incorrect. This sets the foundation that the burden of proof under the Indonesian tax system lies with the tax authority. The notion that the burden of proof lies with the DGT has been confirmed in a civil review decision by Supreme Court judges.[5] However, this would not be the case for a taxpayer who does not maintain proper accounts and records. In such case, the DGT can

4 See Supreme Court Decision No. 492/B/PK/PJK/2010.

5 See Supreme Court Decision No. 161/B//PK/PJK/2010 and 79/B/PK/PJK/2005.

issue a tax assessment letter with an underpaid amount, and add a 50 per cent penalty in the case of income tax, and a 100 per cent penalty in the case of withholding tax, VAT and sales tax on luxury goods.

During a tax audit or tax objection, data and document submission should be managed with great caution. The DGT could deny a taxpayer's objection if the data or documents requested are not submitted during the tax audit pursuant to Article 26A, Paragraph 4 of the GRT Law. The DGT could also request the Tax Court to omit the data or documents submitted in the Tax Court that were not submitted previously during a tax audit and tax objection (other than those in the possession of a third-party), and this has been confirmed by Supreme Court judges.[6] In another Supreme Court decision, this would not be the case if the data or documents, although not submitted during a tax audit, are submitted during a tax objection. In such case, they would still qualify as evidence.[7]

Prior to a tax audit, the taxpayer can amend his or her tax return resulting in overpaid tax or tax loss within three years of the end of the tax period. An amendment resulting in underpaid tax has no time limit, but is subject to a 2 per cent penalty for each month. During a tax audit, taxpayers can voluntarily disclose errors in their tax returns by applying Article 8, Paragraph 4 of the GRT Law, and pay the resulting unpaid tax and a 50 per cent penalty of the unpaid tax prior to submission of a disclosure. However, the DGT would review such disclosure before deciding to accept or deny it.

Prior to the final findings of a tax audit, taxpayers can request a quality assurance review at the higher level of the DGT. The basis for requesting a quality assurance review is if there is a violation of the law and its application by a tax audit officer. The quality assurance team will issue a legally binding decision as a basis for the final findings of a tax audit and its tax assessment letter.

Following a DGT tax collection notification letter, a taxpayer can file for administrative remedies pursuant to Article 36 of the GRT Law as follows: a penalty reduction or write-off (Article 36, Paragraph 1a of the GRT Law); a reduction or cancellation of the tax collection notification letter (Article 36, Paragraph 1c of the GRT Law); and a cancellation of a tax collection notification letter resulting from a tax audit that was completed without the taxpayer receiving temporary audit findings and a final audit closing conference letter (Article 36, Paragraph 1d of the GRT Law).

Following a DGT tax assessment letter, the taxpayer can file administrative remedies pursuant to Article 36 of the GRT Law as follows: a penalty reduction or write-off (Article 36, Paragraph 1a of the GRT Law); a reduction or cancellation of a tax collection notification letter (Article 36, Paragraph 1b of the GRT Law); and a cancellation of a tax assessment letter resulting from a tax audit that was completed without the taxpayer receiving temporary audit findings and a final audit closing conference letter (Article 36, Paragraph 1d of the GRT Law).

Administrative remedies set out in Article 36, Paragraph 1 of the GRT Law are generally resolved within the following timelines:

a an indefinite timeline if filing an application for the first time;

b a DGT decision is made within six months of receipt of the first application;

6 See Supreme Court Decision No. 1026/B/PK/PJK/2014.

7 See Supreme Court Decision No. 877/B/PK/PJK/2013.

c a second application is filed within three months of the DGT decision on the first application; and
d a DGT decision is made within six months of receipt of the second application.

A taxpayer's first or second application is deemed granted if the DGT fails to issue a decision letter within six months of the application being received.

Upon a DGT decision on the first or second taxpayer application of Article 36, Paragraph 1 of the GRT Law, the taxpayer can file a lawsuit to the Tax Court appealing the decision. The lawsuit should be made within 30 days of the decision.

Further to the above, following a DGT tax assessment letter and withholding tax receipt, a taxpayer can request administrative remedies pursuant to Article 25 of the GRT Law by filing an objection to the DGT within three months of the tax assessment letter being sent or the date of the withholding tax receipt. The three-month timeline is not applicable when the taxpayer is able to demonstrate a force majeure situation. Upon filing a tax objection, the administrative remedies set out in Article 36, Paragraph 1 of the GRT Law will be denied as long as the two remedies are closely related. Pursuant to Article 26, Paragraph 4 of the GRT Law, the burden of proof still lies with the DGT, unless the tax assessment was issued based on the grounds of insufficient accounts or records.

The taxpayer's objection will be deemed granted if the DGT fails to issue an objection decision letter within 12 months of the objection letter being received. Upon the DGT objection decision, the taxpayer can file an appeal to the Tax Court. The DGT objection decision could be fully accepted, partially accepted or denied, or could increase the amount of taxes.

Regarding other letters issued by the DGT, such as tax audit instruction letters or private letters, such letters can be resolved by filing a lawsuit with the Tax Court. Generally, the Tax Court will consider the case and decide whether such letter is subject to resolution in the Tax Court provided that certain criteria are met, especially if such letter has resulted in specific tax consequences for the taxpayer.[8] The lawsuit for such letter should be filed within 30 days of the date the letter was sent.

Law No. 30 Year 2014 regarding Governmental Administration (GA Law) provides rules and guidance for governmental bodies when performing their duties. The GA Law is also to be applied by the administrative courts, which system the Tax Court is part of. Administrative products of governmental bodies are defined broadly under the GA Law, which provides more criteria for administrative products. The grounds to challenge administrative products under the GA Law include abuse of power, procedural error and principles of good governance (i.e., the principle of legitimate expectation). However, such grounds have not been applied significantly by Tax Court judges in precedent cases. Nonetheless, the GA Law still arguably provides grounds for the Tax Court in deciding tax disputes both under appeal or lawsuit.

In 2015, the Supreme Court issued Supreme Court Regulation No. 5 of 2015, which allows persons to file a 'request for decision' to the administrative court with regard to their rights to receive an administrative decision from a government body. The ground to file such 'request for decision' is generally when a person's prior request to a government body is deemed granted, but the government body has not issued an executorial decision. With

8 See Supreme Court Decision No. 110/B/PK/PJK/2008 and Supreme Court Decision No. 141/B/PK/PJK/2010.

regards to taxation, it has happened that a taxpayer's request for interest has been granted ultimately by the Tax Court, but the DGT has not issued any executorial decision allowing the interest to be paid to the taxpayer.

A seizure letter as a result of tax collection forces a taxpayer to surrender an amount of money or assets to settle the taxes owed. The taxpayer can file a lawsuit on such seizure letter within 14 days of the date of the letter in the following situations: where the taxpayer has filed for dispute resolution on the taxes due and is in financial distress, and thus requests that any tax collection, including seizure, be halted until the relevant dispute resolution has been issued; or where the process of seizure is procedurally flawed, which could result in the reprocessing of the seizure.

Unpaid taxes or penalties set out in a tax collection notification letter should be followed by active tax collection efforts, including those that end in a seizure letter. On the other hand, the collection of unpaid taxes and penalties set out in a tax assessment letter should be postponed pursuant to the taxpayer's objection to the DGT. However, such unpaid taxes and penalties are subject to a 50 per cent penalty of the unpaid amount if the DGT issues a decision partially granting or denying the taxpayer's objection. The 50 per cent penalty is not imposed if the taxpayer paid the unpaid taxes and penalties prior to objection, or if the taxpayer has filed a tax appeal to the Tax Court. The 2 per cent interest each month imposed on an unpaid tax assessment letter will not be imposed if the taxpayer files an objection to the DGT.

III THE COURTS AND TRIBUNALS

Tax dispute resolution at the judicial level is first settled in the Tax Court. If the taxpayer or tax authority wants to challenge the Tax Court decision, either or both can file a civil review to the Supreme Court. The Tax Court will only be able to accept an application for a lawsuit or an appeal from the taxpayer.

The Tax Court is part of the administrative court system under the judicial power of the Supreme Court, pursuant to Article 27 Paragraph 1 of the Judicial Authority Law. It is located in Jakarta, and uses several cities as its place of trials or hearings, including Jakarta, Yogyakarta and Surabaya. For the purpose of developing its judiciary techniques, the Tax Court is managed by the Supreme Court, while for the purpose of developing its organisation, administration and finance, it is managed by the Ministry of Finance. Although it is managed by two different institutions, Tax Court judges are independent in resolving tax disputes (Article 5 of the Tax Court Law).

Full Tax Court decisions are not provided by the Tax Court. Instead, the Tax Court provides a summary of a Court decision, which is available on its website[9] and on the Supreme Court website.[10] The Secretary of the Tax Court has said that full tax court decisions were not allowed due to the instruction of the Tax Court Chief.[11] Contrary to that, a full Supreme Court decision, even one concerning a tax dispute, is provided by the Supreme Court on its website.[12]

9 www.setpp.depkeu.go.id/Ind/News/Risalah.asp.

10 putusan.mahkamahagung.go.id/pengadilan/pengadilan-pajak.

11 *Inside Tax Magazine*, p. 30: www.ddtc.co.id/en/publication/42/pengadilan-pajak-sudahkah-transparan/.

12 putusan.mahkamahagung.go.id.

Pursuant to Article 81 of the Tax Court Law, the Tax Court is required to issue a decision on an appeal within 15 months (12 months plus a three-month extension) and on a lawsuit within nine months (six months plus a three-month extension). Tax Court decisions that exceed such timeline will not cause the decision to be invalidated by the Supreme Court.[13]

In a lawsuit, a taxpayer is not required to pay unpaid taxes as a procedural requirement, while in an appeal, a taxpayer is required to pay at least 50 per cent of unpaid taxes (Article 36, Paragraph 4 of the Tax Court Law). When an appeal is made on decisions or assessments by the DGCE, by law the unpaid taxes must be paid in full. However, the Supreme Court has issued two decisions ruling that the requirement to pay unpaid taxes for appeals on DGCE decisions or assessments is omitted and not required based on jurisprudence or precedent.[14] For appeals made on objection decisions by the DGT, the unpaid taxes in dispute are not required to be paid, as the unpaid taxes are deemed postponed until one month after the Tax Court decision is made (Article 27, Paragraph 5a of the GRT Law). Prior to an appeal on the DGT objection decision, a taxpayer is only required to pay the amount of unpaid taxes agreed during the tax audit.

If the Tax Court decision is considered unfavourable to either taxpayer or tax authority, either or both could file a civil review application to the Supreme Court. The grounds for such application are (under Article 91 of the Tax Court Law):

a the tax court decision was made based on deception by the counterparty, which was only known after the case was decided, or the Tax Court decision was made based on unauthentic evidence adjudicated by a civil court;

b there is new written evidence that is decisive and that, if known during the court proceedings, will result in a different decision;

c an *ultra petita* decision;

d part of the requisition has been decided without consideration; and

e the Tax Court decision clearly violated the applicable laws.

A civil review application is required to be filed within three months of:

a the discovery of a deception or a civil court decision adjudicating that there is an unauthentic evidence (Article 91a of the Tax Court Law);

b the discovery of new evidence of which the date of discovery must be made under oath and authorised by a competent authority (Article 91b of the Tax Court Law); or

c the Tax Court decision being sent (Article 91c–e of the Tax Court Law).

IV PENALTIES AND REMEDIES

In addition to the use of tax audits for official assessment, tax audits can be used to collect preliminary evidence where a tax crime is suspected. Where a tax audit has been completed, provided that a tax crime investigation has not commenced, a taxpayer could voluntarily disclose an inaccuracy and pay any underpaid tax along with a penalty of 150 per cent of the underpaid tax. Thus, a tax crime investigation will not commence provided that the DGT accepts such voluntary disclosure.

The punishments for a tax crime would be imprisonment and a financial penalty. Generally, the individual taxpayer or the director of a company and his or her accomplices

13 See Supreme Court Decision No. 274/B/PK/PJK/2011.

14 See Supreme Court Decision Nos. 1015/B/PK/PJK/2014 and 300/C/PK/PJK/2009.

will be held accountable for the tax crime, and only the person or company charged with the tax crime will bear the punishment. Not reporting a tax return or reporting an incorrect or incomplete tax return, or attaching incorrect information in the tax return, are generally considered as tax crimes. There is a difference between 'intention' and 'gross neglect': in the latter, if conducted by a taxpayer for the first time, the taxpayer may avoid imprisonment if he or she pays the monetary penalties. There are further, although not significant, differences between intention and gross neglect.

In the case of a Tax Court decision that denies or partially grants an appeal, the taxpayer is subject to a penalty of 100 per cent of the amount of unpaid tax less the tax paid prior to filing an objection to the DGT. Payments made after filing an objection to the DGT will not be considered in the penalty computation. On the other hand, if a Tax Court decision partially or fully grants an appeal on an underpaid objection decision, the taxpayer cannot request interest on the taxes paid prior to the objection or appeal. Interest of 2 per cent for a 24-month maximum period for taxpayers from the DGT could be available in the event that an overpaid tax in a tax return was not granted for refund during a tax audit, yet was granted for refund during a tax objection or appeal. If the DGT is late in issuing a tax refund instruction letter, the taxpayer could also request interest of 2 per cent from the time limit of the issuance of the tax refund instruction letter to the actual date of issuance of the tax refund instruction letter.

V TAX CLAIMS

i Recovering overpaid tax

As explained in Section II, a taxpayer can request a tax refund by stating such request in his or her tax return.

Where a foreign company's income tax exceeding its tax limitation in a tax treaty is being withheld, such overpayment could be recovered through the application by an Indonesian taxpayer to the DGT.

ii Challenging administrative decisions

The principle of equal treatment is applicable as a ground in resolving tax disputes, as explained in Article 31a of the Income Tax Law, Article 16b of the Law on VAT and Sales Tax on Luxury Goods, and Article 28d Paragraph 1 of the Indonesian Constitution. To confirm this, a Supreme Court decision upheld a Tax Court decision allowing a taxpayer's appeal against the DGT objection decision on the ground of the principle of equal treatment.[15]

VI COSTS

The Tax Court does not have the power to adjudicate costs related to legal proceedings to a taxpayer or the tax authorities. However, the Supreme Court can adjudicate the cost of a civil review application in an amount of 2.5 million rupiah, to be borne by the losing party.

15 See Supreme Court Decision No. 566/B/PJK/2013.

VII ALTERNATIVE DISPUTE RESOLUTION

Indonesian tax laws do not provide for arbitration or mediation for tax disputes between taxpayers and the tax authorities in Indonesia. The same applies regarding advance rulings. However, a taxpayer could request a letter to confirm certain tax rules or the tax treatment of a transaction. The DGT is not bound to respond to such a confirmation letter. If the DGT responds, a private letter will be issued and would be legally binding under the principles of legitimate expectation. In many cases, the DGT can also arrange a consultative hearing with the taxpayer, and provide a non-written explanation that is not legally binding.

During a tax dispute resolution at the administrative or court level, both the taxpayer and the tax authority can agree on something previously disputed without mediation.

VIII ANTI-AVOIDANCE

Indonesian tax laws do not have a general anti-avoidance rule with a straightforward meaning. There has been discussion by scholars that the principle of substance over form implicitly embodied in Article 4, Paragraph 1 of the Income Tax Law, and in the Indonesian accepted accounting standards, is the Indonesian general anti-avoidance rule. The substance over form principle is also applied by the Tax Court in relation to the interpretation of the term 'beneficial owner' in tax treaties. Surprisingly, in February 2017, the Supreme Court held that the Tax Court verdict was incorrect because the tax court had applied the substance-over-form principle to recharacterise a transaction.[16]

The Indonesian Income Tax Law also embodies specific anti-avoidance rules:

a thin capitalisation rules (Article 18, Paragraph 1 and Article 18, Paragraph 3): In September 2015, the Ministry of Finance again issued a debt-to equity ratio for denying interest deductions by companies. According to Ministry of Finance Decree No. PMK-169/PMK.101/2015, in effect since January 2016, the applicable debt-to-equity ratio is 4:1;

b transfer pricing rules (Article 18, Paragraph 3) states that related-party transactions should be based on an arm's-length principle by applying transfer pricing methods, namely comparable uncontrolled price, cost-plus, resale price, profit split and the transactional net margin methods. Indonesia's first transfer pricing guideline was DGT Decree No. KEP-01/PJ.7/1993, which was an audit guideline for tax officers and which was subsequently replaced by DGT Regulation No. PER-43/PJ/2010 on 6 September 2010 and further amended by DGT Regulation PER-32/PJ/2011, which adopts most of the OECD Transfer Pricing Guidelines 2010;

c controlled foreign corporation (CFC) rules (Article 18, Paragraph 2 and Ministry of Finance Regulation No. PMK-107/PMK.03/2017): 'Controlled' is defined as directly or indirectly owning 50 per cent of shares in a foreign corporation. The Indonesia CFC rules operate a deemed dividends approach, whereby the undistributed profits net-after-tax income of the CFC is deemed to be distributed as dividends in accordance with shareholdings in the CFC. Further, the CFC regulation will also be applied to a CFC domiciled in a jurisdiction with a tax rate higher than Indonesia;

d indirect transfer of shares (Article 18, Paragraph 3c and Ministry of Finance Decree No. PMK-258/PMK.03/2008); and

16 See Supreme Court Decision No. 135/B/PK/PJK/2017.

e beneficial owner test: This was modified from limitations on benefits rules (DGT Regulation No. 10/PJ/2017). The rules specify criteria and forms to be filed by foreign taxpayers to be entitled to a treaty benefit. One questionnaire form includes a checklist concerning beneficial ownership that adopts the limitation on benefits test.

Even though Indonesia is not a member of OECD, Indonesia has expressed to its support of OECD views that BEPS presents a high risk to state revenue. As part of Indonesia's commitment to the implementation of the BEPS Action Plan related to tax treaties, Indonesia has signed the Multilateral Instrument (MLI) to implement BEPS Action Plan 15. Indonesia chooses to adopt the principal purpose test and simplified limitation on benefits with respect to the Action Plan on prevention of treaty abuse. With respect to Action Plan 13, the minister of Finance has released regulation concerning the country-by-country (CbC) reporting and its corresponding updates to transfer pricing documentation. In general, the contents required in the local file, master file, and CbC report pursuant to the Minister of Finance Regulation are in line with the BEPS Action Plan 13 recommendations.

The DGT has issued regulation on tax treaty application to strengthen anti-treaty abuse rules (DGT Regulation No. 10/PJ/2017). According to the DGT's view, tax treaty abuse takes place when the main purpose or one of the main purposes of the transaction arrangement transaction is to obtain the benefit of the treaty and it violates the purposes and intention of the tax treaty. In the DGT's view, there is no treaty abuse if:

a there is economic substance in the establishment of the entity and carry out of transaction;

b the legal form is same as the economic substance in the establishment of the entity or carry out of transaction;

c the business activities are managed by a company's own management that has sufficient authority to carry out the transactions;

d there are fixed assets and non-fixed assets (other than the assets generating income from Indonesia) that are adequate and sufficient in the carrying out of business activities in that treaty partner jurisdiction;

e it has sufficient employees with the expertise and certain skills in accordance with its line of business; and

f it has activities or an active business other than receiving income in the form of dividend, interest, royalty from Indonesia. The definition of active business is the actual circumstances of business activity that is indicated by the cost incurred, efforts made or sacrifices that relate directly to its business activity in order to earn, collect and maintain income, including significant activities undertaken to maintain operation as a going concern.

The BEPS effects will heavily impact transfer pricing and the entitlement to treaty benefits rules in Indonesia. These topics have been the major issues in the international tax disputes arena in Indonesia. In the author's opinion, the DGT regulation on treaty abuse could bring a wave of disputes related to the entitlement of treaty benefits owing to no valid measures or definition in that regulation concerning economic substance. In addition, the DGT will be tempted to presume intention simply because of the presence of benefits. It seems that the wording of the anti-treaty abuse rules makes it easy for the DGT to assume treaty abuse. In the author's view, it is important to undertake an objective analysis of the aim and objects of all persons involved in putting that arrangement or transaction in place. All relevant facts and circumstances should be weighed to determine whether it is reasonable to conclude that an arrangement or transactions were undertaken or arranged for such purpose. The author agrees with Weber's opinion that an assessment based solely on the effects of an arrangement is not sufficient and merely reviewing the effects of an arrangement will not usually enable a conclusion to be drawn about its purposes.[17]

IX DOUBLE TAXATION TREATIES

Indonesia has concluded and ratified tax treaties with 67 countries (including with the governments of Lao and Armenia, ratified in 2016), which prevail over Indonesian domestic tax laws according to Article 32A of the Income Tax Law. In 2014, Indonesia ratified the Convention on Mutual Administrative Assistance in Tax Matters, and treaties on exchange of information with the governments of Bermuda, the Isle of Man, Guernsey and Jersey. Although Indonesia is not a party to the Vienna Convention on the Law of Treaties, it has a law concerning international treaties that governs that international treaties shall be applied in good faith. This is similar to what is directed in the Vienna Convention. In many Tax Court cases concerning limitations on the benefits of tax treaties, the Tax Court has unanimously held that the domestic rules of limitation on the benefits of tax treaties shall not be applied in excess of that which has been agreed in such tax treaties.

With respect to policy making, the government is trying to renegotiate several tax treaties that are not beneficial to Indonesia, and to promote automatic exchange of information in tax treaties. In November 2011, Indonesia signed the Multilateral Convention on Mutual Administrative Matters, which was ratified through Presidential Decree No. 159/2014. The Minister of Finance subsequently signed the Multilateral Competent Authority Agreement on 3 June 2015 and committed to automatic exchange of information by 2018;[18] however, it is expected that Indonesia will expedite from September 2017.[19] The minister of Finance has also issued the regulation concerning exchange of information that more specific details are to apply the automatic exchange of information with OECD Common Reporting Standard (CRS).[20]

X AREAS OF FOCUS

As previously mentioned, tax disputes mostly arise from audits of tax returns with refund requests. A refund discrepancy is the primary key performance indicator in a tax audit; thus, the tax refund will most likely be reduced. Transfer pricing is still the main focus of tax audits, followed by the mining and agricultural industry, which contributes significantly to the tax revenue. Corporate restructurings involving transfer of intangible properties and workforce, both domestic and international, are also targeted.

17 Denis Weber, 'The Reasonable Test of the Principal Purpose Test Rule in OECD BEPS Action Plan 6 (Tax Treaty Abuse) versus the EU Principle of Legal Certainty and the EU Abuse of Law Case Law', *Erasmus Law Review,* August 2017.

18 See kemenkeu.go.id/en/node/46126 and www.oecd.org/tax/transparency/AEOI-commitments.pdf.

19 See www.thejakartapost.com/news/2015/11/15/indonesia-end-bank-secrecy-2017.html.

20 The Minister of Finance Regulation No. 70/ PMK.03/2016.

XI OUTLOOK AND CONCLUSIONS

The government is planning to amend the Law on General Rules of Taxation and to include in the national legislation a 2015–2019 programme to promote lower compliance costs, and to promote efficient and effective tax administration through, *inter alia*, electronic self-assessment mechanisms and the payment of taxes in currencies other than the Indonesian rupiah.[21] In addition, the government plans to implement technical measures to increase the taxation database with data from other regulatory and governmental bodies. In addition, following the arrest of a senior tax officer by the Corruption Eradication Commission, the Ministry of Finance has established two teams that will oversee and direct the reform of Indonesia's taxation and customs system.[22]

The tax revenue collection policy will be focused on intensified law enforcement and the continued implementation of the exchange of information.

21 Financial Note and State Budget 2016 – II.3-2.

22 One of the team advisers is our firm's managing partner, Darussalam: jakartaglobe.id/economy/finance-ministry-sets-two-teams-reform-tax-office.

Chapter 17

IRELAND

John Gulliver and Maura Dineen[1]

I INTRODUCTION

The Irish landscape for tax dispute resolution provides a platform to avoid litigation through various means, including through various systems of qualifying disclosures, correspondence and by liaising with the specialist Large Cases Division of the Irish Revenue (Revenue). Additionally, where there is a dispute between a foreign tax authority and the Revenue, the Revenue may provide assistance in challenging foreign taxing rights of Irish tax-resident companies' profits through the mutual agreement procedure in Ireland's double taxation treaties.

The Irish tax appeals system was significantly reformed in 2016, and a new tax appeals regime came into operation on 21 March 2016. Substantial changes were introduced, and a new independent Tax Appeals Commission was established. There were a number of changes to the tax appeals process; most notably, the opportunity to appeal a decision of the Appeal Commissioners to the Circuit Court for a rehearing was removed and appeal hearings are now, by default, held in public. However, in certain specified circumstances or at the appellant's request, the Appeal Commissioners may hold the hearing or part of the hearing in private. A further change is that the Tax Appeals Commission is obliged to publish appeal determinations no later than 90 days after notifying the parties of the determination, and there are currently almost 60 determinations available to review on the Tax Appeals Commission website. A case management conference procedure was also introduced in a bid to expedite cases. This is where a commissioner directs that a meeting be held to help progress a case.

Where there is a dispute at law on an appeal commissioner's determination, a party can request the Appeal Commissioners to state and sign a case for the opinion of the High Court. The case stated is prepared by the Appeal Commissioners. Further recourse can be made from the High Court to the newly established Court of Appeal. Only in certain circumstances may a case be taken to the Irish Supreme Court. EU matters can be referred to the Court of Justice of the European Union, or indeed an appeal can be made there as part of the litigation process. Constitutional challenges may only be made after other means of litigation have been exhausted.

Litigating through the Appeal Commissioners and courts requires the hiring of specialist tax litigation counsel. This process is typically time-consuming and lengthy, particularly,

1 John Gulliver and Maura Dineen are tax partners at Mason Hayes & Curran.

given that there were over 4,000 outstanding appeals earlier this year and only three Appeal Commissioners to hear the appeals. There are, however, plans by the Appeal Commissioners to increase recruitment and introduce a list system, which should help to relieve the backlog.

Costs can be substantial, although they can to some extent be restricted at the Appeal Commissioners' level; however, if an advance finding of fact occurs at that level, it cannot be overturned easily.

The Revenue has had some success in litigating aggressive domestic tax avoidance under the Irish general anti-avoidance provision contained in Section 811 of the Taxes Consolidation Act 1997, and more recently is focusing on specific anti-tax avoidance provisions. However, in the Supreme Court judgment in *Revenue Commissioners v. Droog*,[2] the Supreme Court dismissed the Revenue's appeal of a High Court decision that the opinion was out of time. The case concerned whether a Section 811 opinion was 'out of time' in light of the four-year time limit set out in the Irish Tax Code.

II COMMENCING DISPUTES

i Initiating tax disputes

Tax disputes usually start by way of an appeal by the taxpayer against a notice of assessment raised by the Revenue. A welcome change introduced by the new tax appeals process is that a taxpayer who wishes to make an appeal against an assessment raised by the Revenue now does so in writing directly to the Appeal Commissioners and not in the first instance to the Revenue. Tax disputes may also arise where a settlement cannot be reached during the course of a Revenue audit.

The Revenue monitors compliance with Ireland's transfer pricing rules through the use of transfer pricing compliance reviews (TPCRs). A TPCR is a self-review by the taxpayer of its compliance with the transfer pricing rules. It is not an audit or a Revenue investigation; nor is it necessarily a precursor to an audit. The Revenue acknowledges that the TPCR will act as an information-gathering exercise, enabling the Revenue to receive important information (such as facts and data on a particular company or group's business structure, related-party transactions and transfer pricing methodologies used). The Revenue has indicated that in some instances the TPCR will result in a transfer pricing audit. This is likely to apply where the Revenue is not satisfied with the TPCR, or it has raised queries following receipt of the TPCR and such queries were not adequately addressed.

If, during the course of a Revenue audit, the Revenue and the taxpayer cannot reach a settlement and there is a technical dispute, an application can be made to have this referred to the Appeal Commissioners. In a Revenue audit situation, an application for an internal or external review can also be made by the taxpayer if the Revenue issues a notice of opinion in relation to a penalty being imposed and the taxpayer disagrees with the opinion.

In the case of an appeal against a notice of assessment, the taxpayer must make written notice of the appeal within 30 days of the date of the notice of assessment.

ii Self-correction

The Revenue has issued a Code of Practice for Revenue Audits (Code of Practice) to provide taxpayers with guidelines relating to the audit process. The Code of Practice notes that the

2 [2016] IESC 55.

Revenue wishes to facilitate taxpayers who discover errors after submission of their relevant tax returns and wish to regularise this position. Therefore, as a general rule, a taxpayer may 'self-correct' its tax return without incurring a penalty by notifying the Revenue in writing of the adjustments required and paying any interest due. Generally, the self-correction must take place within 12 months of the due date for filing the return. The Code of Practice provides, in the case of VAT returns, that where the net underpayment of VAT is less than €6,000, the amount of the tax can be included (without interest or notification to the Revenue) as an adjustment on the next corresponding VAT return following that in which the error was made. The taxpayer must comply with particular time limits for self-correction as set out in the Code of Practice. The benefit of self-correction does not apply where the Revenue has notified the taxpayer of an audit, or contacted the taxpayer in relation to an investigation into the taxpayer's tax affairs.

iii Time limits

In situations where a taxpayer does not file a return (or makes one with which an inspector of taxes is not satisfied), the inspector may make an assessment that in his or her judgment ought to be made. As a general rule, an assessment cannot be made more than four years after the end of the accounting period to which it relates. No time limit applies where any form of neglect (as defined) or fraud has been committed by or on behalf of the taxpayer.

This four-year period applies generally to corporation tax, income tax and capital gains tax. The Revenue is generally prohibited from making enquiries related to raising an assessment after the expiry of the four-year period commencing at the end of the chargeable period in which the chargeable person has delivered a return for the chargeable period, unless at that time the inspector had reasonable grounds for believing that the return was insufficient due to its having been completed in a fraudulent or negligent manner.

iv Disclosure regime

An important element in Irish tax disputes is the 'voluntary disclosure' regime. With effect from 24 December 2008, the disclosure regime has moved from Revenue practice to having a legislative basis. Broadly, the regime allows a taxpayer to make a 'prompted qualifying disclosure' or an 'unprompted qualifying disclosure'. The disclosure must be made in writing and be accompanied by payment of tax and interest, but not penalties. To be a 'qualifying' disclosure, the taxpayer must provide complete information and full particulars of all matters giving rise to a tax liability under each tax head. By making a qualifying disclosure in relation to matters giving rise to a tax liability, a taxpayer can avoid prosecution and publication on the periodic list of tax defaulters. A further benefit of making a qualifying disclosure is that the penalties may be mitigated. The level of penalty depends on the category of default, (e.g., deliberate behaviour or carelessness), and the level of mitigation of penalty will depend, *inter alia*, upon whether the taxpayer cooperates with the Revenue.

There is also a separate disclosure regime for Ireland's general anti-avoidance provision, which in practice has been used only in very isolated and rare occasions.

v Revenue rulings

While it is possible to apply to the Revenue for a ruling in relation to certain matters, these rulings are not legally binding. Queries of a technical nature are dealt with by the Revenue's technical service to provide clarity for taxpayers on complex technical issues. It should be noted that certain Revenue rulings will be subject to the new exchange of information requirements in respect of tax rulings that have been set out in the Council Directive (EU) 2015/2376 (EU Directive) and the OECD framework. The EU Directive, which is not confined to intra-EU situations, applies to relevant rulings issued on or after 1 January 2017 and also has a look-back measure whereby information in relation to rulings issued, amended or reviewed since 2014 (regardless of their period of validity), and rulings issued in 2012 and 2013 (that were still valid on 1 January 2014), are to be exchanged. The OECD framework is already in effect, and applies to certain rulings issued on or after 1 April 2016. Similar to the EU Directive, there is a lookback provision whereby relevant rulings issued or modified in the tax years 2010 to 2013 (and in effect on 1 January 2014) and all relevant rulings issued or modified between 1 January 2014 and 31 March 2016 are to be exchanged. Unlike the EU Directive, under the OECD framework relevant rulings must be exchanged only with certain countries.

vi Freedom of information requests

The Freedom of Information Act allows people to request access to records, amendments of records or reasons for a decision of a public body, including the Revenue. This can be a useful tool for taxpayers.

III THE COURTS AND TRIBUNALS

i The courts

An appeal of a notice of assessment is determined by the newly established Tax Appeals Commission. The right to have an appeal reheard by a circuit court judge if dissatisfied with an appeal commissioner's decision has been abolished.

Either party may declare its dissatisfaction with the determination as being 'erroneous in point of law', and may within 21 days of the determination of the appeal commissioner require the appeal commissioner, by notice in writing, to state a case for the opinion of the High Court. The decision of the High Court can be appealed to the Court of Appeal. A decision of the Court of Appeal may only be appealed to the Supreme Court where the Supreme Court is satisfied that the decision involves a matter of general public importance or that the appeal is necessary in the interests of justice. A direct appeal from the High Court to the Supreme Court is only possible where the Supreme Court is satisfied that there are exceptional circumstances warranting an appeal to it. A precondition to the Supreme Court being so satisfied is that the decision involves a matter of general public importance or that the appeal is necessary in the interests of justice.

In an audit situation, where there is no agreement on the liability to a penalty or where the agreed penalty is not paid, the penalty will be determined by a relevant court. The relevant court will be the district court, the circuit court or the High Court, depending upon the level of penalty in question. The jurisdictional limits of each court as and from 3 February 2014 are as follows:

a district court: amounts up to €15,000;
b circuit court: amounts up to €75,000; and
c High Court: amounts in excess of €75,000.

ii Judicial review

Where a person claims that the Revenue's procedures are unjust and contravene natural justice, or disagrees with a tax or duty statute (e.g., there is no disagreement with the interpretation of the statute, but rather with the statute itself), that person may seek, in the High Court, a judicial review of the particular infringement.

iii Non-court procedures

A taxpayer can use the Revenue's complaint and review procedure to review Revenue decisions. The first procedural step is for the taxpayer to make a formal complaint to its local tax office. If the complaint cannot be resolved, or if the taxpayer is unhappy with the response, it can request a local review, which is normally carried out by the manager of the local tax office, although the taxpayer can request to have the local review carried out by a manager in the regional or divisional office. Where a taxpayer is dissatisfied with the local review, a request can be made to have the case reviewed by an independent internal or external reviewer, who will make a final decision. A request for an internal or external review should be submitted within 30 working days of the date of the local review decision. Adjudication on points of law is generally a matter for the Appeal Commissioners and the courts, and a reviewer will only intervene where it is satisfied that the Revenue opinion is clearly incorrect. Disputes with regard to civil penalties applicable to audit and investigation matters, enforcement proceedings and settlements involving publication will not be dealt with under the complaint and review procedure.

A taxpayer can also submit a complaint to the Office of the Ombudsman, which examines complaints about the administrative actions of government departments and offices, including the Office of the Revenue Commissioners.

IV PENALTIES AND REMEDIES

Various provisions in Irish tax legislation impose different levels of fixed penalties depending on the tax default. Fixed penalties typically arise where a taxpayer fails to comply with provisions of the Tax Code but a liability to tax may not necessarily arise (e.g., failure to file particular returns).

Tax-geared penalties also apply in situations where the tax default gives rise to a tax liability. The tax-geared penalty varies in accordance with the category of tax default, whether the taxpayer made a qualifying disclosure (prompted or unprompted), and whether the taxpayer cooperated with the Revenue. The highest penalty is 100 per cent of the underpaid tax, and this arises in cases of deliberate default on the part of the taxpayer where there was no qualifying disclosure and the taxpayer did not cooperate with the Revenue. As set out in Section II the disclosure regime provides for the mitigation of penalties where a qualifying disclosure is made to the Revenue. The level of mitigation is reduced for a second or subsequent qualifying disclosure.

Criminal penalties may arise where a person commits a 'revenue offence'. On summary conviction, a person may be liable to a penalty of €5,000 or a term of imprisonment of up to 12 months, or both. On conviction on indictment, a person may be liable to a fine of €126,970 or a term of imprisonment of up to five years, or both.

Where an offence is committed by a body corporate, any person who was a director, manager, secretary or other officer, or a member of the committee of management or other controlling authority of the body at the time of the offence, can in certain circumstances be deemed to be personally guilty of the offence and proceeded against accordingly. This can happen where the offence was committed with the consent or connivance of the person concerned, or where the offence is attributable to any recklessness on the part of the person.

The Irish Companies Act 2014 came into effect on 1 June 2015. This puts a requirement on directors of all public limited companies and large private limited companies with a balance sheet total of greater that €12.5 million and a turnover of greater than €25 million to include an annual compliance statement on a company's Irish tax affairs. This statement should include a confirmation by the directors that the company has in place appropriate structures or arrangements that are, in the opinion of the directors, designed to secure material compliance with its relevant obligations under company and tax law. Failure to comply with this statement could attract penalties or imprisonment.

The Revenue has indicated in its Code of Practice that the following tax offences are most likely to be prosecuted:

a deliberate omissions from tax returns;
b false claims for repayment;
c use of forged or falsified documents;
d facilitating fraudulent evasion of tax;
e systematic schemes to evade tax;
f use of offshore bank accounts to evade tax;
g insidious schemes of tax evasion; and
h failure to remit fiduciary taxes (as distinct from minor delays in such remittance).

A hard line has been taken by the courts in relation to the prosecution of tax offences in recent years. Prosecutions have resulted in a number of high-profile convictions and the imposition of terms of imprisonment, heavy fines, or both.

The rate of interest on a late payment of tax is currently 0.0219 per cent or 0.0274 per cent (depending on the tax) per day on the unpaid tax.

V TAX CLAIMS

i Recovering overpaid tax

Overpaid tax should be refunded on a valid claim being made by a taxpayer. Such a claim will usually be made automatically on the filing of the appropriate tax return evidencing the actual tax liability of the taxpayer compared with the tax paid. As a general rule, a claim for a repayment of tax must be made within four years of the end of the chargeable period to which the claim relates.

Where the repayment due arises from a mistaken interpretation by the Revenue in the application of the law, interest will be paid from the end of the chargeable period or, if later, when the tax was paid, until the repayment is made. Interest will not apply, however, for any period where the repayment is withheld as a result of tax returns not being filed.

In the case of all other repayments, interest will be paid from 93 days after a claim becomes a valid claim until the repayment is made. Interest will not apply, however, for any period where the repayment is withheld as a result of tax returns not being filed.

Prior to making a refund of any overpaid tax, the Revenue is permitted to offset an overpayment against any other tax liability (under any tax head).

ii Challenging administrative decisions

Legitimate expectation

In Ireland, it is generally accepted that to succeed in a claim based on a failure of a public body to respect a legitimate expectation, three matters as set out in the Supreme Court decision of *Glencar Exploration v. Mayo County Council*[3] need to be established:

a the public authority must have made a statement or adopted a position amounting to a promise or representation, express or implied, as to how it will act in respect of an identifiable area of its activity (the 'representation');

b the representation must be addressed or conveyed, either directly or indirectly, to an identifiable person or group of persons affected annually or potentially in such a way that it forms part of a transaction definitively entered into or a relationship between that person or group and the public authority, or that the person or group has acted on the faith of the representation; and

c the representation must be such as to create an expectation reasonably entertained by the person or group that the public body will abide by the representation to the extent that it would be unjust to permit the public authority to resile from it.

Judicial review

In the 2012 High Court *McNamee v. The Revenue Commissioners* case,[4] the taxpayer in question had been issued with an opinion under Section 811 of the Taxes Consolidation Act 1997 (Ireland's general anti-avoidance provision, discussed further in Section VIII), and claimed that the Revenue was obliged, but failed, to issue notices under Section 811 'immediately' after it decided the transactions involved a tax advantage. The transactions in question involved a form of financial straddles using government gilts and foreign currency, which allegedly gave rise to artificial capital losses that were used to shelter capital gains. The High Court found in favour of the Revenue, holding that the relevant officer of the Revenue had to consider all the relevant criteria set out in Section 811 before issuing the notice, and that it had accordingly issued the notice of opinion 'immediately' after the Revenue officer formed the opinion that the transactions were tax avoidance transactions.

Constitutionality of decisions

It is quite difficult for taxpayers to succeed in arguments that decisions of the Revenue are unconstitutional. This is usually seen as a last resort where all other avenues have been exhausted.

Revenue's complaint and review procedure/Ombudsman

In cases where the dispute relates to allegations of unfairness towards a particular taxpayer as distinct from the actual imposition of tax, it is most likely that the Revenue's complaint procedure should be followed or that the Ombudsman be consulted.

---

3 [2002] IR 84.

4 [2012] IEHC 500.

Revenue opinions

As noted in Section II, Revenue opinions are not legally binding. The Revenue's guidance notes on providing technical assistance provide that an opinion given by the Revenue is based on the specific facts relevant to that case and its particular circumstances only. Any material change in the facts or circumstances could affect an opinion, and any such changes should be brought to the notice of the office that gave the opinion or interpretation so that the case can be reviewed. Further, it should be noted that an opinion given in relation to a specific case should not be relied on in any other case. Some opinions will arise from a unique set of circumstances. An opinion will be given on the basis of the legislation as it exists at the time of the request. If this changes in advance of the completion of the transaction, then the opinion may no longer be valid. Redacted forms of opinions issued can be obtained through a freedom of information request. As noted in Section II, these rulings may also now fall within the new exchange of information arrangements in respect of tax rulings.

iii Claimants

Only the party who files a tax return can bring a claim against the Revenue. In the case of a person who suffers unlawful tax (e.g., VAT), recovering such unlawfully imposed tax would generally be a matter of contract law between the parties. An aggrieved person would not have any recourse to the Revenue.

In group scenarios, except in the case of VAT, all parties file their own tax returns. It is generally a matter of contract law between the parties how they treat reliefs surrendered, and tax liabilities arising or reduced as a result of the use of group relief. Only the taxpayer filing the return can claim a refund of tax due to it.

VI COSTS

In the case of a hearing before the Tax Appeal Commissions, each side bears its own costs. The awarding of costs in tax cases before the courts follows the general rule that an order for costs to proceedings shall be at the discretion of the courts. In normal circumstances, costs are awarded on the basis of costs following the event, namely, the successful party is entitled to its costs. There is no specific category of cases that fall outside the general rule of costs. The courts may use their discretion, however, to award costs to the unsuccessful party where the matter at issue is one of 'public interest' and the interests of justice require the courts to do so.

VII ALTERNATIVE DISPUTE RESOLUTION

There are no specific provisions for alternative dispute resolution. Disputes are generally settled through negotiation during the audit process. Where agreement cannot be reached, litigation typically commences.

VIII ANTI-AVOIDANCE

Ireland's general anti-avoidance legislation, as provided for in Section 811 of the Taxes Consolidation Act 1997, enables the Revenue to form the opinion that a transaction gives rise to a tax advantage, and that the transaction was not undertaken or arranged primarily for any reason other than to give rise to a tax advantage, and in such circumstances the transaction is known as a 'tax avoidance transaction'. The Revenue is empowered to determine the tax consequences of the tax avoidance transaction, which may involve making any adjustment required to withdraw the tax advantage. There are two important exclusions provided for in Section 811. The first exclusion applies where a transaction was undertaken to realise profits in the course of the business activities of the person, and was not undertaken or arranged primarily to give rise to a tax advantage. The second exclusion arises where the transaction was undertaken or arranged for the purpose of benefiting from any relief, allowance or abatement provided by tax legislation, where the transaction would not result, directly or indirectly, in a misuse of the provision or an abuse of the provision having regard to the purpose for which it was provided.

On 14 December 2011, the Supreme Court issued its seminal decision in *O'Flynn*.[5] This was the first decision of the Supreme Court concerning Ireland's general anti-avoidance legislation, and the Supreme Court found in favour of the Revenue.

O'Flynn concerned a relief from corporation tax that was available to companies on profits earned from qualifying exports (export sales relief, which had long since been abolished). In addition, dividends received from an export sales relief company were also relieved from income tax in the hands of individual shareholders. *O'Flynn* involved a series of 40 individual steps undertaken over 50 days that resulted in two companies reducing their profits by making capital contributions to other companies (which were later written off), while the shareholders of both companies received dividends from other entities that were relieved from tax under the export sales relief scheme. In essence, the series of transactions involved shareholders of a company that did not benefit from export sales relief receiving dividends from another company – one that did benefit from export sales relief – so that the dividends received by the shareholders of the first company were not subject to tax.

The decision of the Supreme Court centred on whether the transactions involved constituted a misuse or abuse of a relieving provision (the export sales relief). The judgments (both majority and minority) provide a useful summary on statutory interpretation in Ireland and how it applies to taxing statutes. O'Donnell J, in the majority, held that Section 811 expressly requires the utilisation of a purposive approach to statutory interpretation. He noted that legislation in the form of Section 811 was specifically required to overcome the rejection by the Irish courts of a 'substance over form' approach to statutory interpretation. The Revenue, in forming its opinion under Section 811, is expressly required to consider the form and substance of the transaction. In addition, in considering whether there has been misuse or abuse of a relieving provision, this must be determined having regard to the purpose for which that relieving provision was provided. He noted that '[t]he function of the Revenue Commissioners, and on appeal the Appeal Commissioners, and the courts, is to seek to discern the intention of the Oireachtas[6] and to faithfully apply it to the individual case'.

He went on to note that, in this case, 'the form of the transaction was highly artificial and contrived', and held that 'a scheme which allows the shareholders in a non-exporting company to benefit from export sales relief on the profits of the non-exporting company, is surely a misuse or abuse of the scheme having regard to the purpose for which the provision is provided'.

5 *O'Flynn Construction Limited & Others v. The Revenue Commissioners* [2011] IESC 47.
6 The Irish legislative body.

In considering whether the second exclusion from Section 811 applies, there is no distinction between misuse or abuse, but 'what is important is that full effect is given to the intention of the Section that only appropriate uses of the provisions get the benefit of the tax relief'.

IX DOUBLE TAXATION TREATIES

There have been very few cases before the Irish courts involving double taxation treaties. The most recent case, from 2007, concerned the tax residence of an individual who argued that she was resident in Italy for the purposes of the Irish–Italian double taxation treaty (*Kinsella v. The Revenue Commissioners*).[7] The Revenue sought to argue that the treaty did not apply to Irish capital gains tax. The High Court found, however, that the treaty did apply to Irish capital gains tax, and that the individual had been resident in Italy in the year in question under the terms of the treaty.

As regards the interpretation of tax treaties, Ireland acceded to the Vienna Convention on the Law of Treaties with effect from 6 September 2006. In *Kinsella*, the Court noted that even before this, it was clear from the decision of Barrington J in *McGimpsey v. Ireland*[8] that, in interpreting an international treaty, a court ought to have regard to the general principles of international law, and in particular the rules of interpretation of such treaties as set out in Articles 31 and 32 of the Vienna Convention. These Articles require that a court interprets a treaty in good faith in accordance with the ordinary meaning to be given to its terms in their context, and in the light of the treaty's object and purpose. Where such an interpretation leaves the meaning of the treaty ambiguous or obscure, or leads to a manifestly absurd or unreasonable result, then recourse can be made to supplementary means of interpretation.

Avoiding litigation is the preferable route for taxpayers and the Revenue alike. Therefore, in cross-border transactions, it is possible for taxpayers to enter into an advance pricing agreement (APA), agreeing with the Revenue the arm's-length price for arrangements with related parties outside Ireland. The Revenue will engage with taxpayers and negotiate bilateral and multilateral APAs with countries with which Ireland has double taxation treaties. The conclusion of an APA will provide the taxpayer with certainty that its transfer pricing arrangements agreed thereunder are in compliance with Ireland's transfer pricing rules, and thereby result in fewer disputes.

The Irish courts' interpretation of the Treaty on the Functioning of the European Union and the EEA will follow the interpretation rules for other international treaties (i.e., as set out in the Vienna Convention).

Specifically, in relation to VAT, there have been a number of cases where the European Commission has taken cases against Ireland for its failure to comply with the Sixth VAT Directive.[9] These cases have resulted in legislative amendments in Ireland. For example, the Commission took a case against Ireland challenging the VAT treatment of public authorities, which, under Irish law, were not obliged to charge VAT on the provision of certain services. This was seen as giving rise to a distortion of competition.

7 [2007] IEHC 250.
8 [1988] IR 567.
9 Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, which repealed and replaced Directive 67/227/EEC and Directive 77/388/EEC.

Again in relation to VAT, there may be discrepancies between the Sixth VAT Directive and how it is transposed into domestic Irish legislation. Many Member States offer detailed guidance on the interpretation of the Directive. For example, in the case of the management of regulated funds, a service that is exempt from VAT, many Member States have clarified the meaning of 'management', whereas Ireland has not. In practice, it is understood that the Revenue follows the approach of other Member States.

X AREAS OF FOCUS

As noted in Section I, targeting domestic tax avoidance has been a recent area of focus. The Revenue's win in *O'Flynn* was seen as an important victory, indicating that Section 811 would stand up in the courts and should not therefore be taken lightly. It had been commonplace for some advisers to argue that Section 811 would not work, and that it would not be upheld by the courts. It was suggested that Section 811 was unconstitutional (not argued in *O'Flynn* yet) or that general anti-avoidance legislation could not take precedence over specific anti-avoidance legislation (argued unsuccessfully in *O'Flynn*). Taxpayers will need to be cognisant of Section 811 in all their tax planning and ensure that all transactions entered into can be commercially justified.

It is expected that the Revenue will continue to focus on artificial tax avoidance schemes, and seek to challenge these under Section 811 and more specific anti-avoidance provisions. This is particularly the case given its recent success in this area.

Transfer pricing is still a relatively new concept in Ireland and, as noted in Section II, the Revenue requires taxpayers to conduct self-reviews of compliance with transfer pricing rules. It is expected that this will also be an area of focus for the Revenue in the immediate future.

There has been an increase in the number of Revenue audits of research and development tax credit claims over the past few years. These audits involve a comprehensive review of research and development tax credit claims from both a scientific or technological perspective (by a Revenue-appointed expert) and a financial or tax technical perspective (by a Revenue Inspector). In addition, the Revenue has recently issued a number of letters requesting a 'self-review' of research and development tax credits by claimants. The letter typically requires the claimant to answer a number of questions about the tax credit claimed. The self-review does not constitute a formal audit or a notification of a formal audit, but may lead to such an audit based on the responses given.

The level of expenses claimed by independent contractors has also been an area of recent focus for the Revenue. This has continued to be an area of focus for the Revenue. This may in turn lead to cases where an individual's status as an independent contractor is brought into question and employee status alleged. The Department of Finance initiated a consultation process in January 2016 on the use of intermediary-type employment structures and self-employment arrangements, and a further review of these types of arrangements is expected.

The Revenue is also a representative for Ireland on the Organisation for Economic Co-operation and Development Committee on Fiscal Affairs. A dedicated Revenue team is involved in work arising from the base erosion and profit shifting (BEPS) action plan published in July 2013. Ireland's response to Action 13 of BEPS minimum standard of country-by-country (CBC) reporting was published in the Irish Finance Act 2015 and amended by the Finance Act 2016. Regulations were also introduced in 2016. The legislation commenced with effect from 1 January 2016 and will apply where the ultimate parent is tax resident in Ireland whose consolidated group turnover exceeds €750 million. The parent company will need to disclose information for each tax jurisdiction in which they do business in a CBC report. The legislation gives authority to the Revenue to share CBC reports with other tax or governmental authorities, provided that jurisdiction and Ireland have entered into a qualifying agreement on the exchange of information. Ireland has 72 double taxation agreement partners and a further 25 tax information exchange partners, giving Revenue considerable reach.

On 21 June 2016, the Council of the European Union agreed on the Anti-Tax Avoidance Directive (ATAD 1), which sets out anti-avoidance rules across five specific areas, including controlled foreign company (CFC) rules, deductibility of interest, exit taxation, hybrid mismatches and a general anti-avoidance rule.

Some of the ATAD 1 measures were to be transposed into national law by each Member State by 1 January 2017, with certain measures introduced at later dates. Member States that have targeted rules that are 'equally effective to the interest limitation rule' set out in ATAD 1 may continue to use these rules until 1 January 2024.

Further to this, on 29 May 2017, the Council of the European Union adopted the Directive amending ATAD 1. This Directive, known as ATAD 2, extends the scope of ATAD 1 to hybrid mismatches involving third countries (i.e., non-EU countries) and targets other types of mismatches not covered by ATAD 1. The deadline for implementation of ATAD 2 by EU Member States is 1 January 2020 (however, the deadline for the implementation of provisions regarding reverse hybrid mismatches is 1 January 2022).

Measures introduced in the 2016 Finance Act were introduced to tackle offshore structures used to avoid paying tax and deny 'offshore defaulters' the opportunity to use the voluntary disclosure regime with effect from 1 May 2017. A new strict liability criminal offence to facilitate the prosecution of serious cases of offshore tax evasion was introduced along with investment in systems and equipment to assist the Revenue in its investigations. The EU and OECD exchange of information resources should further assist the Revenue in this regard.

In Ireland, the Revenue takes on the role of the competent authority in resolving international tax disputes and ensuring the correct allocation of taxable profits to Ireland. Further to a BEPS consultation process in 2014, initiated by the Department of Finance, the need for the Revenue to devote additional resources to the competent authority function was highlighted. In recent years, the competent authority team has been increased significantly. The role of the competent authority is increasingly important due to the ever-changing dynamics of international trade.

On 7 June 2017, Ireland along with almost 70 other countries signed the OECD's Multilateral Instrument (MLI), which incorporates certain recommendations made under the OECD's BEPS project into many of Ireland's double taxation treaties. The focus of the MLI is on the BEPS recommendations on the treatment of hybrid structures, treaty abuse, permanent establishment status and dispute resolution. Increased information sharing at an EU and OECD level is expected to lead to more cross-border tax disputes. The MLI is intended to provide better dispute resolution mechanisms for cross-border tax disputes. Ireland, like most countries, has opted into the default option of final offer or 'baseball' arbitration. This is where each tax authority submits a proposal to address the issues to an arbitration panel which selects one of the proposals. Ireland is also one of 25 countries that have opted into mandatory binding arbitration in certain cases. Ireland's double taxation treaty with another country will be modified by the MLI where both treaty partners have respectively ratified the MLI.

Finally, the European Commission's announcement of its decision that Ireland granted illegal state aid to two companies in the Apple group in an amount of up to €13 billion plus interest focused international interest on Ireland's tax regime in the past year. However, the Commission did state that the decision does not call into question the general Irish tax system or its tax rate, and it is important to note that the *Apple* case can be limited to its facts, as they apply to the tax regime that was then in existence.

XI OUTLOOK AND CONCLUSIONS

Ireland's relatively low corporate tax rate of 12.5 per cent on trading income, a limited withholding tax regime and limited transfer pricing, and the recent introduction of a 'knowledge development box', means that Ireland is still a focal point for international tax strategies. Multinational corporations' tax charges on profits are increasingly being analysed. To avoid and protect against non-Irish tax challenges to Irish structures, groups with operations in Ireland need to review existing arrangements to ensure the underlying intragroup written agreements and other legal documentation appropriately reflect the substance of that which occurs in Ireland. If the underlying legal structures are simply boilerplate intragroup agreements, the Irish taxpaying corporate should anticipate foreign tax authority challenges.

In addition, a recent UK tax court decision on company tax residence[10] has highlighted the importance of Irish incorporated companies with foreign parents, including US ones, ensuring that their corporate governance regime provides that boards of Irish companies are appropriately staffed and conduct functions in Ireland reflecting the duties of the Irish directors. While this is a UK case, it has persuasive authority in Ireland, and where there is a group relationship, company directors need to ensure that where board meetings are convened to make decisions that have a groupwide effect, the commercial realities of each transaction are discussed at the relevant board meeting and the benefit of the transaction to that particular company also needs to be considered. The board of directors should apply its discretion and not justify its decisions with respect to the wider group structure, but directors should have the ability to account for their decisions for the company pursuant to their duties and obligations as a director of that company.

10 *Development Securities (No. 9) Limited and others* [2017] UKFTT 565 (TC).

Chapter 18

ITALY

Guglielmo Maisto[1]

I INTRODUCTION

The landscape for tax dispute resolution has changed dramatically in Italy. Pre-litigation tax settlements were not previously foreseen by the procedural tax rules (and their legitimacy, particularly their compatibility with constitutional principles, was disputed). The absence of such instruments was at times counterbalanced by the enactment of tax amnesties, which also provided the option to settle pending litigation. The Italian tax legislator introduced judicial settlements in 1992 (with effect from 1996) and pre-litigation settlements in 1997. The use of pre-litigation settlements has increased over time, as they provide for a large reduction in tax penalties, which in Italy may be more than twice the amount of the assessed tax. Moreover, pre-litigation settlements avoid the uncertainties associated with the very lengthy time frame of tax litigation (on average, a tax dispute lasts 10 years if litigated up to the Supreme Court).[2] The areas in which pre-litigation settlements are most successful are those involving evaluation aspects regarding corporate income tax (transfer pricing, anti-avoidance, deduction of payments to blacklisted jurisdictions, etc.).

That said, tax litigation in Italy still has relevance. The most recent statistics issued by the Ministry of Economy, published in June 2017[3] and relating to the situation as at 31 December 2016, show that the number of cases pending before the tax courts of first instance was 318,651, and the number of cases pending before the tax courts of second instance was 150,397.

Moreover, the same statistics highlight that in 2016:

a around 77 per cent of cases filed before the tax courts of first instance and around 58 per cent of cases filed before the tax courts of second instance involved litigations for amounts not higher than €20,000. This was one of the reasons that led the parliament to enact compulsory mediation;[4] and

1 Guglielmo Maisto is the founding partner at Maisto e Associati.
2 For a description of the organisation of Italian tax courts, see Section III.
3 'Relazione sul monitoraggio dello stato del contenzioso tributario e sull'attività delle commissioni tributarie – anno 2016' and 'Appendici statistiche – anno 2016', issued in June 2017 by the Ministry of Economy and the Directorate of Tax Justice. These documents can be found on the Ministry of Economy website.
4 See Section II.

b the amount of cases won by taxpayers before the tax courts of first instance was around 32 per cent (45 per cent of the cases were in favour of the tax authorities);[5] and the tax courts of second instance was around 38 per cent (47 per cent of the cases were in favour of the tax authorities).

Legislative Decree No. 156 of 24 September 2015, issued in the context of a broader reform of the Italian tax system, introduced important changes that have modified some rules of the Italian tax litigation system and that will be explained below.

Most of the changes introduced are effective as of 1 January 2016.

II COMMENCING DISPUTES

The Italian legislation on tax litigation procedure (Legislative Decree No. 546/1992) regulates the procedure for commencing a tax dispute for all kinds of taxes.

This system is strongly influenced by the Italian tax system, which is based on self-assessment (i.e., taxpayers must file their tax returns on the basis of their interpretation of tax legislation). The tax authorities can rectify the tax return within certain deadlines[6] by issuing a deed of assessment. In such cases, the tax dispute is initiated by the taxpayer challenging the deed of assessment issued by the tax authorities.

The deed of assessment may be challenged through two main procedures:

a if the case involves an amount of tax higher than €50,000,[7] the assessment must be challenged by filing a deed of appeal before the court of first instance within 60 days[8] of the date on which the deed has been notified. In particular, the deed of appeal must be served first to the administrative (tax) body that has issued the assessment. To commence litigation properly, the taxpayer must file the trial record with the competent tax court

5 The remaining cases were closed either through judicial settlement or partially in favour of both the taxpayer and the tax authorities.

6 Under Article 43(1) of Presidential Decree No. 600 of 29 September 1973 (as amended by Article 1(131) of Law No. 208 of 28 December 2015), the statute of limitations applicable to taxpayers who have duly filed their tax returns for the purposes of corporate income tax (IRES) and regional tax (IRAP) elapses at the end of the fifth calendar year (31 December) following the one in which the tax return was filed. However this new statute of limitations applies only to notices of assessment relating to fiscal years that will be current on 31 December 2016 and to subsequent fiscal years. For the previous fiscal years, the statute of limitations applies under the rules that were in force before the amendments enacted by Law No. 208 of 28 December 2015. In particular, before such amendments the statute of limitations expired at the end of the fourth calendar year (31 December) following the one in which the tax return was filed. However, the statute of limitations was doubled if the tax violations committed by the taxpayer gave rise to the obligation to communicate the possible commission of a criminal offence to the public prosecutor. In this event, the deadline for issuing and serving a notice of assessment expired at the end of the eighth calendar year following the filing of the tax return, provided that the communication to the public prosecutor took place before the expiry of the ordinary statute of limitations (i.e., before the end of the fourth calendar year (31 December) following the one in which the tax return was filed). Similar provisions apply (and applied until 31 December 2015) for VAT purposes under Article 57 of Presidential Decree No. 633 of 26 October 1972.

7 This threshold was increased from €20,000 to €50,000 by Decree Law No. 50 of 24 April 2017 with reference to the assessments notified from 1 January 2018.

8 Under the Italian law on civil law procedure, the computation of deadlines is suspended from 1 August to 31 August of each year. This suspension also applies to tax cases.

within 30 days of the date on which the deed of appeal was served to the counterparty. The trial record provides the relevant court with the deed of appeal, any documents or evidence, and proof that the deed has been properly served to the administrative body; and

b regarding deeds of assessment of taxes[9] (e.g., corporate income tax, personal income tax, VAT, regional tax on productive activities, registration tax) involving an amount of tax lower than €50,000,[10] the legislature recently enacted an advanced compulsory mediation procedure (mediation can involve disputes relating to deeds of assessment, deeds issuing penalties, notices of payment, denials of tax refunds, withdrawals of tax benefits or denials of tax amnesties, or any other act that can be appealed before the tax courts). The value of the dispute is based on the higher amount of tax (interest and penalties are not relevant). In the event of an appeal against a deed issuing only penalties, the value is determined by such penalties. In such cases, taxpayers must file and give notice of both the appeal and the application for mediation to the competent office within the deadline for the appeal (see above) with a copy of the documentary evidence that the taxpayer intends to submit to the tax court. Mediation is compulsory; failure to submit to mediation leads to a claim preclusion.[11] The tax authorities can accept (even partially) or reject the request, or may make an independent proposal for mediation. The mediation agreement is executed upon its endorsement by the tax authorities and on payment of the entire amount due (or of the first instalment due) within 20 days of the day of execution. In cases of mediation, penalties are due in a reduced amount of 35 per cent of the original amount.[12] The collection of the sums due is suspended throughout the mediation procedure. If the request for mediation is rejected (or if no action is taken by the tax authorities within 90 days), the taxpayer must deposit the trial records with the court of first instance within 30 days. If the mediation procedure does not succeed, the unsuccessful party in the tax trial must pay, in addition to court costs, a sum of 50 per cent of the costs of the proceedings as reimbursement of the expenses of the mediation procedure.

However, tax litigation may also arise from the denial of a refund request filed by the taxpayer (rather than as the result of a tax authority deed of assessment). Reasons leading a taxpayer to apply for a refund may vary (e.g., the taxpayer paid more tax than was due or argues that the tax was not to be paid since the relevant legislation was contrary to the Italian Constitution or European law). The right to file an application for a refund must be exercised within certain deadlines provided by the law (e.g., the right to file an application for refund of income tax is generally exercised within 48 months of the date of payment; the right to claim a refund of VAT is generally forfeited after two years from the date of payment).

9 Owing to the changes introduced by Legislative Decree No. 156/2015, as of 1 January 2016, the mediation procedure is mandatory for all deeds of assessment containing a tax claim and not only for those filed by the Italian Revenue Agency (e.g., customs agency, municipality).

10 See footnote 7.

11 This modification was introduced to avoid the unconstitutionality of the provision, which would have been entailed in the case of the inadmissibility of the appeal.

12 This rate has been introduced by Legislative Decree 156/2015 and replaced the previous rate equal to 40 per cent.

Once the application is filed, two scenarios are possible:

a the tax authorities issue a deed stating that the refund is not due, in which case the procedure challenging a deed of assessment, described above, is followed; and

b the tax authorities do not reply (silent denial), in which case the refund request is deemed to have been implicitly denied after a 90-day period. In such cases, the implicit denial may be challenged before the tax court within 10 years.[13]

The above procedures apply irrespective of the tax involved (direct or indirect) and of the subject involved (individuals, companies or partnerships).

III THE COURTS AND TRIBUNALS

Tax cases in Italy are dealt with by specialised tax courts, which are independent bodies. Notwithstanding this, tax judges are not professional judges.[14]

The tax judiciary is organised in two tiers: provincial tax courts are the courts of first instance and are established in the seat of each province of the state; and regional tax courts are the courts of appeal and are established in the seat of each region of the state. Certain decentralised sections of regional tax courts have been created, particularly in geographically extensive regions.

The deadline to appeal a decision of a court of first instance before a regional tax court is six months from the date on which the judgment is deposited. If one party duly serves notice of the judgment to the opposing party, the period during which the opponent may bring an appeal is limited to 60 days.

Judgments of a regional tax court can be brought before the Tax Chamber of the Civil Supreme Court only in limited cases, including cases where the substantive or procedural law was wrongly applied or where the motivation on the key facts of the matter has been omitted.

In tax cases, at any level, only documentary evidence can be used (i.e., witnesses are not admitted).

IV PENALTIES AND REMEDIES

Administrative penalties may be divided into three categories:

a formal infringements (i.e., infringements that do not lead to a failure to pay tax). The amount of these penalties is provided as a range of fixed amounts;

b infringements related to tax returns. The amount of these penalties is provided as a range of penalties that depend on the amount of the unpaid tax (e.g., for failing to file an income tax return, penalties range from 120 to 240 per cent of the tax due, and for filing a false income tax return, penalties range from 90 to 180 per cent of the higher amount of tax due);[15] and

13 Legislative Decree No. 156/2015 provides, effective as of 1 June 2016, the possibility for taxpayers to enforce positive decisions on tax refunds (and thus obtain payment of refunds) even if the decisions are still subject to appeal and litigation is still ongoing. The refund could be subject to the filing of a guarantee.

14 Legislative Decree No. 156/2015 provides that tax courts will establish specialised chambers dedicated to the decision on particularly controversial significant tax matters to increase the specialisation of tax judges.

15 The penalties for filing a false income tax return have been reduced by Legislative Decree No. 158 of 24 September 2015. The new provisions entered into force on 1 January 2016 according to the Finance

c failure to pay tax (including the delayed payment of tax). The penalty is equal to 30 per cent of the tax due (or paid late).

If a range is provided, the amount of the penalty is assessed by the tax authorities on the basis of the seriousness of the infringement, to be evaluated also in light of the behaviour of the taxpayer. The application of higher penalties must be justified by the tax authorities.

Penalties are increased by 30 per cent in the case of income sourced outside Italy.

Accessory penalties, such as a ban from participating in public tenders, may also apply.

If the infringement is related to the tax obligations of a company, only the company is liable to administrative penalties (not the individual who, for example, signed the tax return). Other persons may be liable in addition to the company to the extent that they concurred to commit the infringement (e.g., an external adviser that promoted a disputed transaction).

Penalties do not apply in cases of objective uncertainty on the interpretation of the law, although in practice this safe harbour is rarely accepted by the tax authorities (or courts).

Generally, any large tax dispute triggers a criminal investigation as the thresholds for triggering a tax crime are very low.

For instance, the crime of filing a false tax return is triggered (irrespective of fraud) provided there is a difference between the tax declared and the tax assessed of more than €150,000, and the higher amount of tax assessed represents more than 10 per cent of the declared turnover (or the costs disallowed are more than 10 per cent of the turnover). The 10 per cent turnover test is irrelevant if the higher taxable base is greater than €3 million.[16]

For tax crimes, the company bears no criminal responsibility itself, so the criminal investigation only involves individuals (e.g., the legal representatives of the company in the years in which the tax returns had to be filed, or the individual who signed the tax returns, or both).

Normally, tax audit reports or tax assessments indicate whether the auditors have informed the criminal prosecutor about a potential crime. The criminal prosecutor will then decide in parallel whether the conditions for the crime have been met and eventually whether to start a criminal proceeding.

The administrative and criminal proceedings are parallel proceedings, and their outcomes can diverge. Generally, payment of the claims, even by way of settlement of the administrative proceeding, determines under the law only an automatic reduction of the criminal penalty, although in practice prosecutors tend to close criminal proceedings if the revenue interest is satisfied.[17]

Bill for 2016 (Law No. 208 of 28 December 2015). The old provisions provided a range equal to 100 to 200 per cent.

16 These thresholds have been introduced by Legislative Decree No. 158/2015. The old thresholds were equal to €50,000 for the taxes evaded and €2 million for the higher taxable base.

17 Of particular relevance is the double jeopardy ruling of the Italian judicial system after the European Convention on Human Rights, Chamber II, No. 172 of 4 March 2014, *Grande Stevens and Others v. Italy*, which stated the illegitimacy of the joinder of administrative and criminal sanctions according to the 'Engel rule'.

V TAX CLAIMS

i Recovering overpaid tax

See Section II.

ii Challenging administrative decisions

Procedural tax rules provide an exhaustive list of acts by the tax authorities that can be appealed before the tax courts. This list has been broadly interpreted taking into account the fact that the acts of the tax authorities generally affect the liability of the taxpayer. If the act of the tax authorities cannot be appealed before the tax courts, it may be appealed before the administrative courts, provided that the conditions for such an appeal are met. Furthermore, procedural tax rules provide that the tax courts are not allowed to apply any act of the tax authorities that is relevant to the case, notwithstanding the fact that such an act may be appealed before the competent court.

iii Claimants

Tax litigation is generally initiated by the person who is liable to the disputed tax.

Certain exceptions exist, including:

a final withholding tax: if the withholding agent did not levy a final withholding tax, the tax and penalties are assessed for the withholding agent, who can initiate a civil law action against the recipient of the income for the amount of the tax due. On the other hand, if the withholding agent did not levy an advance withholding tax, the tax is assessed for the recipient of the income, while the penalties are assessed for the withholding agent; and

b corporate income tax consolidation: when a company participates in a corporate tax consolidation scheme, the assessment relating to an alleged tax violation of a consolidated company is served also to the consolidating company, and both parties have to appeal the assessment. In this case, both parties may stand together before the tax court.

Additional comments must be made for cases involving a refund of VAT. In fact, in VAT cases, a refund may be sought by a supplier even if the VAT burden is economically suffered by the customer. The latter is entitled to ask for a VAT refund only in relation to the supplier in a civil law procedure. The discrepancy between the applicable statutes of limitations (two years for suppliers in relation to the Revenue Agency, 10 years for customers in relation to suppliers) was challenged on the grounds of its compatibility with European law and the case was referred by the Supreme Court to the European Court of Justice (ECJ).[18] The Supreme Court,[19] in the light of the principle enshrined in the decision of the ECJ, concluded that the supplier is not entitled to obtain a refund of undue VAT after the two-year deadline unless it is proven that the customer obtained the VAT refund as a consequence of a decision of a civil law court that cannot be appealed any further; and the tax administration is put in the position of participating in this civil law judgment to argue that no refund shall be made (principle of cross-examination).

18 Case C-427/10, *Banca Popolare Antoniana Veneta*.

19 In Judgment No. 12666/2012.

VI COSTS

Italian law regulating tax litigation provides that the losing party must bear the costs of the litigation and that the costs of the winning party are declared by the court on the basis of the costs incurred. Courts can rule that each party bears, in whole or in part, its own costs, provided that both litigants are partially losers or in cases of exceptional and serious reasons that must be explained in the judgment.[20]

VII ALTERNATIVE DISPUTE RESOLUTION

i Pre-audit

If the infringement has not yet been assessed or investigated by the tax authorities, it may be self-corrected within certain deadlines by the payment of reduced penalties. In such cases, the amount of the reduced penalty varies depending on the point at which the violation is self-corrected by the taxpayer.[21]

Furthermore, the Italian legislator has launched a voluntary disclosure procedure.[22] The procedure does not qualify for tax amnesty and implies the full payment of all taxes (and interests for late payment) due in relation to the unreported assets, and a reduction of the penalties for failing to report assets and the income therefrom.

Moreover, with Decree Law No. 193 of 22 October 2016, the Italian legislator introduced a new provision (Article 6) that entitles the taxpayer to pay without penalties the amounts assigned to the collector agent until 31 December 2016 and not yet paid (i.e., still standing).[23] To benefit from this new rule, the taxpayer has to withdraw the appeal, if any, connected to the amounts involved in such procedure.

Additionally, with Decree Law No. 50 of 24 April 2017 (as converted into law by Law No. 96 of 21 June 2017) the Italian tax legislator, in order to deflate litigation, introduced: (1) an optional tax amnesty provision covering pending litigations; and (2) a new procedure that addresses the cases where non-Italian groups may apply with the Revenue Agency for an evaluation of the risk of existence, in the past, of a permanent establishment in Italy.

Pursuant to the procedure under (1), taxpayers are allowed to settle any pending tax litigations against the Revenue Agency (at any stage of the proceeding), regardless of the outcome of intermediate decisions, by filing an application by 30 September 2017. By applying for this tax amnesty procedure, taxpayers have to pay the amounts claimed in the appealed notice of assessment or other imposing deeds (including interest for late payment calculated until the 60th day after the delivery of the imposing deed), with a full discharge of penalties and default interest.

---

20 This rule was introduced by Legislative Decree No. 156/2015.

21 In such cases, penalties may be lowered down to 1/10th of the minimum penalties due.

22 See Act No. 186 of 15 December 2014, which entered into force on 1 January 2015. The procedure was available for taxpayers until 30 November 2015 and covers violations committed until 30 September 2014. With Decree Law No. 193 of 22 October 2016, the Italian legislator introduced a new voluntary disclosure procedure, very similar to the previous one, which covers violations committed until 30 September 2016. That procedure was available until 2 October 2017.

23 With Decree Law No. 148 of 16 October 2017 (as converted into law with Law No. 172 of 4 December 2017), this procedure has been extended to the amounts assigned to the collector agent until 30 September 2017.

The procedure under (2) is for foreign companies belonging to multinational groups with a turnover exceeding €1 billion that sell goods or provide services in the Italian territory for more than €50 million through the support of one or more Italian resident related companies.[24] If a settlement agreement is reached: (1) administrative penalties are reduced to a half (on top of the reduction to one-third available in any case of settlement); and (2) no criminal allegations can be claimed for omitted income tax return.

ii Post-audit

If the taxpayer is subject to a tax audit, at the end of their activity, the auditors (which may be part of the audit department of either the tax authorities or the tax police) shall draft a final tax audit report in which all the allegations are supported. Such a report does not contain a final claim. After the report has been served, the following options are available:

a the taxpayer can submit observations or additional documentation likely to prove that the tax auditor's conclusion is incorrect. Certain limitations to the option to issue an assessment for the tax authorities apply in the 60-day period following the date on which the report is served;[25]

b the taxpayer can consider filing an application to start a settlement procedure in relation to the contents of the report. The settlement procedure may lead to a reduction of the assessed tax, although there is no obligation upon the tax authorities to enter into the settlement. If a settlement is reached, penalties are reduced to one-third of their minimum amount on the settled tax;[26] or

c the taxpayer can decide to wait for the further assessment activity by the competent tax authority.

iii Post-assessment

Following notice of a tax assessment:

a the taxpayer may pay the assessed tax within 60 days, together with reduced penalties. In such cases, the penalties are reduced to one-third of the assessed amount, while the higher amount of tax assessed is definitively due; and

24 The procedure may be activated by a foreign entity by filing a specific application in case it acknowledges a risk of potential existence of a permanent establishment in Italy in the past tax periods (and still open for a tax assessment) in connection to the support activities rendered by the related Italian service company.

25 For the tax police reports issued on 31 December 2015, if the taxpayer believed that the tax police report fairly assessed the facts and the corresponding amounts, it was possible to accept its content within 30 days of the report being served. In such circumstances, within the following 60 days the tax authorities served the taxpayer with a 'settlement deed' showing the tax due on the adjustment included in the report, and the minimum applicable penalties reduced to one-sixth. The amounts due under such a settlement deed had to be paid within 20 days of receipt of the deed (an instalment programme was available).

26 Until 31 December 2015, in the event that the taxpayer cannot opt for acceptance of the tax police report or in other circumstances (e.g., a change of approach from that of the original claim, on the part of the tax authorities) the tax authorities may issue an 'invitation deed' to the taxpayer. Such a deed would contain the proposal to settle the matter with the payment by the taxpayer or to start a settlement procedure (see option (b) above). In cases of acceptance, the taxpayer could pay the tax indicated in an invitation deed served by the tax authorities with the minimum applicable penalties reduced to one-sixth. In the event that the taxpayer did not accept the payment proposal and did not accept the start of a settlement discussion, an assessment notice was issued.

b the taxpayer may file a settlement request; in such cases, the 60-day deadline for the appeal is suspended for 90 days. The settlement may lead to a reduction of the assessed tax, although there is no obligation upon the tax authorities to enter into the settlement. If a settlement is reached, penalties are reduced to one-third of their minimum amount on the settled tax.

iv After the commencement of the tax litigation

It is still possible to settle the case when it is under litigation. Legislative Decree No. 156/2015 introduced the possibility to conclude a judicial settlement even during the second-tier judgment.[27] The judicial settlement, as opposed to the settlement reached before the litigation starts, can be partial (i.e., it may not necessarily cover all the fiscal year under audit, and can be focused on one or more items under litigation). In cases of settlement during the first-tier judgment, penalties are reduced to 40 per cent of the minimum (on the settled amounts), whereas under the previous system the reduction was to 40 per cent of the charged penalties (i.e., also above minimum). In cases of settlement during the second-tier judgment, penalties are reduced to 50 per cent of the minimum (on the settled amounts).

v Selected issues

Settlements and judicial settlements, as outlined above, shall have a legal basis. Therefore, it is not possible to simply agree a forfeit figure that satisfies both parties from a financial point of view without the terms of the settlement being grounded in the relevant tax provisions.

For transfer pricing disputes, the use of the mutual agreement and arbitration procedures under the EU Arbitration Convention[28] has increased. Since 2010, no penalties are levied in cases of transfer pricing adjustments if certain documentation standards are complied with. In such cases, the Arbitration Convention procedures, which effectively require waiving the domestic litigation, may be particularly appealing, since they guarantee the elimination of double taxation (unlike settlements, if the penalty protection rule does not apply, the Arbitration Convention procedures do not allow a penalty reduction).[29]

The application of the Arbitration Convention may also be useful to bring to the attention of the central tax authorities positions taken by local offices in the course of an audit before the issuance of a tax assessment (indeed, the application may also be filed following a tax audit report, before a tax assessment is issued); in such cases, if the central tax authorities realise that the position taken in the course of an audit cannot be supported during the Arbitration Convention procedures, they can instruct the local office not to issue the tax assessment and close the case.[30]

27 The new rule is applicable as of 1 January 2016, even for pending cases. Before this change, the judicial settlement was possible only during the first-tier judgment.

28 Convention on the elimination of double taxation in connection with the adjustment of profit of the associated enterprises (90/463/EEC).

29 It is worth nothing that, with Decree Law No. 50 of 24 April 2017, the possibility to reduce the income of an Italian company in relation to transactions between associated companies with international activities has been recognised, under certain conditions. This possibility is granted after a mutual agreement or an arbitration procedure or following a definitive claim increasing the taxable base made by another state with which a double taxation convention is in force.

30 In the event that the request for the application of the Arbitration Convention procedure is subsequent to the starting of the litigation, the judge suspends the trial according to the joint request of both parties.

vi Prevention of potential litigation

To prevent potential litigation, several tax ruling procedures are available.

With Legislative Decree No. 156/2015, the entire system of the tax ruling procedures was rationalised and simplified. The new rules are effective as of 1 January 2016.

In the modified system, rulings are grouped into the following categories:

a on the correct interpretation of rules that are objectively uncertain and on the correct characterisation of certain situations for the purposes of specific rules;
b on the existence of the conditions for the application of special tax regimes and the validity of the elements of proof to support such conditions;
c on the applicability of the general anti-abuse rule to a specific case; and
d on the possibility of not applying specific anti-abuse clauses contained in certain rules.

The most important change is that the new rules provide that for all types of ruling (whereas in the previous regime for most types of ruling no mandatory deadline was applicable), the Revenue Agency has a limited time frame of 120 days to reply (except for rulings on interpretation of rules or characterisation of specific situations for which the time frame is 90 days). In the event of no reply by such deadline, the ruling as proposed by the taxpayer will be deemed implicitly accepted. Such time period may be interrupted in the case of requests of additional documentation by the Revenue Agency (with an extension of 60 days from receipt of the documentation).

Furthermore, ruling applications will no longer be mandatory except for certain requests of waiver of specific anti-avoidance rules (such as net operating loss carry-forward limitations for mergers). This is a significant change in comparison with the past when, for almost all cases (controlled foreign corporation (CFC) rules, adjusted current earnings), the filing of a ruling application was mandatory to gain access to a specific regime.

The above changes do not affect advance pricing agreements covering transfer pricing issues, permanent establishment (PE) cases, patent box or new investments that are subject to a separate specific procedure.

VIII ANTI-AVOIDANCE

Legislative Decree No. 128 of 5 August 2015 entirely reviews, with effect from 1 October 2015, the set of anti-avoidance rules and abuse doctrine, and introduces a single legal definition of 'abuse of law' that will replace all definitions and doctrines previously developed (quite extensively) by the tax authorities and endorsed by case law.

The new discipline of the abuse of law is placed in new Article 10 *bis* of Law 27 July 2000, No. 212 (Taxpayer's Bill of Rights) and will repeal Article 37 *bis* of Presidential Decree 29 September 1973, No. 600 (a quasi-general anti-avoidance provision).

Based on this rule: 'One or more business operations are deemed to be abusive of law when they are deprived of any economic substance and, while formally consistent with tax law, they are aimed at obtaining undue tax advantages.'

New Article 10 *bis* specifies that:

a business operations are deemed to be deprived of economic substance when they consist in facts, contracts or deeds, even in connection with each other, that are unsuitable to generate significant legal effects different from the tax saving;
b undue tax advantages consist in tax benefits, even incurred in the long run, obtained in contrast with the purpose of the tax rules or with the principles of the tax legal system;

c any business operation is not considered to be abusive when it is justified by sound non-tax reasons that are not negligible. Such reasons include managerial or organisational reasons aimed at improving the structure or functionality of the business or of the professional activity of the taxpayer; and

d the taxpayer is always free to choose between different alternative tax regimes provided by the law or between different business transactions leading to a different tax burden.

A new rule provides that the taxpayer may always ask for a preliminary ruling under Article 11 of the same Taxpayer's Bill of Rights to know whether the business transactions he or she wishes to undertake could be considered as an abuse of law (see above).

The last two paragraphs of the new Article 10 *bis* introduce two relevant provisions. In particular, the abuse of law can be challenged only if the tax benefits cannot be challenged by other tax provisions; and the last paragraph provides for the non-criminal relevance of abusive conduct while the administrative penalties remain applicable.

The new Article 10 *bis* will apply also with reference to transactions entered into before the entry into force of the Legislative Decree provided that the notice of assessment has not already been served.

This general anti-avoidance clause is also in line with the relevant provisions of Directive No. 2016/1164 of 12 July 2016 of the Council of the European Union (ATAD), which transposes the recommendations developed by the OECD in the context of the BEPS project.

The Italian tax legislation is also compliant with the other provisions contained in such Directive concerning specific anti-avoidance rules.

The areas covered by the above-mentioned Directive are, in particular: (1) limits to the deductibility of interest expenses; (2) hybrids mismatch; (3) exit tax and (4) CFC rules.

The ATAD is part of an anti-tax avoidance package prepared by the European Union aimed at strengthening the rules against avoidance of corporation tax and making corporate taxation in the European Union fairer, simpler and more effective.

IX DOUBLE TAXATION TREATIES

In interpreting double taxation treaties, Italian courts and tax authorities pay little attention to foreign case law and practice.[31] There is also a general tendency of courts and tax authorities not to rely on EU law. Indeed, courts are quite reluctant to rule a case on the basis of EU law and to refer cases to the ECJ. The Supreme Court has expressed its hope that the lower courts will more often apply EU law, or refer cases to the ECJ in the event of doubts on the compatibility of domestic provisions with EU law.[32]

The Supreme Court generally recognises that treaty provisions cannot generate a tax claim that does not exist under domestic law. In a few isolated cases, however, the Supreme

31 See Supreme Court judgment No. 3610 of 24 May 1988, whereby the Court ignored the content of an agreement between the Italian and French tax authorities, which was not formalised but rather included in the internal administrative guidelines in both states.

32 Judgment No. 18055 of 4 August 2010.

Court has taken the surprising view that, if Italian domestic provisions exempt an item of income but the treaty allocates exclusive taxing rights to Italy, treaty provisions trigger the taxation of income in Italy despite the lack of a tax claim under domestic law.[33]

The notion of PE was broadly interpreted by case law. For instance, in *Philip Morris*,[34] the Supreme Court held that the mere attendance of representatives of a local affiliated company (with no power of representation) at the negotiation of contracts between a foreign affiliated company and a resident entity qualifies as the exercise of 'the authority to conclude contracts in the name of' the foreign company.

In 2005, the OECD commentary was amended to reflect the opposite interpretation, but Italy inserted an observation to the commentary to clarify that the Italian jurisprudence is not to be ignored. The interpretation in *Philip Morris* was confirmed in subsequent case law, which invoked the Italian observation.[35]

The OECD Partnership Report is generally followed by tax authorities and case law. However, in one case, the Supreme Court seems to have rejected the principles of the Report by holding that dividends paid by an Italian-resident company to a US partnership with Japanese partners cannot qualify for the Japan–Italy treaty on withholding taxes, despite the fact that the partnership was fiscally transparent under both Japanese and US law (the Supreme Court seems to take the view that the aforementioned treaty may not apply, as the dividends are not 'paid' to the Japanese partners).[36]

X AREAS OF FOCUS

A significant area of litigation is transfer pricing. The case law highlights an approach followed by some Italian courts (including some decisions of the Supreme Court)[37] according to which transfer pricing provisions are qualified as anti-abuse provisions and are regarded as applicable only to the extent to which the tax authorities prove that the income is subject to a more favourable regime in the foreign jurisdiction, as compared with the Italian tax burden. In recent transfer pricing adjustments, the tax authorities started to make secondary adjustments, requalifying the excessive outbound payment as either a dividend subject to withholding tax or an interest-generating loan. The tax authorities have begun litigation in several cases relating to the capital inadequacy of the Italian PEs of foreign banks (and

33 See Judgment No. 29455 of 17 December 2008; Judgment No 3556 of 13 February 2009; Judgment No. 13683 of 12 June 2009; Judgment No. 17076 of 22 July 2009; and Judgment No. 20238 of 4 September 2013.

34 See Judgment No. 3367 of 7 March 2002; Judgment No. 7682 of 25 May 2002; Judgment No. 10925 of 22 September 2002; and Judgment No. 17373 of 6 December 2002.

35 For example, Supreme Court Judgment No. 6799 of 6 April 2004; Judgment No. 17206 of 28 July 2006; Judgment No. 3889 of 15 February 2008; Judgment No. 8488 of 9 April 2010; and Judgment No. 20597 of 7 October 2011.

36 Judgment No. 4600 of 26 February 2009.

37 Judgment No. 22023 of 13 October 2006; Judgment No. 11226 of 16 May 2005; Judgment No. 11949 of 13 July 2012; Judgment No. 7716 of 27 March 2013; and Judgment No. 22010 of 25 September 2013; contra, Judgment No. 10739 of 8 May 2013. However, in a recent decision, the Supreme Court seems to have adopted a different approach, stating that the classification of transfer pricing provision as an anti-avoidance rule must be excluded (see Judgement No. 27018, of 15 November 2017).

companies),[38] and tend to follow the OECD quasi-thin capitalisation or regulatory minimum capital approach; in this regard, it is worth mentioning that recent legislation provides for a reference to the OECD methodologies to compute the free capital attributable to PEs (implementing provisions are awaited).

Case law and the tax authorities tend to adopt quite an aggressive approach in assessing PEs of foreign companies hidden at the premises of their Italian-affiliated companies (see Section IX). A recent pattern of PE assessments involves Italian commissionaires of foreign principals.[39] In PE assessments, the tax authorities tend to take the view that the profits attributable to the alleged PEs are equal to the gross proceeds derived from sales in the Italian market without any deduction for costs, and the deduction of costs is achieved only through strenuous challenge to the tax authorities.

Several cases have been triggered by assessments of the Italian residence of foreign holding companies, particularly of the extent to which they are controlled by Italian residents. Recently, the tax authorities assessed the withholding tax applicable to outbound dividends (dividends paid to a resident company are not subject to withholding tax) in relation to dividends paid to companies that qualify as Italian tax-resident under domestic law since they have their legal seat in Italy but their seat of administration and main purpose located outside Italy (the latter two criteria being the alternative criteria for Italian tax residence under domestic law).

Several cases were triggered by the denial of the deduction of interest expenses incurred in merger leveraged buyout transactions carried out by foreign investors through an Italian vehicle funded with third-party debt. The claim of the tax authorities is generally grounded on either transfer pricing provisions (maintaining that the Italian vehicle must charge the foreign investor for an amount equal to the interest expenses incurred) or the lack of any benefit from the interest expenses for the Italian vehicle (the interest expenses are regarded as beneficial to the foreign investor) or the abuse of law provisions or principles.[40] However, in March 2016, the Italian Revenue Agency issued a Circular Letter[41] changing the approach held so far. In particular, the Italian Revenue Agency clarified that interest expenses accrued to the Italian vehicle should be generally deductible (unless the specific features of the transaction indicate

38 See the following Judgments of the Provincial Tax Court of Milan, Chamber I: Judgment No. 475 of 1 December 2010, and Judgment Nos. 113, 114 and 117 of 1 February 2010; Chamber XXIX, Judgment No. 141 of 4 April 2011; Chamber II, Judgment No. 395 of 28 December 2011; and Supreme Court Judgment No. 26489 of 26 November 2013.

39 In favour of the taxpayer, see Provincial Tax Court of Milan, Chamber XLVII, Judgment No. 6464 of 2 July 2014; Regional Tax Court of Lombardy, Chamber XLIV, Judgment No. 1520 of 29 March 2014; Chamber II, Judgment No. 125 of 20 October 2011; Chamber XXXIV, Judgment No. 137 of 2 December 2009; Regional Tax Court of Tuscany, Chamber XXXV, Judgment No. 64 of 13 January 2014; and Supreme Court, Tax Chamber, Judgment No. 3769 of 9 March 2012, although the Court decided on the basis of a procedural matter.

40 In Judgment No. 24434 of 30 October 2013, the Supreme Court took the view that the deductibility depends on whether the overall transaction is aimed at allowing the foreign investor to realise the capital gain by selling the shares of the Italian vehicle, whether the debt of the Italian vehicle is repaid with funds originating from the foreign investor and whether the interest expenses may be regarded as beneficial to the activity carried out by the Italian vehicle; the case was referred back to the Regional Tax Court for it to take a decision based on these principles set out by the Supreme Court.

41 Circular Letter No. 6 of 30 March 2016.

that it is abusive; in this regard, the tax authorities mentioned, as an example, the case of lack of change of control). The Italian Revenue Agency invited the local offices to revise the notices of assessment already served to the taxpayers.

Other areas of focus include the treaty beneficial ownership condition,[42] the abuse of the Parent–Subsidiary Directive through the interposition of EU parent companies controlled by non-EU shareholders and the deduction of payments to blacklisted jurisdictions.

XI OUTLOOK AND CONCLUSIONS

Law No. 23 of 11 March 2014 enabled the government to reform most of the Italian tax law system. To give effect to the indication contained in this Law, the aforementioned legislative decrees have been already approved, in particular:

a Legislative Decree No. 128/2015 introducing a specific definition of the 'abuse of law' principle;

b Legislative Decree No. 156/2015 regarding the reform of tax ruling and tax litigation procedures; and

c Legislative Decree No. 158/2015 on the reform of administrative and criminal penalties.

In this context, Legislative Decree No. 147 of 14 September 2015 and Legislative Decree No. 159 of 24 September 2015 have been also approved.

Legislative Decree No. 147 amended the rules governing international taxation to make them more competitive. These new rules are focused in particular on the following issues:

a the rationalisation of the CFC rules;

b the replacement of existing 'blacklist cost' rules;

c rules about fiscal units between Italian sister companies controlled by a non-resident company;

d the introduction of an optional all-in all-out 'foreign branch exemption' regime; and

e a redefinition of the interest deduction rules for Italian groups controlling foreign entities.

Legislative Decree No. 159 of 24 September 2015 concerns the rationalisation of the collection system.

42 In this context, it is worth mentioning the decision of the Supreme Court No. 27113 of 28 December 2016. According to the Court: (1) the beneficial ownership provision is a specific anti-avoidance rule; (2) the beneficial ownership status cannot be denied to a (pure) holding company just because it does not have a meaningful structure or substance; (3) a holding company is the beneficial owner of the dividends if it has some sort of autonomy in the management of the shares in the underlying subsidiaries and if it retains and reinvests the dividends received (instead of passing them on to its controlling entity); and (4) the status of beneficial owner of a sub-holding cannot be denied just on the premise that in multinational group dividends from subsidiaries (and more in general income) ultimately benefits the parent at the top of the group; there must instead have been an actual transfer of the income to the ultimate parent. Moreover see Provincial Tax Court of Turin, Judgment No. 124 of 19 October 2010 and Judgment No. 14/7/10 of 11 February 2010; Provincial Tax Court of Alessandria, Judgment No. 31 of 9 March 2009; and Regional Tax Court of Turin, Chamber XII, Judgment No. 28 of 12 January 2012.

Chapter 19

JAPAN

Masakazu Iwakura and Hiroyuki Yoshioka[1]

I INTRODUCTION

In Japan, tax disputes are generally commenced when a tax audit is conducted in connection with a tax return filed by a taxpayer. If a taxpayer is dissatisfied with a reassessment or determination made by the tax authority, such taxpayer may request a re-examination or review. When a taxpayer is still dissatisfied even after such re-examination or review, such taxpayer has the right to file a lawsuit to invalidate such reassessment or determination. It may take several years from the date of reassessment or determination until a final decision is rendered with regard to the reassessment or determination if the case is appealed to the Supreme Court of Japan (SCJ).[2]

In Japan, most taxpayers have historically not argued against reassessments or determinations; however, many large tax disputes have arisen since the late 1990s in Japan, and some of the reassessments have been invalidated, while the number of tax disputes has been decreasing since around 2010.

II COMMENCING DISPUTES

i Tax filing

In Japan, a tax filing system is adopted for most national taxes, including corporation tax, income tax, consumption tax and inheritance tax.[3]

In principle, under such system, the amount of payable tax is determined based on the filing made by taxpayers. In exceptional cases, when there is no filing or when the filed tax amount is inappropriate, the tax amount is instead determined by the tax authority's reassessment or determination after a tax audit.[4]

1 Masakazu Iwakura is a senior partner and Hiroyuki Yoshioka is a senior associate at TMI Associates.

2 For example, in the case referred to in footnote 93, the reassessment was made as of 29 June 2010, and the SCJ rendered its judgment on 29 February 2016. Thus, it took more than five and a half years for a final judgment to be made on the reassessment.

3 Article 120 of the Income Tax Act (Act No. 33 of 1965), Articles 71, 74, 81-19 and 81-22 of the Corporation Tax Act (Act No. 34 of 1965), Articles 42 and 45 of the Consumption Tax Act (Act No. 108 of 1988) and Article 27 of the Inheritance Tax Act (Act No. 73 of 1950).

4 Articles 24 and 25 of the Act on General Rules for National Taxes (Act No. 66 of 1962).

The due dates for tax filings differ depending on the taxation categories.[5] Tax filing may be performed online.[6]

In principle, the tax authority's reassessment or determination is to be made before five years[7] have elapsed after the statutory due date for the tax filing concerning the reassessment or determination.[8]

Nevertheless, a reassessment of national taxes, etc. for which the taxpayer has evaded payment of the whole or part of the tax amount through deception or otherwise wrongful acts, may be made until seven years have elapsed from the statutory due date.[9]

Taxpayers may file an amended return where there is a shortfall in the filed tax amount.[10] The amended return may only change the original tax return adversely for taxpayers, while in order to advantageously change the tax return, a request must be made for reassessment.[11] A request for reassessment must be made within five years of the statutory due date.[12]

ii Tax audits

When tax authorities impose taxation by way of a reassessment or determination, they need to obtain materials or information concerning the requirements for taxation. Therefore, the tax authorities have the right to conduct inquiries and inspections in relation to taxpayers.[13]

Commencement of tax audits

Requirements

Inquiries and inspections may be conducted when they are necessary for tax audits.[14] 'When they are necessary' means when there is an objective necessity, and although tax authorities do not have an unfettered discretion in their judgment, there are few cases where this requirement is not applied.[15]

Targets of tax audits

The targets of tax audits are mainly (1) taxpayers and (2) third parties who are in a business relationship with taxpayers.[16] Generally, audits against those who fall under (1) are called main audits, and audits against those who fall under (2) are called counterparty audits.

5 For example, the filing of corporate tax is to be performed before two months have passed after the end of the business year or the consolidated business year (Articles 74 and 81-22 of the Corporation Tax Act).

6 Article 3 of the Act on Use of Information and Communications Technology in Administrative Procedures (Act No. 151 of 2002).

7 Six years for donation tax and corporation tax concerning transfer pricing taxation, etc. (Article 36, Paragraph 1, Items 1 and 2 of the Inheritance Tax Act, and Article 66-4, Paragraph 17, Item 1 of the Act on Special Measures Concerning Taxation ((Act No. 26 of 1957)).

8 Article 70, Paragraph 1 of the Act on General Rules for National Taxes.

9 Article 70, Paragraph 4 of the Act on General Rules for National Taxes.

10 Article 19, Paragraphs 1 and 2 of the Act on General Rules for National Taxes.

11 Article 23 of the Act on General Rules for National Taxes.

12 Article 23, Paragraph 1 of the Act on General Rules for National Taxes.

13 Article 74-2 of the Act on General Rules for National Taxes, etc.

14 Article 74-2, Paragraph 1 of the Act on General Rules for National Taxes, etc.

15 Supreme Court, Order, of July 10, 1973, *Keishu* Vol.27, No. 7, p. 1205, etc.

16 Article 74-2, Paragraph 1 of the Act on General Rules for National Taxes, etc.

Prior notification

The commissioner of the National Tax Agency (NTA), the regional commissioner of Regional Tax Bureau, the district director of the Tax Office (the District Director) or the director-general of a custom office (collectively, the Directors) shall, prior to tax audits being conducted in relation to taxpayers, notify such taxpayers of the fact that the tax audit will be conducted, and certain other matters.[17, 18]

Nevertheless, it should be noted that such prior notification is not necessary under certain conditions.[19]

Procedures for tax audits

Optional audits

As the Act on General Rules for National Taxes does not allow compulsory audits, inquiries, inspections, entering into business places or inspecting documents and goods against the intention of the audit target is prohibited.

However, criminal penalties will be imposed when the auditee does not respond to the inquiry or refuses the audit without a justifiable reason.[20] Therefore, the audit target is obliged to accept the inquiry and inspection in the absence of a justifiable reason.

Attorney–client privilege

Countries under the legal system of Anglo-American laws provide an attorney–client privilege between an attorney and his or her client.

However, such privilege is not provided in Japan. Therefore, taxpayers may not refuse to respond to a tax audit by using the existence of the attorney–client privilege as an excuse.

End of tax audits

Procedures for ending audits

The Directors shall, when a reassessment or determination is found to be unnecessary at that time as a result of an on-site audit, provide written notification to the taxpayer against whom such audit is conducted of such fact.[21]

On the other hand, where the reassessment or determination is found to be necessary as a result of an on-site audit, such Directors shall explain the result of the audit to such

17 (1) The commencement date of the on-site audit; (2) the place of the audit; (3) the purpose of the audit; (4) the targeted tax category; (5) the period of the audit; (6) the books, documents and other items subject to the audit; and (7) the matters necessary for the appropriate and smooth execution of the audit provided in the Cabinet Order.

18 Article 74-9, Paragraph 1 of the Act on General Rules for National Taxes.

19 Prior notification is not necessary when the Directors find that such notification would render it easier to perform illegal or improper conduct and would make it difficult to grasp the tax base, etc. or the tax amount precisely and other situations that may cause impediments to the proper execution of the audit regarding national taxes, in light of the tax filing of the taxpayer which forms the basis for the audit or the contents of previous tax audits, or the information regarding the business in which the taxpayer is engaged, and other information in the hands of the NTA or Customs (Article 74-10 of the Act on General Rules for National Taxes).

20 Article 127, Items 2 and 3 of the Act on General Rules for National Taxes.

21 Article 74-11, Paragraph 1 of the Act on General Rules for National Taxes.

taxpayer.[22] In such cases, although such Directors may encourage such taxpayer to file an amended return, etc., he or she shall explain that the taxpayer may not make an objection after filing a return form regarding the result of the audit, but that the taxpayer may instead request a reassessment, and shall issue a document to that effect.[23]

Amended return

As referred to above, when being encouraged to file an amended return, the taxpayer may file an amended return in accordance with the intention of the tax authority without the need for a reassessment or determination.

In Japan, settlements in the course of tax audit procedures are not legally permitted.

However, in practice, many cases are solved in a form somewhat close to a settlement, in which filing an amended return regarding part of the tax authorities' claims is conducted instead of a reassessment or determination.

It should be noted that, even after filing an amend return, when taxpayers are dissatisfied with the contents of the filing an amended return, they may request a reassessment to reduce the payable tax until such time as five years have elapsed after the due date for the tax filing concerned.[24]

Reassessment and determination

The District Director may, when the calculations of the tax base, etc. or the tax amount filed do not comply with the provisions of national tax laws, or if the tax base, etc. or the tax amount is otherwise different from the result of the audit, reassess the tax base or the tax amount, etc.[25] In addition, the District Director may, when taxpayers fail to file taxes, determine the tax base or the tax amount.[26]

A reassessment or determination shall be made by sending a reassessment notification or determination notification.[27]

A reassessment shall be accompanied with the reasons for such reassessment.[28] A reassessment made without reasons is invalid, and when the reasons accompanying the reassessment are insufficient, this may constitute a ground for revocation of the reassessment.[29]

It should further be noted that if, after performing a reassessment or determination, the District Director becomes aware that the reassessed or determined tax base or tax amount, etc. is overestimated or underestimated, he or she may further reassess such reassessed or determined tax base or tax amount, etc. There is no limit on the number of times for reassessment.

22 Article 74-11, Paragraph 2 of the Act on General Rules for National Taxes.

23 Article 74-11, Paragraph 3 of the Act on General Rules for National Taxes.

24 Article 23, Paragraph 1 of the Act on General Rules for National Taxes.

25 Article 24 of the Act on General Rules for National Taxes.

26 Article 25 of the Act on General Rules for National Taxes.

27 Article 28, Paragraph 1 of the Act on General Rules for National Taxes.

28 Article 14 of the Administrative Procedures Act (Act No. 88 of 1993) and Article 74-14, Paragraph 1 of the Act on General Rules for National Taxes.

29 Osaka High Court, Decision of January 18, 2013, *Hanrei-jiho*, No. 2205, p. 25.

iii Request for re-examination

When taxpayers are dissatisfied with a reassessment or determination, they may request the District Director for re-examination.[30] In the examination procedure, the taxpayer may request a chance to render an oral opinion on the case[31] and may submit evidentiary documents or materials.[32]

The re-examining agency shall make a determination regarding the re-examination.[33] The standard period for re-examination is three months.

Please note that taxpayers may request a review without requesting a re-examination.[34] In addition, when taxpayers are dissatisfied with the result of a re-examination, they may request a review.[35]

A request for re-examination offers the merit that it leads to a judgment earlier than a request for review. However, as the District Director who has imposed the disposition conducts the re-examination, the conclusion is unlikely to be reversed, and the number of such requests has been decreasing. Nevertheless, in cases such as where there is an obvious error in the documents submitted in the tax audit, a request for re-examination should be considered in order to quickly settle the dispute as the conclusion is likely to be reversed.

iv Request for review

Overview

Requests for review to the director general of the National Tax Tribunal (the Director-General) are generally permitted as to dispositions regarding internal taxes.[36]

Requests for review shall be made within three months of the date[37] on which taxpayers become aware of the disposition.[38] When taxpayers are dissatisfied with the results of the determination regarding the request for re-examination, they may request a review[39] only within one month of the date on which a certified copy of the decision on re-examination is delivered.[40]

Procedures

Requests for review shall be made by submitting a written request for examination with designated matters in duplicate to the National Tax Tribunal (the Tribunal) or its district offices.[41] There are 12 district offices of the Tribunal in Japan. The Tribunal is an agency belonging to the NTA, and organisationally a part of the NTA. However, the Director-General has the independent right to make judgement in the review. The Director-General designates

30 Article 75, Paragraph 1, Item 1, (i) and Paragraph 2, Item 1of the Act on General Rules for National Taxes.
31 Article 84, Paragraph 1 of the Act on General Rules for National Taxes.
32 Article 84, Paragraph 6 of the Act on General Rules for National Taxes.
33 Article 84, Paragraph 7 of the Act on General Rules for National Taxes.
34 Article 75, Paragraph 1, Item 1, (i) of the Act on General Rules for National Taxes.
35 Article 75, Paragraph 3 of the Act on General Rules for National Taxes.
36 Article 75, Paragraph 1, Item 1, (i) of the Act on General Rules for National Taxes.
37 When taxpayers receive a notification concerning the disposition, the date when they receive such notification.
38 Article 77, Paragraph 1 of the Act on General Rules for National Taxes.
39 Article 75, Paragraph 3 of the Act on General Rules for National Taxes.
40 Article 77, Paragraph 2 of the Act on General Rules for National Taxes.
41 Article 87, Paragraph 1 of the Act on General Rules for National Taxes.

one trial examiner in charge and two or more observing trial examiners,[42] and all of these examiners together form a panel to promote the investigation and trial of such requests for review.

When a request for review is lawfully made, the Director-General shall send a copy of the written request for review to the administrative agency that has imposed the disposition (the Disposing Agency), and have the agency submit a written answer in duplicate within a reasonable period of time.[43]

A copy of the written answer by the Disposing Agency is delivered to the requestor, and thereby the requestor may submit a written opposition, or submit evidentiary documents or materials.[44]

Although the trial shall basically be in writing, upon request, the requestor shall be provided with a chance to orally make an opinion.[45]

In addition, although a trial for request for review shall be *ex officio*,[46] the requestor may submit a written opposition, or submit evidentiary documents or materials,[47] and the Disposing Agency may submit documents and other materials that establish the facts on which the disposition is based.[48]

The requestor and the Disposing Agency may inspect the documents and materials and request the provision of copies of such documents.[49]

Judgment

After the examination and the trial, the trial examiner in charge and the observing trial examiners forming a panel have a meeting to draft a resolution through a majority. After the resolution is drafted, the Director-General makes a judgment based on the resolution.[50]

To make the judgment, the Director-General shall send a certified copy of the written judgment supplemented with the reasons for judgment.[51]

The standard period for review is one year.

v Written answer to advance inquiry

Taxpayers may inquire with the NTA in advance of filing a tax return, and the NTA will answer such inquiry in writing if: (1) such inquiry is regarding the tax treatment of the transactions the taxpayer actually conducted or the transactions that the taxpayer intends to conduct; (2) individual specific materials may be submitted; (3) the tax treatment of such transactions is not made clear by circulars regarding the interpretation of the law; and (4) the requirements of (a) and (b), below,[52] are satisfied:

42 Article 94, Paragraph 1 of the Act on General Rules for National Taxes.
43 Article 93, Paragraph 1 of the Act on General Rules for National Taxes.
44 Article 95, Paragraph 1 and Article 96, Paragraph 1 of the Act on General Rules for National Taxes.
45 Article 95-2, Paragraph 1 of the Act on General Rules for National Taxes.
46 Article 97, Paragraph 1 of the Act on General Rules for National Taxes.
47 Article 96, Paragraph 1 of the Act on General Rules for National Taxes.
48 Article 96, Paragraph 2 of the Act on General Rules for National Taxes.
49 Article 97-3, Paragraph 1 of the Act on General Rules for National Taxes.
50 Article 98, Paragraph 4 of the Act on General Rules for National Taxes.
51 Article 101, Paragraphs 1 and 3 of the Act on General Rules for National Taxes.
52 See Administrative Procedures for Answer in Writing to Advance Inquiry (Administrative Guidelines).

a the inquiry is made before the deadline for filing the tax return for the national tax imposed on the relevant transactions; and
b the inquirer agrees to publication of the content of the inquiry and the answer.[53]

Note that the inquiry may not be used in certain cases, such as if the inquiry is related to the valuation of individual assets or the calculation or appropriateness of the amount of transactions, or if the main purpose of the transactions is a reduction of national tax, or the transaction is otherwise unreasonable as a normal economic transaction.

The NTA shall make efforts to provide a written answer within three months of the date of receipt of the inquiry.

As stated above, the cases where inquiry procedures may be used are limited. In addition, even if taxpayers file a tax return in accordance with the answer in writing, the NTA may reach a different conclusion and make a reassessment or decision if there is any amendment to tax law or if, after investigation, the actual facts are found to be different from the facts alleged in the inquiry.

Note that, instead of the above procedures, the APA procedures will apply to the transfer pricing issues.[54]

III THE COURTS AND TRIBUNALS

i Request for re-examination and request for review

As mentioned in Section II.iii and II.iv, a request for re-examination or review of a reassessment or determination is permitted. Taxpayers may request a review without requesting a re-examination, and they may request a review when they are dissatisfied with the result of a re-examination.

ii Tax disputes

When taxpayers are dissatisfied with a judgment on a request for review, they may file a lawsuit against such judgment. As Japan adopts the principle of utilising lawsuits only after requests for review, taxpayers may not generally file a lawsuit without first making a request for review.[55] Note that taxpayers may directly file a lawsuit for revocation when a judgment on a request for review has not been made within three months of making the request.[56] The time limit for filing a lawsuit for revocation is six months after becoming aware of a disposition or judgment[57] and until one year has elapsed after the disposition or the judgment.[58]

The jurisdictions for lawsuits for revocation are: (1) the district court having jurisdiction over the location of the administrative agency that has imposed the disposition;[59] (2) the district court having jurisdiction over the location of the high court having jurisdiction

53 The name of the inquirer will not be disclosed to the public unless requested by the inquirer.
54 Chapter 6 of Commissioner's Directive on the Operation of Transfer Pricing (Administrative Guidelines).
55 Article 115, Paragraph 1 of the Act on General Rules for National Taxes.
56 Article 115, Paragraph 1, Item 1 of the Act on General Rules for National Taxes.
57 Article 14, Paragraph 1 of the Administrative Case Litigation Act (Act No. 139 of 1962).
58 Article 14, Paragraph 2 of the Administrative Case Litigation Act.
59 Article 12, Paragraph 3 of the Administrative Case Litigation Act.

over the location of the general venue of the plaintiff;[60] and (3) the district court having jurisdiction over the location of the general venue of the defendant (the state),[61] and the court in (3) shall be the Tokyo District Court.

Lawsuits for revocation adopt a three-tiered court system. That is, district court, High Court and the SCJ. Among these bodies, the first and second instances are fact-finding proceedings, and the third instance is a law-interpretation proceeding. When a party is dissatisfied with the judgment of the district court, it may file an appeal to a High Court within two weeks of the receipt of the original of the judgment document.[62] However, each party has the right to file an appeal to the SCJ within two weeks of the receipt of the original of the judgment document only when 'the judgment contains a misconstruction of the Constitution or other violation of the Constitution' or other limited grounds are met.[63] Even without these final grounds for appeal, a party may file a petition for the acceptance of a final appeal when it believes the judgment is inconsistent with precedents and otherwise contains important matters regarding the interpretation of laws,[64] but it is at the SCJ's discretion as to whether to accept it.

IV PENALTIES AND REMEDIES

i Tax

Delinquent tax

Delinquent tax is an ancillary tax whose tax base is the amount of unpaid tax.[65] Delinquent tax is imposed if all or part of the national tax is not paid by the statutory due date for national tax.

The annual rate for delinquent tax is 14.6 per cent.[66]

Note that this rate is reduced to 7.3 per cent with regard to the period from the statutory due date for payment until the due date for payment and the period of two months from the date following the due date for payment.[67]

Additional tax

There are four types of additional tax; additional tax for underestimation, additional tax for failure to file, additional tax on non-payment, and substantial additional tax.

When a tax return is filed by the statutory due date for tax returns but the amount of the tax in the return turns out to be underestimated as a result of an amended tax return or reassessment, additional tax for underestimation whose amount is 10 per cent of the

60 Article 12, Paragraph 1 of the Administrative Case Litigation Act.
61 Article 12, Paragraph 4 of the Administrative Case Litigation Act.
62 Article 285, of the Civil Case Litigation Act (Act No. 109 of 1996).
63 Article 312, Paragraph 1 and 2 of the Civil Case Litigation Act.
64 Article 318, Paragraph 1 of the Civil Case Litigation Act.
65 Article 60, Paragraph 1 of the Act on General Rules for National Taxes.
66 Article 60, Paragraph 2 of the Act on General Rules for National Taxes.
67 Article 60, Paragraph 2, proviso of the Act on General Rules for National Taxes. In addition, there is a special rule in relation to such tax rate. If the special base rate for the year is lower than 7.3 per cent, the 14.6 per cent above shall be reduced to the special base rate plus 7.3 per cent, and such rate of 7.3 per cent shall be reduced to the special base rate plus 1 per cent if such reduced rate is lower than 7.3 per cent (Article 94, Paragraph 1 of the Act on Special Measures Concerning Taxation).

difference shall be imposed, in principle.[68] If a tax return is not filed by the statutory due date for tax returns and the amount of tax is fixed by a tax filing after that date or determination or such fixed amount turns out to be underestimated as a result of an amended tax return or reassessment, additional tax for failure to file shall be imposed.[69] The amount of such additional tax shall be 15 per cent multiplied by the fixed amount or underestimated amount.[70]

Additional tax for non-payment shall be imposed when the national tax to be withheld is not paid by the statutory due date for payment.[71] The amount of additional tax for non-payment shall be 10 per cent of the amount stated in the notice of tax payment or the amount of tax paid without receiving notice of tax payment after the statutory due date for payment.

Substantial additional tax shall be imposed instead of additional tax for underestimation, additional tax for failure to file and additional tax for non-payment if there is any concealment or disguise with regard to the facts on which the calculation of taxes to be paid is based and the underestimation, failure to file or non-payment is based on such concealment or disguise.[72] Imposition of substantial additional tax is often a controversial issue in tax audits.

ii Criminal penalties

Certain actions that violate the tax law are subject to criminal penalty.

The acts of evading tax or receiving tax refunds through unfair acts, including fraud, are subject to criminal penalty. The criminal penalty for such actions is either imprisonment for 10 years or less, a fine of ¥10 million or less, or both.[73] The amount of the fine may be increased up to the amount of evaded tax when the amount of evaded tax is the amount of the fine or greater.[74]

Other actions subject to criminal penalty include refusal to answer to a tax audit, in the absence of reasonable ground.[75]

---

68 Article 65, Paragraph 1 of the Act on General Rules for National Taxes. If the difference exceeds the larger of the amount of tax stated in the tax return filed by the statutory due date for tax returns or ¥500,000, 5 per cent of the excess amount shall be added to the amount of additional tax for underestimation (Article 65, Paragraph 2 of the Act on General Rules for National Taxes).

69 Article 66, Paragraph 1 of the Act on General Rules for National Taxes.

70 If the fixed amount or underestimated amount exceeds ¥500,000, 5 per cent of such excess amount shall be added as additional tax (Article 66, Paragraph 2 of the Act on General Rules for National Taxes).

71 Article 67, Paragraph 1 of the Act on General Rules for National Taxes.

72 Article 67, Paragraphs 1, 2 and 3 of the Act on General Rules for National Taxes. The amount of substantial additional tax is, respectively, 35 per cent of the amount of tax which the calculation of additional tax for underestimation is based on, 40 per cent of the amount of tax which the calculation of additional tax for failure to file is based on, and 35 per cent of the amount of tax which the calculation of additional tax for non-payment is based on.

73 Article 238, Paragraphs 1 and 3 and Article 239, Paragraph 1 of the Income Tax Act, Article 159, Paragraph 1 of the Corporation Tax Act, Article 68, Paragraph 1 of the Inheritance Tax Act, Article 64, Paragraph 1 of the Consumption Tax Act, etc.

74 Article 238, Paragraphs 2 and 4 and Article 239, Paragraph 3 of the Income Tax Act, Article 159, Paragraph 2 of the Corporation Tax Act, Article 68, Paragraph 2 of the Inheritance Tax Act, Article 64, Paragraph 2 of the Consumption Tax Act, etc.

75 Article 127, Items 2 and 3, Article 128 and Article 129 of the Act on General Rules for National Taxes.

V TAX CLAIMS

i Recovering overpaid tax

Request for reassessment

Taxpayers may make a request to the District Director for a reassessment as to the tax base or the tax amount, etc. within five years of the due date when they have reported an overstatement of the tax amount because of the calculations of the tax base or the tax amount, etc. filed does not comply with the provisions of laws or there is an error in the calculations.[76] When taxpayers have reported an overstatement, they basically may not exercise any remedy other than the request for reassessment. That is, when taxpayers have paid an excessive amount of tax owing to an error, they are able to obtain a refund by requesting a reassessment, not by an amended return.

To request a reassessment, a written request containing the reasons for the request and other designated matters must be submitted to the District Director.[77] When a request for reassessment is made, the District Director shall, after examining the tax base or the tax amount, etc. concerning the request, make a notice to the requesting taxpayer of the result.[78]

Taxpayers may request a re-examination or review, or file a lawsuit for revocation as to such notification.

Claims for national compensation

Claims for national compensation are regulations with the purpose of providing relief against violations of rights by the state's illegal acts, and are provided in the State Redress Act based on Article 17 of the Constitution. That is, Article 1 of the State Redress Act states:

> *When a public officer who exercises the public authority of the State or of a public entity has, in the course of his/her duties, unlawfully inflicted damage on another person, intentionally or negligently, the State or public entity shall assume the responsibility to compensate therefor.*

It is construed that where there is illegal taxation, taxpayers may make a claim for national compensation without the need to file an administrative objection or a lawsuit for revocation.[79]

Nevertheless, upon making a claim for national compensation (as it is relatively difficult to make such a claim, compared to filing an administrative objection or a lawsuit for revocation because the taxpayer needs to establish that the personnel of a tax authority has violated their duties, in addition to proving that the taxation does not comply with the provisions of laws), it is more usual to file an administrative objection or a lawsuit for revocation when such avenues are possible.

76 Note that taxpayers may request a reassessment within six years of the due date for donation tax, as the period for reassessment or determination for donation tax is six years (Article 32, Paragraph 2 of the Inheritance Tax Act).

77 Article 23, Paragraph 3 of the Act on General Rules for National Taxes.

78 Article 23, Paragraph 4 of the Act on General Rules for National Taxes.

79 Supreme Court, Decision of June 3, 2010, *Minshu*, Vol.64, No. 4, p. 1010.

ii Challenging administrative decisions

When taxpayers are dissatisfied with a reassessment or determination made by the tax authorities, as mentioned in Section II.iii and iv, and Section III, they may file a request for re-examination or review, and when they are still dissatisfied with the result, they may file a lawsuit for revocation.

iii Claimants

In principle, taxpayers may make a request for refund of excessively paid taxes.

As to consumption tax, as taxpayers are those who have transferred taxable assets or provided taxable services, they shall make a request for refund by requesting a reassessment when there is excessively paid tax. The counterparty of the taxable transactions may not request the NTA to refund excessively paid tax.

VI COSTS

No cost will be incurred for making a request for re-examination or review, except for attorneys' fees.

When a lawsuit for invalidating a reassessment or decision is filed, administration fees must be paid, and such administration fees increase in accordance with the amount subject to the lawsuit.[80]

Note that the cost for lawsuits (e.g., costs for delivery of documents) shall be borne by the losing party, in principle.[81]

VII ALTERNATIVE DISPUTE RESOLUTION

i ADR

There is no ADR system for tax disputes in Japan.

ii Written answer to advance inquiry

As described in Section II.v, advance inquiry may be made to the NTA in certain cases, and the NTA will provide a written answer.[82]

iii APA

There is an advance pricing agreement (APA) procedure for application of the transfer pricing rule. An APA is a procedure for the tax authority to confirm the most reasonable transfer pricing method adopted by the taxpayer and the details of the method.[83] There are two types of APA; unilateral APAs and bilateral APAs. According to the NTA, the average time spent for bilateral APAs was 25.7 months in 2015.[84]

80 Article 7 of the Administrative Case Litigation Act, Article 8 of the Civil Case Litigation Act.
81 Article 7 of the Administrative Case Litigation Act, Article 61 of the Civil Case Litigation Act.
82 See the Administrative Procedures for Written Answers to Advance Inquiries (Administrative Guidelines).
83 Chapter 6 of Commissioner's Directive on the Operation of Transfer Pricing (Administrative Guidelines).
84 Status of Mutual Negotiation in 2015, the NTA.

VIII ANTI-AVOIDANCE

i Outline

In Japan, there is no GAAR. However, there are anti-avoidance rules for family companies in the Corporation Tax Act, the Income Tax Act and the Inheritance Tax Act,[85] and the tax authority actively applies these rules. In addition, there are (1) comprehensive anti-avoidance rules for corporate reorganisation[86] and (2) comprehensive anti-avoidance rules for consolidated tax return.[87]

ii Tax avoidance rule for family companies

Under the Corporation Tax Act, when it is found that any acts conducted or calculations made by a family company[88] will, if allowed, unreasonably reduce the burden of corporation tax, the amount of corporation tax, etc. may be calculated, based on such company's own recognition, notwithstanding the said acts or calculation.[89] The Income Tax Act and Inheritance Tax Act have similar rules.[90]

The *IBM* case is one of the cases where the application of such anti-avoidance rule was an issue.[91] In this case, the tax authority denied the capital loss caused by acquisition of treasury stock pursuant to the anti-avoidance rule; however, the court denied the application of the anti-avoidance rule and invalidated the imposition of corporation tax in the amount of ¥120 billion.

iii Comprehensive tax-avoidance rules for corporate reorganisation

When it is found that any acts conducted or calculations made by certain companies will, if allowed, unreasonably reduce the burden of corporation tax, owing to a decrease in the amount of profit or an increase in the amount of loss on the transfer of assets and liabilities transferred as a result of a merger, etc., or because of other grounds, the amount of corporation tax, etc. may be calculated based on the taxpayer's own recognition, notwithstanding the said acts or calculation.[92]

There has been a controversy about the meaning of 'unreasonably reduce the burden of corporation tax'; however, a recent case has rendered a judgment about such meaning.[93] In the case, the SCJ held that 'unreasonably reduce the burden of corporation tax' means

85 Article 132, Paragraph 1, Item 1 of the Corporation Tax Act, Article 157, Paragraph 1, Item 1 of the Income Tax Act and Article 64, Paragraph 1 of the Inheritance Tax Act.

86 Article 132-2 of the Corporation Tax Act, Article 157, Paragraph 4 of the Income Tax Act and Article 64, Paragraph 4 of the Inheritance Tax Act

87 Article 132-3 of the Corporation Tax Act.

88 'Family company' means a company in which three or fewer shareholders or members, and individuals or corporations that have a special relationship therewith, hold shares or capital contributions that account for more than 50 per cent of the total number or total amount of the issued shares of or capital contributions to the company (Article 2, Item 10 of the Corporation Tax Act).

89 Article 132, Paragraph 1, Item 1 of the Corporation Tax Act.

90 Article 157, Paragraph 1, Item 1 of the Income Tax Act and Article 64, Paragraph 1 of the Inheritance Tax Act.

91 Supreme Court, decision of 18 February 2016 (not yet listed in published materials).

92 Article 132-2 of the Corporation Tax Act.

93 *Yahoo Japan Corporation* case (Supreme Court, Decision of February 29, 2016, *Minshu*, Vol.70, No. 2, p. 242).

reducing the burden of corporation tax by an act or calculation of a company abusing the provisions regarding corporate reorganisation as a way of tax avoidance,[94] and the imposition of corporation tax in the amount of ¥26.5 billion was upheld.

IX DOUBLE TAXATION TREATIES

As of November 1, 2017, Japan has executed 57 tax treaties. Some provisions of tax treaties may be directly applied; however, the Special Act for Implementation of Tax Treaties, etc. (Act No. 46 of 1969) has been established to implement tax treaties. For example, a prior notification is required to claim reductions of or exemptions from withholding tax under tax treaties.[95]

Under the Japanese Constitution, the prevailing view is that the Constitution prevails over treaties.[96] On the other hand, tax treaties are considered to prevail over laws.

Japan is a party to the Vienna Convention on the Law of Treaties, and tax treaties are interpreted in accordance with the Convention.

Recently, the interpretation and application of a tax treaty was an issue in the *Glaxo Smith Klein* case,[97] wherein the NTA imposed tax on the income of a Singaporean subsidiary of Japanese company in accordance with Japanese anti-tax-haven rules. Whether such taxation violated Article 7, Paragraph 1 of the Japan–Singapore Tax Treaty was an issue in this case because the income of a Singaporean company was found to be subject to Japanese tax even if it did not hold a PE in Japan. The SCJ held that such taxation did not violate the treaty because the income of the Singaporean company was deemed to be that of the Japanese company and the Japanese company was subject to Japanese tax. The legal status of commentary on the OECD model tax treaty was also an issue in this case and the SCJ held that such commentary was a 'supplementary means of interpretation'[98] because the Japan–Singapore Tax Treaty was prepared based on the OECD model tax treaty.

X AREAS OF FOCUS

i International taxation

Recently, there have been many cases where significant amounts of tax have been imposed on large companies based on the transfer pricing rule. However, the number of transfer pricing taxation cases is decreasing because the NTA failed to prevail in some lawsuits regarding transfer pricing taxation[99] and the use of APA has become more common.

94 According to the SCJ, whether or not such abuse exists shall be determined from the viewpoint of whether such act or calculation is conducted in a way deviating from the intent or purpose of provisions regarding corporate reorganisation with the purpose of reducing tax, taking into consideration whether such acts or calculation are unnatural and whether there is any other reasonable business purpose for such act or calculation other than the purposes of tax reduction.

95 Article 2-2-5 and Articles 9-5 to 9-9 of the Order for Enforcement of the Act on Special Measures Concerning Taxation.

96 Article 98, Paragraph 1 of the Constitution of Japan.

97 Supreme Court, Decision of 29 October 2014, *Minshu*, Vol. 63, No. 8, p. 1881.

98 Article 32 of the Vienna Convention on the Law of Treaties.

99 Tax imposition on Takeda Pharmaceutical Co, Ltd owing to alleged failure to declare income of approximately ¥122.3 billion was partially invalidated by objection (Takeda Pharmaceutical Co, Ltd press release – 6 April 2012), and the remaining part of tax imposition was invalidated by review (Takeda

In addition, there are many cases where tax is imposed based on anti-tax-haven rules. Such rules are strict in Japan compared with other countries. A recent case saw a taxpayer win because the SCJ reversed the conclusion with regard to the satisfaction of requirements for exemption from the anti-tax-haven rules.[100]

ii Taxation on the wealthy

In Japan, some wealthy people have recently migrated to countries where the tax rate is low in order to reduce their income tax, inheritance tax and gift tax. Japan has introduced laws to prevent such tax avoidance and to strengthen taxation on the wealthy. The NTA also focuses on taxation on the wealthy by, for example, establishing a super wealthy project team.

To list a few examples of such legislation, Japanese residents with ¥50 million or more of assets in a foreign country at the end of year must submit a report of their overseas assets to the competent tax bureau by March 15 of the next year.[101] Filing a report of assets and debts is also required when the income and assets of a taxpayer are more than a certain amount.[102]

In addition, an exit tax was introduced in Japan as of 1 July 2015. If an individual who has ¥100 million or more of certain types of assets migrates overseas, any unrealised capital gains on such assets shall be subject to income tax upon migration.[103]

XI OUTLOOK AND CONCLUSIONS

In Japan, taxpayers have generally hesitated to commence tax dispute as the possibility of winning a tax lawsuit was limited and taxpayers were also fearful of worsening their relationship with the tax authorities by commencing a tax dispute.

However, after corporate profits decreased as a result of the end of the economic bubble, shareholders' demands became stronger and the risk of shareholder litigation increased if a company accepted an unreasonable tax imposition. Accordingly, the number of tax litigations increased around the year 2000, and there have been some cases where large amounts of tax impositions have been invalidated.[104]

Pharmaceutical Co, Ltd press release – 25 March 2013). Tax imposition of ¥7.5 billion on transactions between Honda Motor Corporation and its subsidiary was also invalidated (Tokyo High Court, Decision of 13 May 2015, *Zeimu-sosho-shiryo,* Vol. 265, No. 12659).

100 Supreme Court, Decision of 24 October 2017, *Saibansho-jiho*, No. 1686, p. 1.

101 Article 5, Paragraph 1 of the Act on Submission, etc. of Report regarding Overseas Transfer of Money, etc. for Ensuring Proper Taxation of Domestic Tax (Act No. 110 of 1997).

102 Article 6, Paragraph 1 of the Act on Submission, etc. of Report regarding Overseas Transfer of Money, etc. for Ensuring Proper Taxation of Domestic Tax.

103 Article 60-2 of the Income Tax Act.

104 For example: (1) the *Industrial Bank of Japan, Limited* case (Supreme Court, Decision of 24 December 2004, *Minshu,* Vol. 58, No. 9, p. 2637) where imposition of corporation tax in the amount of approximately ¥150 billion was invalidated; (2) the IBM case mentioned in footnote 91; (3) the *Takeda Pharmaceutical Co, Ltd* case mentioned in footnote 99; (4) the *Yahoo Japan Corporation* case mentioned in footnote 93; (v) the *Takefuji Corporation* case (Supreme Court Decision of 18 February 2011, *Shumin*, Vol. 236, p. 71) where imposition of donation tax in the amount of approximately ¥133 billion was invalidated; (6) the *Tokyo Banking Tax Ordinance* case (Tokyo High Court Decision of 30 January 2003, *Hanrei-jiho*, Vol. 1814, p. 44) where the Tokyo High Court held that such ordinance was invalid and that tax paid by banks in the amount of approximately ¥162.8 billion should be returned to the banks (the

The number of tax litigations has decreased recently compared with those days[105] as the tax authority is careful about tax imposition because of clarification of the tax audit rules by the amendment to the Act on General Rules for National Taxes. The NTA's losses in several high profile tax litigations is one of the reasons why the NTA has become less aggressive toward tax imposition.

Japan has become stricter toward tax avoidance recently (e.g., the introduction of stricter anti-tax haven rules); however, the protection of taxpayers has become strengthened by way of legislative amendments and court judgments.

parties later settled at the Supreme Court); and (7) the *Osaka Banking Tax Ordinance* case where banks filed a lawsuit to confirm that the ordinance was invalid and then withdrew their claims because the tax rate was reduced from 3 per cent to 0.9 per cent.

105 The number of tax lawsuits filed in 2016 was 230 (Outline of Litigation, the NTA), which was about half of the number of the 457 tax lawsuits filed in 2004 (Report of the NTA in 2005).

Chapter 20

LIECHTENSTEIN

Heinz Frommelt[1]

I INTRODUCTION

Liechtenstein is a constitutional hereditary monarchy on a democratic and parliamentary basis and has been a sovereign state since 1806. The state authority is shared between the Prince and the people of Liechtenstein. The state in its current form is based on the Constitution enacted in 1921. In 1924, Liechtenstein adopted the Swiss franc as official currency and became part of the Swiss customs area. Liechtenstein has been a member of the European Economic Area (EEA) since 1995.

Until 2011, taxation in Liechtenstein was governed by the Tax Act of 1961, which provided for a wealth tax and ancillary income tax for individuals as well as a capital and corporate income tax for legal entities. Foundations or trusts with settlors or beneficiaries resident in Liechtenstein were usually considered as transparent for tax purposes and were subsequently also subject to wealth tax. In addition, a coupon tax was levied on certain dividend distributions by legal entities and certain interest payments, and a capital gains tax was levied on the sale of real estate located in Liechtenstein. Further, the Tax Act provided for an estate tax as well as an inheritance and gift tax. Moreover, legal entities qualifying as holding companies (including foundations) as well as entities having merely their registered seat in Liechtenstein without exercising any commercial activity in the country (domiciliary companies) were subject to a privileged taxation. The same applied to trusts registered in Liechtenstein. Finally, a lump sum taxation was available for foreign individuals resident in Liechtenstein who had no occupation in the country and no income from Liechtenstein sources.

In 2010, a new Tax Act and a new Tax Ordinance were enacted with effect from 1 January 2011. The new Tax Act 2010 brought some radical changes to the Liechtenstein taxation system, in particular for legal entities, since the capital tax on equity was abolished and a unitary corporate income tax was introduced for all legal entities. The coupon tax and estate tax, as well as the inheritance and gift tax, have all been abolished. In lieu of the inheritance and gift tax, a new endowment tax applicable upon transfer of assets to a legal entity considered as opaque for tax purposes with a settlor or beneficiaries resident in Liechtenstein has been introduced.

Taxes are levied on a state and municipal level in Liechtenstein. Income of resident individuals is taxed at a progressive rate, with applicable allowances depending on the taxable base and the marital status of the taxpayer. Spouses are generally assessed jointly, unless they both request a separate assessment. Wealth tax is calculated through a notional interest

1 Heinz Frommelt is a partner at Sele Frommelt & Partner Attorneys at Law Ltd.

on the taxable assets at a current rate of 4 per cent, which is then added to the taxable income base. In the case of individuals and legal entities subject to wealth taxation (basically foundations or trusts with settlors or beneficiaries resident in Liechtenstein), a state tax rate of currently a maximum of 8 per cent is levied on the taxable base. The figure is then further multiplied by a percentage rate depending on the municipality of residency of the taxpayer. The multiplier ranges between 150 and 250 per cent, and can be determined individually by each municipality on an annual basis. Currently, the highest multiplier imposed by a Liechtenstein municipality is 200 per cent.

The possibility for foreign individuals resident in Liechtenstein with no occupation in the country and no income from Liechtenstein sources to obtain lump sum taxation remains unchanged under the new Tax Act.

The new Tax Act 2010 abolished the privileged taxation of holding and domiciliary companies. All legal entities with a registered seat or place of effective management in Liechtenstein are currently subject to full corporate income tax liability at a rate of 12.5 per cent with a minimum income tax of 1,800 Swiss francs per year. Legal entities set up before 2010 and formerly subject to privileged taxation were granted a three-year transition period until the end of 2013. Unwilling to completely give up the former taxation regime, the legislator has introduced a new special tax regime for legal entities qualifying as 'private asset structures' (basically a vehicle – very often a private foundation – used for the management of an individual's private wealth without pursuing an economic activity). Owing to Liechtenstein's membership in the EEA, the new private asset structure tax regime was examined by the European Free Trade Association Surveillance Authority and declared by the same to be in compliance with the applicable European competition and state aid rules. A new notional interest deduction as well as an attractive IP-box regime were also introduced for legal entities subject to tax in Liechtenstein. The IP-box regime was abolished with effect as of 1 January 2017 because it was deemed to be non-compliant with base erosion and profit shifting (BEPS). Companies making use of this tax regime in financial year 2016 will be grandfathered for their IP income until calendar year 2020. Further, a tax group is possible with a parent subject to full taxation in Liechtenstein and group members subject to tax in Liechtenstein or abroad.

Partnerships are treated as transparent for tax purposes, and the income generated by the partnership is thus taxed directly in the hands of each partner. In relation to partners who are resident individuals, the partnership's assets directly attributable to them are subject to wealth tax.

With respect to investment funds, the Tax Act exempts income generated by the special fund, thereby subjecting only the income generated by the investment company itself to taxation.

Since Liechtenstein is part of the Swiss customs area, the Swiss federal legislation on stamp duties (including formation duties, duties on insurance premiums and securities transfer tax) is directly applicable in Liechtenstein. In those cases where the Swiss federal legislation on stamp duties is not applicable, a special Liechtenstein formation duty or a duty on insurance premiums is levied. Because of the customs area with Switzerland, Liechtenstein also applies the Swiss VAT regime, and Liechtenstein has undertaken to adopt the material Swiss VAT provisions. Liechtenstein has thus enacted its own VAT Act (2009) and a VAT Ordinance (2009), which are modelled upon the Swiss legal basis.

Litigation in tax matters was rare in Liechtenstein in the past. This was largely due to the fact that a great portion of the Liechtenstein legal entities were subject to privileged taxation, and resident individuals, as well as legal entities subject to ordinary taxation, would rather address uncertain questions with the Tax Authority by way of advance rulings. These rulings are still widely used in daily practice. Since the new Tax Act 2010 came into force, litigation cases have increased considerably, although the number of cases still remains low compared to the total number of taxpayers (individuals and legal entities).[2] The penalties imposed for violations of tax provisions have also increased over the past few years.

II COMMENCING DISPUTES

i Initiation of the tax assessment procedure

Each individual subject to tax in Liechtenstein has a duty to file a tax return in relation to income and wealth taxes on a self-assessment basis before a deadline set annually by the (central) Tax Authority in Vaduz and announced publicly. The same applies to legal entities subject to tax in Liechtenstein in relation to corporate income tax. The deadlines are usually set around April following the relevant tax year for individuals, and around July for legal entities. Tax returns must be lodged by individuals either with the tax department of the municipality where they reside, or directly with the Tax Authority, or alternatively by means of electronic filing. Tax returns of legal entities must be lodged directly with the Tax Authority or by means of electronic filing. Trusts with no income from real estate located in Liechtenstein and without a permanent establishment in Liechtenstein are subject to only the minimum income tax of currently 1,800 Swiss francs[3] and are not required to file a tax return. The same applies to private asset structures. Income generated by a partnership attributable to individual partners must be declared by the same in their own tax return along with, if applicable, any assets of the partnership attributable to the partner for wealth tax purposes.

With respect to capital gains tax on real estate, endowment tax as well as Liechtenstein formation duty and the duty on insurance premiums, the public authority involved in the transaction (e.g., the Land Register, the Commercial Register) has the duty to inform the Tax Authority directly about the executed transaction (e.g., sale of real estate, formation of a legal entity), which then issues a tax assessment notice thereupon. In the case of endowment tax and the duty on insurance premiums, the notification to the Tax Authority must be lodged by the endowing party and respectively by the Liechtenstein fiscal representative of the insurance company.

ii Issuance of the tax assessment notice

After the tax return is lodged, it is reviewed by a tax commissioner and a tax assessment notice is issued by the Tax Authority. Prior to that, the taxpayer has the duty to fully cooperate with the Tax Authority to enable a full and accurate assessment. This includes, for example, providing oral or written information, and submitting accounting documents, ledgers and other documents deemed necessary. The tax assessment notice has to contain the taxable base, the tax rate and the tax amount due. Likewise, a tax assessment notice is issued by the Tax Authority in the case of capital gains tax on real estate, endowment tax, formation duty or duty on insurance premiums. If a taxpayer fails to file a tax return, or if the taxable

2 As of 31 December 2015, 37,622 individuals were resident in Liechtenstein (of which 29,393 were assessed for taxation) and 36,307 legal entities and trusts were registered in Liechtenstein.

3 Increased from 1,200 Swiss francs up to 1,800 Swiss francs on 1 January 2017.

base cannot be assessed properly as reliable or complete documentation is missing, the Tax Authority is entitled to assess the tax due at its own discretion by taking into consideration empirical figures, and changes in the taxpayer's wealth and his or her style of living. During the whole tax assessment procedure, the taxpayer has the right to submit any facts, present any evidence and make any request, unless the Tax Act provides to the contrary.[4] The assessed tax becomes due upon service of the tax assessment notice and is generally payable within 30 days of service.

iii Formal complaint with the Tax Authority

In the event of disagreement with the tax assessment notice, a taxpayer has the right to lodge a formal complaint within 30 days upon service with the same tax authority that issued the disputed notice. The complaint must be filed in writing and contain the requests, the grounds for complaint, the evidence offered, and the signature of the taxpayer or of his or her legal counsel. In the complaint, the taxpayer may advance all arguments for legal deficiency of the tax assessment notice, in particular any defectiveness or violation of the law, or that certain facts have not been sufficiently considered in the decision.[5] If the tax assessment notice has been issued by the taxing authority at its own discretion, the taxpayer may only challenge the assessment notice on the grounds of obvious inaccuracy.

If the formal requirements for the complaint are met, the Tax Authority must re-examine the tax assessment notice, and may then either amend the notice in whole or in part or reject the taxpayer's complaint. The Tax Authority has the duty to examine and evaluate the evidence produced by the taxpayer. The taxpayer has the burden of proof in relation to facts that annul or reduce his or her tax liability, and has the right to illustrate and defend his or her complaint in front of the Tax Authority personally and to be heard. If the taxpayer's complaint challenges a tax assessment notice containing detailed reasons, the complaint can be treated upon the taxpayer's request, or with his or her consent, as a formal appeal filed with the State Tax Commission, and must be forwarded to the same for direct decision.

iv Appeal before the State Tax Commission

The Tax Authority's decision pronouncing on the taxpayer's complaint can be appealed by the taxpayer within 30 days of service by filing an appeal before the State Tax Commission. The State Tax Commission is thus the first instance of appeal in tax matters. The procedural rules applicable in the case of a complaint in front of the Tax Authority (written form, content of the pleading, evidence, representation, etc.) are also applicable in the case of an appeal. The appellant has the duty to indicate the defects of the decision appealed, and to substantiate his or her arguments in the notice of appeal.[6] The taxpayer may advance grounds for appeal such as violation of the taxpayer's legal interest protected by the law, or to be protected by the Authority, or because his or her interests have directly been treated in an inappropriate or unfair manner. A tax assessment notice by the Tax Authority issued at its discretion can only be appealed on the grounds of obvious inaccuracy. Differing from the complaint procedure in front of the Tax Authority, there is a limitation of possible evidence that may be used in front of the State Tax Commission: evidence that has not been produced during the assessment

4 See Administrative Court VGH 2014/003.

5 Article 89 National Administration Act.

6 See Administrative Court VGH 2013/103, 2014/034.

or complaint procedure is inadmissible in the appeal procedure in front of the State Tax Commission. Such limitation encourages the taxpayer to present useful evidence to the taxing authority in a straightforward fashion during the assessment or complaint procedure.[7] The Tax Authority is a formal party to the appeal before the State Tax Commission, and has the right to file a counterstatement to the taxpayer's notice of appeal. In the same way as the taxpayer, the Tax Authority has the right to present and defend its arguments before the State Tax Commission.

The State Tax Commission has the right to engage experts, make inspections, request written or oral information from the taxpayer, request confirmations by the same, or inspect his or her books and ledger accounts. If the Commission exercises such right and the taxpayer refuses to comply, the appeal must be rejected as unfounded. Potential consequences for punishment under criminal or administrative law remain reserved.

The State Tax Commission can annul the Tax Authority's decision or remit the matter to the Tax Authority for taking new or further evidence, reconsidering and re-deciding. The tax initially assessed by the Tax Authority remains due and payable irrespective of the taxpayer's decision to appeal the assessment notice.

v Appeal before the Administrative Court

A decision of the State Tax Commission can be appealed to the Administrative Court as second-instance authority within 30 days of service of the Commission's decision. The appeal can be filed by either the Tax Authority or the taxpayer. The Tax Authority is, therefore, in each case a party to the appeal. If the taxpayer is the appealing party, the Tax Authority has the right to file a counterstatement. In front of the Administrative Court, the appellant can assert only a violation of the law or argue that the appealed decision has been rendered on the grounds of facts assessed incompletely or upon facts contrary to the records contained in the taxpayer's file. A complaint on the consideration of evidence and on the facts already fully assessed by the lower authorities is not admissible in front of the Administrative Court.[8] The notice of appeal must contain the grounds of appeal, the request, the matters of fact and the evidence offered. A mere reference to the grounds of appeal contained in the appeal filed at a lower level (e.g., in front of the State Tax Commission) is inadmissible and leads to the rejection of the appeal.[9] Contrary to the appeal in front of the Commission, new or further evidence may still be produced in front of the Administrative Court. The appellant must duly denote which parts of the appealed decision are challenged and duly substantiate his or her appeal, otherwise it will be declared inadmissible. The Administrative Court may schedule *ex officio* a hearing of the parties, take new evidence or even start the whole assessment procedure from scratch.

The Administrative Court renders a ruling that is final, unless a further appeal to the Constitutional Court is possible on constitutional grounds.

vi Appeal before the Constitutional Court

If the taxpayer considers that the final decision of the Administrative Court violates his or her basic rights granted by the Constitution or by the European Convention on Human Rights, to

7 See Administrative Court VGH 2011/082.
8 See Administrative Court VGH 2016/097.
9 See Administrative Court VGH 2016/097.

which Liechtenstein is a party, a constitutional appeal may be filed. Such appeal must be filed within four weeks of service or can be filed without notice in cases of the effective immediate violation of the appellant's rights. Generally, the appeal has no suspensory effect. However, if enforcement of the appealed decision would trigger a disproportionate inconvenience to the appellant, and provided there are no overriding public interests, the president of the Constitutional Court can suspend the enforcement upon the appellant's request.

vii Appeal in VAT and Swiss stamp duty matters

As in the case of other Liechtenstein taxes, tax assessment notices of the Tax Authority in the field of VAT may be appealed first by way of complaint and further by appeal to the State Tax Commission and the Administrative Court. However, a verdict by the Administrative Court on the matter of VAT may be appealed further within 30 days of service before the Swiss Federal Supreme Court as the competent court in this effect. On VAT matters there is, therefore, an additional third court level available to a Liechtenstein taxpayer liable to VAT. Both the taxpayer and the Liechtenstein Tax Authority have such right of appeal before the Swiss Federal Supreme Court. The appeal is permissible only for reasons of violation of the law, and the procedure is governed by the applicable Swiss rules on appeals in front of the Federal Supreme Court. Decisions relating to VAT offences of criminal nature are excluded from appeals before the Swiss Federal Supreme Court.

With regard to the Swiss federal stamp duties applicable in Liechtenstein, the directly competent assessing authority is the Swiss Federal Tax Authority. Any complaints or appeals by a Liechtenstein taxpayer against notices or orders issued by the mentioned authority must therefore be lodged in front of the competent Swiss authority pursuant to the applicable Swiss procedural rules.

viii Amendment of final tax assessment notices

Once a tax assessment notice has become final, it may still be amended according to the following principles. The Tax Authority has the right to assess a supplementary tax even after the tax assessment notice has become final, but no later than within five years, if facts or pieces of evidence previously unknown to the Tax Authority come up at a later stage and lead to the conclusion that taxation has been wrongfully omitted or that the final tax assessment notice is incomplete.[10] Likewise, the taxpayer has the right to request a revision of a final tax assessment notice if material facts or decisive evidence have been discovered, or if the Tax Authority has ignored material facts or decisive evidence that were or should have been known to the same, or if it has otherwise violated essential principles of procedural law.[11] The revision can also be initiated *ex officio*. The taxpayer's request must be filed in writing within 90 days of gaining knowledge of the ground for revision, or at the latest within 10 years of service of the relevant tax assessment notice.

The Tax Act further enables the correction of arithmetical errors or typographical errors in final assessment notices and decisions upon the taxpayer's request or *ex officio*, at the latest within five years of service of the notice or decision.[12]

10 Article 120 Tax Act.

11 Article 123 Tax Act.

12 Article 125 Tax Act.

III THE COURTS AND TRIBUNALS

A taxpayer's formal complaint addressed to the Tax Authority is dealt with and decided by the same authority. The decision procedure is smooth and is usually concluded within a short time. Most disputed cases are resolved at this level.

The State Tax Commission is the first level of appeal, and is composed of five members and three alternate members who are elected by the parliament for a term of four years. Members of government and officials of the Tax Authority and of the municipality's tax department are not eligible for election. The President and Vice-President of the Commission are nominated by parliament and must have legal education. The State Tax Commission usually meets once a month to hear cases. A decision is generally rendered within a couple of months.

The Administrative Court is the second and, unless a motion to the Constitutional Court is permissible, final level of appeal. It consists of a panel of five judges and five alternate judges who are appointed by the Prince. The judges are independent in the exercise of their duties, and subject only to the Constitution and the law. The majority of the judges must be Liechtenstein citizens and have legal education. Each judge's term in office is five years, taking into account that every year one judge must be replaced by a new member. The panel nominates a President and a Vice-President, renewable on an annual basis. A verdict by the Administrative Court is usually rendered within six to 12 months.

The Constitutional Court consists of a panel of five judges and five alternate judges who are appointed by the Prince. The President of the Court and the majority of the judges must be Liechtenstein citizens. In addition, the procedural rules relating to the Administrative Court apply *mutatis mutandis*. Decisions of the Constitutional Court are generally rendered within six to 12 months.

Due to the applicability of Swiss stamp duty legislation and the Swiss VAT regime, the Swiss Federal Tax Authority in the first case and the Swiss Federal Supreme Court in the second are respectively the competent assessing authority and final judicial authority.

IV PENALTIES AND REMEDIES

i Administrative penalties

Misdemeanours are subdivided into violations of procedural duties, jeopardising of duties and tax evasion.

Anyone who, wilfully or negligently and in spite of a reminder, fails to comply with or complies incorrectly with a duty imposed upon the same by the Tax Act, the Tax Ordinance or a decree issued by the Tax Authority on the basis of the Tax Act is punished by a fine of up to 1,000 Swiss francs or, in severe or recurrent cases, up to 10,000 Swiss francs.[13]

Unless the *actus reus* is punishable as tax evasion or tax fraud, anyone who wilfully or negligently jeopardises the levy either of the formation duty or of the duty on insurance premiums is punished by a fine of up to 20,000 Swiss francs. The act committed can consist of a failure to file a tax return, account statements or breakdowns, or to provide information or produce the books, registers or other written evidence; but may also consist of making untrue

13 Article 135 Tax Act.

statements or concealing essential facts in a tax return, account statement or breakdown, or of producing untrue documents about essential facts or of giving false information, or impeding, obstructing or making impossible a regular control.[14]

Tax evasion is defined as an act committed by the taxpayer by wilfully or negligently filing an untrue or incomplete tax return, or by impeding the levy of the tax due by giving false or incomplete information or by otherwise culpably keeping back taxes due. The law also considers it as an act of tax evasion when a withholding agent obliged to withhold taxes at source wilfully or negligently fails to withhold the tax in total or in part, or anyone who wilfully or negligently keeps back the formation duty or the duty on insurance premiums for its own benefit or the benefit of others.[15] The law also punishes any taxpayer or withholding agent who wilfully or negligently triggers an unlawful reimbursement of a tax or an unlawful exemption from taxes. Tax evasion is punished by a fine, usually two times the amount of the tax evaded. In cases of minor fault, the fine can be reduced down to a third, while in cases of serious fault, the fine can be increased to three times the amount. Attempts to evade taxes are also punished by a fine that corresponds to two-thirds of the fine that would have been imposed in cases of intentional consummation of the misdemeanour. The law further punishes with a fine anyone who instigates or aids and abets a taxpayer to commit a tax evasion, irrespective of whether the taxpayer has ultimately been subject to punishment. If a misdemeanour is committed with effect for a legal entity, the penalty is imposed directly upon the legal entity in accordance with the general administrative penalty rules. If the legal entity fails to pay the fine imposed, the body legally representing the company is liable for the payment of the fine.

The Tax Act attributes the competence to sanction a violation of procedural duties, jeopardising of duties and tax evasion to the municipality where the taxpayer resides, or to the Tax Authority. The taxpayer has the right to appeal a penalty order within 14 days of service, either before the Tax Authority or the State Tax Commission. Decisions of the State Tax Commission can be further appealed before the Administrative Court within 14 days of service.

ii Criminal penalties

Tax fraud and embezzlement of taxes withheld at source are punishable as criminal offences.

Tax fraud is defined as the act of committing tax evasion by wilfully using false, forged or, in terms of content, untrue accounts or other documents. Such criminal act is punished by a prison sentence of up to six months or a penalty of up to 360 daily fines.[16] Equally, the Tax Act punishes with a prison sentence of up to six months or a penalty of up to 360 daily fines the act committed by a withholding agent obliged to withhold tax at source who uses the tax withheld for its own benefit or for the benefit of others.[17] If tax fraud or the embezzlement of taxes withheld at source is committed by a legal entity, the punishment is imposed upon the body of the entity.

Tax fraud and embezzlement of taxes withheld at source are sanctioned by the Princely Court in Vaduz. Court orders can be appealed before the Court of Appeal pursuant to the rules of the Code of Criminal Procedure.

14 Article 136 Tax Act.
15 Article 137 Tax Act.
16 Article 140 Tax Act.
17 Article 141 Tax Act.

In the case of VAT, the same punishable acts apply as with other taxes, but with different penalties. In addition, the VAT Act contains the punishable crimes of qualified tax evasion[18] and dealing with goods on which VAT has been evaded.[19]

V TAX CLAIMS

i Recovering overpaid tax

The Tax Act entitles a taxpayer to recover taxes paid erroneously in whole or in part, on which an interest amount of currently 2 per cent is due if the payment day of the recoverable tax dates back more than 30 days. The application for recovering the overpaid tax must be submitted within five years from the end of the year in which the tax was effectively paid.[20]

The refund of taxes acknowledged as overpaid by the Tax Authority is usually smooth and quick. We are not aware of cases where a refund of overpaid tax has been refused or delayed by the Tax Authority.

With respect to VAT, the taxpayer is entitled to obtain a refund in the case of a surplus following the calculation of the VAT effectively due. The taxpayer is further entitled to request repayment of taxes paid, but not due, as long as the tax assessment has not become final.[21]

ii Challenging administrative decisions

It is possible to challenge administrative decisions on the grounds illustrated in Section II. Tax provisions are usually enacted with effect going forward. The enactment of tax provisions triggering financial burdens on taxpayers with retroactive effect is generally prohibited unless special circumstances apply. If a tax provision is declared to be in violation of the Constitution, such provision is usually abrogated with effect going forward starting from within a maximum of one year as set by the Constitutional Court, and may thus in certain cases still continue to apply in spite of the verdict.[22]

iii Claimants

As a general rule, only the respective taxpayer addressee of the tax assessment notice is entitled to bring a tax claim against the authorities. In the case of a tax group, each member of the group subject to tax in Liechtenstein is obliged to file an individual tax return and will, therefore, receive an individual tax assessment notice, which may be appealed by the member.

As regards VAT, a taxpayer liable to VAT who thus lodged its VAT return and becomes the addressee of the tax assessment notice is entitled to bring a claim. In the case of a VAT tax group, the group representative lodges the VAT return consolidating the individual VAT accounting of each group member, and will thus be the addressee of the tax assessment notice. Each tax group member is, however, severally and jointly liable for the tax due along with the group representative.[23]

18 Article 89 VAT Act.

19 Article 90 VAT Act.

20 Article 130 Tax Act.

21 Article 78 VAT Act.

22 See Constitutional Court StGH 2012/175.

23 Article 15 VAT Act.

VI COSTS

The general rule is that, if a complainant or appellant taxpayer loses a case, the same has to bear the procedural costs, while no costs are imposed if the complaint or appeal is successful. If a complainant or appellant is partially successful, the costs payable are reduced in relation to the degree of success. Even if a complainant or appellant has succeeded with a complaint or appeal, the same can be ordered to bear the costs if the complaint or appeal proceeding has been initiated for no reason. The same principles apply for proceedings in front of the Administrative Court. No costs are awarded to taxpayers for attorneys' fees or expenses even in cases where they prevail and regardless of the procedural level.

In the case of disputes involving VAT, the Tax Authority is entitled to order the payment of costs for its own decrees and decisions in whole or in part. If, following a complaint, the same is rejected, the taxpayer is usually ordered to bear the costs of the rejecting decision. A proportional reduction of the costs is due if the taxpayer is partially successful. If the complaint has been initiated for no reason, the succeeding taxpayer can nevertheless be ordered to pay the costs in whole or in part. Costs of investigations can be imposed upon such person who has culpably triggered them, irrespective of the outcome of the proceedings. For VAT proceedings before the Administrative Court, the same principles as with other taxes apply. As with other taxes, no costs for attorneys' fees or expenses are awarded to the taxpayer even in cases where they prevail.

The administrative cost for the granting advance rulings usually ranges between 500 and 2,000 Swiss francs.

VII ALTERNATIVE DISPUTE RESOLUTION

Liechtenstein law does not provide for a legal mechanism of alternative dispute resolution with the Tax Authority. Nor does the EU Arbitration Convention apply, since Liechtenstein is not a Member State of the EU.

However, Liechtenstein has a long tradition of advance rulings, which continue to be part of dealings with the Tax Authority. Advance rulings are granted by the Tax Authority in relation to facts leading to taxation not yet realised at the time of requesting the ruling and provided the taxpayer has a special interest due to a foreseeable relevance of the envisaged legal effects. Tax rulings may be requested by individuals and legal entities, partnerships and trusts as well as any other person having a legitimate interest in obtaining the confirmation of the tax assessment even if the taxable event will be realised by a legal entity, partnership or trust not yet set up at the time of application. Advance rulings have a binding legal effect with regard to the Tax Authority – in other words, in the assessment and potential complaint procedure before the Tax Authority – but have no binding legal effect in front of the upper court levels. The State Tax Commission or the Administrative Court may, therefore, quash the effects of a ruling. As of 1 January 2017, the concept of binding information and commitment (rulings) was defined by the Tax Act. It is now stated that the taxpayer can apply for binding information in writing. The application will be answered in writing, and, therefore, the respective rulings will be documented.

The binding effect of advance rulings is subject to the proviso that the facts assessed remain unchanged or depart to an immaterial extent, and the legal provisions ruled on are not amended. Advance rulings can also be obtained in relation to transfer pricing issues (advance pricing agreements) and are granted for a limited duration.

VIII ANTI-AVOIDANCE

The Tax Act 2010 introduced an anti-avoidance provision, which was previously unknown in Liechtenstein. Article 3 of the Tax Act now enables the Tax Authority to disregard a legal tax planning or an arrangement in fact that is deemed abusive. Such can be the case if the planning is deemed inadequate in relation to its economic circumstances and if its only aim is to obtain a tax advantage, which would otherwise collide with the rationale of the Tax Act and which has no valid economic or other non-tax reasons for its implementation. All the mentioned requirements must be met to affirm the application of the anti-avoidance provision.

In a 2013 case, the Administrative Court applied the new anti-avoidance principle and ruled against a medical doctor resident in Liechtenstein who had restructured his medical business activity by setting up a company limited by shares, of which he became the owner and an employee. Before that, the doctor had run his medical business as a self-employed person, and all his income had been taxed as income from self-employment. The Court ruled that, while the structuring of the medical business by using a company limited by shares and the conclusion of an employment agreement with the doctor's company were not deemed abusive, the doctor had violated Article 3 of the Tax Act by agreeing an employee's wage that was too low when compared with the average annual income generated by the doctor in the past as self-employed person.[24] The judgment has recently been challenged in front of the Constitutional Court and is currently still pending. So far, this judgment remains the only published court decision dealing with the new anti-avoidance provision.

With regard to VAT, it is worth mentioning a decision by the Swiss Federal Supreme Court of 2013, which was preceded by a dispute between the Liechtenstein Tax Authority and a Liechtenstein establishment. The Swiss court – as competent supreme authority in VAT matters relating to Liechtenstein – held that the Liechtenstein establishment had abused the VAT regime, and ruled against the establishment by ordering the retroactive cancellation of the establishment from the VAT register (thus invalidating the establishment's VAT number) and disallowing the deduction of VAT input tax.[25] The Court acknowledged abusive behaviour of the taxpayer on the ground of its effective business activities – in other words, the purchase of luxury cars by deducting the input tax and only partial lending to paying third parties, while mainly making the cars available without consideration to parties related to the owner of the establishment.

With regard to BEPS, with effect from 1 January 2017, several provisions of the Tax Act were amended with a view to implementing the minimum standard, namely four of the 15 BEPS Action Points in Liechtenstein: (1) 'correspondence principle' for dividends; (2) exchange of tax rulings; (3) abolition of the IP-box regime; and (4) introduction of transfer pricing rules and country-by-country reporting and anti-treaty abuse rules. Moreover, Liechtenstein has, in accordance with BEPS Action Point 6, also committed to include limitation-on-benefits and anti-abuse clauses in all of its DTAs.

Currently, Parliament is discussing the revision of the Tax Assistance Act[26] to further implement the spontaneous exchange of information. As a main point of the said bill, the exchange of the rulings as defined in the Tax Act (see Section VII) in relation to those matters

24 See Administrative Court VGH 2013/067.

25 See Swiss Federal Supreme Court BGE 13 February 2013, C2_487/2011.

26 Steueramtshilfegesetz.

for which there is, according to BEPS, a mandatory spontaneous exchange of information should be regulated, moreover, the conditions of such exchange, confidentiality, the use of information, etc. The bill will also regulate the extent to which existing rulings need to be exchanged. It is planned to exchange all rulings issued after 1 January 2012 that are still valid for taxation as of 1 January 2017 and those rulings issued after 1 January 2017.

IX DOUBLE TAXATION TREATIES

Until recently, Liechtenstein had only concluded DTTs with Austria (1969) and Switzerland (1995, revised 2015). Since 2009, Liechtenstein has signed and ratified a growing number of new DTTs that have mainly been modelled upon the OECD Model Tax Convention on Income and Capital. New DTTs have been signed with Luxembourg (2009), San Marino (2009), Uruguay (2010), Hong Kong SAR PRC (2010), Germany (2011), Bahrain (2012), the United Kingdom (2012), Singapore (2013), Malta (2013), Guernsey (2014), the Czech Republic (2014), Georgia (2015), Hungary (2015), the UAE (2015), Andorra (2015), Iceland (2016) and Monaco (2017).[27] Other treaties are under negotiation. All DTTs concluded by Liechtenstein contain a mutual agreement procedure clause that has, in most cases, been established in accordance with the OECD standard.

For historical reasons, there is very little case law on the application and interpretation of DTTs in Liechtenstein. So far, there has been only one published decision dealing with a DTT to which Liechtenstein is a party. In a 2009 case pertaining to the DTT with Austria, the Administrative Court ruled that Article 23 of that DTT explicitly provides for a tax progression clause for the state of residence of the taxpayer, but does not exclude such tax progression for the state of source. Therefore, the Court held that an individual tax resident of Austria is subject to the tax progression clause applicable by Liechtenstein tax law in relation to his or her income and assets subject to taxation in Liechtenstein.[28]

X AREAS OF FOCUS

The case regarding the new anti-avoidance provision illustrated in Section VIII is an absolute novelty in the tax jurisprudence of the Liechtenstein courts. Given the recent introduction of the concept of anti-avoidance in the Liechtenstein legal order and the rather strict application of the provision by the Administrative Court, it may safely be assumed that the Tax Authority will likely scrutinise future tax planning schemes more deeply from an anti-avoidance point of view.

Moreover, since the transitional provisions applicable to former holding and domiciliary companies elapsed on 1 January 2014, thus subjecting all those legal entities to the new Tax Act, it is to be expected that controlling of tax rules by and enforcement against corporate taxpayers will increase compared to the past. Notably, private asset structures may become a bigger target of control regarding whether the entity meets the legal requirements for the privileged tax regime, and whether the declarations rendered upon application are being respected and implemented. In this regard, the Administrative Court rendered its first decision on the private asset structure regime in April 2015 in a case where a foundation, which holds folk art collections lent free of charge to the foundation's underlying company, had requested

27 Some of the signed DTTs have not yet come into force pending ratification.

28 See Administrative Court VGH 2008/147.

to be taxed as a private asset structure.[29] The Court clarified when an economic activity is deemed to be exercised by a legal entity for tax purposes, and held that the foundation's activity at stake (the lending of folk art collections) and the holding of a participation in an underlying company are not deemed as economic activities for the purposes of the private asset structure regime, even if the participation equals 100 per cent and the underlying company itself exercises a commercial activity. An inadmissible economic activity is deemed only when the shareholder's participation is linked to or triggers influence in the underlying company.

XI OUTLOOK AND CONCLUSIONS

Owing to the increasing number of DTTs signed by Liechtenstein since 2009, and following the enactment of the new Tax Act 2010, tax issues have come to the forefront of the Liechtenstein legal agenda. As a result, tax disputes have increased considerably over the past few years, although their number still remains low compared to the number of resident taxpayers and to the overall number of litigation cases in courts. The Tax Authority has seemingly started to interpret and enforce tax provisions in a stricter manner than in the past, which may be one of the reasons for the higher number of tax disputes. The trend of the judiciary is less clear, but seems likely to move towards applying greater rigour.

Since its enactment, the Tax Act 2010 has already been revised a few times, partially for clear fiscal reasons and partially in view of clearing out certain ambiguous provisions. With effect from 1 January 2017, several provisions of the Tax Act were amended with a view to implementing four of the 15 BEPS Action Points in Liechtenstein (see Section VIII). In addition, from 2017 onwards, the minimum income tax for legal entities has been increased up to 1,800 Swiss francs per annum. A revision of the notional interest deduction regime, as well as of the assessment base of assets for wealth tax purposes and the exchange of the rulings, as mentioned in Section VIII, on which discussions have been led by Parliament and the government just recently are also likely to remain subjects of discussion for some time to come.

29 See Administrative Court 2015/009.

Chapter 21

MEXICO

Manuel Sáinz Orantes and Claudio F Cárdenas Salomon[1]

I INTRODUCTION

Under Mexican jurisdiction, tax disputes between taxpayers and the tax authorities are very common. In those disputes, taxpayers first try to solve disputes through meetings held with the tax authorities; however, it is common that the parties do not agree, so taxpayers usually need to start procedures to challenge an assessment or a tax refund denial.[2]

The Mexican tax authorities usually start audit procedures, with all types of taxpayers, when they detect such taxpayers have failed to pay all the taxes they should have, and they end with a tax assessment. Regarding tax refunds, it is important to point out that in recent years, the tax authorities have denied such refunds in a very visible manner, mainly regarding value added tax refunds.

When the tax authorities determine a tax assessment or deny a tax refund, it is very common for taxpayers to end up with a litigation, for which it may take around three years to obtain a final decision. The fees and costs of such litigations may vary taking into consideration the amounts of the assessments or tax refunds, if the respective lawyer works by him or herself or in a firm, and the prestige of such firm.

II COMMENCING DISPUTES

Once a tax assessment is determined or a tax refund is denied, taxpayers have the opportunity to challenge the ruling that contains the tax assessment or the tax refund denial. There are two legal remedies available for purposes of challenging rulings, which are set out below.

i Administrative appeal

At first instance, taxpayers have the option of filing an administrative appeal within a 30 business-day term as of the date the ruling is notified.

It is important to point out that the First Division of the Supreme Court of Justice issued a criterion in which it stated that taxpayers were required to offer the necessary evidence during an audit procedure; otherwise, they would be barred from offering new evidence if they challenge the tax assessment before the Federal Administrative Court through an annulment complaint.

1 Manuel Sáinz Orantes is a partner and Claudio F Cárdenas Salomon is an associate at Chevez Ruiz Zamarripa y Cia, SC.

2 There are also other causes for tax disputes, such as fines, but tax assessments and tax refunds are the most common, so we will focus on them in this chapter.

In terms of such criterion, if a taxpayer wishes to offer additional evidence to the tax authorities than that provided during the audit procedure, the taxpayer must first file an administrative appeal to be allowed to offer such evidence before the tax authorities.

In accordance with this criterion, in the event that taxpayers intend to offer evidence additional to that submitted during the audit procedure, they must first file an administrative appeal to be in a position to do so.

In the event of an unfavourable resolution, taxpayers are entitled to file an annulment complaint against the Federal Administrative Court within a 30-business-day term as of the date the resolution of the administrative appeal is notified.

ii Annulment complaint

The other way to challenge an unfavourable resolution is by filing an annulment complaint before the Federal Administrative Court within a 30-business-day term as of the date the ruling is notified to the taxpayer.

Against a favourable or unfavourable resolution, the tax authorities or the taxpayers may respectively file an appeal or an *amparo* complaint before a collegiate tribunal within a 15-business-day term as of the date the decision is notified.

iii Amparo complaint or tax authorities appeal

The *amparo* complaint is filed by taxpayers before a collegiate tribunal to challenge decisions issued by the Federal Administrative Court within a 15-business-day term as of the date the decision is notified.

The tax authorities can also file an appeal challenging the decision issued by the Federal Administrative Court within a 15-business-day term as of the date the decision is notified, and it is also solved by a collegiate tribunal.

In cases where taxpayers file an *amparo* complaint and the tax authorities also file the respective appeal, the same collegiate tribunal will solve them in the same session.

iv Extraordinary appeal

It is important to point out that the parties may file an extraordinary appeal within a 10-business-day term challenging the decisions issued by a collegiate tribunal while solving an *amparo* complaint only to argue that an article violates the Constitution or human rights.

Such extraordinary appeal is solved by the Supreme Court of Justice, which decides if the matter is transcendent and important before admitting the extraordinary appeal.

v Guarantee

In accordance with the Federal Tax Code, if an administrative appeal is filed before the tax authorities, taxpayers will not have to offer any security to guarantee the tax assessment until the tax authorities rule on the administrative appeal.

However, in the event that an annulment complaint is filed challenging a tax assessment or once the administrative appeal is solved unfavourably to the taxpayers' interests, it would be necessary to offer a guarantee for purposes of securing the tax assessment.

Taxpayers must secure it as follows:

a cash deposit;

b security interest or mortgage;

c security bond granted by an authorised institution;

d joint and several liability assumed by a third party;
e administrative-law attachment; and
f securities or loan portfolios.

Finally, it is important to mention that there is no significant difference in the dispute if the tax assessments or tax refunds correspond to personal, corporate or partnership taxes.

III THE COURTS AND TRIBUNALS

i Administrative appeals

As previously mentioned, the tax authorities are in charge of solving administrative appeals that taxpayers may file against an assessment or a tax refund denial.

In fact, there is a special legal section that is part of the Mexican tax authorities that is in charge of solving administrative appeals. The persons in charge of solving such appeals are tax authorities' officers depending on the tax residence of the taxpayer.

Such appeals take approximately six months to be solved (it may take more or less time depending on how difficult it is to study the appeal); however, under the Federal Tax Code, if the tax authorities do not issue a decision within a three-month term, taxpayers may choose to take such omission as an unfavourable negative decision and proceed to challenge it, or wait until a formal decision is issued.

In practice, it is unlikely that taxpayers will obtain favourable decisions at this stage, unless they prove that during the audit procedure the tax authorities did not analyse all the evidence that was submitted, or even when taxpayers submit evidence during the appeal additional to that submitted during the audit procedure. This is the case because, as previously mentioned, the Supreme Court of Justice issued a criterion in which it established that evidence that was not provided during the audit procedure can only be provided while filing the administrative appeal.

ii Annulment complaints

Annulment complaints are solved by the Federal Administrative Court, which is integrated by three collegiate judges. It may take around a year for the Federal Administrative Court to issue its first instance decision. However, the parties are entitled to challenge such decision through an *amparo* complaint (taxpayers) or an appeal (tax authorities), which will be resolved by a collegiate tribunal.

It is common to offer as evidence a tax opinion issued by a certified public accountant in the annulment complaints filed to challenge a tax assessment or a tax refund denial. However, this depends on the specific case, and what the taxpayer needs to prove to demonstrate the illegality of the assessment or the origin of the tax refund.

When such expert opinion is offered as evidence, the parties (taxpayer and tax authorities) should appoint an accountant expert who will be in charge of such opinion. In the event such opinions differ, the Federal Administrative Court must appoint a third-party expert whose opinion will prevail.

iii Amparo complaint or tax authorities appeal

Amparo complaints or a tax authorities' appeal is resolved by a collegiate tribunal, which is composed of three judges.

It usually takes around seven months for collegiate tribunals to issue their decisions, which can only be challenged through an extraordinary appeal.

iv Extraordinary appeal

As previously mentioned, the parties may file an extraordinary appeal challenging the decisions issued by a collegiate tribunal only to argue that an article violates the Constitution or human rights.

Such extraordinary appeal is solved by the Supreme Court of Justice, which is composed of 11 judges divided into two sections. Such judges issue their decisions by sections (first and second sections) or in a full seating.

Regarding tax assessments and tax refunds, only a few matters end up in an extraordinary appeal before the Supreme Court of Justice, since they are mainly solved with the *amparo* complaint or the authorities' appeal before a collegiate tribunal.

IV PENALTIES AND REMEDIES

Under Mexican legislation, tax disputes usually conclude with a final decision that determines the legality or illegality of a tax assessment or a tax refund.

If the decision is favourable to a taxpayer, the tax authorities will annul the assessment. In cases where the taxpayer had already paid the assessment, the tax authorities will refund the taxes with adjustments for inflation, surcharges and fines. If the matter is a tax refund, the tax authorities will refund the taxes with adjustments for inflation and surcharges.

In the event that the decision is unfavourable to the taxpayer regarding tax assessments, the taxpayer will have to pay such assessment to the tax authorities with adjustments for inflation, surcharges and fines. If the matter is a tax refund, the denial of such refund will be confirmed.

Criminal penalties will only be imposed on taxpayers that commit any of the crimes typified in the Federal Tax Code, such as tax fraud or contraband.

V TAX CLAIMS

i Recovering overpaid tax

Taxpayers may recover overpaid taxes as long as they prove that such taxes should have never been paid to the tax authorities.

To recover such amounts, taxpayers must file before the tax authorities a tax refund application in which they must specify why the specific amounts correspond to overpaid tax.

In cases where the tax authorities deny such tax refund, taxpayers may challenge such decision through the procedures explained above.

ii Challenging administrative decisions

Administrative decisions or assessments may always be challenged by means of any of the procedures set forth herein.

It is important to note that under Mexican law, taxpayers are allowed to assert formal and substantive arguments. However, under a recent criterion issued by the Supreme Court of Justice, formal arguments can only declare the nullity of a ruling to provide that such formal violation is amended.

iii Claimants

The parties entitled to file tax claims are those who are obliged to pay the applicable tax, or those who have already paid the tax and file a tax refund application.

Regarding VAT, for purposes of filing a tax claim, the parties must demonstrate whether they lodged the VAT refund or passed on the VAT to another party in accordance with the VAT mechanism set forth in Mexican law, and that they are entitled to claim the refund thereof.

VI COSTS

It is not common for taxpayers to recover the costs incurred to challenge a tax assessment or a tax refund; however, under the Tax Administration Services Law, the tax authorities are responsible for paying damages caused by their officers derived from the performance of their duties.

In fact, under the Tax Administration Services Law, the tax authorities must indemnify taxpayers when their ruling is declared null and void as a result of not being duly grounded in law and fact or the competence of the tax authorities; is contrary to a criterion issued by the Supreme Court of Justice in terms of legality; or is declared null for abuse of power.

However, in practice, obtaining a decision where the courts order the tax authorities to pay such costs is unlikely.

The tax authorities are never entitled to charge their costs regarding tax claims. Under the Federal Tax Code, they are entitled to recover the costs incurred in other kinds of procedures, such as the seizure process, but we do not analyse this in this chapter.

VII ALTERNATIVE DISPUTE RESOLUTION

i Taxpayers' Ombudsman

The Mexican Taxpayers' Ombudsman, better known as Prodecon, is an independent public organisation established through a Decree of Law published on 4 September 2006.

On 1 September 2011, Prodecon opened as a decentralised public agency on tax matters that follows up those grievance or complaint procedures against acts of the federal tax authorities that violate the rights of taxpayers.

Among other faculties, Prodecon plays a major role in conclusive agreements (mediation procedure), which are the first alternative means of tax dispute resolution in the Mexican tax system.

To initiate a conclusive agreement, a taxpayer needs to have a ruling issued by the tax authorities with a classification of acts or omissions within an audit procedure. However, under the Federal Tax Code, one of the requirements that should be met to initiate the conclusive agreement is that a tax deficiency has not been assessed. The conclusive agreement allows a negotiation between taxpayers and the tax authorities in which Prodecon acts as a mediator, and it may grant mutual benefits for the parties.

The issuance of a conclusive agreement is binding on the parties and cannot be challenged. However, if taxpayers do not agree with the tax authorities' proposal, they may decline it.

In recent years, Prodecon has played an important role in tax disputes, and has clearly provided a new option for taxpayers to avoid litigation against tax assessments and tax refunds.

ii Mutual agreement procedures

The mutual agreement procedure is another alternative dispute resolution applicable in Mexico, which is established in the treaties for the avoidance of double taxation entered into by the Mexican government with other governments.

Such mutual agreement procedure can be initiated simultaneously with the previously described administrative appeal, and it suspends the resolution of the administrative appeal or the annulment complaint.

To initiate such procedure, taxpayers must first file a writ before the Mexican tax authorities. Once the writ is filed, if the writ is duly grounded, the competent tax authority must try to find a solution unilaterally.

If the competent authority considers said writ grounded but is not in a position to adopt a favourable decision, it must try to solve the matter through a mutual agreement with the competent authority of the other country.

By means of the mutual agreement procedure, the Mexican tax authorities will establish the terms and conditions of the agreement.

If the other country's government agrees to a correlative adjustment, the most common outcome will result in the elimination of the double taxation through the 'corresponding adjustment'.

Once the agreement between the authorities is concluded, the taxpayer will be notified of the decision with the corresponding explanation. After the taxpayer accepts the decision, the tax authorities will exchange written confirmation of the agreement, which will also be notified to the taxpayer.

Subsequently, both tax authorities will execute the result, effectively repairing the non-conforming assessment.

If the decision is favourable to the taxpayer, it will express its conformity and commit to abandon any claim or appeal that it may have filed in Mexico, or it will refrain from filing any other claims or appeals.

Once the taxpayer has expressed its conformity, the competent authorities shall proceed to enforce said decision within their jurisdictions, or carry out the necessary proceedings for it.

With respect to the mutual agreement procedure, there is a Manual for the Application of the Administrative Process of the Organisation for Economic Co-operation and Development that establishes that usually the authorities grant a two-year period to issue a decision, and if the competent authorities do not come to an agreement they may continue their discussions or consider the possibility of granting a reasonable extension to reach such agreement.

VIII ANTI-AVOIDANCE

Under the Federal Tax Code, tax provisions that set forth burdens as well as exceptions thereto for private parties, in addition to those that define violations and set forth penalties, are of strict application. Provisions that define taxpayers, activities subject to tax, the amount to which the tax rate applies, rates or the tax rate schedule thereof, are considered to impose burdens on private parties.

Other tax provisions will be interpreted by applying any method for legal interpretation. In the absence of an express tax provision, the provisions of federal law will be applied, provided that the application thereof is not contrary to the essence of tax legislation.

In terms of the aforementioned, there are no general anti-avoidance rules for tax purposes; however, the Mexican legislation establishes special anti-avoidance rules, such as the case of the Mexican Income Tax Law, which establishes an exemption for transactions entered into between related parties.

In fact, the Income Tax Law establishes that, for the purposes of calculating Mexican-source income, the tax authorities may, in exercising the powers of verification afforded by law, determine that a transaction is a sham exclusively for tax purposes. Such determination shall be duly based on law and facts within the review procedure, and the existence of the sham shall be stated in the ruling assessing the taxpayer's fiscal situation, provided that the transactions had been conducted between related parties as set out in the Law.

For fiscal year 2013, a modification was proposed for the Federal Tax Code to establish that if the tax authorities detect practices or operations from taxpayers that formally do not imply a taxable activity and lack business rationality, they could assess the corresponding tax. However, such amendment was not approved and did not come into effect.

The Income Tax Law also establishes as a non-deductible item the interest on a taxpayer's debts that exceeds the equivalent of three times its shareholders' equity, and that comes from debts entered into with foreign-resident related parties.

In addition, the Income Tax Law establishes as non-deductible items payments of interests, royalties or technical assistance made to a foreign entity that controls or is controlled by the taxpayer when the foreign entity that receives payment is considered transparent; the payment is considered non-existent for tax purposes of the country or territory where the foreign entity is found; and the foreign entity does not consider such payment as income subject to tax under the applicable tax provisions.

The Income Tax Law also establishes the possibility for the following to be treated as dividends for the purposes of such Law: interest derived from credits extended to legal entities or to permanent establishments in Mexico of foreign residents by Mexican residents or foreign residents that are related to the party paying the credit. Such is the case for interest derived from back-to-back loans, even if extended through a financial institution residing in Mexico or abroad.

Regarding the OECD base erosion and profit shifting (BEPS) proposal, as an OECD member, Mexico is seeking to implement measures through its tax authorities to comply with the commitments made within such organisation. Among others, the Mexican tax authorities are starting to audit taxpayers who have conducted business restructurings with related parties, where the authorities consider that the purpose sought was to erode the tax base in Mexico.As of 2014, the Federal Tax Code incorporated a new obligation for taxpayers to provide the information established in the official form 76 'Information of relevant operations (Article 31-A of the Federal Tax Code)'. The most relevant transactions to be provided through such official form are: financial derivative instruments transactions, transfer pricing transactions, shares transactions and corporative restructures.

Also, in 2016, an amendment was made to Mexican legislation to include a new transfer pricing provision for Mexican taxpayers, which in general obliges them to file before the tax authorities additional information regarding related-party transactions through informative tax returns. The above-mentioned obligation is based on the BEPS Action Plan issued by the OECD, specifically Action 13, regarding transfer pricing documentation (master file, local file and country-by-country report).

From our point of view, taxpayers who use this kind of structure to carry out their business in Mexico (related parties), should review their current standing in respect of tax and transfer pricing obligations, in order to anticipate a possible tax audit by the Mexican tax authorities and, if necessary, be in a position to provide the corresponding supporting documentation.

IX DOUBLE TAXATION TREATIES

Mexico has entered into treaties for the avoidance of double taxation with many countries. However, there are no specific domestic rules applicable to the interpretation and application thereof.

Derived from the above, to interpret and apply such treaties Mexico should observe the Vienna Convention on the Law of Treaties, the Model Convention of the Organisation for Economic Co-operation and Development and its commentaries, as well the respective protocols.

X AREAS OF FOCUS

i Relevant operations report

For fiscal year 2014, a modification was added to the Federal Tax Code that obliges taxpayers to provide to the tax authorities a report of the relevant transactions they have carried out.

In terms of such modification, for the tax authorities to exercise their functions effectively and efficiently, it is essential that they have the relevant information in a timely manner, and, owing to the proposal to eliminate the obligation to submit audited tax reports, it is necessary for the authorities to replace that information through requests made to taxpayers.

Owing to the above, Article 31-A was added to the Federal Tax Code providing that taxpayers must submit to the tax authorities information related to the relevant operations indicated in the official form approved by such authorities within a 30-day term counted from the date the operations were entered into. It also provides that, whenever taxpayers submit information in an incomplete or erroneous manner, they will have a 30-day term counted from the notice of the tax authorities to correct the information wrongly submitted, and if that information is not corrected, the obligation shall be considered as unfulfilled.

The tax authorities have established a catalogue of 36 operations contained in different fields that are considered relevant, including:

a financial operations;
b transfer pricing operations;
c reorganisation and restructuring operations, and
d other relevant operations.

We consider that taxpayers should take into account the obligation of reporting such relevant operations to the tax authorities and be aware of such obligation's importance.

ii Amendment regarding human rights

In 2011, an amendment was made to the Federal Constitution that basically obliges all Mexican authorities, including the judicial branch, to always respect the human rights of private parties, including taxpayers. Derived from such amendment, all judicial authorities, including the Federal Administrative Court, the collegiate tribunals and the Mexican

Supreme Court of Justice, should issue their decisions taking into consideration taxpayers' human rights, especially those provided by international treaties or agreements entered into by Mexico.

Although the amendment was a big step to respect human rights at all levels, the Supreme Court of Justice has already issued a criterion in which it establishes that, if an article of the Constitution goes against a human right provided for in a treaty entered into by Mexico, such provision must prevail, which, from our standpoint, is a regression in the evolution of human rights.

iii VAT refunds

As previously mentioned in Section 1, in recent years the tax authorities have denied tax refunds in a very visible manner, mainly refunds related to VAT. In fact, the tax authorities sometimes fail to respond to such refunds, or when they do so, they merely limit their response to a request for additional documents to proceed to such refunds.

In addition, in recent years the tax authorities have requested from taxpayers documents that are not related to or irrelevant for the respective tax refund in order to deny such refund.

iv Substantial claim and substantial administrative appeal

In 2017, an amendment was realised, and a new claim as well as a new administrative appeal to challenge tax assessments (not tax refund denials) were incorporated into the Mexican legislation.

In such processes, the parties are only able to make arguments in connection with the substance of the tax assessment, and no formal or procedural arguments are allowed. Their filings are optional for the parties.

One of the benefits of the 'substantial claim' is that the taxpayers are not obliged to offer a guarantee for the purposes of securing the challenged tax assessment, and its study and resolution is undertaken by specialist judges with extensive knowledge in tax matters.

Another benefit of the 'substantial claim', as well as of the 'substantial administrative appeal', is that in such processes the oral principles should be privileged (implementation of hearings, verbal communication between the judge and the parties) and celerity (reduction of deadlines by eliminating formalities).

The parties are only allowed to file the 'substantial claim' or the 'substantial administrative appeal' when the amount of the tax assessment exceeds approximately 5 million Mexican pesos.

In our experience, in the hearings that have been held in the new 'substantial administrative appeals', not only have the responsible officials participated, but they have also included their teams (the tax authority that issues the assessment, as well as the tax authority that will issue its decision in the appeal), which seems right and positive in order that the appeal be resolved considering all the elements exposed by the parties.

XI OUTLOOK AND CONCLUSIONS

Even though Prodecon has played an important role in the past in allowing taxpayers to negotiate with the tax authorities and to solve disputes between such parties, we consider that much work remains to be done to challenge the tax authorities' position in many matters. With respect to this, we believe that Prodecon will continue to play an important role;

however, it appears that Prodecon's workload capacity has been exceeded, so we consider that something should be done in this regard. We also consider that it would be advisable to afford Prodecon greater power so that its recommendations become mandatory for tax authorities.

In recent years, we have also seen that the Supreme Court of Justice has issued decisions regarding tax matters in a manner that does not benefit taxpayers. Clear examples of the above-mentioned are the recent decisions issued by the Supreme Court of Justice regarding the appeals filed by taxpayers challenging the amendments made to the tax legislation in fiscal year 2014, in which almost all the decisions were issued in an unfavourable manner to the taxpayers, notwithstanding the clear violations to their human rights.

In view of this, given that the Supreme Court of Justice is the highest court in Mexico, we strongly believe that the designation of new judges must be made by preferring officers with a judicial career over officers with a background related to the tax authorities or tax administration. This is to avoid such judges issuing decisions with interests other than the administration of justice.

With respect to the above, in our opinion a requirement that should be met to become a judge of the Supreme Court of Justice is that candidates have never worked (or at least not for a long period of time) in the public administration, particularly in the Tax Administration Service.

Chapter 22

NETHERLANDS

Paul Kraan[1]

I INTRODUCTION

The Netherlands has a long-standing tradition of avoiding tax disputes through an open dialogue with the tax authorities. In line with the history and culture of the country (which is known as the 'polder model'), generally the Dutch tax authorities favour the resolution (or rather: prevention) of tax disputes by cherishing a climate where discussing tax positions is perfectly acceptable. In practice, most taxpayers tend to agree with that approach, if only because it avoids the inherent uncertainty of litigation and the considerable amount time (and costs) associated with having to go through that process. This implies that the vast majority of (potential) tax disputes is resolved through dialogue and never ends up in court.

In light of the fact that the Dutch tax authorities are known for their cooperative attitude, not surprisingly the Netherlands has always been a frontrunner when it comes to exploring opportunities to reduce uncertainty in the area of taxation up front. As such, the Netherlands has a long-standing practice of obtaining advance certainty from the tax authorities through rulings.

At present, tax rulings normally take the form of a *Vaststellingsovereenkomst* (settlement agreement) as defined in the Dutch Civil Code. This entails a written compromise on the interpretation of certain legal provisions as applicable to the taxpayer within the context of a proposed arrangement or series of arrangements. Settlement agreements are normally concluded on a case-by-case basis.

Also with respect to tax matters that are not covered by the Dutch ruling practice, taxpayers may seek to conclude a settlement agreement with the tax inspector, namely either to avoid a potential debate or to terminate a dispute that has already occurred.

Notwithstanding the above, in the Netherlands tax litigation is certainly not an uncommon phenomenon and is generally accepted as a means of resolving disputes. One could say that because the country has a tradition of discussing tax matters openly, it is also accepted that parties may eventually agree to disagree. Obviously, litigation may be the only possibility to resolve a tax dispute where the facts are already fixed and the relevant tax period lies in the past.

Where the tax authorities have imposed a penalty for (allegedly) filing an incorrect tax return, litigation may become inevitable. This can be the event, for instance, the tax authorities are combating structures perceived as aggressive tax planning. Such cases tend to evolve around the question of whether a certain legal arrangement has any genuine economic substance or was created solely with a view to achieve certain tax benefits. In those cases,

1 Paul Kraan is a partner at Van Campen Liem.

the Dutch tax authorities tend to evoke the abuse of law (*fraus legis*) doctrine in order to ignore these arrangements and, thus, deny the tax benefit that would result from a literal interpretation of the relevant legal provisions.

This is a particular area where the authorities tend to have less appetite for resolving a dispute cordially. At the same time, while taxpayers (and their advisers) may be willing to compromise on the desired tax benefit, they are often not prepared to accept a penalty (for various reasons). Litigation may then be the only possibility to cancel such penalty.

As regards tax disputes with an international dimension, the Netherlands is a strong advocate of resolving these in dialogue with the competent authority in the other state, namely through a mutual agreement procedure. Where the domestic taxpayers' interests at stake are significant, the Dutch tax authorities are generally willing to invest considerable time and effort of government officials in these procedures. Nonetheless, if necessary, such disputes may need to be resolved through binding arbitration, another dispute resolution favoured by the Dutch tax authorities.

II COMMENCING DISPUTES

In the Netherlands, the General Administrative Law Act provides for a wide-ranging framework governing the relations between citizens and their administration. The relevant legislation contains the principles any Dutch governmental body must adhere to in the process of making its decisions. Moreover, it contains the rules governing the consequences of these decisions, particularly the right of individual citizens to challenge these. Although most of these rules apply in matters of taxation as well, the General Tax Act provides for specific rules regarding matters of taxation, such as filing tax returns and the establishment of (additional) tax assessments, as well as procedural rules regarding administrative appeal and litigation in tax matters. While some of these rules merely add to the general framework, others deviate from it.

i Mandatory objection phase

Within the applicable legal system, a tax dispute typically commences with a taxpayer filing a notice of objection against an assessment or a formal decision issued by the tax inspector. This administrative appeal procedure with the tax administration must be completed prior to lodging an appeal to the tax courts, meaning that the initial appeal to court (i.e., to the lower court, in the first instance) is always launched by the taxpayer, namely against a (negative) decision by the tax inspector on such notice of objection.

The purpose of this mandatory objection phase is twofold. On the one hand, the procedure forces the tax administration to review decisions taken by an individual tax inspector, which should eliminate apparent mistakes and ensure a uniform and consistent approach to certain matters within the administration. On the other hand, administrative appeal is supposed to have a sort of filter function: since disputes do not immediately go to court, they may still be resolved between the parties at the preceding stage. Even though in some cases parties clearly have a different view on the application of the law (meaning that the administrative appeal procedure is essentially a repetition of moves – eventually the magistrates will need to decide on the matter), generally the obligation for the administration to reconsider its earlier decision reduces the number of cases brought before the Dutch tax courts.

ii Matters subject to objection

In relation to tax matters, administrative appeal is possible against tax assessments imposed on the taxpayer, as well as any formal decision taken by the tax inspector. In this regard, the specific procedural rules for tax litigation (as laid down in the General Tax Act) deviate from common Dutch administrative law (as laid down in the General Administrative Law Act). While the latter provides for an open system of legal remedies in that any decision taken by the administration is in principle subject to objection and appeal, for tax purposes the system of legal remedies is more or less closed.

In principle, a taxpayer can only come up against those decisions that are explicitly open to objection (and subsequent appeal to court). In contrast, if a decision taken by a tax inspector is not explicitly subject to objection and appeal, its effects can only be challenged in court once these have led to an unfavourable tax assessment. This applies for instance with respect to an advance clearance or ruling request: if this is denied, the taxpayer has no legal remedy against that and can only await the first tax assessment resulting from the relevant fact pattern (or abandon from that pattern in light of the uncertainty regarding its tax consequences).

Apart from tax assessments, taxpayers may also challenge notifications determining the amount of tax losses, essentially 'negative' tax assessments. Moreover, the taxpayer may request (and if necessary challenge) formal decisions regarding the application of certain facilities, such as tax consolidation (fiscal unity) or rollover relief.

Nowadays the tax inspector also has the possibility to issue an information notification, stating that a taxpayer has failed to comply with certain information obligations. If the taxpayer disagrees, that particular notification can be challenged, avoiding the need to await a tax assessment that is based on that missing information (or to litigate the mater before a general court without specific tax expertise).

iii Statute of limitations

As regards taxes that become due upon imposing an assessment formalising the obligation to pay (such as personal and corporate income tax), in principle the inspector must impose such assessment within three years after the end of the relevant financial year. If the taxpayer was granted an extension for filing the tax return for the said year, a similar period of extension applies to the deadline for imposing the related assessment.

Once a final tax assessment has been imposed, as a rule the tax inspector may no longer impose an additional assessment. However, at present a final assessment containing an apparent error can still be adjusted within two years of the date of such assessment, in order to avoid the possibility that taxpayers could benefit from evident mistakes within the tax administration.

Otherwise, the tax inspector may impose an additional assessment only if certain facts come to his or her attention that he or she could not be aware of previously (or if the taxpayer has acted in bad faith in relation to those facts). In any case, the statute of limitations expires within five years of the end of the relevant financial year (for certain foreign-source income this is increased by seven years), again adding any period of filing extension granted.

Likewise, as regards taxes that are not formalised through issuing an assessment (such as value added tax and wage tax), the tax inspector can make an adjustment by imposing an additional assessment. However, also for these remittance-based taxes, the statute of limitations expires within five years of the end of the financial year during which the relevant tax liability arose (for certain foreign-source income this is potentially increased by seven years).

iv Start of investigation or dispute

Since tax return filings (and payments) nowadays are more or less automatically processed, increasingly the trigger point for the administration to start an investigation tends to be information coming to its attention, either through a (regular or specific) tax audit or more or less incidentally. Other than the statute of limitations for imposing additional assessments, there is no specific time frame for an examination to be concluded. In practice, assessments are often imposed just to prevent the expiration of the statute of limitations.

As before, the trigger point for the taxpayer to start a dispute continues to be the receipt of an assessment deviating from the return previously filed. As said, such assessment must first be challenged in an objection procedure, within six weeks of its date. If the administrative appeal is not (entirely) honoured by the inspector, the taxpayer may lodge an appeal with the (lower) district court against that decision. Depending on the court's verdict, subsequently the taxpayer or the inspector may lodge an appeal with the (higher) court of appeal.

Ultimately, the parties may appeal to the Dutch Supreme Court. Where the dispute mainly concerns the application of the law, parties may agree to skip the procedure before the court of appeal and go to the Supreme Court directly. The courts may also request a preliminary ruling on the relevant matter of law from the Supreme Court (i.e., within the context of a pending appeal).

In each instance, the appeal must in principle be launched within six weeks of the date of the government decision or court verdict that is the subject of the appeal.

III THE COURTS AND TRIBUNALS

i Administrative appeal procedure

As mentioned, the administrative appeal procedure is initiated by the taxpayer (i.e., by lodging an objection with the inspector). This must be done within six weeks of the date of the relevant decision (e.g., a tax assessment). If is lodged after the six-week term has lapsed, in principle the objection is inadmissible and the inspector's decision, therefore, becomes final. This will also be the case if the objection is not substantiated. However, in order to preserve his or her rights, the taxpayer may first submit a *pro forma* notice of objection (i.e., within six weeks) and substantiate that at a later stage.

To enhance the character of a reassessment, the decision on the objection must be taken by another tax inspector (i.e., not the same person that took the initial decision). Before that inspector decides on the notice of objection, the taxpayer is entitled to a hearing of the case. There are no filing costs or registration fees for lodging an objection.

Formally, the tax inspector is required to decide on the objection within six weeks of the moment the period of lodging it expired, meaning that in principle the objection phase should take no longer than 12 weeks from the date of the original decision that is being challenged. However, the inspector is still allowed to unilaterally extend this period by an additional six weeks, taking the maximum time frame for dealing with the objection up to 18 weeks. Further extension can be agreed upon by the parties.

If the tax inspector does not decide within the statutory (or agreed) period, in principle the taxpayer can take formal steps to force a decision in the appeal procedure. However, in practice this only happens in exceptional cases.

ii Appeal and higher appeal proceedings before the tax courts

If the inspector decides not to (or not entirely) honour the objection, the taxpayer can lodge an appeal against that decision with the district court. In that instance, a registry fee becomes due.

Again, the notice of appeal must be submitted within six weeks of the date of the decision by the inspector in the administrative appeal procedure. If lodged after six weeks, the appeal may well be inadmissible. Again, to be admissible the appeal must also be substantiated, although in order to preserve rights the taxpayer may first submit a *pro forma* appeal (i.e., within six weeks) and substantiate that at a later stage (within the time frame granted by the court).

Once the substantiated notice of appeal has been submitted, the court will send it to the tax inspector, who will be allowed a certain time frame for submitting his or her statement of defence. Depending on the complexity of the case, a second written round may be requested.

The parties must be invited to attend the court hearing at least three weeks in advance. However, if the parties consent, the court may refrain from a hearing. Each party may submit additional documents until 10 days before the hearing. In tax matters, the court's hearing is typically held behind closed doors. Nonetheless, eventually the court's decision will be published, albeit it in anonymous form. At the courts, the taxpayer may represent himself or herself; representation by an attorney (or a tax adviser) is not mandatory.

The district court rules both on the facts of the case and the application of the law. Although the term of its ruling can be extended (which is often the case), in principle the district court must render its verdict within six weeks of the date of its hearing or otherwise inform the parties with respect to the delay.

Both the taxpayer and the inspector can appeal against the (lower) district court's verdict at the (higher) court of appeal. Again, the term for lodging such 'higher appeal' is six weeks from the date of the decision of the district court. The rules that apply to the higher appeal are more or less similar to those that apply to the initial appeal at the district court. Like the district court, the court of appeal rules both on the facts and the law.

iii Rules of evidence

In proceedings before the tax courts, the judges are not bound by any specific rules of evidence. Thus, subject to the requirement that its findings must be comprehensible, the courts may assess the evidence provided by the parties freely. Unlike in civil proceedings, in tax proceedings the courts tend to play quite an active role in exploring the relevant facts.

Based on case law, the burden of proof typically lies with the party that claims something. For instance, normally the inspector must provide evidence for a profit adjustment, while the taxpayer must substantiate a deduction or exemption claimed. In any case, the burden of proof must be apportioned between the parties reasonably. This implies that if one party has exclusive access to certain relevant information, that party must produce the required evidence even if the burden of proof would normally be with the other party.

In specific cases, the General Tax Act provides for a reversal of the burden of proof, for instance if a required tax return has not been filed in a timely manner. Furthermore, the inspector may issue an information notification stating that in his view the taxpayer fails to meet obligations to provide information or documentation, or to keep an adequate administration. As such, this information notification may be challenged as well. However, should the notification become final, as a consequence the taxpayer may face a reversal of the burden of proof in the main case.

In relation to the tax inspector's decision to impose a penalty on the taxpayer, a reversal of the burden of proof is not allowed.

iv Supreme Court proceedings

An appeal to the Supreme Court (a procedure known as 'cassation') can be launched both by the taxpayer and the tax authorities (in that instance, the Dutch State Secretary for Finance replaces the inspector as a party to the proceedings). The aim of this procedure is mainly to preserve legal uniformity and steer the development of law. However, the procedure may also safeguard legal protection as it might function as a quality check on the contested judgment, both as regards the application of the law by the court and the logic of its reasoning.

The procedure with the Supreme Court differs from an ordinary appeal in that not every aspect of the case can be reconsidered: within the Dutch legal system. The Supreme Court must base its decision on the facts established by the courts and may not examine these facts all over again.

Proceedings before the Supreme Court are almost entirely in written form. In tax cases, the taxpayer may lodge the appeal and submit its grounds, and must be represented by an attorney when pleading before the Supreme Court.

If the Supreme Court decides to honour the appeal, it may refer the case back to another court for further handling. However, the Supreme Court may render final judgment if no significant questions of fact remain undecided.

v Extension of payment

Payment of the contested amount of the tax assessment is not automatically extended through initiating judicial proceedings. Instead, the taxpayer must request the tax collector for extension of payment. This is typically granted until the moment that particular procedure ends, meaning that in each instance, the taxpayer must again request for extension of payment.

The tax collector may request security (e.g., a bank guarantee or a right of pledge) for the amount of tax left unpaid. If the litigious tax assessment also includes an amount that is not disputed, such amount must be paid in accordance with the term stipulated in the relevant tax assessment. Interest is calculated on any unpaid amount of tax. However, if the taxpayer initially pays the tax, any refund of tax obtained if the appeal is honoured will not bear interest.

IV PENALTIES AND REMEDIES

i Criminal penalties

Severe criminal offences in the sphere of taxation may well result in prosecution before a criminal court. This is handled by the public prosecutor's office, not the tax administration.

As regards the potential sanctions in criminal proceedings, a distinction must be made between a misdemeanour and a – more serious – offence. In the first case, the sanction tends to be just a penalty, in the latter case a jail sentence can be imposed as well.

ii Administrative penalties

Less severe offences in the sphere of taxation are dealt with by the tax authorities through administrative penalties. In this regard, a distinction must be made between situations of default and situations of wilful misconduct or gross negligence.

In case of default, the administrative penalty is set at a maximum of €5,278 for failure to file the required tax return in a timely manner (for taxes due upon an assessment, such as corporate and personal income tax) or failure to pay remittance-based taxes in a timely manner (such as wage tax, VAT or dividend tax). As regards the latter category, a default penalty may still be imposed if the amount of tax is paid in a timely manner, but the corresponding tax return is not submitted in a timely manner. In that case the maximum penalty is €1,319 for failure to file a wage tax return and €131 for failure to file a VAT or dividend tax return.

In the case of wilful misconduct or gross negligence, administrative penalties are generally set at a maximum of 100 per cent of the amount of the assessment or the tax not paid. Note that the maximum increased to 300 per cent in specific cases concerning tax evasion by private individuals.

In relation to taxes levied by way of assessment, a penalty may be imposed if the required tax return is intentionally not (or incorrectly or incompletely) filed or the tax assessment is otherwise set too low owing to wilful misconduct or gross negligence on the side of the taxpayer. Specifically in relation to a request for (revision of) a preliminary tax assessment, a penalty may be imposed if information or documentation is intentionally not (or incorrectly) provided.

In relation to remittance-based taxes, a penalty may be imposed if the amount of tax due is not (in a timely manner and entirely) paid, owing to wilful misconduct or gross negligence on the side of the taxpayer.

V TAX CLAIMS

i Recovering overpaid tax

If a taxpayer has overpaid taxes, an objection can be lodged within six weeks of the date of: (1) the assessment (for taxes levied based on an assessment imposed by the tax inspector); or (2) payment (for remittance-based taxes levied on the basis of self-assessment). If the term to lodge an objection has already passed, the taxpayer may request the tax inspector for an *ex officio* reduction or an *ex officio* refund. Based on a policy decree, a tax inspector is generally authorised to grant an *ex officio* reduction or refund over the past five years. However, it is not possible to lodge an objection against a decision to deny a request for an *ex officio* reduction or refund.

ii Challenging administrative decisions

In the event an administrative decision is not made in accordance with principles of good governance, such as the principle of legitimate expectations, the right to equal treatment and the principle of fair play, the decision can also be challenged purely on the basis of those principles. Thus, if an assessment is not in line with commitments previously made or with a point of view explicitly determined towards a taxpayer (or group of taxpayers) or if a certain decision is not in line with official policy, the taxpayer can invoke the principle of good governance in that regard.

iii Claimants

In principle, only the person paying a remittance-based tax or receiving a tax assessment or another decision open to administrative appeal can challenge such payment, assessment or decision. Other stakeholders can only challenge these assessments in exceptional circumstances.

VI COSTS

As regards the administrative appeal procedure, the taxpayer is entitled to reimbursement of legal expenses incurred if the tax inspector honours the objection lodged. However, to that end the taxpayer must request reimbursement before the inspector renders his or her decision on the notice of objection. Even then, the compensation is significantly restricted by law and concerns a fixed amount that is often just a fraction of actual costs.

In the case of an appeal to the courts, in any case the court registry fee will be refunded if the court rules (wholly or partially) in favour of the taxpayer. At the request of the taxpayer, the court may also rule that the tax authorities must reimburse the taxpayer for (legal) expenses incurred in relation to the procedure. Also in this instance, the taxpayer must explicitly request a reimbursement of costs in the court proceedings. As with the legal expenses incurred in the administrative appeal procedure, the amount of compensation is fairly limited and normally concerns a fixed amount provided for in the law. Even though the courts may deviate from those fixed amounts, they tend to do so only in very exceptional cases.

VII ALTERNATIVE DISPUTE RESOLUTION

i Advance tax rulings and advance pricing agreements

Within the framework of the Dutch ruling practice, taxpayers may seek to obtain certainty in advance from the Dutch tax authorities with respect to the tax consequences of their (contemplated) investments in – or via – the Netherlands. Following criticism regarding the standardised way in which rulings were previously granted, back in 2001 the Dutch ruling practice was significantly reformed. Since then, rulings are aligned with the international approach developed within the OECD framework and may either take the form of an advance tax ruling (ATR) or an advance pricing agreement (APA).

Even though there is no legal time limit for requesting or obtaining an ATR or an APA, the Dutch tax authorities tend to apply internal policies as regards the duration of the rulings.

Filing a request for an ATR or an APA does not constitute any legal obligation for the tax authorities to formally respond to the request: applications can be denied at discretion, and such decision is not subject to objection or appeal.

Taxpayers may apply for an ATR to obtain advance certainty with respect to the tax consequences of certain specific structures and transactions, such as the application of the Dutch participation exemption or the presence (or absence) of a permanent establishment. Likewise, with respect to matters of transfer pricing, taxpayers may conclude an APA with the Dutch tax authorities, confirming the 'arm's length' nature of the conditions applied for their related party transactions.

Today, the Dutch ruling practice is quite mature, and the ruling process is relatively efficient, particularly if measured by international standards. The current ATR/APA practice is laid down in various administrative decrees, providing the competent tax inspector and the taxpayer with technical and administrative guidelines to be complied with in the process.

Both types of rulings can be described as a settlement agreement, namely a written compromise on the interpretation of certain legal provisions as they apply to a specific taxpayer within the context of a proposed arrangement or set of arrangements. Such a settlement agreement is normally concluded on a case-by-case basis.

Rather than being a prerequisite for obtaining specific tax treatment essentially deviating from applicable Dutch tax law, tax rulings should be perceived as a confirmation of the views and interpretation of the Dutch tax authorities regarding a specific fact pattern in view of legislation in force and applicable case law. Consequently, rulings should not provide advantageous tax treatment to individual taxpayers. As recent developments show, this process is closely monitored by the European Commission, which aims to take away any such advantages by applying the EU state aid doctrine.

ii Mutual agreement procedures and arbitration

Under most tax treaties, potential cases of double taxation can be resolved through a mutual agreement procedure between the competent authorities of both treaty states. Even though the Dutch tax authorities are known to invest considerable time and effort in those procedures, clearly the downside of the standard mutual agreement procedure is that it does not necessarily lead to an outcome, let alone an outcome that completely eliminates the double taxation. Besides, normally the taxpayer cannot initiate a mutual agreement procedure; in fact the taxpayer is not (formally) involved in the procedure at all.

Within the European Union, specifically as regards the elimination of double taxation in connection with the adjustments of profits of associated enterprises, Convention 90/436/EEC, known as the Arbitration Convention, already provides for binding arbitration in connection with transfer pricing adjustments. The Netherlands was one of the first signatories to the Arbitration Convention and since then has always advocated the inclusion of binding arbitration clauses in double tax conventions, not just its own bilateral treaties, but also at a supranational (EU) and multilateral (OECD) level.

In May 2017, the EU Council agreed on a draft directive creating a framework for resolving all sorts of double taxation disputes within the EU. This draft directive is essentially based on the existing Arbitration Convention. The proposal aims to improve the mechanisms used for resolving disputes between Member States arising from the interpretation of double tax conventions. The draft directive requires dispute resolution mechanisms to be mandatory and binding, with clear time limits and an obligation to reach results.

Under the draft directive, a mutual agreement procedure can be initiated by the taxpayer, under which Member States must reach an agreement within two years. If the procedure fails, an arbitration procedure is launched to resolve the dispute within specified timelines. For this, an advisory panel of three to five independent arbitrators is appointed together with up to two representatives of each Member State. The panel (also know as 'advisory commission') issues an opinion for eliminating the double taxation in the disputed case, which is binding on the Member States involved unless they agree on an alternative solution.

iii Mediation and settlement

In the Netherlands, there other alternative methods of resolving tax disputes. Apart from the well-known settlement agreement, since 2005 mediation in tax disputes has been used by the Dutch tax authorities as well.

VIII ANTI-AVOIDANCE

Even though there is no general definition of tax avoidance in the Netherlands, Dutch tax law does contain the unwritten doctrine of abuse of law (*fraus legis*). This doctrine enables the tax authorities (and hence the courts) to eliminate or substitute a certain legal arrangement if the relevant arrangement: (1) was entered into for the sole purpose of saving tax (and, thus, does not serve any other purpose); and (2) would lead to an outcome that would be in contradiction with the objective and purpose of the law if it were respected.

If the abuse of law doctrine is evoked successfully, the tax position will again be established on the basis of the fact pattern as it results from the application of that doctrine, namely by eliminating or substituting the relevant legal arrangement. Recently, an example of a successful application of the abuse of law doctrine was confirmed by the Dutch Supreme Court in its April 2017 ruling in the *Credit Suisse* case.

In addition to the abuse of law doctrine, over the past decades, many specific anti-abuse rules have been introduced, particularly because application of the abuse of law doctrine by the Dutch tax courts was not always found satisfactory by the tax authorities. This has led to (and affected) various tax provisions, notably those in relation to interest deduction and loss compensation.

IX DOUBLE TAXATION TREATIES

The Netherlands has one of the most extensive networks of double tax conventions in the world. Since double tax conventions generally provide for a substantial reduction of foreign withholding taxes that would otherwise be due on dividend, interest and royalty payments, increasingly there is some political pressure (both domestically and coming from abroad) on the Netherlands to take measures against structures set up to benefit from the Dutch treaty network while the incoming payments are largely passed on to entities based in tax haven jurisdictions. To avoid such abuse of the Dutch treaty network, the new Dutch coalition government is considering the introduction of a specific 'anti-abuse' withholding tax on dividends, interest and royalty payments to certain tax havens.

In addition, the interpretation and application of double tax conventions, as well as the EU Parent–Subsidiary Directive, may be expected to become subject to a more stringent anti-abuse approach under the influence of the General Anti-Abuse Rule (GAAR) laid down in the Anti-Tax Avoidance Directive (ATAD) established at EU level. The GAAR provides for a number of criteria to ignore an arrangement or a series of arrangements for the purpose of determining the taxable amount. Two of these can also be derived from the abuse of law doctrine as applied in Dutch case law, namely that (1) the main purpose or one of the main purposes of the arrangement is obtaining a tax advantage (the 'subjective criterion'), which (2) would conflict with the object or purpose of the law if the arrangement were respected (the 'objective criterion').

Under the GAAR included in the ATAD, there is a separate third criterion for tax avoidance, being that the relevant arrangement is, or series of arrangements are, not genuine with regard to all relevant facts and circumstances. However, in the view of the Dutch tax authorities, the absence of valid commercial reasons that reflect economic reality is also relevant when it comes to the subjective criterion that is part of the abuse of law doctrine. In other words: absent valid commercial reasons that reflect economic reality, tax avoidance has to be one of the main purposes of putting the relevant arrangement in place. Since case law from the ECJ provides that a Member State may implement a directive through an existing general legal framework that can be interpreted as consistent with the relevant provisions of the directive, the Netherlands may take the view that the GAAR is already implemented by means of the abuse of law doctrine.

Moreover, the Netherlands adheres to the OECD's base erosion and profit shifting (BEPS) proposals, notably BEPS action item 6, which has meanwhile resulted in the Multilateral Instrument (MLI). In relation to this MLI, the Netherlands has opted to apply the principal purpose test (PPT) for determining whether evoking a certain tax treaty must be considered abusive. In fact, a recent legislative proposal (expected to enter into force with effect from 1 January 2018) more or less codifies the PPT into Dutch domestic (dividend) tax provisions.

Therefore, it can be said that the attitude of the Netherlands towards international anti-avoidance initiatives is generally quite cooperative. Even though certain double tax conventions concluded by the Netherlands already contain an anti-abuse rule, the roll-out of the MLI with its PPT is expected to increase the importance of the anti-abuse element significantly.

Finally, as regards the exemption from VAT for collective investment management activities, based on recent case law from the European Court of Justice an additional requirement for exemption is that the relevant activities are subject to 'specific state supervision'. Even though the unexpected introduction of this additional requirement initially caused some commotion in the fund management industry, by now in most countries (including the Netherlands) there is more clarity as to what this implies from a financial regulatory point of view.

X AREAS OF FOCUS

As is the case in many countries worldwide, increasingly transfer pricing is becoming an area of focus for the Dutch tax authorities. Also in this respect, the OECD's BEPS proposals play a pivotal role, notably BEPS action item 13 which has meanwhile resulted in the country-by-country reporting rules.

In general, owing to the increased international cooperation in the field of exchange of information particularly regarding transfer pricing, both on supranational (EU) and multilateral (OECD) level, it is expected that the obstacles to challenge the policies applied by multinational enterprises will gradually diminish.

XI OUTLOOK AND CONCLUSIONS

In practice, it is expected the policy and the attitude of both the tax authorities and the courts will increasingly be leaning towards application of the anti-abuse doctrine. As the anti-avoidance aspect comes to the forefront, the literal wording of the law may become less important. Clearly, that has the potential downside that the aspect of legal certainty may be ignored.

Furthermore, in June 2017 the 'proposal for a Directive amending Directive 2011/16/EU as regards automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements' was launched by the European Commission. This proposal, commonly referred to as the 'intermediaries proposal' is known as the mandatory disclosure rules. If this Directive were adopted by the Council, that may impact the system of dealing with tax disputes in the Netherlands, particularly in relation to the potential assessment of penalties. As recently clarified by the Dutch Supreme Court in its April 2017 ruling in the *Credit Suisse* case, at present the main question is whether the taxpayer had a *pleitbaar standpunt* (reporting position) when filing its tax return. If mandatory disclosure becomes the new standard within the EU, the paradigm will shift to the question of whether a certain scheme or position had to be disclosed up front to the tax authorities.

Otherwise, there are no indications that the Netherlands will soon see any significant proposals for legislative change in the area of dealing with tax disputes and tax litigation. There would seem to be no need for such system change either, as legal protection in tax matters in the Netherlands is already perceived as quite adequate.

Chapter 23

NEW ZEALAND

Geoffrey Clews[1]

I INTRODUCTION

Tax investigations and disputes are common in New Zealand[2] but tax litigation less so.[3] This is the result of three factors:

a a self-assessment and penalty regime that makes it important for taxpayers to act reasonably in taking a tax position;

b a formal tax disputes regime that is designed to ensure that Inland Revenue (IR) arrives at a correct statement of liability, but can also 'burn off' taxpayer resistance when IR does not; and

c a pragmatic attitude and approach by the courts to tax issues that makes it more likely that the courts will uphold IR's position in disputed matters.[4]

New Zealand's tax system is largely based on taxpayer self-assessment. A taxpayer who is required to file a tax[5] return is treated when doing so as taking a tax position that quantifies their liability until that position is altered as permitted by law. IR may accept the self-assessed tax position or correct it but, except in certain extreme cases, such as alleged fraud, IR may not reassess a taxpayer outside a four-year time bar[6] and without first having undertaken a pre-assessment disputes process, which is comprehensively regulated under the Tax Administration Act 1994 (TAA).[7] This means that in most cases IR must have decided to query a tax position, have undertaken any necessary investigation and then carried out the disputes process before being able to assess.

Because of the time pressure this places on IR, in many cases IR invites a solution that avoids the need to apply its resources to a full investigation and formal dispute. Thus, it will often commence its dealings with a taxpayer with a 'risk review'. This is avowedly not the start of an investigation and is usually couched in terms that invite the taxpayer to consider

1 Geoffrey Clews is a barrister at Old South British Chambers, Auckland, New Zealand. The author acknowledges the assistance of Sam Davies, barrister associate, of Old South British Chambers.

2 While the precise number of investigations is not reported, they gave rise to recoveries amounting to NZ$1.3 billion where taxpayers did not return correctly: IR Annual Report 2017.

3 At 30 June 2017 IR had 104 active cases involving interpretations of tax law and 115 live tax prosecutions before the courts: IR Annual Report 2017.

4 The most recent statistic has IR winning 80.8 per cent of disputes that proceeded to litigation: IR Annual Report 2017.

5 Tax refers to Income Tax and Goods and Services Tax (New Zealand's equivalent of VAT).

6 Normally calculated from the end of the reporting period in which the relevant return has been filed. Section 108 and 108A, TAA.

7 See, generally, Part IVA, TAA.

the correctness of its position and to make a voluntary disclosure of anything that might be an error. Voluntary disclosures are encouraged with significant penalty reductions and, if they are made prior to the notification of an audit (the stated effect of a risk review), an assurance of non-prosecution for tax crimes.[8]

Not all cases commence with a risk review or can be resolved by disclosure. An investigation may be commenced. IR has broad powers of investigation, search and seizure.[9] They are not the subject of this chapter and fall outside the statutory disputes process. To the extent that the conduct of investigations is subject to judicial review, the very limited ability to challenge an investigation is referred to in the section dealing with litigation.

The disputes process usually follows an investigation by IR, from which it concludes that the taxpayer's position is incorrect. In its full form, the process involves the formal exchange of notices between taxpayer and IR, a conference phase[10] and ultimately (unless a taxpayer opts out) the referral of an unresolved dispute to the Disputes Review Unit (DRU) of IR. There, the respective positions of the relevant IR investigations team and the taxpayer are independently considered on the papers, and a decision made as to which prevails.[11]

The whole process is characterised by firm deadlines, where failure to comply leads to a loss of taxpayer dispute rights. The usual response period under the process is two months. Although it is possible to seek further time to meet the steps that the process requires, the rules for time extensions make these difficult to obtain. This means that formal disputes can sometimes be conducted under extreme time pressure.

The disputes process has sometimes been called a 'ritual dance'. It requires taxpayers to respond to IR notices on time and with content that is stipulated in the TAA. In some cases,[12] content will bind the taxpayer as to the issues and legal arguments that can be advanced in later litigation. The process requires care, attention to detail, efficient management and can involve considerable cost.

If an assessment emerges from the disputes process, the taxpayer concerned may challenge the assessment before the Taxation Review Authority (TRA)[13] or the High Court. Rights of appeal lie from both, though there are important jurisdictional differences between the TRA and the Court.

II COMMENCING DISPUTES

Contentious tax matters arise in three ways. First IR may seek to test a taxpayer's position by undertaking a risk review. This is not an investigation and is not normally dealt with in the same way as a formal dispute. Formal tax disputes follow two distinct phases: pre assessment and post assessment. The pre-assessment phase is the statutory disputes process briefly referred

8 Penalty reductions are under Section 141G, TAA. Assurance of non-prosecution for a pre-notification voluntary disclosure is by standard practice statement.

9 See Part 3, TAA.

10 An administrative addition to the process that is not provided for in statute.

11 The disputes review stage is intended to assure taxpayers that investigative officers' decision making is considered with a fresh set of eyes.

12 At what is called the statement of position (or SOP) phase.

13 A first level tribunal operating under its own legislation and presided over by a district court judge.

to in Section I. The post-assessment phase is a tax challenge brought by a taxpayer in the TRA or the High Court. In certain limited circumstances, it is possible also to dispute IR actions by way of judicial review in the High Court.

i Risk reviews

IR employs a range of analytical tools to identify tax positions that present a risk of error. Rather than always commencing a pre-assessment dispute when a risk is identified, IR often contacts the taxpayer to invite it to review its position and correct anything that may be mistaken. The invitation to make a voluntary disclosure is an effective means of avoiding IR having unnecessarily to commit investigative resources to a matter that could be resolved more simply. The invitation is made more attractive by the fact that the risk review is avowedly not the start of an investigation. Because of that, penalties that might otherwise apply are reduced by between 75 per cent and 100 per cent and an assurance of non-prosecution applies to any tax discrepancy that is disclosed and corrected on a risk review.

ii The pre-assessment disputes process

If IR elects not to deal with a matter by way of risk review or its less formal approach to the taxpayer does not elicit a response, it is likely to start an investigation leading to the pre-assessment disputes process. Broadly speaking, this process follows four stages:

a the exchange of initial notices between IR and taxpayers;
b a conference stage;
c the exchange of statements of position (SOPs); and
d reference to the DRU and determination of the dispute.

The purpose of the disputes procedures is to improve the accuracy of IR decisions, reduce the likelihood of disputes by encouraging the full exchange of information, promote early identification of the basis for a dispute and promote prompt and efficient resolution.[14] This is achieved by locking the taxpayer and IR into a series of exchanges that have to occur within a 'response period', normally of two months, but in some circumstances where the taxpayer is required to issue a first notice, four months.[15]

Initial notices

These are called a notice of proposed adjustment (NOPA) and a notice of response (NOR). A NOPA initiates a matter of dispute and may come from IR or from the taxpayer when IR is permitted to assess without issuing a NOPA. There are 16 instances in which IR is not required to issue a NOPA prior to assessing. In practice those most likely to arise are where there is *prima facie* evidence of fraud by the taxpayer, issuing a NOPA would be likely to cause the taxpayer to flee New Zealand or otherwise make recovery of tax more difficult or

14 Section 89A, TAA.
15 Response periods may be enlarged but only in exceptional circumstances that have been closely confined by statute and the courts.

the taxpayer has failed to file a return.[16] Taxpayers will often also use the NOPA to dispute a return that has been filed on a conservative basis and the taxpayer wishes to advance a different tax position without the risk of penalty.[17]

The content of a NOPA is prescribed by statute[18] and must:

a identify the tax adjustments that are proposed;

b provide a statement of facts and the law in sufficient detail to inform the opposing party of the grounds for the proposed adjustment;

c state how the law applies to the facts; and

d include copies of 'significantly relevant' documents.

Before the expiry of the applicable response period, the person to whom the NOPA is issued must provide a NOR or be deemed to have accepted the previously proposed adjustments and to have lost the right to challenge the resulting assessment.[19] The content of a NOR is also prescribed and is designed to join issue with the matters raised in the NOPA, principally by setting out an explanation for why they are considered to be wrong. There have been some instances where poor content has led to IR arguing that a notice is invalid, but the threshold is relatively low as long as the main requirements for content are met.[20]

The conference stage

The exchange of initial notices sets the stage for discussion, argument and negotiation between IR and taxpayers. Although not part of the statutory disputes regime, the conference stage has proved to be a useful and generally welcome addition to the process because it allows the parties to explain and advocate their respective positions outside the limitations of a written document.

IR has placed significant importance on the conference stage as an opportunity to resolve disputes before they escalate too far. The conferences are conducted with trained IR facilitators in the chair so that the risk of unproductive outcomes is reduced. Facilitators are senior and experienced IR officers who have no connection with the case or the IR case officers. While they are not able to impose a resolution on case officers, facilitators will suggest that they reconsider IR's position on taxpayer arguments when that seems necessary and set a time within which further exchanges should take place. The conference stage may be adjourned more than once when the parties consider it prudent or productive to continue talking, rather than move to the next phase of the disputes procedure.

The next phase of the disputes process may also be truncated by agreement. In an 'opt-out' provision, IR and the taxpayer may agree that the dispute would be resolved more efficiently by being submitted to the Court or TRA without the disputes process being completed.[21] Opting out is not usual, but in major disputes where the positions of the parties

16 Sections 89C and 89D, TAA.

17 Section 89DA, TAA.

18 Section 89F, TAA.

19 Sections 89H and 89I, TAA.

20 Validity is not a matter that is determined only by IR but by the Courts. Taxpayers may refile a notice to correct invalidity if they have demonstrated the intention to carry on a dispute: Section 89K, TAA.

21 Section 89N(1)(c)(viii), TAA.

are clear and it is very unlikely that either will be moved, it is a useful option that allows taxpayer and IR resources to be applied more quickly to litigating a dispute that is clearly not otherwise amenable to resolution.

Exchange of SOPs

If the disputes process continues, the parties exchange 'binding' SOPs. Their binding nature is achieved by the issue by IR of a 'disclosure notice',[22] the effect of which is to limit the parties to the issues and propositions of law disclosed in the SOPs in any later challenge to an assessment.[23]

Once again, the content of a SOP is prescribed but a higher standard applies to it. While initial notices have to provide sufficient detail to 'advise' the recipient of the notice, a SOP must 'fairly advise' the recipient, at least in outline form, of the facts, issues, evidence and propositions of law that are relied on. The significance of a SOP is twofold. First, unless one of the several exceptions applies, IR may not amend an assessment of tax unless it has at least considered the taxpayer's SOP. Secondly, if the dispute is referred to the DRU, the SOPs that have been exchanged and the materials that accompany them form the basis of its autonomous review and determination of the dispute.

Whether a dispute is referred to review or not is often determined by time. The disputes process can be time-intensive, and unless IR has planned its process carefully, it can face pressure to complete a dispute to the minimum expected stage before the statutory time bar on reassessment falls.[24] The time bar prevents IR from increasing an assessment if more than four years has elapsed since the end of the period in which the taxpayer filed the relevant return. Though the time bar may be waived,[25] and there may be good reasons for granting a waiver, there is no obligation on a taxpayer to do this.

Determination by the DRU

Like the conference phase, the DRU (formerly known as the Adjudication Unit) has no statutory role in the disputes process. Its role is administrative, and not all disputes are referred to it. The DRU is part of the Office of the Chief Tax Counsel and part of IR's National Office. It is separate from IR's audit/investigation function and takes a fresh look at the dispute, providing a decision on the issues that is distanced from IR's investigators.

There are limits to the DRU's role. It will not make judgements of credibility because its consideration is 'on the papers' and so defers to investigators' conclusions. It follows IR policy and so does not reconsider matters where the correctness of the policy is in issue. The DRU produces reports that are generally of high technical standard and, even if it finds against a taxpayer, its consideration of the issues often provides useful additional information that can be taken further into the post assessment challenge phase.

As to that, it is an interesting quirk of the regime that a DRU decision that upholds IR's position may be challenged by the affected taxpayer but a DRU decision in favour of the taxpayer may not be challenged by IR. This has been described as a 'win, no lose' proposition for the taxpayer.[26]

22 Section 89M, TAA.
23 Section 138G, TAA.
24 Section 108 and 108A, TAA.
25 Section 108B, TAA.
26 *CIR v. ANZ National Bank Limited* (2007) 23 NZTC 21,167 (CA).

iii Post-assessment challenges

Broadly speaking, a taxpayer must have completed the minimum requirements of the pre-assessment disputes process to have the right to mount a challenge to an assessment.[27] That challenge must be commenced in one of the two available 'hearing authorities' within the response period that follows the issue of the relevant assessment notice. Subject to limited opportunities to enlarge time, this means that litigation has to be under way within two months of an assessment being issued,

The available hearing authorities are the TRA or the High Court. These are dealt with in more detail in Section III. The procedures of each are set out in comprehensive rules and involve all the usual elements of civil litigation, including discovery, the exchange of written witness statements, written legal submissions and the conduct of hearings on the basis that the taxpayer is plaintiff in the action and the IR defendant.

Tax litigation is usually conducted on behalf of IR by the office of the solicitor general, Crown Law (CL). CL has a hybrid role as both advocate for IR and protector of the public interest in revenue matters.[28] This can lead to CL advancing arguments in litigation that are at odds with the position adopted by IR. This makes the binding nature of SOPs important, though, as seen, they are not always completed.

iv Judicial review

In some very limited circumstances it is possible to dispute procedural actions by IR through judicial review in the High Court.[29] The scope for judicial review has narrowed considerably in recent years. In all but a few instances, the courts prefer that arguments over procedural validity should be taken in the context of a challenge to a substantive assessment, rather than as a separate attack on IR.[30] This stems from a suspicion that judicial review would otherwise allow taxpayers to game the system, especially considering the tight time frames within which IR must investigate, conduct and resolve a dispute, whether by concession or assessment.

III THE COURTS AND TRIBUNALS

The two fora in which a tax challenge can be commenced are the TRA and the High Court. There are important differences between the two, though the practical implications of the differences for the conduct of tax litigation are limited.

i The TRA

The TRA is a specialist tribunal established by its own legislation[31] to hear and determine tax challenges independently of IR. It has a non-exclusive first instance jurisdiction, and, although the TRA hears only tax matters and can be expected to have considerable tax expertise, the High Court is generally regarded as the court of first instance in which complex taxation

27 There are some assessments for which there is no right of challenge, such as those under various provisions that are left entirely to the discretion or judgment of IR: Section 138E, TAA.

28 Protocols between IR and CL set out the relationship as of July 2009.

29 For actions that are capricious or arbitrary, or unreasonable in the administrative law sense, or where a right of challenge is not conferred by the TAA.

30 Senior courts have warned counsel that recourse to judicial review over the available route of tax challenge may sound in a personal costs award.

31 Taxation Review Authorities Act 1994 (TRA Act).

matters should be commenced. The choice of forum is initially the disputant's, but it is not unusual for IR to apply to have complex matters moved into the High Court. Moreover, where it is likely that a first instance outcome will be appealed, the courts will usually not want to have three steps of appeal as would occur from the TRA, when two would be normal from the High Court.

The TRA is obliged to hear cases *in camera*,[32] and its decisions are published on the basis that all identifying details of the disputant taxpayer are removed. That can be a distinct advantage for taxpayers who guard their privacy, but there is no guarantee that such anonymity will survive a TRA decision if the matter is appealed to the High Court. There, the principal of open justice will often prevail unless the protection of commercial secrets warrants continuing anonymity.

The TRA has the status of a commission of inquiry[33] and so has an independent authority[34] to issue summonses for the attendance of witnesses and the production of documents. Nevertheless, it is bound by the limits imposed under a disclosure notice in the pre-assessment disputes phase,[35] and although it has some latitude as to the formality with which it receives evidence,[36] it must still operate on the basis that the burden of proof in a tax challenge rests with the taxpayer and under the statutory rules of evidence.[37]

The TRA has only a very limited jurisdiction to award costs, another characteristic that makes it a popular forum with taxpayers who may wish to test a position without the usual risk of an adverse costs award should the test not be favourably resolved. The costs jurisdiction is generally only to admonish bad behaviour such as failing to appear or failing to give adequate notice of abandonment or settlement of a challenge. Costs do not 'follow the event' as in the courts.

A tax challenge in the TRA is commenced by notice of claim whose content is stipulated and, where there is no procedure stipulated under the TRA Act and regulations, normally proceeds under the rules applicable to civil hearings in the district court.

The TRA is presided over by a district court judge[38] who travels to the main centres of New Zealand, and sometimes further afield, to hear tax challenges. A review of recent TRA decisions suggests that the time between the last day of hearing and decision is usually about three months. TRA decisions must be given in writing.[39]

ii The High Court

The High Court is New Zealand's court of general jurisdiction, and it shares first instance jurisdiction to hear tax challenges.[40] Unlike the TRA, there is no presumption that tax matters can be heard in the High Court with any degree of privacy. The court is generally reluctant

32 Section 16(4), TRA Act.

33 By Section 15, TRA Act.

34 Commissions of Inquiry Act 1908.

35 Section 17(2A), TRA Act. The TRA may, however, allow new issues and propositions of law in very limited circumstances: Section 17(2B), TRA Act.

36 Section 17, TRA Act.

37 Section 17(3), TRA Act, referring to the Evidence Act 2006.

38 The TRA Act provides for one or more TRAs to be appointed. They need not be judges, but in recent times have been appointed from the District Court bench. The current TRA is Her Hon Judge Alison Sinclair.

39 Section 25, TRA Act.

40 It is one of two hearing authorities under Section 138G, TAA.

to set aside the principle of open justice, though if an application for confidentiality orders is based on good grounds, such as matters of commercial sensitivity, some protection is likely to be given, though not necessarily for the identity of the disputant.

A tax challenge is commenced in the court by way of statement of claim and proceeds as orthodox civil litigation under the High Court Rules. It is subject to civil discovery[41] and the usual range of interlocutory applications and hearings.

High Court judges are not usually specialists in tax. With some exceptions, judges tend to be appointed to the High Court bench from broad generalist backgrounds, rather than from specialities. That reflects a view expressed by a number of senior judges that tax is simply a matter of statutory interpretation and that ordinary litigation processes will sort out the facts to which such interpretation applies. In reality, the generalist quality of the bench can mean that counsel in a tax challenge must often introduce the judge to, and explain, unfamiliar tax concepts.

High Court hearings are not free. Court hearing fees are payable and can be significant if a matter is to be heard over days or weeks. Costs follow the event, which is to say that the successful party is entitled to an award of costs. Such awards do not usually reimburse the successful party for its full costs. Costs are calculated on a scale according to the complexity of the proceedings, and each step in a case has a costs value ascribed to it depending on the complexity band to which it is allocated. Despite the use of a scale, it is not unusual for costs in tax cases to be considerable. This is one factor that encourages taxpayers to opt for the TRA over the High Court as a first instance forum. 'Indemnity costs', namely actual and full costs incurred by the opposing side, can be awarded but usually only because of especially poor behaviour in either bringing or conducting proceedings.

The same sort of review as was done for TRA decisions suggests that the time between hearing and a written tax decision being released by the High Court is usually between one and two months and is often shorter.

iii Conduct of proceedings generally

Whether they are advanced before the TRA or the High Court, tax challenges are subject to case management by the judges. Timetable orders are set, and adherence to them is expected. Evidence in chief is usually submitted to the TRA and court in the form of written briefs that must also be supplied to the opposing party. Document bundles must be settled between the parties, and at first instance the disputant taxpayer usually has the obligation to ensure that the material being relied upon in evidence is available to the Court and IR's counsel. The senior courts in New Zealand are moving towards electronic document management prior to and during a hearing, and this is gradually gaining traction in the High Court, but most first instance hearings are still predominantly paper-based.

Tax challenges often require expert evidence. Experts are required to act as servants of the Court and not as partisans for the taxpayer or IR. New Zealand is a small country and marketplace, and if local expertise is required for a hearing it is often wise to plan for this well in advance to be sure that a 'quality' witness is not lost to the other side. There are strict limits on what evidence will be received as 'expert', and the courts have recently criticised both counsel and witnesses in tax cases where expert testimony was called on matters the Court considered to be within its remit.

41 The Court is trying to reduce the extent of required discovery with tailored discovery orders that often apply in tax cases where a good deal of material is exchanged before the challenge commences.

The TRA and Court deal with a challenge by way of a fresh consideration of all evidence and argument. They are given the same powers as IR to be able to resolve the matter by confirming, cancelling or adjusting an assessment of tax.[42] When the matter in issue is not an assessment, the hearing authority acts by directing IR to alter its decision to conform with its findings.

iv Rights of appeal

The TRA Act permits any party to appeal a TRA decision when the tax involved in the appeal is NZ$2,000 or more, where the amount of any loss involved in the appeal is NZ$4,000 or more or when the appeal is on a question of law only. In any other case the TRA's decision is final and conclusive.[43] The appeal is to the High Court but the appellant is required first to file with the TRA a notice of appeal setting out its grounds and then to submit to the TRA a case on appeal, setting out the facts and issues to be determined. In a curious hold over from a 'case stated' procedure, the case on appeal therefore goes first to the TRA to be signed off and is then conveyed to the High Court.[44]

Appeals from the High Court are to the Court of Appeal. They are commenced by notice of appeal and require a case on appeal comprising the record of the first instance proceedings to be prepared and submitted for a rehearing of the matter. Rehearing means that although evidence is not taken afresh, the written record of evidence at first instance is considered afresh. Most substantive first instance tax decisions of the High Court carry a right of appeal to the Court of Appeal, but where the High Court has heard an appeal from the TRA, a further appeal is by leave only.

The court of final jurisdiction in New Zealand in the Supreme Court. Appeals to this Court are by leave only and must evince a matter of general or public importance or general commercial significance. If the Supreme Court is satisfied that an appeal does not meet this threshold, it will treat the decision of the Court of Appeal as having resolved the matter and decline leave.

The Supreme Court has heard a number of significant tax cases since it was established in 2004. In its earlier years, the Court was clearly marking out a different approach to tax avoidance disputes especially. This is dealt with more fully in Section VIII. More recently, the Supreme Court has considered somewhat fewer taxation matters.

IV PENALTIES AND REMEDIES

i Civil penalties

A reassessment of tax gives rise to additional imposts. These include late payment penalties (LPPs),[45] use of money interest (UOMI)[46] and shortfall penalties (SFPs).[47] In most cases, a reassessment is made with a new due date[48] so that LPPs are not applied retrospectively, but UOMI will normally be imposed from the original due date for assessed tax. Although

42 Section 138P, TAA.
43 Section 26, TRA Act.
44 Section 26(2), (3), (5) and (6), TRA Act.
45 Section 139B, TAA.
46 Imposed under Part 7, TAA.
47 Section 141 et seq., TAA.
48 Section 142A, TAA.

UOMI is not a penalty, it is charged at a rate that is about twice commercial rates of interest and so is nevertheless regarded as punitive. This has led to recognised methods of mitigating UOMI costs, such as purchasing tax from pools maintained by tax intermediaries.

IR must consider whether to impose an SFP in each instance of a tax shortfall.[49] The SFP may be proposed at the same time as IR proposes substantive tax adjustments or it may be held in abeyance to await the outcome of the substantive dispute.[50] The time bar that limits IR's power to reassess does not apply to SFPs.

SFPs are based on a sliding scale that reflects the relative culpability of the taxpayer in taking the disputed tax position. At the lower end of the scale, a penalty of 20 per cent of the shortfall applies for a failure to take reasonable care or taking an unreasonable tax position. This applies if the position fails to meet the test of being 'about as likely as not' to be correct. The next serious SFP is imposed at 40 per cent of the shortfall for gross carelessness. This requires recklessness as to the correctness or not of the tax position or some other egregious omission by the taxpayer, short of dishonesty. A penalty of 100 per cent of the shortfall applies to an 'abusive tax position', where the dominant purpose is to avoid tax. At the highest level, a SFP of 150 per cent of the shortfall applies in the case of evasion or similar act.[51]

These penalties are then subject to potentially substantial reductions for voluntary disclosure[52] and for prior good taxpayer behaviour.[53] Decisions over whether and at what level to apply SFPs can take some time because they are subject to consistency oversight within IR.

In addition to the ordinary range of SFPs a special promoter penalty applies to those who offer, sell, issue or promote avoidance arrangements to 10 or more persons in a tax year.[54]

ii Criminal penalties

Tax crimes are prosecuted under the TAA and the Crimes Act 1961. Under the TAA, there are three broad categories of offences:

a absolute liability offences;
b knowledge offences; and
c intent offences.

Absolute liability offences cover mundane non-compliance, such as failing to file returns, to keep required documents or to register when required to do so. The penalties imposed upon conviction for these offences are fines only, on a sliding scale up to NZ$12,000 per offence after a second conviction.[55]

Knowledge offences reflect a more serious range of non-compliance, where the offender knows of the relevant obligation and fails to meet it. Some of these offences are the same as absolute liability offences but with a knowledge overlay. They also include, however, more serious offending such as falsification or the provision of misleading information and the misapplication of tax deducted at source under New Zealand's employee Pay As You Earn (PAYE) scheme.

49 Section 141, TAA.
50 This can be affected by the possibility of criminal prosecution, which is ruled out if an SFP is imposed first.
51 See Sections 141A, 141B, 141C, 141D and 141E, TAA.
52 Section 141G, TAA.
53 Section 141FB, TAA.
54 Section 141EB, TAA.
55 Section 143, TAA.

The extent of the required knowledge has been developed in case law. It is not necessary for IR to prove more than knowledge of a tax obligation and of the failure to meet it as required. The penalties imposed upon conviction for knowledge offences are a combination of fines and imprisonment. A second and subsequent conviction can attract a fine up to NZ$50,000 per offence and, in some instances, a term of imprisonment for up to five years can be imposed.[56] Where a penalty of imprisonment is provided for, the court has available a range of sentencing options from community based sentences and home detention through to imprisonment.[57]

Intent offences are essentially the knowledge offences overlaid with a more serious element in that the relevant default has not only occurred knowingly but also with intent to evade the assessment or payment of tax. These offences all carry a maximum sentence of a NZ$50,000 fine and up to five years' imprisonment.[58]

A number of more serious offences under the Crimes Act 1961 can arise out of tax offending. For instance, using tax filings to obtain refunds and credits to which one is not entitled can be prosecuted under more general heads of fraud and falsification of documents can be prosecuted as forgery. This is often done if the prosecution considers that the sometimes higher penalties available under the Crimes Act ought to be available to the court.

V TAX CLAIMS

i Recovering overpaid tax

Because New Zealand's tax system is based on self assessment, the opportunities are limited for a taxpayer to correct an incorrect tax position that has led it to overpay tax. The starting point is that is that if a taxpayer considers that it has filed an incorrect return, it should use the NOPA procedure to advise IR of the need to change its tax position. If that is done within the relevant response period, the matter can be resolved without an issue arising over timing.

That is not always possible, and in some cases an overpayment only becomes apparent because of events that occur later. This commentary deals with three instances, namely where:

a there is a case law change that allows a tax concession not previously claimed;

b a correction is sought beyond the time that a NOPA could be filed; and

c a taxpayer has second thoughts over an available choice of tax position.

Case law change

Largely unless a taxpayer has actively maintained a dispute or can otherwise bring itself within the NOPA time line, it will not be permitted to go back and pick up the benefit of case law that arises after their filing. In some instances, it is possible to suspend IR action on a dispute pending the determination of a test case, but this requires formal recognition of the test and is not always available.

56 Section 143A, TAA.

57 Under the Sentencing Act 2006.

58 Section 143B, TAA.

Correction out of time for NOPA

A residual discretion is given to IR, outside the disputes process, to correct assessments at any time to ensure that they are correct.[59] This is subject to the statutory time bar that limits when an assessment to tax can be increased, but there is no limit on the period within which a correction by reducing liability can be made. The IR has a wide discretion to amend an existing assessment that may not be correct and substitute another more appropriate assessment. In exercising the discretion, IR may take into account factors such as that the discretion is not intended to be used by taxpayers as a way of circumventing the statutory disputes process or 'gaming the system', the merits of the case and the resources available to IR.[60]

Regretted choice

IR refused in the past to consider its discretion to ensure correctness if it considered that the applicant taxpayer was trying to backtrack on a choice of tax positions that has ended up badly for it. Because it is now clear that IR must consider a number of factors, the 'regretted choice' approach, which was used by the Commissioner to simply bowl out a taxpayer's request for relief, is no longer a satisfactory basis on its own for refusing relief. A more nuanced consideration of the competing positions and what led to the choice being made will be required. If a taxpayer has simply made a mistake or has genuinely overlooked a tax advantage that could legitimately have been preserved, it might be due some leniency. The taxpayer that is well resourced and should have known better, and moreover made the error repeatedly without it being spotted might not be dealt with as sympathetically.[61]

ii Challenging administrative decisions

The limited possibility that judicial review may be available for some administrative decisions has already been covered. For the most part, if a taxpayer considers that administrative defaults have arisen in IR, it must raise those in the disputes process and challenge them before a hearing authority, rather than try to pre-empt IR in its functions. There are extreme (and possibly theoretical) instances in which judicial review could be used independently of the disputes process to curtail capricious, arbitrary or unreasonable IR behaviour. Judicial review is also available to dispute IR actions such as the pursuit of information requests made under double tax treaties. However, the focus is on the use and application of the disputes process as the primary means of testing the validity of an assessment. Although the concept of a disputable decision is wider than just an assessment,[62] the courts have concluded that a right of challenge is only conferred when an administrative decision translates into an assessed liability.[63]

This approach is reflected also in the prevailing view that published IR practice statements are not binding on IR and do not usually give rise to any general legitimate expectation as to how IR will behave.[64]

59 Section 113, TAA.
60 *Westpac Securities NZ Limited v. CIR* [2014] NZHC 3377.
61 Case note, www.taxcounsel.co.nz, G D Clews 2015.
62 Section 3(1), TAA.
63 *Vinelight Nominees Limited v. CIR* (2005) 22 NZTC 19,298.
64 *Westpac Banking Corporation v. CIR* (2008) 23 NZTC 21,694.

Because of these limits, there is a greater emphasis on escalating within IR complaints about administrative behaviour that is inconsistent with IR publications. Departmental embarrassment can only take you so far, however.

iii Claimants

Standing to bring tax claims

A tax challenge may only be brought by the person whose tax position is under dispute.[65] There may be other parties that are affected by that tax position, but they have no standing to bring a challenge themselves unless they have also taken a tax position and have disputed that to the point a right of challenge arises. This leads to a number of instances in which it is important for the interests of a person affected by the tax decisions of another to be protected by contract.

In the case of land transactions and goods and services tax (GST) (New Zealand's VAT equivalent), the tax status of a vendor may thwart a purchaser's expected input tax claim. Standard land conveyancing documents go some way to protecting the purchaser in such a case, but bespoke terms are often required. In this and other such cases, the terms can include comprehensive provisions under which one party agrees to conduct a tax challenge, having the standing to do so, when the economic outcome is for the benefit of another party who has no direct right of challenge.

Relief in recovery of tax debts

The guidelines for this article postulate the position where:

a company A in a group is assessed for tax;

b company B in the group has an available tax asset (say losses) that are transferred to company A to offset its liability; and

c subsequently the liability in company A is reversed, and company B is then assessed for tax that could have been sheltered had its losses not been allocated to company A.

In this case, if the group is a 'consolidated group' of companies,[66] only a single tax return will be filed by a nominated member of the group. The allocation of losses and profits between group companies will be managed on a group-wide basis. If group A's liability is reversed, the net group position will revive unused losses that will be available when calculating the subsequent year's group income.

Outside a consolidated group, company tax positions have to be managed individually, though in parallel. If the formal disputes process is unavailable, an application would normally be made to reverse the transfer of losses and restore them to company B for offset against its income, using the IR discretion to reassess for correctness.

65 Section 138B, TAA.

66 A wholly owned group.

VI COSTS

Costs usually only arise in litigation and have been addressed earlier in this chapter. Outside litigation, IR is entitled to charge for its time and attention in the consideration and delivery of binding rulings. The rulings process is covered next in relation to alternative dispute resolution.

Costs charged for binding rulings include an application fee and an hourly fee for preparing the rulings. The application fee is currently NZ$322 (including GST) and covers the cost of reviewing an application to establish whether it is valid and complete. After the first two hours (which are covered by the application fee) IR charges a fee of NZ$161 (including GST) per hour or part-hour for all applications except advance pricing agreements.

The cost of a private or product ruling can vary significantly, depending on the type of arrangement and the issues raised. As a guide, IR has published that the cost for applications for a private or product ruling completed between 2013 and 2015 ranged between NZ$4,000 and NZ$51,000. The average fee was approximately NZ$16,750, which reflects the fact that many binding ruling applications relate to substantial commercial transactions.[67]

VII ALTERNATIVE DISPUTE RESOLUTION

i Mediation and arbitration

Outside the facilitated conference stage of the pre-assessment disputes process, there is no recognised arbitration or mediation option to resolve tax disputes.

ii Binding rulings

A well developed system of private, and public or product, binding rulings exists to permit taxpayers the opportunity to settle the tax outcomes of a proposed transaction or product ahead of time.[68]

Any person (including a company, trust and other unincorporated body) in its own right, or on behalf of a person who is yet to come into legal existence, can apply for a private or product ruling. If a ruling is applied for on behalf of a person who is yet to come into legal existence (like a company yet to be incorporated), the person must legally exist before the ruling can be issued.

An agent can apply on behalf of a person or persons, provided that the agent has the written consent of the applicant or applicants. For private rulings, the person must be, or intend to be, a party to the arrangement, and can apply either individually or jointly with other persons who are parties to the arrangement. For product rulings, the applicant must be, or intend to be, a party to the arrangement or be a promoter of the proposed arrangement.

The main advantage of a private or product ruling is that it is binding on IR. If the taxpayer applies the tax law as stated in the ruling, IR must follow the ruling, provided the taxpayer satisfies all stated conditions or assumptions. The applicant, however, is not required to follow the ruling.

A ruling will not be binding on IR if:

a there is a material difference between the facts identified in the ruling and the arrangement actually entered into;

67 www.ird.govt.nz/techncal-tax/binding-rulings/.

68 The following commentary is drawn from IR's published web page on binding rulings, see note 67.

b the applicant materially omits or misrepresents information in the application or when supplying further information;
c the ruling contains assumptions about future events or other matters that are incorrect, and are material to the ruling; or
d a condition stated in the ruling is not satisfied.

Although IR is bound to apply a ruling if a taxpayer follows it, IR can check whether the ruling has been complied with. It is not unusual for IR to investigate whether a taxpayer has satisfied any conditions or assumptions and whether the facts of the arrangement entered into match the arrangement described in the ruling. A ruling will not be binding if it has not been complied with. Private and product rulings are also only binding on the persons stated in the ruling in respect of the arrangement described in the ruling, and are not binding for any other person or arrangement, no matter how similar the facts may be. Rulings are not open-ended and will usually be for a stipulated period of years.

In transfer pricing, IR may issue a unilateral advance pricing agreement (APA) using the binding rulings process. Bilateral or multilateral APAs are administered under the relevant double tax agreements. Although unilateral APAs are one-sided, should double taxation arise on transactions covered by a unilateral APA, IR has published assurance that it will enter into competent authority negotiations with the other jurisdiction on the basis of the unilateral APA position. It considers unilateral APAs to be especially viable where the amounts at stake are small or where most of the transfer pricing risk lies in New Zealand, or both.

In the year to 20 June 2017, IR completed 17 APAs, well down on the 153 completed the year before.

VIII ANTI-AVOIDANCE

i GAAR

Tax avoidance is addressed by both a general anti-avoidance rule (GAAR) and specific anti-avoidance rules. This commentary deals only with the first.

New Zealand's GAAR[69] addresses tax avoidance arrangements (i.e., arrangements having a more than incidental purpose or effect of tax avoidance) and empowers IR to reconstruct the arrangement to the extent required to counter any tax advantage produced by it. The approach of the Supreme Court has recently been summarised thus[70] by reference to three major cases.[71]

a A staged test applies. At the first stage, the legal form of the transaction is tested against the ordinary meaning of any relevant specific provisions. At the second stage, the economic substance of the arrangement is considered, both in its constituent parts and as a whole. That arrangement is then tested against a wider view of the purpose of

69 Sections BG1 and GA1, Income Tax Act 2007.

70 Justice Susan Glazebrook, *Statutory Interpretation, Tax Avoidance and the Supreme Court: reconciling the specific and the general (2013)*; published on iknow.cch.co.nz. Her Honour is a current member of the Supreme Court bench.

71 *Ben Nevis Forestry Investments Limited v. CIR* [2008] NZSC 115; *Glenharrow Holdings v. CIR* [2009] 2 NZLR 359; *Penny v. CIR* [2011] NZSC 95.

the specific provisions, viewed in the context of the Income Tax Act as a whole. The second stage consists of testing the economic substance of an arrangement against the economic substance Parliament contemplated by the specific statutory provisions.

b If the arrangement (or any constituent part of that arrangement) does not fit within the particular provisions (considered in the wider sense) at the second stage, then, viewed objectively, the purpose or effect of the arrangement will be tax avoidance. In this way, effect is given to both the general avoidance provision and the specific provisions, both viewed purposively.

c The majority of the Court has noted a number of factors that would be relevant to the second stage, parliamentary contemplation, inquiry. These include the manner in which the arrangement is carried out, the duration of the arrangement and the financial consequences for the taxpayer, artificiality, circularity, non-market transactions and pricing, whether expenditure will in fact be incurred and the (lack of) effect on a taxpayers' financial position.

There is a third stage (referring to the words 'merely incidental') but the majority of the Court considered it would rarely apply.

There is nothing wrong in a taxpayer seeking out a tax advantage as long as it is one that Parliament contemplates would be obtained in the circumstances. However, if an arrangement uses specific tax provisions within the legislation in a way that was not within Parliament's contemplation, it will be tax avoidance, even if a taxpayer technically complies with the specific provisions.

The reality that tax outcomes should follow economic benefits and burdens has also been confirmed, as the factors listed above show. If a transaction produces a tax benefit that is totally disproportionate to the economic burden undertaken by the taxpayer it is likely to be avoidance.

BEPS

New Zealand has enthusiastically supported the work of the OECD BEPS initiatives. On 6 December 2017 a bill was introduced to Parliament[72] that, when passed, will:

a tighten further the way related party debt is priced, to limit interest deductibility;

b eliminate tax benefits arising from hybrid and branch mismatches;

c address methods used to avoid creating a permanent establishment in New Zealand; and

d realign related-party transactions so that profits are better allocated to actual economic activities undertaken in New Zealand.

IX DOUBLE TAXATION TREATIES

The approach adopted under New Zealand law to the interpretation and application of DTTs has recently been the subject of two decisions. One dealt with the New Zealand DTT with South Korea and one with the DTT with China. Both decisions applied well known principles of purposive interpretation of treaties but also addressed some of the realities about inconsistent treaty language.

72 Taxation (Neutralising Base Erosion and Profit Shifting) Bill 2017.

In *Chatfield*[73] IR sought information in New Zealand on behalf of the South Korean Revenue. The New Zealand party from whom the information was sought applied for judicial review of the IR decision to make the request and then sought discovery of the South Korean DTT information request. The application for discovery was declined and the High Court[74] made a number of observations about the interpretation and application of DTTs that were not disturbed on appeal:

a differences in language between treaties is likely because they are negotiated against the background of particular languages, legal systems, historical influences, tax law and wider policies and national expectations;

b it cannot be expected that the terms of the DTTs will be expressed with the same precision as ordinary domestic tax legislation;

c it should not be assumed that various provisions dealing with a matter that is common to all DTTs mean the same thing. The particular DTT in question should be examined but in light of its international context and the preceding points; and

d on the use of OECD commentary as an aid to interpretation, the Court noted:

> *Any changes to the Commentaries (where there has been no relevant substantive change to the Model Convention) are to be viewed not as recording an agreement about a new meaning but as reflecting a common view as to what the meaning is and always has been.*

Having made these observations, the Court considered whether IR could be required to disclose to the applicant the basis on which South Korea had sought information under the DTT. In issue was the problem that the domestic law's exception from tax secrecy seemed to allow IR to release information related to tax challenges (i.e., cases dealing with liability) but not judicial review. The judge considered this in the light of the OECD model DTT and the commentaries to it.

The judge noted that the model DTT included six additional words that did not appear in the South Korean DTT with New Zealand. She construed the DTT as if those words were in it, so that the way was cleared for the Court to consider whether the Commissioner should meet ordinary expectations of discovery in judicial review. This is an example of a wide interpretation being made of DTT language, by reference to commentary and to give effect to the broad principles of the DTT. The High Court subsequently struck down IR's request for information on behalf of South Korea, in part because IR did not satisfy the Court that it had considered adequately the DTT terms for the exchange of information.[75]

In *Lin*,[76] the High Court considered whether a tax sparing credit should be available to a New Zealand resident shareholder of a Chinese company whose income was attributed to the shareholder under New Zealand's controlled foreign company regime. IR argued that the wording of the China DTT excluded the credit, even though it would have been available had the shareholder invested directly in China and not through a company. The Court concluded that the language relating to tax credits had effectively been extended by the development of

73 Cases culminating in *Chatfield & Co v. CIR* [2017] NZSC 48.

74 At first instance and not disturbed on appeal.

75 *Chatfield & Co Ltd v. CIR* [2017] NZHC 3289.

76 *Patty Tzu Chou Lin v. CIR* [2017] NZHC 969. Note this decision is under appeal, to be heard in early 2018.

OECD commentary so that tax was creditable (and by extension so was tax spared) if it had been paid in China on income also brought to charge in New Zealand, though the actual taxpayer in each case was a different person.

X AREAS OF FOCUS

IR's current tax policy work programme[77] sets out a number of areas of focus. These include the BEPS initiatives already mentioned and enhancements to New Zealand's general 'broad base low rate' approach to taxation. The latter includes such things as:

a a review of the tax framework for employee share schemes including possible deferral for start-up companies;
b a review of income protection insurance;
c considering the deductibility of holding costs for revenue account property;
d petroleum mining decommissioning expenditure;
e taxation of non-bank securitisation vehicles; and
f feasibility and 'black hole' expenditure.

The investigative focus for IR is reflected in the matters on which it reports regularly to its minister. For the past several years, those reports have emphasised the hidden economy, complex issues including aggressive tax planning, fraud and tax compliance in the property sector.[78]

XI OUTLOOK AND CONCLUSIONS

i Outlook

On 19 October 2017 New Zealand's government changed. Under the country's system of proportional representation, a coalition of previously opposition parties achieved a parliamentary majority. The Labour Party, which leads the new government, campaigned on the need for tax reform. To that end, it has appointed a tax working group (TWG) to examine and report on aspects of the tax system.

The TWG is to consider whether:

a the tax system operates fairly in relation to taxpayers, income, assets and wealth;
b the tax system promotes the right balance between supporting the productive economy and the speculative economy;
c there are changes to the tax system that would make it more fair, balanced and efficient; and
d there are other changes that would support the integrity of the income tax system, having regard to the interaction of rules for taxing companies, trusts and individuals.[79]

Certain matters are beyond the TWG's remit. These include increasing any income tax rate or the rate of GST and inheritance tax, and changes that would apply to the taxation of the

77 http://taxpolicy.ird.govt.nz/work-programme.
78 http://www.ird.govt.nz/aboutir/reports/annual-report/annual-report-2017/.
79 https://www.beehive.govt.nz/release/towards-fairer-tax-system-tax-working-group-terms-reference-announced.

family home or the land under it. In addition, the adequacy of the personal tax system and its interaction with the welfare transfer system is outside the TWG's scope. The TWG will also not consider the BEPS agenda, for which legislation was introduced very recently.[80]

ii Conclusion

The New Zealand system for the resolution of tax disputes is administratively complex, formulaic and cumbersome. It is intended to improve taxpayer compliance and IR decision-making and, in combination, reduce disputes in number and longevity. The numbers speak for themselves: while a good many tax matters are disputed, comparatively few are litigated, and, of those that find their way into the courts, the great majority are resolved in IR's favour.

That is not to say that there is unfairness or bias in the system. On the contrary, tax disputes are pursued in this country in an environment remarkably free, by some international standards, of influence, unfairness or graft. Instead, the system is doing what was intended. It winnows out matters that ought not to be litigated much earlier than might otherwise be the case. That is achieved by a combination of incentives for better taxpayer decision-making and a greatly improved capability for technical analysis and judgment within IR. By and large, that leaves the few cases that are tested each year being the ones that raise issues worthy of judicial consideration.

80 See note 72.

Chapter 24

NIGERIA

Etigwe Uwa, Adeyinka Aderemi, Eberechi May Okoh and Munachiso Michael[1]

I INTRODUCTION

Tax disputes in Nigeria are primarily resolved by the courts and the Tax Appeal Tribunal (TAT). The Constitution of the Federal Republic of Nigeria, 1999 (as amended) and the Taxes and Levies (Approved List for Collection) Act, LFN 2008 provide for the assessment and collection of taxes by the federal, states and local governments. The jurisdiction of the courts over tax disputes derives from whether the taxes are federal, state or local government taxes. Jurisdiction for taxes administered at both the federal and state levels, such as stamp duties, is determined by the legal personality of the taxpayer and for individuals, their place of residence.

The Federal High Court (FHC), states' High Courts and TAT are vested with jurisdiction to hear and determine tax disputes. Appeals from the TAT lie to the FHC, appeals from the FHC and states' High Courts lie to the Court of Appeal, while appeals from the Court of Appeal lie to the Supreme Court, which is the apex and final court in the country.

Nigerian laws also provide administrative channels for resolution of tax disputes before resort to litigation. A taxpayer challenging an assessment may write an objection to the tax authority giving reasons for the challenge. The tax authority either upholds the objection and quashes the assessment or rejects the objection. Where the tax authority rejects the objection, it will issue a notice of refusal to amend (NORA) to the taxpayer. The aggrieved taxpayer may within 30 days, file an appeal at the TAT or other relevant court. It is noteworthy that these administrative channels do not bar an aggrieved taxpayer from proceeding to the TAT or the courts, pending the exhaustion of the administrative process.[2]

Tax disputes have been held by the Nigerian courts to be outside the purview of arbitration and other alternative dispute resolution mechanisms. The Court of Appeal in the case of *SNEPCO & 3 Ors v. FIRS,*[3] recently upheld the decision of the FHC that disputes over company taxation are exclusive to the FHC and, thus, not arbitrable as they pertain to the revenue accruing to the sovereign government.

In the course of prosecuting a civil dispute, where evidence of possible criminality is discovered, details of same will be forwarded to the Department of Public Prosecution for necessary actions.

Remedies available on tax disputes could include quashing the contested assessment, damages, cost of action, penalties, interest, fine, etc.

---

1 Etigwe Uwa and Adeyinka Aderemi are partner and Eberechi May Okoh and Munachiso Michael are senior associates at Streamsowers & Köhn.

2 *Oando Supply &Trading Limited v. FIRS* (2011) 4 TLRN 113.

3 *SNEPCO & 3 Ors. v. FIRS and Anor* CA/A/208/2012. Judgment delivered on 31 August 2016.

The Nigerian government formally launched the Voluntary Assets and Income Declaration Scheme (VAIDS) in June 2017, an initiative designed to encourage voluntary disclosure of previously undisclosed assets and income for the purpose of payment of all outstanding tax liabilities. Taxpayers who take advantage of the scheme will enjoy waivers on penalties and interest that would otherwise have accrued. The scheme ends in March 2018.

II COMMENCING DISPUTES

Tax disputes can be commenced either by the taxpayer or by the relevant tax authority (RTA).

A taxpayer who objects to a tax assessment may within 30 days of receiving notice of the assessment, apply by notice of objection to the federal or state Inland Revenue Service (depending on whether it is a federal or state tax) urging the RTA to review the tax assessment along the lines of the objection raised. Where the RTA agrees with the objection, the assessment will be amended accordingly. However, where the RTA disagrees with the objection, it shall issue a NORA.[4] Upon a NORA being issued against a taxpayer's objection, the aggrieved taxpayer shall within 30 days of receipt of the NORA file an appeal at the TAT or file an action at the relevant federal or state High Court.

Generally, an action may be commenced at the High Court either by a writ of summons, originating summons or an originating motion or petition. A writ is used where the facts are in dispute and the case is most likely to be contentious. The writ is filed along with a statement of claim setting out the plaintiff's claims and reliefs sought in detail. Where the facts are not in substantial dispute, an originating summons is used. An action may also be commenced by originating motion or petition where expressly provided by statute.[5]

To commence proceedings before the TAT, the appellant shall file a notice of appeal in Form TAT 1 in the zone of the TAT where the facts of the case took place. The notice of appeal must contain the grounds of appeal; whether the whole or part only of a decision is contested; the exact nature of the relief sought; the names and addresses of all parties directly affected by the appeal; and the address for service on the appellant and respondent. The notice of appeal must be filed concurrently with the list of witnesses, witnesses' sworn written statements on oath and copies of every document to be relied on at the trial.

All processes filed are to be served personally on the respondent, unless an order for substituted service is granted by the Tribunal. Upon receipt of the filed documents, the respondent has 30 days within which to file its opposition in Form TAT 3 if any. Proceedings at the TAT are to be held in public, and the onus of proving its case rests on the appellant.[6]

The Tribunal may, after hearing both parties, confirm, reduce, increase or annul the assessment or make any such order as it deems fit.[7]

Either party aggrieved by the final decision of the TAT may appeal to the FHC by giving notice in writing to the secretary to the TAT, within 30 days of the service of the TAT's final decision on the party. Failure to appeal within this set time will mean the assessment and demand notices become final and conclusive, or in the case of an action against a decision of the RTA, it means the decision of the TAT is final and conclusive on the issue pending appeal.

4 Section 69 Companies Income Tax Act Cap. C21, Laws of the Federation of Nigeria, 2010.

5 Olumide K Abayomi, Tax Litigation in Nigeria and a Review of Recent Nigerian Court Decisions in Taxation (2014) *Research Journal of Finance and Accounting*.

6 Section 15, Fifth Schedule, FIRS Act.

7 Ibid.

Statutes of limitation do not apply to appeals brought before the TAT,[8] save the provisions relating to time within which to appeal after a NORA and to appeal from a decision of the TAT. Also, statutes of limitation do not apply to actions filed by RTA for recovery of any tax.

Other than tax returns, there are no other procedures for claiming tax reliefs or exemptions as reliefs or exemptions can only be claimed if they apply at the time of filing the returns.

Possible triggers of tax disputes include:

a information garnered by the RTA during periodic audits;

b information delivered by bankers to the Federal Inland Revenue Service (FIRS) as provided by law: The law requires bankers to make quarterly returns to the FIRS specifying details of transactions of 5 million naira or above for individuals and 10 million naira and above for corporate bodies;

c periodic returns filed by taxpayer;

d assessment or additional assessment by RTA; and

e the mention of any differences for different types of taxes:

- personal tax: Disputes relating to personal income tax may be commenced before customary courts, magistrates' courts, state High Courts, the TAT or the FHC, depending on the jurisdiction of the court, the amount of tax involved and whether the action is against the federal or state tax authority;
- corporation tax: companies income tax (CIT) is a federal tax and all disputes relating to its payment are commenced before the TAT or FHC;
- wealth taxes: Individuals are not taxed on their net wealth as a separate tax in Nigeria. Property taxes, withholding tax on dividends and capital gains taxes are charged on companies or individuals. Commencement of tax disputes would depend on the taxpayer and the tax base;
- partnerships: Disputes arising out of partnership taxes may be commenced before customary courts, magistrates' courts, state High Courts, the TAT or the FHC, depending on the jurisdiction of the court, amount of tax involved and whether the action is against the federal or state tax authority;
- indirect taxes: Indirect taxes in Nigeria comprise value added tax (VAT) and customs and excise duties. As with federal taxes, disputes are commenced at the TAT and FHC; and
- stamp duty: Disputes over stamp duties may be commenced before the state High Courts, the TAT or the FHC depending on whether the duties accrue to the federal or state government.

III THE COURTS AND TRIBUNALS

In practice, administrative channels within the RTA are usually the first step for resolution of tax disputes. Unresolved disputes proceed to the TAT or FHC, or where the tax is a state tax, to the state High Court. The High Courts at the federal and state levels, magistrates' courts and customary courts within states have jurisdiction to hear tax disputes. The TAT is the only tribunal set up under the FIRS Act to hear tax disputes over federal taxes on the conditions earlier set out above. We shall provide a description of these courts and their jurisdiction.

8 Section 19, Fifth Schedule, FIRS Act.

Customary, magistrates' and state High Courts are the venue for disputes arising from levies and taxes imposed by local government authorities and taxes under state tax laws. Claims below 600,000 naira, lie before the customary court in the state the transaction occurred.[9] Claims in excess of 600,000 naira but less than 10 million naira may be commenced before the magistrates' court.[10] Claims for taxes imposed by state laws, in excess of 10 million naira are commenced before the state High Courts, which are courts of unlimited jurisdiction. The customary, magistrates' and state High Courts are composed of a single judge for the determination of disputes. Appeals from the decision of the customary or magistrates' courts lie to the state High Courts, while an appeal from a decision of the state High Courts lie to the Court of Appeal.

The Tax Appeal Tribunal is vested with jurisdiction to hear disputes arising from the operations of the FIRS, which includes: the Companies Income Tax Act (CITA), Petroleum Profits Tax Act, Personal Income Tax Act (PITA), Capital Gains Tax Act and (Value Added Tax Act (VAT Act),[11] and any other federal Acts. The jurisdiction of the TAT over PITA is restricted to the taxation of persons employed in the Nigerian army, Nigerian navy, Nigerian air force, Nigerian police force, officers of the Nigerian foreign service and persons resident outside Nigeria who derive income or profit from Nigeria. The TAT is composed of tax commissioners appointed by the Minister of Finance. The TAT has eight zones each headed by a chairman and four commissioners. The proceedings of the TAT are conducted by a minimum of three commissioners, and where there is need for a full panel of the Tribunal, five Commissioners.[12] Most tax disputes are resolved at the TAT. Appeals from the decision of the TAT lie as of right to the FHC on questions of law.

The FHC has exclusive jurisdiction in any dispute pertaining to taxation of companies, bodies established or carrying on business in Nigeria and all other persons subject to federal taxation.[13] The FHC has a single jurisdiction across the federation and is composed of a single judge. An action may be commenced before the FHC at first instance once its jurisdiction is rightly invoked. Appeals lie to the FHC from the decision of the TAT on questions of law. It is equally possible to apply to the FHC to quash the directive or decision of the TAT through the prerogative writs of *certiorari*, prohibition and *mandamus*. Appeals from the decision of the FHC lie to the Court of Appeal.

The Court of Appeal has appellate jurisdiction over tax disputes from the FHC and state High Courts. Tax appeals lie as of right to the Court of Appeal where they are final decisions, the ground of appeal involves questions of law alone and questions as to the interpretation of the Constitution.[14] In all other cases, leave of court must be obtained to appeal.[15] The Court of Appeal is composed of not less than three justices. Appeals from the Court of Appeal lie to the Supreme Court.

The Supreme Court is the apex and final court in Nigeria. Tax appeals from the decisions of the Court of Appeal lie to the Supreme Court as of right where they are on questions of law alone and on questions as to the interpretation of the Constitution. The Supreme Court

9 See, e.g., Section 20(1) of, and First Schedule to, the Customary Courts Edict.
10 Section 28(2) of the Magistrates' Court's Law of Lagos State (2011).
11 Fifth Schedule, Federal Inland Revenue Service Establishment Act, 2007.
12 Section 2, Fifth Schedule FIRS Act.
13 Section 251(1)(b) 1999 Constitution (as amended).
14 Section 241 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended).
15 Section 242 of the 1999 Constitution (as amended).

is duly constituted if it consists of not less than five justices, provided that in cases involving the Court's original jurisdiction[16] or actions relating to the interpretation of the Constitution, the Court shall be constituted by seven justices.[17]

In the authors' experience, time spent on litigating tax disputes increases with each level of appeal. Tax disputes at the TAT are resolved in a much shorter time (sometimes within the year of commencement) than the higher courts. The Supreme Court takes the longest, with appeals taking over five years to be resolved.

The various court hierarchies and the TAT are independent of the tax authorities, and their decisions are equally binding on the tax authority as well as on the taxpayer.

IV PENALTIES AND REMEDIES

Tax disputes are usually civil matters, but may also be quasi-criminal, or criminal matters.

The remedies and penalties available in tax disputes are as follows.

i Criminal penalties: what they are and where they are available

Under CITA, any person guilty of an offence against the Act or who contravenes or fails to comply with the provisions of the Act shall be liable on conviction to a fine of 20,000 naira. Where such offence is the failure to furnish a statement or information or to keep records required, a further sum of 2,000 naira for each and every day the failure continues and in default of payment to imprisonment for six months.[18]

Offences under the Act include: failure to comply with the requirements of a notice without sufficient cause; failing to answer to a notice or summons; knowingly making any false statement or false representation; and aiding, abetting, assisting or inducing another person to make false return or statement or to keep false accounts or unlawfully refuse or neglect to pay tax.[19]

The above provisions are replicated in the PITA.[20]

ii Civil liability and administrative penalties: what they are and where they are available

Civil sanctions under the Nigerian Tax Acts take the form of administrative penalties and civil liability[21] such as the following.

a The RTAs are empowered to raise assessments according to the best of their judgement (BOJ) where returns are not filed.[22]

b Additional assessments may be raised by the RTA within the year of assessment or within six years of the expiration thereof if it opines that a taxpayer has not been assessed or has been assessed at a less amount than that which ought to have been charged.[23]

16 Disputes between the Federal Government, States and National Assembly. Section 232 of the 1999 Constitution (as amended).

17 Section 234 of the 1999 Constitution (as amended).

18 Section 92 CITA.

19 Section 94 CITA.

20 Sections 94–96 PITA.

21 MT Abdulrazaq (2016) Taxation System in Nigeria: Gravitas Legal and Business Resources Ltd, pp. 225–226.

22 Section 65(3) CITA; Section 54(3) PITA.

23 Section 66 CITA; Section 55 PITA.

c If any income tax charged by any assessment is not paid within two months, an interest sum equal to 10 per cent of such tax shall be added thereto.[24]

d Monetary fines as prescribed by law may be imposed on the taxpayer by the RTA. Where an assessment has become final and conclusive and a demand note has been served upon the taxable person, if payment of the tax is not made within the time limited by the demand note, the RTA may, for the purpose of enforcing payment of the tax due:
- distrain the taxpayer's goods or other chattels, bonds or other securities;
- distrain any land, premises or place in respect of which the taxpayer is the owner; and
- recover the amount of tax due by sale of anything so distrained.[25]

e Where income tax assessed has been sued for and recovered in a court of competent jurisdiction, the full cost of the action may be recovered from the person charged as a debt due to the federal government of Nigeria.[26]

f Damages are equitable remedies which are imposed at the discretion of the court. They may be awarded in favour of the taxpayer or the RTA depending on the nature of the claim.

V TAX CLAIMS

i Recovering overpaid tax

The Nigerian tax laws provide that taxpayers may at any time, not later than six years after the end of the year of the assessment complained of, make an application in writing to the RTA for relief of excess tax paid by reason of some error or mistake in the return, statement or account made.

The RTA may give by way of repayment of tax such relief as appears to be reasonable and just[27] or if it disagrees with the application refuse to repay the overpaid tax. The taxpayer may file an appeal at the TAT, or an action at the relevant high court having jurisdiction, and claim the overpaid tax.

Where the RTA agrees with the application or a decision of the court is reached ordering a repayment of the overpaid tax, the RTA shall give a certificate of the amount of the tax to be repaid under any of the provisions of statute or under any order of a court of competent jurisdiction and upon the receipt of the certificate, the accountant general of the federation or relevant state shall cause repayment to be made in conformity therewith.[28] In practice, the excess sum paid is treated as tax credit for the taxpayer against any future payment.

ii Challenging administrative decisions

Administrative decisions can be challenged by taxpayers where such decisions depart from the law. Taxpayers have brought claims against the RTA and have been awarded judgments in their favour.

24 Section 32 FIRS (Establishment) Act 2007.
25 Section 86 CITA; Section 104 PITA; Section 33 FIRS (Establishment) Act.
26 Section 87 CITA; Section 78 PITA.
27 Section 90 CITA, Section 83 PITA.
28 Section 91 CITA, Section 84 PITA.

Where a taxpayer challenges an administrative decision on the basis that one or more taxpayers received a waiver, the peculiarities of each case would determine the outcome. It must be noted that the government sometimes offers a tax amnesty to taxpayers owing interest and penalties. As such, taxpayers who leverage on such windows may enjoy a flexible payment plan that may not be open to other taxpayers who did not participate in the amnesty programme. No cause of action will be sustainable on the basis of the differential treatment.

In the case of *SEDCO Forex International Incorporated v. FIRS*[29] the taxpayer challenged the decision of the RTA to disallow the deduction of recharges paid by a foreign company. The court in refusing the taxpayer's contention and in pronouncing on the reliance on the doctrine of legitimate expectation, held that to benefit from the doctrine, there must be fairness and openness of dealings; thus, a person must have made full disclosure or displayed utmost good faith in the transaction. The doctrine cannot stand where it conflicts with a clear statutory provision. The court held that the taxpayer's action must fail as recharges are not allowable deductions when calculating a foreign company's income tax, as opposed to when calculating a Nigerian company's income tax.

iii Claimants

Tax claims are brought by the taxpayer or the RTA. Thus, a tax claim can only be brought by the person who bears the economic burden of the charge. Thus, where a taxpayer is aggrieved by a tax assessment or demand notice, the *locus standi*[30] to enforce the relief sought rests on the taxpayer as he bears the economic burden.

The above rule is not different in indirect tax situations like VAT. The party on whom the economic burden to pay the tax rests is the party with the *locus standi* to bring the tax claim. The court in the case of *Vodacom Business Nig Ltd v. FIRS*[31] was called upon to determine whether supplied satellite-network bandwith capacities were VATable and on who the VAT was chargeable. The court held that the service fell within the description of VATable goods and services under the Act and that the taxable person was the consumer of the said goods and services, in this case the Nigerian company.

Where the tax was paid in consideration other than money, a decision in favour of the taxpayer will be based on the market value of the consideration.[32]

VI COSTS

Recovery of costs varies from court to court. The FIRS Act provides that parties to an appeal at the TAT shall bear their own costs.[33]

However, it is noteworthy that the various tax acts provide that tax may be sued for and recovered in court by the tax authority with full cost of the action claimed from the taxpayer and charged as a debt due to the government.[34]

29 (2015) 18 TLRN 42.
30 Legal standing to institute an action.
31 (2016) 23 TLRN 72.
32 Section 5(3) VAT Act.
33 Section 22, Fifth Schedule FIRS Act.
34 Section 87 CITA, Section 78 PITA.

At the High Courts, Court of Appeal and Supreme Court, costs follow events. Imposition of costs is at the discretion of the court and the court is required to exercise that discretion judicially and judiciously in the interest of justice between the parties.

VII ALTERNATIVE DISPUTE RESOLUTION

The decision of the Court of Appeal in the case of *SNEPCO & 3 Ors v. FIRS & Anor*[35] is to the effect that tax disputes are not arbitrable as they relate to the revenue of the federation and, thus, fall under the exclusive jurisdiction of the FHC. The court held that where an arbitral tribunal sits on a tax dispute, the award of the tribunal will be unenforceable for conflicting with the express provisions of the Constitution.

Curiously, the same court in the case of *Statoil (Nig) Petroleum v. NNPC*[36] earlier held that once parties have agreed to arbitrate their disputes, the courts are not to interfere with same, even where the dispute relates to tax issues. However, it is instructive that tax disputes are usually between the RTA and the taxpayer and not between private individuals.

We consider the *SNEPCO* decision a better judgment in the instant regard.

VIII ANTI-AVOIDANCE

The Nigerian tax laws provide general anti-avoidance provisions under different statutes with the intention of curbing the penchant for taxpayers to take advantage of loopholes in tax laws to minimise the tax payable.

An anti-avoidance provision is contained in Section 22 of CITA.[37] The said provision states that:

> *Where the Board is of the opinion that any disposition is not in fact given effect to or that any transaction which reduces or would reduce the amount of any tax payable is artificial or fictitious, it may disregard any such disposition or direct that such adjustments shall be made as respects liability to tax as it considers appropriate so as to counteract the reduction of liability to tax affected, or reduction which would otherwise be effected, by the transaction and any company concerned shall be assessable accordingly.*

In the case of *Addax Petroleum Services Limited v. FIRS*,[38] the court identified Section 30 of CITA as an anti-avoidance provision. The said Section provides that where in any assessment year, the trade or business of a company produces either no assessable profits or the assessable profits are less than might be expected to arise from that trade or business, or where the true amount of the assessable profits of the company cannot be ascertained, the RTA may, in the case of a Nigerian company, assess and charge it to tax on such fair and reasonable percentage of the turnover of the trade or business as the RTA may determine; and in the case of a foreign company which has a fixed base, permanent establishment, sales outlet, dependent agent or executes a single contract involving surveys, deliveries, installations or construction

35 *SNEPCO & 3 Ors v. FIRS and Anor* CA/A/208/2012. Judgment delivered on 31 August 2016.

36 (2014) 15 TLRN 1.

37 With corresponding provisions in Section 17 PITA and Section 20 Capital Gains Tax Act.

38 (2013) 9 TLRN 136–138.

in Nigeria, assess and charge the foreign company to tax on a fair and reasonable percentage of that part of the turnover as may be attributable to the fixed base, permanent establishment, sales outlet, dependent agent or single contract.

The court in the *Addax* case above held that the mischief rule of interpretation of statutes was tailor made for tackling tax avoidance provisions of statute; however, if the provisions are clear, the literal rule should be adopted.

Nigeria recently hosted the African Tax Administration Forum in September, 2017. Nigeria is very receptive of the BEPS proposals, and the FIRS has already incorporated some of the principles in its audit procedure. For instance, the FIRS is scrutinising transactions between Nigerian subsidiaries and their foreign related parties, especially those located in tax-friendly jurisdictions. The aim is to ensure that these entities actually provide the services contracted and are not simply letter-box companies. The Nigerian tax authority may, however, not be able to penalise any established case until the tax laws are amended, unless it can prove that the transactions are artificial or fictitious.[39]

IX DOUBLE TAXATION TREATIES

Nigeria has concluded double taxation treaties (DTTs) with over 22 different countries of the world; however, for a treaty between Nigeria and any country to have the force of law, it must be enacted into law by the National Assembly.[40] To this end, only countries whose DTTs with Nigeria have been enacted into law by the National Assembly can rely on the provisions of such treaties. Some countries whose DTTs have been enacted and, thus, taken full effect include: Belgium, France, the Netherlands and the United Kingdom. Where companies' resident in these countries derive profit from Nigeria, they will be chargeable to withholding tax on the rate prescribed in their DTT with Nigeria, usually 7.5 per cent, while companies from other countries are chargeable to withholding tax at 10 per cent.

In the case of *Saipem Contracting Nig Ltd & 2 Ors v. FIRS & 2 Ors*,[41] the plaintiffs (which comprised a Nigerian, a Dutch and a French company) commenced an action via originating summons against the FIRS claiming among others that by virtue of the provisions of the Nigerian tax laws and the DTTs between Nigeria and France and Nigeria and Netherlands, the second and third defendants were not liable to pay VAT, withholding tax and CIT under their contract with the third defendant (Shell). The court upon hearing the arguments of parties held that a DTT is not meant to give the tax that is due to one country to another, but to ensure that the same income is not taxed twice by two different countries and that there was nothing before it to show that the transaction in question had suffered tax in another tax jurisdiction. In determining the taxes payable by the plaintiffs, the court held that they were liable to tax under CIT and to withholding tax on profits to be paid to them by Shell, while not liable to be charged VAT as VAT is a consumption tax paid by the consumer of the taxable goods and services and considering the plaintiffs were not the consumers of the service in question, they were, therefore, not liable to pay VAT.

39 https://home.kpmg.com/content/dam/kpmg/pdf/2015/11/tnf-nigeria-beps-nov18-2015.pdf.
40 Section 12(1) Constitution of the Federal Republic of Nigeria, 1999 (as amended).
41 (2014) 15 TLRN 76.

X AREAS OF FOCUS

The Nigerian tax authorities in their drive to boost the country's economy through improved tax collection, have targeted non-resident companies (NRC), especially international oil companies.

To this end, enforcement of the Income Tax (Transfer Pricing) Regulations No. 1 of 2012 has been a focal point for the FIRS as they readily work to find that NRCs either have fixed bases, permanent establishments, sales outlets or dependent agents in Nigeria so as to subject their Nigerian income to taxation in accordance with Sections 9, 13 and 30 of CITA. The transfer pricing regulations are applied in a manner consistent with the arm's length principle in Article 9 of the United Nations and OECD Model Tax Conventions on Income and Capital; and the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations. However, where there are inconsistencies between the model conventions and the local legislation, the provisions of the local legislation shall prevail.

The courts have been faced with more cases for and against NRCs on interpretation of transactions entered with Nigerian partners or subsidiaries to determine the accurate tax liabilities that accrue to such transactions. The *Saipem Contracting* case referred to above is an example. Also, in the case of *Global Scansystems v. FIRS*,[42] when faced with the question of tax treatment of income derived from a single contract involving survey, installation, deliveries and construction, the court held that Section 13(2)(c) of CITA is to the effect that the entire profit from the contract is subject to Nigerian taxation and not just the profit attributable to the foreign company's fixed base. Thus, the Nigerian company is liable to withhold tax on payments to the NRCs for services rendered both within and outside Nigeria under such a contract.

As regards controlled foreign companies (CFC) rules, Nigeria does not currently have any specific CFC rules. It is however very likely that steps are in place to enact same.

VAT is another area of tax focus in Nigeria. It has led to a good number of tax litigation actions. This has raised concerns among tax practitioners on the need for an urgent amendment of the current Act as controversies abound over the interpretation and enforcement of certain provisions of the Act.

XI OUTLOOK AND CONCLUSIONS

On 29 June 2017, Nigeria formally launched VAIDS (the Voluntary Assets and Income Declaration Scheme), an initiative designed to encourage voluntary disclosure of previously undisclosed assets and income for the purpose of payment of all outstanding tax liabilities. Specifically, this initiative is expected to broaden the national tax base, curb tax evasion and discourage illicit financial flows. The scheme commenced on 1 July 2017 and is for a period of nine months, terminating in March 2018. The scheme is applicable to all persons liable to tax in Nigeria. Taxes covered under the scheme include CIT, personal income tax, withholding tax, petroleum profits tax, capital gains tax, VAT, stamp duties, tertiary education tax and national information technology development agency levy.[43]

42 (2016) 22 TLRN 28–29.

43 https://www.pwc.com/ng/en/assets/pdf/voluntary-assets-income-declaration-scheme.pdf.

The federal government has taken a posture that suggests it will come down heavy on citizens who do not make use of this opportunity and remain in default. This means the TAT and courts can expect an increased number of tax disputes to flood in from 2018 when the scheme expires.

Taxpayers who take advantage of the scheme before 31 December, 2017 will enjoy waivers on both penalties and interest, while those who take advantage of the scheme between January and March 2018 will enjoy waivers only on penalties but will be made to pay interest in addition to the tax arrears.

Additionally, it is noteworthy that tax exemptions and waivers exist for businesses granted pioneer status in Nigeria under the Industrial Development Income Tax Relief Act 2004.

Chapter 25

NORWAY

Thor Leegaard[1]

I INTRODUCTION

Tax assessments may as a general matter not be negotiated with the tax authorities. Tax disputes are, therefore, normally resolved by administrative appeal to the Tax Appeal Board or through litigation. In litigation, the tax authorities are free to negotiate the result and settle out of court. This does take place to a certain extent, in cases where the tax authorities are worried about the outcome of a judgment or where it is evident that the taxpayer has a strong case.

While tax cases make up a fair percentage of the number of cases litigated in Norwegian courts, the vast majority of tax cases are solved at administrative level. A single Tax Appeal Board was established in July 2016 for the entire country, covering all types of taxes, except for Petroleum Tax, for which there is a separate appeal board.

The Tax Appeal Board replaced regional appeals boards, and is served by a secretariat that is independent from the tax authorities, but administratively managed by the Directorate of Taxes. The secretariat is understaffed. As a consequence, administrative appeals are now extremely time-consuming, at the time of writing estimated to up to two years until a decision in the Tax Appeal Board. On the positive side, it seems more appeals result in a decision in favour of the taxpayer than earlier.

There is generally only one court system in Norway, dealing not only with administrative law, but also private law and criminal law. Court proceedings are as a matter of principle oral, in the sense that written submissions are not taken into account unless argued before the court.

The time to a final judgment in tax cases can take several years, in particular in complex cases. Especially the Tax Appeal Board and the courts of appeal have a significant backlog.

II COMMENCING DISPUTES

All taxpayers are required to file annual tax returns, although for the vast majority of individuals who are subject to tax only on salaries and other reportable income and wealth, it is not strictly necessary to file a return. Tax returns for individuals are generated and made available through the government portal, Altinn. If the information included in the pre-populated return is correct, it is not necessary to actively confirm the return.

Businesses, including corporations, file returns. For significant or unusual transactions, it is also common to include an appendix to the return with a description of the tax treatment.

1 Thor Leegaard is a partner at KPMG Law Advokatfirma AS.

Under the current Taxes Management Act (TMA), such an appendix may prevent tax penalties in cases where the tax authorities disagree with the position taken by the taxpayer, and provide for a five year statute of limitation.

Until 2015, the statute of limitation was two years (10 years with regard to VAT until 2017). If the taxpayer had failed to provide correct and complete information to the tax authorities, the statute of limitation was 10 years. From 2015 (2017 with regard to VAT), the statute of limitation is five years, unless there are grounds to impose higher rate of tax penalties. In such cases, the statute of limitation is 10 years.

A tax dispute may start either through an audit or through a more simple exchange of letters with the tax authorities. Often, such exchanges may start with a request for additional information. The administrative process ahead of a dispute may in some cases be time consuming. In many cases, the tax office requests detailed and extensive information, which prolongs the process.

It is important to consider requests for information properly. Correspondence with advocates is generally privileged, but if consent has been given to share such correspondence with the tax authorities, it may be used as evidence.[2] In cases where the tax authorities have seized and copied electronic archives, this may contain correspondence that is privileged. In HR-2017-467-A *Saga Tankers* of 1 March 2017, the Supreme Court held that the tax authorities are allowed to review all correspondence and determine as a starting point what is considered privileged. The Court held that sufficient safeguards were in place under Article 8 ECHR. The decision is widely criticised, but must nevertheless be taken into account in preparing for a tax audit.

In some cases, the tax authorities request information about group companies and transactions outside Norway. It may be appropriate, depending on the circumstances, to refer the tax authorities to the available agreements for exchange of information in such cases.

A tax audit is normally initiated by a notice from the tax authorities. This may in many cases detail the scope of the audit, although this would not limit what the tax authorities are allowed to investigate, should other issues surface during the audit. The tax authorities are also allowed to perform unannounced audits, but this is quite uncommon.

In most cases, there would be a start-up meeting with the tax authorities. To ensure documentation of information requests and information provided, this meeting should be limited to a presentation of the business and of facts requested by the tax authorities. In addition, the meeting is a good opportunity to discuss expectations and timing of the process.

During the audit, the tax authorities may either be on site of off site, and may request electronic access to the company's accounting systems and may request access to personnel for interviews. It is important to manage the process and ensure that information requests are documented and that the tax authorities clarify the transactions under investigation and their positions. It is possible (if uncommon) to challenge decisions made by the tax authorities during the process, either by appeal to the Directorate of Taxes or in court.

At the end of the audit, the tax authorities issue a draft audit report, mainly to allow the taxpayer to correct factual mistakes, including submission of additional evidence. Once a final report is issued, it would normally be accompanied by an updated notice of reassessment, allowing for additional submissions in fact and in law by the taxpayer.

2 Rt 2013.1206 *Seadrill Norge AS.*

The administrative process before a reassessment by the tax authorities also includes the right to review a draft version of the proposed reassessment. The draft is reasoned, stating the relevant facts and legal arguments the tax authorities are making for the reassessment. It is also possible to ask for a meeting with the tax authorities to clarify facts and legal arguments.

Once a decision has been made by the tax office to reassess, a claim for payment of the outstanding tax will be issued and must be paid within three weeks. This includes interest until the due date for payments. If the case is on appeal, it may be possible to agree a postponement of the payment, subject to security and late payment interest in case of a loss. Tax penalties, on the other hand, are not payable until the deadline for appeal is passed or the case is finally decided either by the Tax Appeal Board[3] or in court.

A decision by the tax office may either be appealed to the Tax Appeal Board or be brought before the courts. Appeals must be made within six weeks of the time a decision has reached the taxpayer.[4] A lawsuit must be filed within six months.[5] The tax authorities may decide that a lawsuit cannot be filed before an appeal has been heard by the Tax Appeal Board.[6]

In the choice between an administrative appeal to the Tax Appeal Board and a lawsuit, it is important to consider whether additional evidence is required. Taxpayers are to a certain degree prevented from presenting new evidence in court, to the extent that they could reasonably be expected to have been presented during the administrative process.[7] If, on the other hand, the tax authorities have presented additional evidence, the taxpayer may be allowed to counter this new evidence.[8] These principles are governed by case law, and can be complex to navigate.

A decision by the tax authorities may also be brought before the parliamentary Ombudsman for review. The view of the Ombudsman is not binding. An appeal to the ombudsman does normally provide for an extension of the deadline for a lawsuit.[9]

III THE COURTS AND TRIBUNALS

The Tax Appeal Board is independent of the tax authorities, and members are appointed for a period of four years. They are mainly recruited from academia, the professions and business. It is assisted by a secretariat in charge of preparing cases before the Board. Neither the secretariat nor the members can be instructed by the tax authorities.[10]

The Appeal Board consists of a leader, a deputy leader and 51 members. Most cases are tried by three members without a physical meeting, but cases can be referred to an extended group, in which the leader and deputy leader participates. If the case is tried in a meeting, the Board may decide that the taxpayer is allowed to be present. Such a decision may not be appealed.

3 Section 14-10 TMA.
4 Section 13-4 TMA.
5 Section 15-4(1) TMA.
6 Section 15-5(1) TMA.
7 Rt 2002.509 *Sundt*.
8 Rt 2001.1265 *Agip*.
9 Section 15-4(2) TMA.
10 Section 2-9 TMA.

Administrative appeals are sent to the tax office that prepared the reassessment. The tax office can decide to cancel the reassessment if it agrees with the taxpayer.[11] It is also allowed to provide comments in other cases.[12] The secretariat thereafter prepares a draft decision for the Board. The taxpayer is entitled to a copy of the comments from the tax office, and also to review the draft from the secretariat.[13]

The Tax Appeal Board has full jurisdiction and can try all parts of the case, including new evidence. It can also consider issues that have not been raised by the taxpayer.[14] This does not mean that the Board can consider issues that are unconnected with the reassessment or the appeal. An example provided in a white paper[15] is that it cannot consider the taxpayer's employment income if the appeal concerns wealth taxation and income from real estate. This is evident, but there may be gray areas. In its application of law, it is nevertheless certain that the Board is not bound by the arguments made by the tax office or the taxpayer.

Currently, there is a significant backlog in cases before the Board, and it is estimated that some cases may take up to two years to decide. This is partly because of the time spent by the tax offices preparing arguments before sending appeals to the secretariat, and partly because the secretariat is understaffed.

There are three court instances in Norway. The district courts are the courts of first instance. Norway is divided into court districts, consisting of one or more municipalities.

The courts of appeal are the second instance, hearing appeals against judgments in the district courts within their geographical jurisdiction. There are six courts of appeal in Norway. Judgments from the district courts must be appealed within one month of when it was serviced.[16] In cases concerning less than 125,000 kroner, leave of appeal is required.[17] The court may also refuse appeal if it finds that it is evident that it cannot succeed. This is intended to be applied only in exceptional cases and in practice, the courts of appeal have proved reluctant to refuse appeal.

The Supreme Court is the highest court in Norway. Its decisions are final and cannot be appealed (although the European Court of Human Rights may try the Court's application of the ECHR). Appeal to the Supreme Court requires leave from the Court.[18] Leave requires that the appeal concerns questions of interest also for other case, or that there are other significant reasons for requesting a judgment from the Court. In practice, it is not certain that leave will be granted even if the case concerns significant amounts or if the judgment from the Court of Appeal is questionable. The Court can also limit the leave of appeal to certain parts of the case.

In exceptional situations it is possible to make an appeal over a judgment from the District Court directly to the Supreme Court.[19] This requires leave from the Court and applies only in cases concerning significant cases of public importance where it is of interest quickly to obtain the view of the Supreme Court.

11 Section 13-6(3) TMA.
12 Section 13-6(4) TMA.
13 Section 13-6(5) TMA.
14 Section 13-7(2) TMA,
15 Prop. 38 L pkt. 19.9.3.
16 Section 29-5(1) Civil Procedures Act.
17 Section 29-13 Civil Procedures Act.
18 Section 30-4 Civil Procedures Act.
19 Section 30-2 Civil Procedures Act.

Cases before the Supreme Court are normally heard by five judges, but the Court can decide to hear the case with 11 judges or in plenary session. In addition to granting a judgment, the Supreme Court may return the matter to the Court of Appeal for new hearing. The reasoning for judgments are provided in full by the Court, and all judgments are publicly available.

A mention must also be made of the possibility of requesting an advisory opinion from the EFTA Court of Justice. Such a request may be made at all stages of the appeals procedure by the relevant court, including the Tax Appeal Board. In joined cases E-3/13 and 20/13 *Fred Olsen and others* Paragraphs 66 and 72, the EFTA Court held that the former Tax Appeal Board of the Central Tax office for Large Sized Enterprises, exercised a judicial or quasi-judicial function and as such qualified as a court or tribunal.

Review by a court of law is limited to the examination of the assessment of the evidence and the application of the law. The courts are not limited to testing the legal reasoning in the decision from the tax office, but may apply the law freely (within the boundaries of the arguments made by the parties). One limitation is that it cannot test a different transaction or factual situation.[20]

Courts will not assess the tax office's discretionary assessment (e.g., pricing or valuations) unless they are held to be contrary to the evidence or to be arbitrary or grossly unreasonable. The tax authorities, therefore, generally argue that discretionary assessments are modest in order to limit the examination by the courts.

IV PENALTIES AND REMEDIES

The general rate of tax penalties is 20 per cent (of the additional tax), and may be imposed if the taxpayer has failed to provide correct and complete information.[21] Penalties may be increased to 40 per cent or 60 per cent if the failure to provide information is deliberate or grossly negligent.[22] In disputes over penalties, the courts can try all aspects of the decision of the tax authorities.

Criminal liability can be applied if the taxpayer has failed to provide correct and complete information.[23] There are also provisions in the TMA providing for criminal liability for third parties not supplying information to the tax authorities[24] and for failure to assist in tax audits.[25]

V TAX CLAIMS

i Recovering overpaid tax

Tax returns may be amended within three years of the deadline for the original submission. This applies only in cases of self assessment, and applies to income and corporation tax, wealth tax, VAT, employers' social security contributions, financial activities tax and excise duties. Such voluntary amendments do not necessarily involve the tax authorities, in the

20 E.g., Rt 1998.1779 *INA* and Rt 2010.999 *First Securities*.
21 Section 14-5 TMA.
22 Section 14-6 TMA.
23 Section 378 of the Criminal Code.
24 Section 14-12 TMA.
25 Section 14-13 TMA.

sense that the amendments are made under the self assessment regime. In cases where the previously assessed tax is too low, an amendment may be obligatory in the sense that failure to amend could lead to tax penalties.

For refund of dividend withholding tax, a special administrative regime applies, whereby claims must be submitted within the five year period to the Central Tax Office for Foreign Tax Affairs. The distributing company may also amend the withholding tax return within three months of the due date for the return, though at the latest by 31 December in the year in which the dividend was paid (or when the taxpayer could have claimed payment if earlier).

ii Challenging administrative decisions

General administrative law applies alongside the Tax Assessment Act. These principles have the role of protecting taxpayers against injustice, arbitrary decisions, the tax authorities' attack on fundamental rights and predictability. A basic requirement is that administrative proceedings must be proper, hereunder that they must be considerate and allow for contradiction.

The behaviour of the tax office cannot be in conflict with good administrative practice, that is, the tax office cannot make unfounded claims or attempt to turn the burden of proof.

Another principle is that the administration cannot make arbitrary or grossly unreasonable decisions.

In addition to this, there is a general rule against (domestic) double taxation. This rule was previously in the Taxes Act. While the wording was changed in 1999, the rule still applies. It prohibits double taxation even where the tax is not payable by the same taxpayer[26] and was last confirmed in Rt 2015.982 *Barlaup*.

iii Claimants

It is the party to the decision from the tax office who is entitled to make administrative appeals.[27] However, anyone who is ultimately liable for the tax may also apply. For corporation tax, this does not extend to other group companies, as Norway does not provide for consolidated group taxation. For VAT, however, the entity that is the head of a VAT group may appeal as well as the entity that is party to the decision.

In addition, companies may appeal against the tax valuation of its shares for wealth tax purposes, and partnerships may appeal in respect of the determination of taxable income to be taxed at the level of the partners.[28]

These rules also determine who is entitled to bring a case to court.[29]

Since the Tax Appeal Board may determine in favour of the taxpayer, the Ministry of Finance has the right to sue the Board.[30] This right is limited to the factual basis for the decision and the application of law, and is not extended to the discretionary assessment of the Board. In such cases, the taxpayer is not party to the case, but may decide to intervene as an

26 Rt 1987.723 *Vestre Strandgate*.
27 Section 13-1 TMA.
28 Section 13-2 TMA.
29 Section 15-1 TMA.
30 Section 15-2(1) TMA.

accessory party in the court case. Therefore, the taxpayer must be notified of a decision to sue the Board.[31] Such lawsuits are uncommon, but have taken place recently in a case concerning deductibility of input VAT on certain real estate transactions.

VI COSTS

Under Section 5-9 TMA, costs are awarded where a decision is amended in favour of the taxpayer. This applies where an appeal leads to an amendment or repeal of a reassessment by the tax office, or where the Tax Appeal Board overturns a reassessment. Recoverable costs are limited to significant costs that were necessary to have the decision amended.

In court, the ordinary rules apply for the award of costs. The general rule is that a party who has won the case is entitled to a full award of costs.[32] Therefore, both the tax authorities and the taxpayer may be awarded costs. Unusually, the court may refrain from awarding costs if there were good reasons for trying a contested legal issue if the winning party is to blame for not resolving the case earlier.[33] Costs may also partly be awarded in cases where a party has won parts of the case.[34]

VII ALTERNATIVE DISPUTE RESOLUTION

Advance rulings are available under Norwegian law for planned transactions, subject to certain material limitations. Most importantly, an application cannot concern liability to tax in Norway or the tax residency of companies, valuation or matters depending on the interpretation of a tax treaty. Advance rulings are binding for the tax authorities for a period of three years after the year in which the ruling was issued, and provided that the transaction is in accordance with the facts provided to the tax authorities and in line with the ruling. A ruling can be appealed to the Tax Appeal Board. It cannot, however, be tried in Court.

Norway does not have legislation providing for advance pricing arrangements, but the tax authorities have established a centralised team dealing with advance pricing arrangements and MAP under Articles 7 and 9 of the OECD Model Convention.

VIII ANTI-AVOIDANCE

A general anti-avoidance standard developed by the courts exists, under which transactions undertaken with little or no other purpose than avoiding tax under certain circumstances may be disregarded for tax purposes. There is ongoing work to incorporate the general anti-avoidance standard in the legislation.

For the general anti-avoidance standard to be applicable, two conditions must be met. The first condition is that the main motive for carrying out a transaction is tax savings. The assessment is based on the taxpayer's subjective motives for carrying out the transaction. However, a presumption for tax motivation exists where the predominant effect of a

31 Section 15-2(4) TMA.
32 Section 20-2(1) Civil Procedures Act.
33 Section 20-2(2) of the Act.
34 Section 20-2(3) of the Act.

transaction is that the taxpayer obtains substantial tax savings. The tax savings must have been a notably more important motive for carrying out the transaction than all other motives combined, for example, Rt 2006.1232 *Telenor*.

The second condition is that the tax benefits gained from the transaction are obtained contrary to the legislative intent. When considering whether the tax benefits gained from the transaction are contrary to the legislative intent, it is necessary to take into consideration all aspects of the transaction, including its effects and the taxpayer's subjective motives. Based on jurisprudence, the threshold is quite high, for example, Rt 2014.227 *ConocoPhillips*.

Norway has been active in the OECD BEPS project, and continues to take an active approach to its effect on domestic legislation. The main changes that are in the pipeline is an extension of earnings stripping rules to cover interest paid to unrelated parties and implementation of further anti-hybrid rules. The Ministry of Finance is also considering implementing withholding taxes on interest and royalties.

IX DOUBLE TAXATION TREATIES

Tax treaties become an integral part of domestic law by ratification, under a law from 1949, under which the King may enter into agreements for the avoidance of double taxation. Treaties must, therefore, be applied by the tax authorities and by the courts. The interpretation and application of tax treaties follow the provision in Article 31 No. 1 of the Vienna Convention on treaty law, even if Norway has not ratified the Convention.[35] The OECD commentaries are relied on extensively in the interpretation of tax treaties.[36] This applies also to versions of the Commentaries issued after the relevant treaty was ratified, and to a degree even when the new version is intended to reflect a change of practice.[37]

In transfer pricing cases, the arm's length provision in Section 13-1 of the Taxes Act (TA) specifies that the OECD Transfer Pricing Guidelines must be taken into account. This refers to the current Guidelines at any point in time, but it is an open question whether material changes to the taxpayer's detriment may be applied. The Guidelines will also be applied in cases concerning transactions involving parties that are not resident in a country with which Norway has a tax treaty. In Rt 2001.1265 *Norsk Agip AS*, the Supreme Court held that Section 13-1 TA entails the same principles as those expressed in the guidelines.

Norway is not a Member State of the EU, but is part of the internal market through the EEA Agreement. The Agreement is incorporated into Norwegian domestic law by virtue of Section 1 of the EEA Act. Section 2 of the Act determines that the EEA Agreement takes precedence over domestic law in case of conflict. Effectively, therefore, the provisions of the EEA Agreement may be invoked directly by taxpayers.

Norwegian courts and tribunals may refer questions of interpretation of the Agreement to the EFTA Court of Justice. The Court will provide advisory opinions to the domestic Court, and while these are not binding, they will be of significant importance.[38] Jurisprudence from the CJEU from before the EEA Agreement was signed is incorporated in the Agreement and, therefore, binding on Norwegian courts. In practice, also newer jurisprudence is relevant.[39]

35 Rt 2011.1581 *Dell Products* paragraph 41.
36 Rt 2008.577 *Sølvik* paragraph 47.
37 Rt 2004.957 *PGS Geophysical AS* paragraph 49.
38 Rt 2000.1811 *Finanger*.
39 Rt 2002.391 *God Morgen*.

The EEA Agreement does not cover tax and VAT, and as a consequence, the tax directives therefore do not have EEA relevance. The fundamental freedoms and state aid rules are included in the Agreement and, therefore, limits the Norwegian legislator. This was contested by the Norwegian government, until the advisory opinion of the EFTA Court of Justice in E-1/04 *Fokus Bank*. The courts have also gone further, and will interpret domestic legislation in a way which ensures that the application does not conflict with the fundamental freedoms.[40]

VAT was introduced in 1970 and applies to domestic sales of most goods and services. The current VAT Act entered into force from 1 January 2010. Tax is charged at all stages, including on import and purchases from abroad regarding services capable of delivery from a remote location, except if an exemption is obtained. The standard rate of VAT is 25 per cent. The registration threshold is 50,000 kroner.

Financial services, financial instruments, educational services, healthcare and certain other supplies are outside the scope of the VAT system. Furthermore, the transfer and letting out of real estate is outside the scope of the VAT system, except in cases of voluntary registration. The transfer of ships and platforms used in oil and gas production, export sales, and a few other transactions, are VAT zero-rated.

X AREAS OF FOCUS

There is a continued focus on permanent establishments from the Norwegian tax authorities, including the taxation of individuals working in Norway. This is likely to increase with the changes through Article 12 of the MLI on avoidance of PE through commissionaire arrangements, although it seems many treaty partners do not match Norway's position.

In 2014 a national project group was established, and the most recent reports shows that the resources used on transfer pricing is around 90 full-time employees. In practice, the tax authorities often take quite aggressive positions testing out the boundaries of the arm's-length principle. Notably, the Supreme Court accepted the use of secret comparables in Rt 2015.353 *Total E&P Norge AS*, although this may have turned on the specific facts.

According to the latest reports from 2016, leasing (mostly in relation to bareboat charters) and management fees and other services were the most significant group of cases. In addition, allocation of profits to permanent establishments and thin capitalisation have been high on the agenda for the tax authorities.

It could also be mentioned that EEA Law is an area with increased importance in tax disputes. This is partly because of the fact that Norwegian taxpayers and their advisers are more aware of the principles than previously, but also to the fact that there have been high-profile cases concerning the application of CFC legislation, wealth tax and cross-border group contributions recently.

XI OUTLOOK AND CONCLUSIONS

Whether or not the courts will accept the recent more aggressive approach of the tax authorities in transfer pricing cases will be interesting to follow going forward. The impact of the changes to the PE-definition on the approach of the tax authorities also remains to be

40 Rt 2012.1380 *Statoil Holding* paragraph 54.

seen. Building on historical experience, it can be envisaged that the tax authorities may take more bold positions in the future. The big question is when we can expect to see such cases tried in court, given the time lag for cases before the Tax Appeal Board. This means it may be many years before disputes on controversial positions in law are finally settled.

It should also be expected that the implementation of further measures inspired by BEPS will increase the number of enquiries and tax audits. There is certainly no lack of interest in strengthening the resources of the tax authorities. In addition, the effects of automation means that resources are freed up to deal with more complex tasks than processing tax returns.

The issue of tax certainty and of objectiveness of the tax authorities in disputes is much in discussion. While (perceived) aggressive tax planning is unlikely to get much attention in this context, taxpayers in general are adversely affected by the time and cost required to have cases tried in court. Some developments in recent years, such as the establishment of an independent secretariat for the Tax Appeal Board and the unenforceability of tax penalties before cases are final, have been positive. There remain, however, significant issues on which further progress is required.

Chapter 26

POLAND

Sławomir Łuczak and Magdalena Polak[1]

I INTRODUCTION

The Polish tax law system is characterised by tax regulations that are highly complex yet vague and volatile. The large volume of Polish tax acts has contributed further to the complexity of Polish tax law. It is noteworthy that the Polish tax authorities demonstrate a very pro-tax approach, which leads to high potential fees foreseen in cases of the committing of a tax crime or tax violation.

The Polish Ministry of Finance has worked on legislation that has the following aims: to improve the current patchwork system through the introduction of (still-too-vague) regulations; and to bring Poland in line with the current global trend to tighten the leaking tax system through the introduction of a General Anti-Avoidance Rule (GAAR), controlled foreign corporation (CFC) rules, taxation of closed-end funds, transfer pricing documentation requirements and to be introduced since 2018 limits in the amount of tax deductible costs and new commercial real estate tax. These factors have an impact on the amount of tax disputes arising between taxpayers and the tax authorities.

Court proceedings involving Polish tax disputes are generally excessively lengthy, and may take up to four years to conclude. The tax authorities are not in favour of less adversarial procedures to resolve these tax disputes (such as mediation or arbitration). Under the current tax law system, tax litigation is rife; consequently, it is rather costly for taxpayers.

The main issue with Polish tax disputes is that although the administrative courts have determined judgments that are favourable for taxpayers, the tax authorities do not always follow these judgements. This causes legal uncertainty, as the tax authorities often present different conclusions to the administrative courts in relation to the same subject matter. This state of affairs has led to an increase in the number of tax disputes between taxpayers and the tax authorities.

The introduction of a new provision in the Tax Ordinance Act in 2015 that reflects the *in dubio pro tributario* principle has not proved to be of much assistance with this issue. The provision stipulates that if there is a dispute in relation to the interpretation of a given provision, it should be decided in favour of the taxpayer. However, the application of this provision remains a dead letter of Polish tax law.

When the taxpayers win a case, they may expect that will be granted 'bonuses' that include a refund of the erroneously charged tax with statutory interest, and a reimbursement of their judicial costs (however, the judicial costs are not high). Taking into account the significantly prolonged tax litigation proceedings, and the fact that the taxpayer is exposed

1 Sławomir Łuczak is a partner and Magdalena Polak is a lawyer at Sołtysiński Kawecki & Szlęzak.

to certain risks during the proceedings (especially regarding his or her company or business activity), the above 'bonuses' are not satisfactory compensation. Although the taxpayer has a right to seek damages from the State Treasury in civil court, experience shows that not many taxpayers choose to do so (after already having spent many years in the tax offices and administrative courts).

II COMMENCING DISPUTES

i Tax audit

As a Polish tax law general rule, taxpayers in Poland pay their taxes on a self-assessment basis (by filing their VAT, corporate income tax (CIT), personal income tax (PIT) or transfer tax return). A small number of tax obligations arise from decisions issued by the tax authority.

For the above reason, the practice of tax auditing is growing. The main purpose of a tax audit conducted at the tax authority's initiative is to examine the accuracy of taxpayers' settlements. A taxpayer must be notified by the tax authority that a tax audit is to be conducted. The tax audit is initiated no earlier than seven, and no later than 30, days from service of the tax audit notice. In certain circumstances, a tax audit may be conducted without prior notification (e.g., a fiscal or commerce offence has been committed).

In most cases, the tax audit is conducted at the audited taxpayer's registered office or another location where the business activity is performed, or at locations where documents are stored. Therefore, the audited taxpayer should be present while a tax audit is conducted.

The audited taxpayer has the right to actively take part in the tax audit. Particularly, the taxpayer may submit clarifications, present evidence or demand consideration of certain documents or witness hearing. The audited taxpayer should cooperate with the tax authority to allow it to perform its task effectively (e.g., provide access to documentation and necessary clarifications).

The tax audit must be conducted within the period indicated in the authorisation (i.e., a document authorising the tax authority to initiate a tax audit). According to the Business Freedom Act, the duration of all audits of a business entity conducted during a single calendar year cannot exceed the following:

a micro-enterprises: two business days;
b small enterprises: 18 business days;
c medium-sized enterprises: 24 business days; and
d large enterprises, 48 business days.

An audit is deemed concluded on the date of delivery of the audit report, which consists of a description of facts and a legal assessment of the case, but which does not constitute a tax liability. When the audited taxpayer does not agree with the audit report, it may submit reservations or clarifications within 14 days of service of the report. The authority is obliged to review the taxpayer's reservations and clarifications within 14 days of receiving them from the taxpayer. It should be noted that the taxpayer may not correct a tax return while a tax audit is being conducted. This right is suspended until the delivery of the tax authority's conclusion of a tax audit protocol where all irregularities are indicated. Tax proceedings may be commenced by the tax authority if the audited taxpayer does not correct the tax return.

ii Tax proceedings

The main aim of the tax proceeding is to settle a case by issuing a pertinent decision. To issue the pertinent decision, the tax authority will establish the case facts, collect the most important evidence and make the most appropriate tax assessment. In most cases, tax proceedings are initiated by the tax authority when a tax audit reveals irregularities on the side of the taxpayer (e.g., tax arrears, undisclosed income or improper tax return). Tax proceedings may also be initiated upon application of a taxpayer. There are two stages involved in tax proceedings: generally, at the first instance, the tax authority is the head of the tax office; and at the next instance (the upper instance), the tax authority is the director of the tax administration chamber. The date on which proceedings are initiated by the tax authority is the date that the taxpayer is served with the decision to initiate proceedings. A taxpayer has a right to actively participate at each stage of the proceedings (e.g., make demands, comment on the evidence and other materials in the case prior to issuance of a decision, inspect case files).

On the other hand, the tax authority may take all essential actions to clarify all facts during the proceedings and, when it is possible, should resolve the case at first instance. Moreover, the tax authority should provide a taxpayer with all necessary information and clarifications concerning the case.

As previously mentioned, the tax authority issues a proper decision at the end of the tax proceeding. However, within seven days of delivery of the notification from the tax authority and prior to the issuance of that decision, the taxpayer has a right to comment on the evidence and materials.

Every tax decision made at the first instance of proceedings may be appealed and heard at the upper instance (mostly by the director of the tax chamber). To appeal a tax decision, the appeal should be submitted within 14 days of the date of delivery of the decision. A decision is final if a taxpayer does not file an appeal within this time period, and the tax proceeding is then final.

In cases where an appeal is submitted to the upper instance, the upper instance tax authority will settle the case, and its decision will be final and enforceable. That final decision may be challenged by lodging a complaint to the (provincial) voivodship administrative court (further court proceedings are described in Section III).

iii Customs and tax audit

In addition to a tax audit, Polish tax law also recognises a customs and tax audit, which concerns more serious matters than tax audits conducted by tax offices. It may be conducted only at the initiative of a tax authority – the head of the customs and tax office (which acts more like a 'tax policy'). A customs and tax audit differs from a tax audit because:

a it is started with no prior notification: namely, it starts with the delivery of the authorisation to perform it;

b the taxpayer has right to correct a tax return in the scope covered with the tax audit within 14 days of the date of the tax audit authorisation delivery; and

c the Business Freedom Act rules do not apply to it, namely there are no limits on simultaneous audits, no limits on the duration of audits and no possibility to file the opposition to the incorrect initiation or conduct of the audit.

The customs and tax audit ends with the audit result. Within 14 days of the date of delivery of the result, the taxpayer may adjust the tax return covered by the audit. If no irregularities were found during the audit or the taxpayer corrected tax returns accordingly to the result, no tax proceedings are initiated. However, if irregularities have been found as a result of the audit and the tax return has not been corrected within the prescribed period, the audit is automatically transformed into a tax proceeding. Such tax proceeding, performed by the head of the customs and tax office, may result in a decision from which the taxpayer has right to appeal. The appeal is lodged within 14 days to the same body that issued the decision. The case is re-examined by the same authority and also ends with a decision, on which the taxpayer may file a complaint to the administrative court.

iv Rulings

An individual tax ruling is a very important tool for taxpayers in the Polish tax law system. The main aim of the ruling is to allow a taxpayer to apply to the tax authority for a ruling on whether any planned or actual taxpayer actions, arrangements or transactions comply with the law. As from 2016, an application for a tax ruling may be submitted jointly by two or more taxpayers participating in the same transactions or events. A tax ruling is binding for the tax authorities but not for the taxpayer. In other words, as a rule, tax authorities may not challenge tax settlements of a taxpayer following the letter of the ruling. Confirmation of a taxpayer's standpoint protects a taxpayer from criminal liability and from the obligation to pay interest on tax arrears in cases where the tax authority changes its point of view on that particular matter. Moreover, the biggest advantage of an individual tax ruling is that it may protect a taxpayer from paying tax in circumstances where the taxable event has not already taken place. If the taxpayer obtains an unfavourable tax ruling, they may appeal to the voivodship administrative court.

It is noteworthy that from 15 July 2016, the tax authorities will not issue rulings in cases where a potential transaction, action or arrangement raises a justified suspicion that it may be subject to the Polish GAAR or may constitute an abuse of law under the VAT Act. However, the taxpayer has a right to apply for a protective opinion regarding such planned transaction, action or arrangement. A protective opinion will be issued in cases where there is no danger of the GAAR's application. The fee for obtaining such opinion is far more costly than for obtaining an individual tax ruling (a tax ruling costs 40 zlotys, a protective opinion 20,000 zlotys).

The issuance of such opinion also takes much longer than the issuance of the tax ruling (approximately six months; a tax ruling is issued within three months).

III THE COURTS AND TRIBUNALS

According to the Polish Constitution, the Polish judiciary consists of two separate branches of courts: courts of general jurisdiction and military courts headed by the Supreme Court; and administrative courts headed by the Supreme Administrative Court. The structure of administrative courts consists of two levels: voivodship administrative courts as courts of lower instance and the Supreme Administrative Court as the court of upper instance. Administrative courts exercise control over administrative activities including decisions and certain administrative provisions, local laws, written interpretations of tax law issued in individual cases by directors of tax chambers and other acts or state administrative activities concerning powers or obligations arising from law. Administrative courts also hear complaints against the inactivity of the administrative authorities.

There are 16 administrative courts of lower instance and one Supreme Administrative Court, which has its seat in Warsaw. The Supreme Administrative Court is divided into three chambers: the Financial Chamber, the Commercial Chamber and the General Administrative Chamber. The Financial Chamber exercises supervision over the judicature of voivodship administrative courts on issues of tax liabilities and other money contributions to which tax provisions and provisions on execution of money contributions apply.[2] The Supreme Administrative Court supervises the operation of voivodship administrative courts as regards adjudication in a mode specified by relevant acts and in particular hears appeals against judgments of those courts.[3]

An important feature of the Polish administrative judiciary is its independence. Administrative court judges are appointed by the president. They exercise their functions independently, and are subject only to the Constitution and other relevant statutes. That supreme supervision over the administrative activities of the administrative courts is exercised by the president of the Supreme Administrative Court is of major importance.[4] The administrative courts should not be dependent on the government administration in any way.

As regards tribunals, the Constitution lists the Constitutional Tribunal and the Tribunal of the State. These two Tribunals are separate organs remaining outside any structural, organisational or procedural associations with the court system in Poland. However, only the Constitutional Tribunal may, to a certain extent, deal with tax disputes, as it adjudicates on:

a the constitutionality of national legislation and international agreements;
b the compliance of national legislation with international agreements, whose ratification is required prior to approval by parliament;
c compliance with the Constitution of legal regulations issued by central state authorities, ratified international agreements and legislative acts;
d the constitutionality of the objectives or activities of political parties; and
e constitutional complaints.

The Tribunal of the State adjudicates cases in which persons who occupy (or have occupied) the highest positions of state are charged with violating the Constitution or other legislative acts. Therefore, tax matters lie outside of the scope of its actions.

The right to lodge a complaint to the voivodship administrative courts is available to any person who has a legal interest therein, such as a public prosecutor, ombudsman and societal organisations (mostly non-governmental organisations), within the scope of their statutory activities and in matters concerning the legal interests of other persons, provided such an organisation has participated in administrative proceedings. However, it is a necessary precondition for lodging a complaint that the complainant has exhausted the means of review in the proceedings before a tax authority.

Complaints against decisions and rulings (and other administrative acts) should be lodged within 30 days of the decision to the voivodship administrative court via the tax authority that issued the decision or ruling in the last instance. When a complaint is lodged, the administrative authority is under an obligation to turn it over to the court with the relevant files and to prepare a response within a period of 30 days of the date of its lodging. The authority analyses the possibility of granting the complaint in whole (a 'self-inspection

2 A Skoczylas, M Swora, Administrative Judiciary in Poland in search of fairness and efficiency – overview, p. 118: rtsa.ro/tras/index.php/tras/article/viewFile/359.
3 Ibidem.
4 Article 12 of the Law on the System of Administrative Courts.

procedure'). The complaint is not particularly formalised, since it only has to meet the requirements of a letter in the court proceeding. The voivodship administrative court first examines the formal and legal correctness of the complaint. The compliant will be rejected when the court finds that there are formal obstacles preventing it from hearing the case. When the court finds no formal or legal deficiencies in the complaint, it will examine it. The court may dismiss the complaint, overturn a decision in full or in part or confirm the invalidity of a decision in whole or in part.

The voivodship administrative court rules within the limits of the case but is not bound by the claims or statements stated in the complaint or the legal grounds raised by the party (i.e., a taxpayer or a tax authority). Consequently, the court will independently assess the correctness of the action or decision of the tax authority and assess the tax authority's compliance with the law. Generally, an administrative court may not alter a decision or rule on merit[5] (i.e., issue a decision instead of the tax authority), but it may instruct a tax authority to re-examine a case.

Often the ruling is issued at the first hearing. The administrative court hears cases on the basis of the file of documents provided by the public authority.

A judgment of the voivodship administrative court may be challenged by a complaint to the Supreme Administrative Court (signed by an attorney, an attorney-in-law or a tax adviser). A cassation appeal is lodged via the voivodship administrative court that issued the judgment within 30 days of service of the judgment together with a justification. The cassation appeal may only be based on strictly defined grounds, namely the violation of substantial law owing to an erroneous interpretation or incorrect application of law; or a breach of procedural regulations, if that infringement could have seriously affected the outcome of a particular case. The cassation appeal cannot be based on any irregularity in the proceedings, but only on the infringements that could possibly affect the decision content.

As a rule, a case before the administrative court should be completed as soon as possible. However, the reality is slightly different. Obtaining a hearing date largely depends on the court's location. In small cities, a date for an oral hearing is set within two or three months, but in larger cities the date may be set significantly later than this. A taxpayer lodging a complaint at the voivodship administrative court in Warsaw or Krakow will likely wait for approximately one year[6] before the case is considered. A backlog of hundreds of thousands of cases in the Supreme Administrative Court (as it is the only upper administrative court in Poland) causes long delays of up to 18 months in obtaining a hearing date.

The administrative extraordinary measures that may be invoked against final tax decisions are the repeal, amendment or annulment of a decision, as well as the reopening of proceedings. Annulment applies when, for example, a decision was issued by a non-competent authority, without a legal basis or in gross breach of law. Reopening is possible in cases where facts of the case were determined on the basis of false evidence or the taxpayer did not participate in proceedings by no fault of its own.

The levels of appeal are as follows:

a administrative procedure: the body of first instance is the head of the tax office; the body of second instance is the director of the tax administration office; and

b procedure before an administrative court: the bodies of first instance are the voivodship administrative courts; the body of second instance is the supreme administrative court.

5 Since 15 August 2015, the voivodship administrative court has right to rule in certain situations.

6 Information confirmed by the Warsaw Voivodship Administrative Court in a telephone conversation.

IV PENALTIES AND REMEDIES

Under the Polish tax law system, a taxpayer may be subject to both criminal and administrative liabilities at the same time. Criminal penalties are imposed solely by criminal courts, whereas administrative tax penalties are imposed by the tax authorities.

Most criminal tax acts are punished by a fine and, in more serious cases, by imprisonment – usually accompanied by a fine. A forfeiture is an accessorial measure. The fine for tax offences is imposed in daily units. The number of day units is between 10 and 720, and the day unit may vary between approximately €15 and €6,000. The personal and financial situation of the defendant (the taxpayer) should be taken into account by the court when determining the punishment. Imprisonment terms range from five days to five years. Fiscal contraventions are punishable by fines that may not exceed 10 minimum monthly wages (approximately €4,200).

Tax evasion (Article 54 of Penal Fiscal Code) is committed by a taxpayer who evades taxation (non-disclosure of a taxation object to the tax authority or diminution of taxable base and tax). The fine for this penalty is up to 720 day units or imprisonment for up to five years (both are the highest penalties provided for in the Penal Fiscal Code).

Tax fraud (Article 56 of Penal Fiscal Code) is committed by a taxpayer who diminishes the value of his or her tax by filing a tax return with misleading or false information. The penalty is the same as in the case of tax evasion.

Regarding specific tax fraud, an improper return of tax already paid (Article 76 of Penal Fiscal Code) is the most common tax fraud in VAT cases (i.e., carousel fraud). The penalty is the same as for the above-mentioned tax criminal acts. For delays in the payment of tax already collected from the taxpayer by the tax collector (Article 77 of Penal Fiscal Code), the penalty is up to three years of imprisonment. It must be noted, that because Poland was particularly affected by the activities of organised crime groups extorting VAT in the carousel frauds, detecting usage of so-called 'blank invoices' on amounts of 19.7 billion zlotys in 2013, 33.7 billion zlotys in 2014 and 81.9 billion zlotys in 2015.[7] In 2017 new, tightened criminal provisions were introduced. As of 1 March 2017, individuals who falsify invoices may be held liable pursuant to new Criminal Code provisions. According to them (Article 270a, Article 271a and 277a of Criminal Code), the following acts are subject to criminal liability:

a falsifying invoices, issuing fabricated invoices with regard to data that might affect the amount of tax liability of the level of any refund;

b provision of false information in the invoices in order to gain tax advantages; and

c the use of a fabricated invoice in place of authentic ones.

The severity of penalties for those crimes depends on the value resulting from such 'blank invoices', reaching up to 25 years of imprisonment when exceeding 10 million zlotys.

Administrative penalties in Polish tax law are not legally defined in any legal act.[8] A characteristic feature of administrative penalties is that their function is only prevention. Administrative penalties do not play the role of repression or punishment that criminal penalties do. Polish tax law recognises many examples of administrative penalties, such as higher (sanction) tax rates or an additional tax obligation, for example:

7 Statistics of the Supreme Audit Office: https://www.nik.gov.pl/aktualnosci/nik-o-przeciwdzialaniu-wyludzaniu-vat.html.

8 A Nita, A Światłowski, 'Administrative versus penal sanctions in Polish tax law – The dual system or two systems?', p. 198: www.vestnik.vsu.ru/pdf/pravo/2016/01/2016-01-22.pdf.

a a higher tax rate under the Polish Inheritance and Gift Act: when a taxpayer evades inheritance and gift tax, and only declares the tax base and gift during an audit, tax proceedings, fiscal control, or control activities, the level of the tax rate payable by that taxpayer is always 20 per cent (instead of 7 to 20 per cent); and

b the higher tax rate under the Polish Personal Income Tax Act will apply to income or revenue from undisclosed sources. Since the Polish Constitutional Tribunal, in a judgement of 29 July 2014,[9] found this regulation too vague, the Polish legislator has amended the provisions concerning undisclosed source of income to be more precise. Concealed income means income that is covered by disclosed sources, including revenues disclosed by a taxpayer, but that has been declared in the incorrect amount; or income from undisclosed sources, including revenues from sources not declared by a taxpayer.

Tax obligations with respect to income not obtained through disclosed sources or revenue from undisclosed sources arise on the last day of the fiscal year in which that income was gained. When a tax authority, during tax control proceedings, determines a source and an amount of undisclosed income, the taxpayer will be taxed in accordance with the regulations related to the source of that income. Additionally, the taxpayer will be obligated to pay penalty interest and will incur penal sanctions. In cases where it is not possible to determine the source of the above-mentioned revenues, income not covered by disclosed sources or revenue from undisclosed sources will be taxed a flat rate income tax in an amount of 75 per cent of the tax basis (much higher than regular PIT tax rates, i.e., 18 and 32 per cent).

Regarding VAT, an additional tax obligation applies when:

a the taxable person violates the obligation to keep a record of the turnover and amounts of the output tax. An additional tax liability is 30 per cent of the tax charged upon the acquisition of goods and services; however, this additional tax liability is not determined in the case of natural persons who, in respect of the same act, bear liability for a fiscal contravention offence or fiscal offence;

b a taxable person incorrectly settles VAT, for example, lowers the VAT amount due, settles a higher VAT refund than amount due, reduces a higher output tax amount than amount due, does not submit a tax return and does not pay the VAT liability amount. An additional tax liability is 30 per cent of the amount by which the tax liability was understated or overstated or of the amount by which the tax difference refund amount; however, this additional tax liability may be reduced to 20 per cent when the given taxable person corrects or submits a proper tax return and pays the tax liability amount or returns the undue refund amount; and

c the incorrectness mentioned in point b above results in full or in part, from the reduction of the output tax amount by the input tax amounts resulting from 'blank invoices' – an additional tax liability is 100 per cent in the part concerning the input tax amounts.

9 No. P 49/13.

V TAX CLAIMS

i Recovering overpaid tax

An overpayment may arise when undue tax was paid (e.g., although there was no obligation to make a payment, such payment was made) or the payment amount was higher than required. In most cases, an overpayment arises when a taxpayer made an error in tax returns or actual payment. However, it is also possible that the tax authority wrongly assessed the tax duty of a taxpayer. In those situations, a taxable person has a right to ask the tax authority for refund of any overpaid tax.

As a general rule, a tax authority is obliged to determine the tax overpayment after a taxpayer submits a request (e.g., a taxpayer questions the tax remitter's right to withhold tax). When specific tax provisions provide that the taxpayer should submit a tax return, the taxpayer must submit a request to the tax authority to determine the tax overpayment together with an amended tax return. The procedure concerning a tax overpayment usually ends with the tax authority's decision, but it is also possible for the tax authority to refund the overpayment without issuing a decision. Depending on the source of overpayment, the time frame for reimbursement ranges from 30 days to three months. However, in practice this period is extended, and the whole procedure may last longer.

There are two situations when a taxpayer is obliged to calculate the amount of overpaid tax. These are where:

a the value of overpaid tax is proved when a taxpayer submitted a tax return (this applies to both corporate and income tax returns and excise tax returns); and

b a taxpayer files a separate motion or application for an overpayment reimbursement in cases where an overpayment arose as a consequence of judgments of the European Union Court of Justice or the Polish Constitutional Tribunal (e.g., where a judgment holds that there is no tax duty).

When a taxpayer assesses overpaid tax, the tax authority may verify that amount. If the tax authority does not challenge that overpayment, it should reimburse the overpaid tax within 30 days.

The overpayment, with applicable interest, is credited *ex officio* towards any tax arrears, including interest for late payment, and any current tax liabilities of a taxpayer. In the above situations, the overpayment is refunded to the taxable person (into the person's bank account or in cash). The taxpayer may also request that the overpayment be credited in whole or in part toward his or her future liabilities. It should be stressed, however, that when other tax proceedings (such as audits) are carried out with respect to the same tax, the overpayment procedure is suspended. The taxpayer's right to seek a refund of an overpayment expires five years after a determination of overpayment.

The overpayment is connected with the issue of interest. In certain cases, when the tax authority is responsible for the overpayment, the taxpayer may demand interest. It should be noted that interest is due only when the overpayment arose as a consequence of a tax authority's decision that was amended or repealed by another decision or by a judgment of the administrative court. Interest for overpayment is the same as it is or tax arrears.

ii Claimants

Tax complaints, claims or appeals may be filed only by the taxpayer on whom the tax is imposed. Tax imposed on a taxpayer cannot be challenged by another person unless that person has succeeded to the rights and liabilities of the taxpayer (i.e., tax succession). This situation may arise in the case of a merger or the split up of a company. The tax liabilities of the absorbed or split company are inherited by the 'new' company. In the case of a tax group, each member of the group is subjected to tax and is obliged to file an individual tax return.

VI COSTS

There is a distinction between administrative fees and costs in tax proceedings. As a rule, the tax authorities do not have influence on the fees to be charged; they are most often determined on the basis of the Act of 16 November 2006 on stamp duty. Conversely, costs in tax proceedings are fixed by the authorities on the basis of the expenditure incurred in connection with the conduct of the proceeding.

Costs related to the conduct of tax proceedings are regulated in the Polish Tax Ordinance Act. As a rule, the costs of proceedings before the tax authorities are incurred by the State Treasury, voivodship, county or district, which leads to the conclusion that these costs will not apply to a controlled taxpayer (during a tax audit or control proceedings). These concern, in particular:

a travel expenses and other receivables of witnesses;
b expert and translator costs;
c costs of inspections; and
d costs of delivering official letters.

The tax authority may also include other expenses directly related to resolving the case in the costs of proceedings.

The tax authority refunds the above costs of the proceedings upon request. A request for a refund of travel costs incurred should be submitted to the tax authority conducting the proceedings before the issuing of a decision on the merits, otherwise the claim will be lost.

It should be noted that the above-mentioned costs are borne by the State Treasury when proceedings are initiated *ex officio* or when a party was mistakenly summoned to appear. This condition is always met in cases of tax audit and control proceedings, which are always initiated *ex officio*. Tax proceedings may be initiated *ex officio* or on application by a party. In the latter case, the party bears its own costs.

The Tax Ordinance Act provides a derogation from the general rule that the State Treasury incurs the cost of proceedings before the tax authorities. A taxpayer is charged with costs incurred in its interest, or at its request, but not arising from a statutory obligation of the authorities conducting the proceedings. The likelihood of costs arising that satisfy such conditions is low. It should be noted that the tax authority is obliged to gather and consider evidence. Costs in this regard are not charged to the taxpayer.

The taxpayer is also charged with costs:

- *a* for preparing copies or excerpts;
- *b* for the appearance of participants in the proceedings at a hearing that did not take place as a result of an unjustified appearance of the party who submitted an application to conduct a hearing;
- *c* resulting from concealing or failing to submit evidence by the prescribed deadline;
- *d* resulting from the provision of false explanations or false testimony; and
- *e* for translations of documents provided by the taxpayer into the Polish language.

In principle, parties bear their own costs for their involvement in proceedings before the administrative courts. However, a court may award legal aid to a party if such party applies for it prior to or during proceedings. Legal aid takes the form of an exemption from court fees or the appointment of an attorney, an attorney-at-law, a tax adviser or a patent spokesperson.

The Polish legislator has specified two regulations regarding the reimbursement of court proceeding costs at first and second instance. At first instance, the applicant recovers the costs if it wins the case. Costs are not awarded to the tax authority whose action or failure to act is the subject of complaint by the taxpayer, even if the voivodship administrative court dismissed an action brought by the taxpayer (i.e., the case has been successfully completed for the tax authority). The reimbursement of court proceeding costs at the second instance (i.e., at the Supreme Administrative Court) is regulated differently. In that case, the principle of equality is applicable, which means that the unsuccessful party bears the costs of the proceedings.

VII ALTERNATIVE DISPUTE RESOLUTION

Alternative dispute resolution is not widely used in disputes between taxpayers and the tax authorities. There are no general provisions pertaining to the mutual agreement procedure (MAP) in the Polish Tax Ordinance Act. The MAP is present only within bilateral tax treaties between countries.

Polish law on proceedings before administrative courts provides only one specific procedure in proceedings before the administrative courts: mediation. Mediation is allowed only when an appeal has been filed with the administrative court, and may be conducted at the request of a complainant or the authority. It is also possible that mediation is initiated *ex officio*. The deadline for filling a request for mediation is the date of the hearing. As a rule, mediation should be conducted during a single court session. If the mediation ends in failure, and the parties fail to agree on a common position, the case will be resolved through the standard procedure (i.e., it will be referred to a hearing).

When a dispute is effectively settled at mediation, there are two possible outcomes: the court proceeding is discontinued because of the withdrawal of the appeal, or the mediation arrangements may provide an obligation for the administrative authority to verify its decision.

The administrative authority, within the scope of the performance of the mediation, is free to choose how it will proceed. Therefore, a complainant has no influence on the application of such arrangements. Nevertheless, it is possible to file an appeal to a voivodship administrative court against the act or measures taken by authority as a result of the mediation within 30 days.

However, mediation is not a widely used mechanism in the administrative judiciary. Compared with the number of appeals filed with the voivodship administrative courts between 2004 and 2013, mediation proceedings represented 0.4 to 0.1 per cent thereof.[10] In 2014, 10 cases were initiated following the mediation procedure, but only four cases (in the area of tax law and custom law) were settled under that procedure.[11]

Although alternative dispute resolution is not used in Polish tax disputes, rulings are a well-developed part of the tax authorities' practice. A taxpayer may request a tax ruling concerning the current factual status or future events. The tax authorities should issue such rulings within three months of the date of receipt of a request.

VIII ANTI-AVOIDANCE

Polish law does not provide rules that distinguish between permissible and impermissible tax avoidance. The judiciary has stated that it is practically impossible to determine a clear distinction between when taxpayers avoid taxation in a legal or an illegal way. Each time the judiciary is faced with such a decision, it should be made on the basis of the factual circumstances of a given case and the elements of the particular tax structure. In a judgment of 24 November 2003 in the *Optimus* case, the Polish Supreme Administrative Court formulated an argument that whenever the legal system allows a taxpayer to choose from several legal constructions to achieve an economic goal, a selection of the most favourable tax options cannot be treated as the avoidance of tax law.[12]

The Polish tax law system provides tax neutrality for economic events such as a merger or division of companies or exchange of shares. However, the Polish legislator has laid down one condition that such operations should be carried out for valid commercial reasons, and that the main objective or one of the main objectives cannot be tax avoidance or tax evasion.

The fate of a GAAR in Poland seems to be tortuous, but the government finally enacted an anti-abuse rule that came into force on 15 July 2016.[13] The GAAR was created as a new tool for the tax authorities to reclassify business operations where a taxpayer has obtained substantial tax profits through tax avoidance strategies. Achieving a 'tax benefit' through artificial arrangements prevents the possibility of applying the anti-abuse rule. The term 'tax benefit' should be understood as 'reducing, avoiding or postponing the taxpayer's tax liability, creating a tax payment surplus or an entitlement to a tax refund, or increasing the amount of tax payments surplus or tax refund'. To determine whether a legal arrangement is artificial, various factors should be taken into account, such as excessively complex transactions. It should be noted that when a taxpayer obtains a 'tax benefit' that does not exceed 100,000 zlotys in a given settlement period, the GAAR will not be applied.

10 This statistic was presented in a letter of the Polish Ombudsman to the Polish Minister of Finance of 1 April 2016, Ref. No. V 511.126.2016.KB: www.sprawy-generalne.brpo.gov.pl/pdf/2016/4/V.511.126.2016/699841.pdf.

11 Ibidem.

12 Supreme Administrative Court, 24 November 2003 (Case No. FSA 3/03).

13 GAAR was originally introduced in the 2003 Tax Ordinance Act, and continued to be applied until May 2004, when the Polish Constitutional Court held that the GAAR provision was unlawful because it did not meet the constitutional requirements of appropriate legislation and repealed this rule. Since then, the Polish tax law system has not had a GAAR until 2016; however, some attempts were made in the past to introduce this clause with regard to closing remaining loopholes in Polish tax law.

The clause will allow the tax authorities to ignore artificial legal arrangements, which means taxpayers may be obliged to pay the avoided tax with default interest and become exposed to criminal fiscal liability. To protect taxpayers from the tax authorities' discretionary powers, the Council for Tax Avoidance Matters was created as a collegiate body independent of the tax authorities. At the request of the taxpayer or the competent authority, the Council issues non-binding opinions on whether the GAAR should be applied in any given case. Moreover, the taxpayer may apply to the Minister of Finance to issue an opinion that prevents the application of the GAAR. The cost of this opinion is 20,000 zlotys. The Polish GAAR is applicable as *lex generalis* to other specific anti-avoidance rules. The Ministry of Finance states that the GAAR should be applied only as a last resort when other measures (i.e., specific anti-abuse rules) fail. Given the recent GAAR's introduction, it is difficult to predict how this rule will be applied by the tax authorities and the courts. So far, the clause has been rather used for dissuasive purposes, namely:

a the Ministry of Finance issued several warning letters in which it was stated that GAAR may be used for certain transactions and structures, or

b to deny a taxpayer a tax ruling or an opinion that prevents the application of the GAAR.

IX DOUBLE TAXATION TREATIES

A fundamental source of interpretation of international agreements, such as double taxation treaties, is the Vienna Convention on the Law of Treaties, which was ratified by Poland in 1990. According to Article 31(1) of the Convention, the Treaty is to be interpreted in good faith, within the ordinary meaning to be given to the provisions of the Treaty and in light of its subject matter and purpose.

When interpreting double taxation treaties, it is important not to lose sight of the OECD Model Tax Convention. While the Convention is not a source of law, it plays an essential role regarding the interpretation of double taxation treaties that are based on the provisions of the Convention. The Supreme Administrative Court has stated that both the OECD Model Tax Convention and the Commentary to the OECD Model Tax Convention may constitute a context in the sense of Article 31 of the Vienna Convention on the Law of Treaties.[14]

X AREAS OF FOCUS

Recently, the Polish Ministry of Finance presented statistics regarding fiscal audits conducted in the first half of 2016.[15] The fiscal audits were much more efficient in 2016 than in 2015. Auditors are mainly focused on tax fraud (mostly in the VAT context), tax avoidance (harmful tax optimisations) and the issue of transfer pricing.

Poland has struggled with VAT fraud (mostly VAT carousel) for several years, which has had devastating consequences for the State Treasury (as discussed in Section IV). The administrative courts also support the tax authorities in combating unfair taxpayers. The

14 Supreme Administrative Court, 19 June 2009 (Case No. II FSK 276/08).

15 Information provided on the website of the Ministry of Finance: www.finanse.mf.gov.pl/web/bip/ministerstwo-finansow/wiadomosci/aktualnosci/ministerstwo-finansow2/-/asset_publisher/M1vU/content/id/5737513.

application of the principle of good faith and due care by the taxpayer in his or her contacts with trade partners is rather strictly interpreted by the administrative courts. However, the main problem with VAT fraud is that, in their fight against fraud schemes, the tax authorities reach all companies in the supply chain regardless of whether they knew or could have known about the fraud actions performed by their trade partners. For this reason, tax audits and fiscal audits may potentially affect every taxpayer.

Many tax rulings concern the newest regulations in Polish tax law, such as CFC rules, amended thin capitalisation rules and the tax treatment of widely used cash pooling agreements. The Polish Ministry of Finance is mainly concentrating on closing remaining loopholes in the Polish tax system and combating tax evasion and tax avoidance; therefore, the tax authorities may start using their newest 'weapon', the GAAR, much more broadly.

XI OUTLOOK AND CONCLUSIONS

As previously mentioned, Polish tax law is frequently amended. As such, Polish taxpayers must be prepared for numerous changes in the tax law area every year. 2018 will bring many significant changes in Polish tax law aimed at combating tax evasion and tax avoidance. The key changes in Polish tax law in 2018 are as follows.

i VAT changes aimed at preventing tax fraud and increasing tax collection

Owing to the fact that the Ministry of Finance's objective is to close up the loopholes in the VAT system and to ensure greater tax revenue stability, since April 2018 a new type of bank account – a VAT account – will be introduced for B2B transactions.[16] When using the split payment mechanism, the purchaser pays VAT separately into the VAT account and the net sales value to the supplier's bank account. The supplier would then have very limited access to the VAT account and, thus, generally, would be unable to dispose of those funds freely. While the funds accumulated on the VAT account will always be the property belonging to the VAT taxpayer, generally, they may be able only to use their VAT account to make transfers to other VAT accounts and to make VAT liability payments to the tax office. All withdrawals from the VAT account will have to have the prior consent of the tax office.

ii Income taxes

Owing to the fact that the Ministry of Finance aim for 2018 is to increase the collection of income taxes and tighten the tax system, since 2018 the following changes were introduced into Polish tax system

- *a* separation of income and loss sourced from capital transactions from other income and loss sources;
- *b* limitation threshold of 5 per cent of EBITDA of costs deductibility from intangible services and royalties acquired from the related parties;
- *c* limitation of financial costs deductibility;
- *d* minimum 0.035 per cent income tax level for taxpayers holding substantial real estate that has an initial value over 10 million zlotys;
- *e* new CFC rules;

16 The split payment mechanism is to be introduced with the Act of 9 November 2017 amending the Act on tax on goods and services and some other laws.

f change of rules regarding CIT tax groups; and
g changes in CIT deductibility rules: one-off write-down for fixed assets of small value up to 10,000 zlotys (previously 3,500 zlotys), exclusion of deductibility of interest from debt-push-down structures and limitation of deductibility of costs in sale and leaseback transactions.[17]

17 The amendments are to be introduced with the Act of 27 October 2017 amending the personal income tax act, corporate income tax act and lump-sum income tax on certain revenues achieved by natural persons

Chapter 27

PORTUGAL

Pedro Miguel Braz[1]

I INTRODUCTION

Tax litigation in Portugal has constituted a heavy burden over the years for the administrative authorities, the judicial courts and, most of all, taxpayers. This burden is attested to not only by the number of cases pending decision (in 2014, there were 52,649 in all the tax courts, as opposed to the 45,728 cases in 2009[2]) but also by their average length, which far exceeds the indicative two years laid down by law.[3] Added to all of this are taxpayer success rates of approximately 50 to 60 per cent in judicial courts[4] and 59 per cent in tax arbitration courts.[5] The immediate interpretation to be made of these rudimentary data is that the Portuguese tax system and, in particular, the tax administration itself, has a propensity towards generating contentious tax situations, a substantial portion of which are subsequently declared illegal by the judicial courts.

There are many reasons for this state of affairs, some of which are endemic. Foremost among them, however, are the growing complexity of the entire tax system, the emergence of new taxes and forms of taxation as a last resort for raising tax revenue, primarily in the past five years, and a tax administration stance and mode of operation overly focused on concerns relating to the assessment and collection of taxes.

II COMMENCING DISPUTES

Portuguese tax litigation has several administrative and judicial reaction mechanisms, the most significant of which are the tax claim (an administrative procedure) and the judicial tax claim (court proceedings). In parallel, albeit with a narrower scope of application, there is also tax arbitration, which, although initially introduced into the law as a simple alternative to court proceedings for tax disputes, has acquired especial prominence in its five years of existence.

In essence, tax litigation consists of annulment proceedings, and its quintessential subject matter is tax acts, with tax assessments being of particular significance in this respect.

1 Pedro Miguel Braz is a partner at Garrigues Portugal, SLP.
2 www.cstaf.pt/Paginas/Estatistica-Processual.aspx.
3 See Article 96(2) of the Administrative and Judicial Tax Procedure Code.
4 These are estimated figures, as there are no reliable statistical data.
5 www.caad.org.pt/files/documentos/noticias/CAAD-Estatisticas_Arbitragem_Tributaria-2013-12-11.pdf.

As a rule, the time limits for contesting tax assessments only begin to run after the final date for voluntary payment, which is generally 30 days after the assessment notice. In cases of assessment where the tax is computed at zero, the time limits for any corresponding litigation begin to run from the time of the notice.

The tax claim is an administrative proceeding before the tax administration and, in general terms, must be lodged within 120 days. The decision in these proceedings may be appealed to the next hierarchical level or tax claim in court, or an application to constitute a tax arbitration court may be filed within time limits of 30 days, three months and 90 days respectively.

Within the field of this administrative litigation, the law establishes, to the benefit of taxpayers, an option aimed at avoiding decisions dragging on eternally: the possibility of lodging a hierarchical appeal, a judicial tax claim or applying for a tax arbitration court to be constituted if the tax administration has not made a decision on the complaint within four months of its filing.

The law provides for situations where access to the judicial courts or arbitration implies prior recourse to administrative litigation, whether by way of a tax claim or through some other administrative procedure. The former includes, *inter alia*, if certain circumstances are not fulfilled, disputes regarding self-assessments of tax, tax withholding or real estate property valuations, and, with regard to tax withholding, disputes relating to the application of indirect methods for determining the tax base. In either situation, prior administrative litigation is a condition for access to the courts or arbitration.

The judicial tax claim is a process that takes place in the tax courts. It is a relatively simple process, and essentially one that is conducted in writing and with little in-person intervention on the part of lawyers. According to the applicable legal provisions, the key stages of this process are:

a filing the statement of claim;
b the tax administration's statement of defence;
c the taking of expert and witness evidence when requested and not dispensed with;
d optional written statements of case; and
e the judgment.

This decision may be appealed to a higher court: the Central Administrative Court if it comprises points of fact or points of fact and points of law, or the Supreme Administrative Court if it only comprises points of law. The rulings of either of these higher judicial courts may also be the subject of an appeal, which, owing to the admissibility requirements thereof, is 'extraordinary' by nature.

Tax arbitration is, in turn, a relatively recent means of alternative dispute resolution (having been in existence for five years), but has been consolidating its position not only as an instrument to which more and more taxpayers are resorting, but also owing to the quality of the awards delivered in arbitration proceedings. Arbitration courts decide in accordance with the law, and there can be no recourse to equity.

The scope of tax arbitration is narrower than that of the judicial courts, given their legal scope and the terms and limits in accordance with which the tax administration may have accepted a binding tax arbitration.[6] The contours of this scope and commitment are essentially the following:

a claims for a declaration of illegality of additional tax assessments and self-assessments, tax withholding and payments on account when these latter have been preceded by an administrative process;

b claims for a declaration of illegality of decisions that fix the taxable income, when it does not give rise to the assessment of any tax, of decisions determining the taxable base and decisions that fix asset values, with the exception of those that result from the application of indirect methods.

By virtue of that commitment, claims relating to customs duties on imports and related indirect taxes, as well as claims relating to the classification, origin and customs value of goods, are excluded from the scope of tax arbitration.

The commitment is limited further by the value of the disputes themselves, which may not be higher than €10 million. Cases with a value of up to €60,000 are decided by a single arbitrator, while cases in excess of this figure are decided by a panel of three arbitrators.

Two characterising features of tax arbitration are its swiftness and the absence of ordinary appeals (i.e., the right to appeal in tax arbitration is extremely restricted to only exceptional cases).

The swiftness of tax arbitration derives from the fact that there is a six-month time limit for delivering an award after the constitution of a tax arbitration court (deferrable for a further two periods of three months), while on average an award is delivered within four months and 20 days, according to the most up-to-date information.[7]

The Portuguese legal order has no *stare decisis* rule, but there is a legal principle that the tribunals must respect previous case law in their decisions. For this reason, the swiftness of arbitration proceedings places the awards by these tribunals in a favourable position for defining case law (all the more so because, owing to the limited possibility of appeals, these awards are usually final).

Appeals from arbitral awards are made specifically to judicial courts with jurisdiction over tax matters. The law lays down three possible ways in which to react to an arbitral award: challenging the arbitral award (when it contains flaws that affect its validity), lodging an appeal with the constitutional court (when the application of the rule is rejected on the ground on unconstitutionality, or when the unconstitutionality of the rule that is applied has already been raised) and lodging an appeal based on conflicting rulings (when, in respect of the same fundamental point of law, the award of the arbitration court clashes with a decision of the central administrative courts (CAC) or the Supreme Administrative Court (SAC). In other words, the law entrusts the examination of arbitral awards to the judicial courts in cases where more critical situations are involved, whether because their validity may be affected or they clash with other higher judicial court decisions, or because some constitutional provision or principle is involved.

6 See Ministerial Ordinance No. 112-A/2011, of 22 March.

7 www.occ.pt/fotos/editor2/diarioeconomico16abril.pdf.

This is a detraction from the principle of tax arbitration swiftness – because the desired swiftness is affected upon entering the judicial court circuit – for the benefit of a higher system guarantee, since it is aimed at safeguarding the conformity and stability of the legal order itself.

One special rule must be mentioned: the delivery of an arbitral award favourable to a taxpayer's claim immediately terminates the bank guarantee that was provided to suspend collection of the tax debt, regardless of whether an appeal is lodged.

Tax law enshrines certain principles and procedures that, although they cannot be deemed covered by a broad concept of tax litigation, have such a degree of connection with it that taking them into consideration in any analysis is implied. Among other equally relevant principles, we highlight cases of the principle of enforceability of the tax act and of the advance binding information.

The principle of enforceability of tax acts brings about an effect of extreme significance, which is that payment of the additional tax assessed by the tax administration is claimable immediately and may only be suspended if the relevant tax proceedings (whether administrative, judicial or arbitral) are underway and if a guarantee is provided that covers, where applicable, payment of the amount owed.

In other words, from a legal standpoint, litigation is not sufficient to suspend collection of the tax until a judgment declares its illegality. That said, as a rule, the taxpayer will have to pay or provide a guarantee when faced with a tax assessment, even in cases where he or she takes legal action in respect of that assessment. There is, however, an exception to this rule, which involves the possibility of a guarantee dispensation being authorised on an exceptional basis.

This possible dispensation of the guarantee has extremely restrictive prerequisites, since it can only be authorised in the case of such a provision causing irreparable harm to the taxpayer, or where the lack of financial resources is both obvious and not caused by the taxpayer subject to enforcement proceedings.

As a counter to the immediate enforceability of tax acts, however, provision is made for the right to compensation for a taxpayer who, having paid or provided a guarantee, is successful in his or her litigation and the tax administration is deemed liable for the error in the tax assessment. In situations where the taxpayer has paid the additional tax assessment, compensation is effected through the payment of interest,[8] and in cases where a guarantee is provided, by means of payment of the expenses incurred.

It follows from this that the enforceability of tax acts is of particular significance, since a taxpayer faced with a tax assessment has two practically simultaneous decisions imposed on him or her: whether to contest its legality and, consequently, whether to pay or present a guarantee.

As to advance binding information, its significance derives from two fundamental aspects. The first, owing to its very nature, is that of permitting the interpretation and application of the law to be fixed in a specific case binding the tax administration, while the second is the fact that this paves the way for litigation.

In relation to the first aspect, similarly to the situation in other jurisdictions, once this ruling has been issued, the tax administration is prevented from proceeding differently, save in compliance with a court decision. However, the law affords the possibility of the tax administration revoking the ruling after one year subject to a prior hearing for the taxpayer.

8 Currently 4 per cent per year.

The application for advance binding information must contain a description of the facts for which the legal and tax classification is requested, and the ruling will be issued within a 150-day period.

The advance binding information may, in exceptional cases, be urgent in nature. This circumstance gives rise not only to greater speed in issuing the ruling in comparison to the norm (the time limit is 90 days), but also, *inter alia*, differences in the treatment given to the content of the application for a ruling in terms of costs and the effects of any tacit decision. Effectively, an application for an urgent ruling must, apart from the relevant factual framework, also contain a proposed legal and tax framework. In addition, it implies the payment of a fee that may vary, according to the complexity, from 25 to 250 account units.[9] Finally, if the ruling is not given within the above-mentioned 90-day period, the proposed legal and tax framework for the facts will be deemed tacitly approved as a binding ruling.

The decision underlying the binding ruling may be appealed to the extent that it concerns the non-existence of the assumptions for an urgent binding ruling; the existence of a particular technical complexity that renders a binding ruling impossible; or the legal and tax framework for the facts contained in the reply to the application for a binding ruling.

This possibility of appeal also has a short life span (three years) but, especially in cases where the subject of the appeal concerns the legal and tax framework for the facts, constitutes an extremely relevant step for affording taxpayers all the mechanisms necessary for consolidation of their tax affairs and the relevant operations, without the need to do so solely when faced with tax acts (mainly tax assessments) of the tax administration.

Apart from the principle and procedure described above, there is also a form of tax litigation proceedings that must be highlighted: the figure of opposition to enforcement. Opposition to enforcement is a mechanism that seeks, in essence, to ensure the possibility of reaction by the taxpayer to any illegal forcible collection of a tax (because it is already paid, because the tax obligation is time-barred, for lack of grounds, etc.). Similarly to what is mentioned above, in these cases, too, the collection of the tax is only suspended if, in parallel with the opposition to enforcement, a guarantee is presented or the right to dispensation from the same is recognised.

This opposition to enforcement must be filed within 30 days of service of the summons on the taxpayer.

However, in this regard we note that despite being a procedural expedient designed specifically for reacting to the illegal collection of a tax – with the law reserving the reaction to the illegality of the tax assessments that underlie it to the tax claim, judicial tax claim and tax arbitration – this same law permits (albeit in exceptional circumstances) that the illegality of the tax assessment may also be disputed through it. This is only possible, however, when the law provides no legal means of challenging or appealing the assessment.

III THE COURTS AND TRIBUNALS

As stated in the previous section, the three quintessential mechanisms for initiating tax litigation are the tax claim, the judicial tax claim and tax arbitration.

A tax claim is an administrative proceeding before the tax administration and must be decided by the latter. The normal reaction mechanism within the tax administration framework to a decision on a tax complaint is the hierarchical appeal. This appeal, which is

9 Each account unit is currently €120.

optional and has non-suspensive effect, must be lodged within 30 days of the notice of the decision on the complaint – that is to say, its decision is not subject to appeal. Nevertheless, in the specific case of decisions on hierarchical appeals lodged against tax claim decisions, the law expressly provides that these decisions may be appealed to the judicial courts, which is to say that, in such cases, the taxpayer may opt to exhaust the administrative avenues (tax claim and subsequent hierarchical appeal) before transferring the case to the judicial courts.

The tax courts are judicial courts and naturally independent of the tax administration. In these courts, as a rule, there is a double degree of jurisdiction, with cases being weighed up and decided on first by a first instance court and, at an appeal stage, by a higher court, which, as mentioned, may be a CAC or the SAC, depending on the grounds for the appeal.

The decisions of these higher courts may also be appealed but, from an ordinary standpoint, the power of these judicial courts is practically exhausted given the exceptional requirements for lodging further appeals. Nevertheless, we shall elaborate on appeals from judicial tax claim proceedings. They are based on conflicting rulings of the CAC, of the CAC with the SAC, or of the latter with itself. Another reason for appealing is the refusal to review CAC rulings when the questions at issue, owing to their legal or social importance, are of fundamental importance, or when the admission of the appeal is clearly necessary for a better application of the law. Both the appeals mentioned must be decided by the SAC. Finally, if an issue of unconstitutionality has been raised during the proceedings, an appeal may be made to the Constitutional Court.

IV PENALTIES AND REMEDIES

The infringement of a tax provision has consequences at levels other than that of the obligation to pay or pass on any outstanding tax. From the outset, the failure to pay or pass on tax may be associated with an obligation to pay compensatory interest,[10] which accrues from the end of the deadline for filing the tax return until such time as the situation is detected or corrected.

There are other consequences relating to administrative or criminal offences. The law provides, in this respect, for a close relationship between a criminal and an administrative offence, whereby the latter applies if the former does not; moreover, the relevant offences are set down in the same legislation.

There are various offences, at both administrative and criminal offence level, but we give particular emphasis to those whose application to specific cases is called upon more often.

Foremost among criminal offences are fraudulent tax evasion and misappropriation of funds; and failure to pay or pass on tax and omissions and inaccuracies in tax returns and other tax-relevant documents on the side of administrative proceedings.

Fraudulent tax evasion is only punishable when the unlawful gain is greater than or equal to €15,000, and penalties vary from a minimum penalty payment of up to 360 days to a maximum five-year term of imprisonment for aggravated fraud.

10 Currently 4 per cent per year.

Certain behaviours aimed at evading the assessment, payment or passing on of tax, or at unduly obtaining tax relief, refunds or other pecuniary advantages capable of causing a fall in tax revenue that may be classified as capable of falling within the offence of fraudulent tax evasion are the following;

a the concealment or alteration of facts or figures that must be contained in accounting books or records, or of the returns filed or provided for the specific purposes of the tax administration inspecting, determining, assessing or checking the taxable income;

b the concealment of undeclared facts or figures that should be disclosed to the tax administration; and

c carrying out a simulated transaction, whether as to its value, its nature, or by interposing, omitting or substituting people.

Misappropriation of funds is punishable if the tax that is not paid or passed on is greater than or equal to €7,500, and carries penalties that vary from a minimum of a 360-day penalty payment to a maximum five-year term of imprisonment.

Noteworthy among the administrative offences is that of failing to pay or pass on tax, which is only applicable if the facts do not constitute a tax crime, and which carries penalties of between 15 per cent and double the amount of the missing tax in the case of individuals, and 30 per cent and quadruple the amount of missing tax in the case of legal persons.

In either case, the fines are subject to a maximum limit of €165,000 for legal persons and €82,500 for individuals in cases where there is intent, and €45,000 for legal persons and €22,500 for individuals in cases of negligence.

For administrative offences involving omissions and inaccuracies in tax returns or other tax-relevant documents, the applicable fines range from a minimum of €93.75 for individuals and €187.50 for legal persons to a maximum of €22,750 for individuals and €45,500 for legal persons.

A reduction of the fines, depending on the time at which it is requested, may be obtained:

Reduction	Base	Request filed
12.5 per cent	Legal minimum amount	Within 30 days after the infringement and, provided that the charge sheet has not been drawn up, a report received or a tax inspection initiated
25 per cent	Legal minimum amount	Within 30 days after the infringement and, provided that the charge sheet has not been drawn up, a report received or a tax inspection initiated
75 per cent	Legal minimum amount	By the end of the tax inspection when the infringement is merely negligent
Legal minimum	Legal minimum amount	By the end of the time limit for defence in administrative offence proceedings in the case of a simple administrative offence
75 per cent	Fixed amount	Before the decision in administrative offence proceedings

Apart from these reductions, the law also provides for the possibility of waiver or special mitigation of the fine. There may be a waiver if the following cumulative conditions are met: the infringement has not generated any actual loss in tax revenue; the situation is now in order; and there is an extremely small degree of fault. Regardless of whether the requirements are fulfilled, the fine may be especially mitigated when the infringer acknowledges his or her responsibility and puts his or her tax affairs in order before the decision in the proceedings.

The taxpayer has a right to appeal any decision to impose a fine to the judicial courts within a 20-day period.

As a rule, if litigation regarding the tax assessment is underway,[11] the criminal and administrative offence proceedings will be stayed until the decision is handed down in that case.

V TAX CLAIMS

i Recovering overpaid tax

A self-assessment of tax that has resulted in the payment of more tax than due or the refund of less tax than due may be corrected by filing a tax claim within the time limits and on the terms set down in the Portuguese Administrative and Court Tax Procedure Act (CPPT).

Tax withholding and payments on account may also be contested on grounds of error by means of a tax claim filed on the terms and within the time limits set down in the CPPT. If the tax claim is rejected, the taxpayer may then contest the legality of the act in the tax courts.

On an exceptional basis, the law also permits an *ex officio* review of tax acts, on the ground of an error attributable to the tax department, or of serious and flagrant injustice, within the time limits and on the terms set down in the General Taxation Law, the rejection of which also opens up the possibility of an appeal to the courts.

As stated above, undue payment of the tax affords a right to the payment of compensatory interest on the terms set down by law in the case of an error attributable to the tax administration departments. However, this right also exists in the case of failure to comply with the legal time limit for *ex officio* restitution of taxes, delays in the processing of the credit note or in the decision on the review of the tax act. The decisions of the tax administration departments on the payment of compensatory interest or the tax acts issued in respect of the same may also be contested on the terms set down by law.

Apart from the above-mentioned reaction mechanisms, non-resident taxpayers also have a number of legal mechanisms aimed specifically at the recovery of unduly paid tax based on the application of double taxation treaties (DTTs) and EU directives.

In addition, there is a VAT refund system for taxable persons not established in the refunding Member State.[12]

ii Challenging administrative decisions

In general, tax acts and tax matters are binding and provide no leeway for free appraisal by the tax administration departments. However, tax law sometimes resorts to indeterminate concepts that entail some degree of discretion in the appraisal of the same and in the decision to be delivered by the tax administration.

In such situations, taxpayers may take legal action using the reaction mechanisms, exercising their powers in terms of control and examination of the binding powers of the tax administration and in terms of the reasonableness of the solution adopted by the latter.

11 In relation to criminal proceedings, the law limits itself to mentioning the judicial tax claim and opposition to enforcement, while in relation to administrative offence proceedings, the law mentions the judicial tax claim, the tax claim and, in certain situations, opposition to enforcement.

12 Decree-Law 186/2009, of 12 August, which transposes into the domestic legal order Council Directive 2008/09/EC, of 12 February.

This involves a jurisdictional appraisal with a reach that depends inevitably on the circumstances of facts attendant to the specific case. In certain situations, the discretion of the tax administration departments is reduced to nothing, enabling them only to rubber stamp a certain kind of solution.

iii Claimants

The general rule on standing is that any person who has a legally protected interest has standing to take part in administrative and judicial tax proceedings.

In particular, we emphasise the standing of the affected taxpayer to file a tax claim or a judicial tax claim against tax acts, irrespective of the initiative of the taxable person and the standing of the tax substitute to file a tax claim or a judicial tax claim against withholding assessment acts that, although still disputed by the tax administration, has been embraced by tax court jurisprudence.

In terms of stamp duty, when the burden of the tax falls on someone other than the taxable person, the standing of the former to act must also be understood, ultimately in conjunction with the taxable person, with the objective of guaranteeing and ensuring the refund of any undue tax.

VI COSTS

Administrative proceedings, as is the case with tax claims, are not subject to fees or rates. The only exception concerns an increase of up to 5 per cent of the tax base that is the subject matter of the application when there is no reasonable foundation for the complaint.

Actions in the judicial courts imply the payment of a court fee that represents, in average approximate terms, between 3 per cent of the financial value of the action for the amounts of inferior value and 1.2 per cent for the higher amounts.

In tax arbitration, the fees to be paid represent 5 per cent in average approximate terms of the financial value of the action for the amounts of inferior value and 1.3 per cent for the higher amounts.

In the case of success in either judicial or arbitration proceedings, the fee paid is recoverable. In judicial proceedings, the refund is requested from the losing party (tax administration), while in arbitration proceedings it is assured by the arbitration centre itself.

VII ALTERNATIVE DISPUTE RESOLUTION

Arbitration is an alternative means of tax dispute resolution. Its main characteristic is its swiftness: the time limit for delivering the arbitral award after a tax arbitration court is constituted is six months. Its greatest limitation, inherent to its very nature, is that there is no ordinary appeal from an arbitral award. Appeals are only allowed on relatively narrow assumptions. Even so, the fact of the admissibility of a request for a preliminary ruling to the Court of Justice of the European Union (CJEU) being unquestionable today confers a relative elasticity on arbitration proceedings that, along with their swiftness, has seen recourse to this mechanism grow steadily over the years.

VIII ANTI-AVOIDANCE

Since 1995, specific anti-abuse provisions on transfer pricing, payments to non-resident entities subject to a more favourable tax system and undercapitalisation have been inserted in the Corporate Income Tax Code. Taxpayer transactions that hint at tax evasion are also combated by the general anti-abuse clause, which implies a devaluation of the sought-after tax consequences in legal and tax terms. There is also a mechanism that seeks to combat the same phenomenon *ex ante* by way of provisions governing duties of communication, information and clarification to the tax administration by tax consultants and financial entities of pre-fabricated 'aggressive' tax planning schemes to offer clients that seek to obtain a tax advantage.

As regards to Base Erosion Profit Shifting (BEPS) policies, Portugal has not adopted legislation as a direct consequence of key global BEPS action points but has over the past years adopted legislation that is already aligned to specific action points of the BEPS action plan.

For example, Portugal has implemented measures that may be considered BEPS-aligned measures, such as: (1) anti-hybrid clause for inbound dividends; (2) interest barrier rules; (3) the General Anti-Avoidance Rule (GAAR) complemented with Specific Anti-Avoidance Rule (SAAR) in areas of dividends and reorganisations; (4) strengthening of CFC rules; and (5) disclosure rules for aggressive tax planning arrangements that may be considered as BEPS-aligned measures.

The 2013 Budget Law already replaced the old thin capitalisation rules (a 2:1 debt-to-equity ratio applicable only to non-EU-resident lenders) with an interest barrier rule that limits the deductibility of net financial expenses (regardless of type lender) to the higher of €1 million or 30 per cent of adjusted EBITDA. The interest barrier rules also provide for a denied interest deduction and unused EBITDA carry-forward clauses.

This measure included a phase-in-provision according to which the EBITDA limit would be 70 per cent in 2013 and would decrease 10 basis points per year until reaching 30 per cent from 2017. It may be expected with the gradual increase of the number of companies covered by this regime that some of the issues raised in Action 4 of the BEPS Action Plan may well be revisited.

More recently, Budget Law for 2016 includes a specific measure for the implementation of CbC reporting and an authorisation to adjust the Portuguese Patent Box regime to the nexus principle.

These changes to the patent box are designed to ensure that the benefits of the Portuguese tax regime are only available where the research and development expenditure required to develop the IP also took place in Portugal.

In the meantime, Portugal has also implemented Directive 2015/121, which establishes an anti-abuse rule for the purposes of transposition of the Parent–Subsidiary Directive.

The Budget Law for 2016 implemented CbC reporting. The new CbC reporting obligations were effective for fiscal years starting 1 January 2016 and generally applies to Portuguese tax resident entities which are head of a group, to the extent the consolidated group's net turnover in the immediately preceding fiscal year exceeds €750 million.

The CbC reporting applies provided the Portuguese-resident entity head of a group is not at the same time dependent on any other entity, whether they are a Portuguese resident or not, that is obliged to submit to a CbC report.

In addition ,the CbC reporting rules also apply to Portuguese entities which are, directly or indirectly held by a non-Portuguese resident head entity when any of the following circumstances is met: (1) the Portuguese resident entity has been appointed by its non-resident parent entity to prepare the CbC reporting; (2) the country in which the entity is resident has not established CbC reporting obligations in similar terms to Portugal; and (3) the country in which the head entity is resident has not signed an automatic exchange information agreement with Portugal.

The BEPS initiative has not yet specifically affected tax audits but is likely to be raised as international exposure of BEPS action points increases.

In practise, we see growing concern in tax audits towards specific cross-border issues such as transfer pricing, restructuring operations and interest deductibility issues under increased monitoring under tax audits.

Another concern that we may expect in the future to be raised in tax audits will be points related to the definition of permanent establishment (specially in more decentralised models) as well as of economic substance (i.e., when does a company have sufficient local substance to manage its assets, operations and associated risks).

IX DOUBLE TAXATION TREATIES

Portugal has a network of 77 double taxation treaties (DTTs), approximately nine of which have yet to come into force. In general, the provisions of the DTTs follow the provisions of the OECD Model Convention. Apart from the DTTs, EU treaties and directives are also of undeniable importance, particularly in harmonisation matters.

The Portuguese legislation is adapted to the relevant provisions in international tax law and EU tax law, and the tax administration supports the more recent positions of the CJEU, although disputes still persist in which the interpretation of treaties and directives, or the conformity of national provisions with the international and EU rules that prevail over them, is argued. This type of dispute can and is often the subject of a request for a preliminary ruling from the CJEU.

In Portugal, there are template forms designed, specifically, to prove satisfaction of the requirements on which the application of DTTs is dependent, which must be certified by the competent tax authorities of the state of residence or accompanied by a document issued by the competent authorities of the relevant state of residence attesting to residence in that state for tax purposes during the period in question and being liable to tax therein. A significant number of disputes also persist in the judicial courts in which the need to obtain and present these forms is contested, which are not unrelated to the difficulties in having the beneficial owners certified in some states of residence.

For the purposes of VAT and without prejudice to EU harmonisation in this field, it must be pointed out that the right to deduction or refund of the excess tax paid or passed on may only be exercised for up to four years after the right to the deduction or the overpayment of the tax, respectively, came into being. In addition, for the purposes of putting tax affairs in order, the law has established a number of requirements and time limits that must be followed for the taxpayer to be able to make the relevant corrections.

X AREAS OF FOCUS

A new trend in recent years has been the application of a general anti-abuse clause. Companies with restructuring operations and shareholdings in non-resident entities may be targets.

However, despite the intensified use of this measure, the judicial courts have not yet fleshed out or sufficiently framed the concept of tax abuse owing to the particularities of the specific cases.

The preferred actions of tax inspectors are also VAT refunds and fraud in intra-community acquisitions (carousel fraud), while the financial sector, construction sector and real estate sector usually fly under the tax administration's radar. Given the constraints of the state budget and the imperative need to raise revenue, large taxpayers are one of the main, and openly targeted, focus points.

XI OUTLOOK AND CONCLUSIONS

Over the years, the efficiency of the tax machine has been enhanced, specifically with regard to the mechanisms for collecting taxes, dictated of course by the needs for more tax revenue for the state. This circumstance, whether owing to its dynamics or the exponential increase in tax acts, obviously empowers situations of illegality in the actions of the tax administration. This is increasingly more common today, whether with regard to collections, or to tax inspections and the resulting tax assessments. In addition, a number of taxes have been created in the past six years – largely targeting exclusively specific areas of activity[13] – or changes made to preexisting ones, the legality, and sometimes, the constitutionality, of which are still under scrutiny by the judicial courts. In this context, the need for speedy and efficient responses in contentious situations has become imperative. Some legal advances have been made through the creation of tax arbitration, sporadic changes in the administrative and judicial tax procedure codes, and even through intervention in the judiciary system. However, tax litigation is still a long way from a suitable response to illegal actions on the part of the tax administration, whether because of the need to create more efficient administrative and judicial tax procedure mechanisms, or by enhancing the response capacity of the judicial courts through the allocation of more human and material resources.

13 Banking sector contribution, extraordinary energy sector contribution, pharmaceutical industry contribution, tax on drinks with added sugar or other sweeteners, etc.

Chapter 28

RUSSIA

Yana Proskurina and Maria Mikhaylova[1]

I INTRODUCTION

Tax disputes are very common in Russia. All large or medium-sized companies have been involved in tax litigation with the authorities at least once, and many companies are involved in tax disputes on a regular basis. For many years now, Russian companies have frequently resorted to litigation to contest tax matters, as the courts have proven to be the most effective venue for resolving tax disputes. Moreover, litigation is generally quite quick, as it usually takes only nine months to a year to pursue a lawsuit through all three judicial instances (and most claims do pass through all three). However, over the last few years, we have seen a number of changes to this trend. Judges have become more conservative and tend to take up a pro-budget position. At the same time, disputes are becoming increasingly complex, resulting in a smaller number of disputes considered by courts and making it more difficult for taxpayers to win in court. Furthermore, owing to the turbulent law enforcement practice in the last two years, it is difficult to predict an outcome of the litigation.

A few years ago, the proliferation of tax-related court cases prompted efforts to shift disputes towards the pre-litigation stage. Since a portion of relatively simple or standard disputes are now being settled in pre-litigation, the courts have started hearing fewer but more complex cases. This trend has been evident for the past four to five years.

Accordingly, the percentage of cases won by taxpayers has fallen to some extent: prior to 2010, the percentage of cases won was 70 per cent or higher; it currently stands at 15 to 20 per cent. Nevertheless, taxpayers continue to apply to court, seeking the settlement of a dispute and clarification on a matter in dispute.

Most cases arise as the result of a tax audit. Ninety-nine per cent of field tax audits in Russia result in additional tax levies. Recently, many tax audits have resulted in additional levies of under 25 million roubles, and in such cases taxpayers often prefer not to contest the additional amounts assessed. If, however, the amount of additional tax assessed is significant and the taxpayer has solid arguments in its favour, then a formal dispute usually arises.

In terms of litigation costs, the state duty is rather small (in most cases, 3,000 roubles to appeal a case, although sometimes this can rise to as much as 200,000 roubles in property claims). Attorneys' fees are largely dependent on the complexity of the case, the existence of relevant case law, the number of charges in the case and the volume of documents to be examined (in Russian tax disputes, documents play a very important role). Many companies

1 Yana Proskurina is an ex-partner and Maria Mikhaylova is a director at PwC Legal.

offer support in resolving tax disputes, representing a very broad range in terms of pricing and quality. These include the Big Four firms, international law firms, and large and small local companies.

II COMMENCING DISPUTES

There are a large number of ambiguities and disputed issues in Russian tax law.

Unfortunately, one cannot obtain an advance clearance or ruling in Russia; accordingly, it is not always possible to avert a dispute in ambiguous cases. Taxpayers can request the Ministry of Finance (MinFin) to give clarification on ambiguous pieces of legislation. However, although it provides exemptions from penalties and fines, MinFin clarification letters in response to such requests are non-binding. Furthermore, MinFin can provide clarification on interpreting the law but does not respond to information requests concerning specific taxpayer situations. Nor does it go into detail on how a specific deal or transaction by a taxpayer should be interpreted for tax purposes.

The only exception is the possibility of concluding a pricing agreement. This option became available to taxpayers in Russia in 2012, when new transfer pricing (TP) rules were introduced. The first pricing agreement was concluded in November 2012, and eight such agreements have been concluded to date. Nevertheless, this option has not become workable in practice because of the unwillingness of tax authorities to conclude such agreements.

Given this inability to obtain any kind of binding clarification, taxpayers must complete their tax returns based on their own understanding of the tax law. If a taxpayer makes an error in completing its return and discovers this error itself, it is entitled to file an adjusted return. There is no deadline for filing adjusted tax returns. However, if because of an error a taxpayer becomes entitled to a refund of overpaid tax, such a refund can be made only if a relevant request is filed with the tax authorities within three years of the tax overpayment. The tax authorities verify that taxpayers have a correct understanding of the tax law during tax audits.

Most disputes initiated by taxpayers in Russia originate either from the results of a tax audit or from a taxpayer's request for a refund of certain tax amounts (refund of overpaid or overcharged taxes, VAT refunds). The following should be considered regarding disputes related to tax audit results.

There are three types of tax audit in Russia:

a a desk audit, which is generally a formal review of a tax return conducted within three months of its filing. The tax authorities have only limited rights during this period. As such, disputes resulting from desk audits are rather rare, except for certain categories (e.g., VAT refunds, confirmations of tax benefits and certain other cases);

b a special TP audit, which verifies the accuracy of TP calculations. This type of audit was introduced in 2012 under the new TP legislation. The first TP audits were initiated in summer 2014, but to date just a few decisions have been made in these cases, and no court case has been finished yet; and

c field audits, which are the predominant type of audit. The tax authorities can go back three years preceding the year an audit is initiated. It is a full-scope audit. Since 99 per cent of field tax audits result in additional taxes being charged, disputes are very common. Disputes based on field tax audits are usually the largest and most complex.

If the tax authorities discover errors during any type of audit, they will issue a certificate describing the violations committed by the taxpayer. The taxpayer must then generally file its objections to this certificate within one month (20 business days for special TP audits). Objections are considered by the same tax authority, in the taxpayer's presence; the tax office could conduct additional control measurers (it is optional) and then issues a final resolution on the audit after reviewing all objections.

If the taxpayer disagrees with the final resolution, it can file an administrative appeal to a higher tax authority within one month. This appeal constitutes a mandatory pre-litigation stage. On average, the higher tax authority takes one to two-and-a-half months to review an appeal. In most cases, the higher tax authority upholds the resolution of the lower authority. However, recently a positive trend has emerged of the tax authorities being more objective when hearing appeals and more frequently supporting the taxpayer's position. Once a taxpayer has filed such an administrative appeal with a higher tax authority, it will then have no liability to pay the additionally assessed tax until its appeal has been heard. If the taxpayer fails to file an appeal within the one-month time frame, however, then the tax authority's decision will take effect and the additionally assessed tax may be collected from the taxpayer. However, the taxpayer can still file an appeal with the higher tax authority within one year of the date on which the decision was adopted, to comply with the procedure for a mandatory pre-litigation appeal.

A taxpayer can bring its case to court within three months of obtaining an unfavourable ruling from a higher tax authority. To initiate litigation, a taxpayer files a motion to dismiss the ruling with the court of first instance. The taxpayer may not go to court, however, if the pre-litigation procedure has not been followed.

Another major group of disputes relate to receiving cash funds from the state budget. The most common types are disputes related to refunding or offsetting overpaid tax; refunding or offsetting overcharged tax; and VAT recovery.

Usually, these disputes arise in two instances: the tax authority resolves to deny a refund or offset of tax (resolution to deny VAT recovery); or the tax authority takes no action and does not issue a resolution on refunding or offsetting tax, although it is obligated to refund and offset the relevant tax (refund VAT).

In the first instance, taxpayers can appeal against the tax authority's resolution denying the refund or offset of tax (denying VAT recovery). To appeal against such resolutions, taxpayers must first file with the higher tax authority (within one year of obtaining the resolution), and only then with the court (within three months of obtaining the higher tax authority's resolution).

In the second instance, taxpayers can file a complaint about the tax authorities' inaction with the higher tax authority (within one year; however, there is some uncertainty regarding when exactly the one-year period should begin – in most cases, in practice the period begins from the tax authorities' deadline for adopting a relevant resolution), and only then file with a court (within three months of obtaining the higher tax authority's resolution).

In either case, when filing an appeal with a court, taxpayers often file a second (property) claim: that is, in addition to filing a motion to dismiss a relevant resolution (complaint about inaction), taxpayers also ask the court to obligate the tax authority to adopt a resolution on refunding (offsetting) the tax. Property claims can be filed within three years of the date of tax overpayment or overcharging of tax. The second claim simplifies the subsequent enforcement of the court's decision. Property claims are also filed independently (e.g., when the deadline for filing the first (non-property) claim is missed, or if a taxpayer is seeking to avoid the pre-litigation procedure). Property claims have some procedural specifics; in such situations, courts may take differing approaches to the legality of filing a property claim.

In addition to the disputes described above (based on audit results and to obtain tax amounts from the budget), taxpayers may initiate other disputes. Taxpayers can appeal against other unlawful non-regulatory acts, actions and omissions of the tax authorities (including requests for payments, resolutions to recover, inaction on issuing a resolution). The appeal procedure is on the whole identical to that for appealing a tax audit decision. First, one must file an appeal with the higher tax authority within one year, and then file with a court within three months of the date one receives the higher tax authority's decision.

Another type of dispute involves appealing against regulatory acts. In the case of tax disputes, if the law is ambiguous, taxpayers or the tax authorities can request clarification letters from MinFin, or MinFin can provide clarifications independently. In certain cases, clarification letters are binding on the tax authorities. If such letters violate taxpayers' rights, taxpayers can appeal against them as if they were regulatory acts. In this case, appeals should be filed with the Russian Federation Supreme Court (SC) (the highest judicial instance for civil cases and, since 6 August 2014, for commercial and tax cases as well).

Taxpayers can sometimes purposefully instigate a tax dispute. This could be necessary to test a specific disputable position if the taxpayer is not certain its position is correct, and is seeking to verify its validity in court without waiting for a field tax audit (which could occur after two to three years), and further does not want to assume the risk of liability. To instigate a dispute, the taxpayer files tax returns and purposefully does not claim any tax benefit (expenses, benefits, etc.), and pays the entire tax amount listed in the returns. After a certain period, the taxpayer then files adjusted returns in which it additionally claims the relevant tax benefit (expenses, benefits, etc.) that it did not claim before, and requests a refund of the overpaid tax amount. Since the tax authorities are not eager to refund taxes, they would most probably search for reasons not to refund the tax, issue a resolution to deny the tax refund or simply do nothing.

The taxpayer can appeal against a resolution to deny a refund of overpaid tax or the inaction of the tax authorities. Such a dispute could result in the setting of an interesting judicial precedent that is important for the taxpayer (although Russia is not formally a common law country, the courts do seek to establish uniform judicial practice, and the positions of the highest judicial instances effectively serve as virtual precedents). If the case is won, the taxpayer can then as far as it is possible safely use the relevant tax benefit in future. If the case is lost, the taxpayer can avoid penalties and clarify the law more quickly than if the dispute had only arisen during a field tax audit. However, the tax authorities do not always respond as expected to such an instigation, and may refund overpaid tax without a dispute only to challenge the claimed benefit or expense at a later date during a field tax audit.

All of the above by and large applies for both legal entities and individuals; however, there are some differences:

a legal entities and entrepreneurs litigate in arbitrazh courts, whereas individuals litigate in general jurisdiction courts (see Section III); and

b legal entities and entrepreneurs litigate extensively, and initiate most tax disputes, while individuals litigate much less in disputes, and such disputes are largely initiated by the tax authorities. This is because the tax authorities can levy additional taxes on legal entities and entrepreneurs using the pre-litigation procedure, but on individuals only through litigation. Thus, individuals need not initiate disputes on their own.

The above-mentioned disputes are initiated by taxpayers. Disputes initiated by the tax authorities include disputes concerning the collection of taxes, penalties and fees when they cannot be collected out of court (e.g., from individuals, and when a relevant statute of limitations is missed for legal entities). The tax authorities can also initiate some other types of disputes (e.g., to recover damages caused to the state due to a bank unlawfully debiting a taxpayer's account after receiving a resolution by the tax authorities to suspend transactions, which prevents the tax authorities from collecting arrears, overdue penalties and fines as provided by the Tax Code), but they are infrequent and of a rather specific nature.

III THE COURTS AND TRIBUNALS

As noted in Section II, based on tax audit results, the tax authorities issue a certificate against which taxpayers can appeal. The final audit resolution is issued only after the taxpayer's counterarguments are heard. If a taxpayer has not been given a chance to appeal, or the proper procedure was not been observed when its counterarguments were heard, this constitutes unconditional grounds for revoking the tax authorities' audit resolution.

Once the tax authorities issue their final audit resolution, they cannot amend it in any way that would put the taxpayer at a disadvantage, but may amend it to the taxpayer's advantage (e.g., reduce the amount of additional tax assessed or cancel it altogether).

If a taxpayer disagrees with the resolution, it must appeal to the higher tax authority, which represents the obligatory pre-litigation stage. The same applies to appeals of any other non-regulatory resolutions by the tax authorities, or their actions or omissions. After observing the mandatory pre-litigation procedure, taxpayers can take their cases to court.

Tax disputes between the tax authorities and legal entities and entrepreneurs are heard in arbitrazh courts. The arbitrazh court system consists of three tiers. The first instance tier is usually a court at the level of one of Russia's 85 constituent regions. Appeals against resolutions of a first instance court can be made to the appellate instance (there are 21 appellate courts). Appeals against resolutions of an appellate court can be made to the cassation instance (there are 10 cassation courts). Regular tax disputes go through these three tiers.

From 6 August 2014, the fourth ('second' cassation) and the fifth (supervisory) instance are in the SC, which is now the highest judicial instance for hearing tax disputes (previously it was the Supreme Arbitrazh Court (SAC), which was disbanded on 6 August 2014).

In most cases, to defend its position a corporate taxpayer files a claim with the arbitrazh court of first instance (except for claims contesting regulatory acts issued by state bodies, which are filed directly with the SC). If the tax authorities want to initiate a tax dispute against a legal entity or an entrepreneur, they also file with the arbitrazh court of first instance. The filing is made in the defendant's local court.

The case is considered on its merits by a single judge in the court of first instance. In some Russian constituent regions (e.g., Moscow, St Petersburg), judges specialise in tax litigation. In other constituent regions, there is no tax specialisation (tax specialisation is not mandatory for court judges). Consideration of a dispute starts with a preliminary court hearing. At the preliminary hearing, parties present their key evidence and argue their positions, after which the court starts the main session. A typical case would have one preliminary hearing and two to four main sessions. It takes three to five months for a dispute to progress through the first instance, but this process may take longer (up to a year and even longer) for complicated disputes. Disputes are usually based on an in-depth analysis of documents (evidence), which are the primary evidence (legal proceedings in general are very document-intensive). Examinations of witnesses and experts are not often conducted during court hearings. However, recently such examinations have begun to occur more frequently, reflecting the fact that tax disputes are becoming increasingly complex. The burden of proof in disputes on invalidating non-regulatory acts of the tax authorities lies with the latter (i.e., the tax authorities must prove the validity of their decisions). In practice, however, taxpayers must establish the legitimacy of their position and the illegitimacy of the tax authorities' position. Consideration of a case in the first instance concludes with the issuing of a relevant court decision.

The losing party can appeal against the decision to the appellate court. This must be done within one month of the date the first instance court's decision was issued. If an appeal is filed, the relevant first instance court decision does not take effect until the appellate instance court has ruled on the case. A three-judge panel hears tax disputes at the appellate instance. A dispute is usually considered during a single hearing. Additional evidence cannot generally be presented to the appellate court, except when it could not be presented to the court of first instance. The appellate court considers a case within one to two months after the appeal is filed. Based on the results, a resolution is then issued.

The losing party can appeal against the appellate court decision to the cassation instance. The relevant cassation appeal must be filed within two months of the date that the full appellate resolution is issued. A three-judge panel considers cases at the cassation instance. The cassation court reviews the correctness of the legal provisions applied by the lower courts, but does not check the facts of the case (although in practice, the facts of the case are also sometimes reviewed). The cassation court usually considers a case during a single hearing that takes place within one to two months of the date the cassation appeal was filed. If the claimant complies with the filing deadlines and certain procedures, both the appellate and cassation courts must accept the appeal for review and consider it.

Should the losing party disagree with the court resolutions, it can take its case to the SC (previously the SAC).

The latest amendments to Russian law have established a new two-stage procedure for appealing arbitrazh court rulings to the supreme judicial authority: in the second cassation instance, and in accordance with a supervisory procedure.

Effective August 2014, a cassation appeal to the Judicial Board of the Russian Supreme Court (SC Judicial Board) represents the fourth level for hearing tax disputes.

A cassation appeal may be filed to the SC Judicial Board within two months of the date on which the latest ruling subject to appeal came into force. Such a cassation appeal is considered individually on a preliminary basis by an SC judge, who decides whether to escalate the case to the SC Judicial Board. The SC judge issues a relevant ruling within two months (without a writ of *certiorari*) or three months (if a writ of *certiorari* was issued).

Thus, the SC Judicial Board does not consider all appeals filed by taxpayers or the tax authorities of decisions issued by the lower courts. A case is sent for reconsideration only if an SC judge identifies grounds for such a rehearing at the preliminary stage.

If a case goes to the SC Judicial Board for consideration, the Board must consider its merits within two months. Upon considering a cassation appeal, the Board issues a ruling on the case, which comes into force from the date it is issued.

Only a significant breach of substantive or procedural law by arbitrazh courts may serve as grounds for the SC Judicial Board to invalidate the rulings of such courts during a second cassation procedure.

A ruling issued by the SC Judicial Board after considering a second cassation appeal may be appealed within three months in accordance with the supervisory procedure of the SC Presidium.

A supervisory appeal is considered individually by an SC judge within two months (without a writ of *certiorari*) or three months (if a writ of *certiorari* was issued). Following that, the judge issues an individual judgement on whether the case should be escalated to the SC Presidium, issuing a relevant ruling. If a case is escalated to the SC Presidium, the latter considers the merits of the supervisory appeal within two months.

Any breach in the uniformity of the courts' application and interpretation of legislative provisions, civil and political rights, and the rights and legitimate interests of the general public and other public interests, may serve as grounds for invalidating previously-issued SC Presidium rulings.

Following its consideration of the case, the SC Presidium issues a resolution that comes into force immediately and may not be appealed.

The SC Chair or his or her deputy may, based on an appeal filed by interested parties, make recommendations to the SC Presidium for reconsidering judicial resolutions under the supervisory procedure 'for the purposes of eliminating fundamental breaches of substantive and/or procedural law'. Such appeals may be filed within four months of the date on which the appealed court resolution came into force.

In addition, the SC Chair or his or her deputy may, at their own discretion, invalidate the rulings that decline to escalate a cassation appeal to the SC Judicial Board; decline to escalate a supervisory appeal to the SC Presidium; and reinstate a missed deadline for filing a second cassation appeal.

The number of tax disputes considered by courts as part of a second cassation is negligibly small and accounts for 0.01 per cent of filed appeals. Thus, just handful of cases are appealed at the second cassation level. Although Russia is not formally a common law country, SC Judicial Board rulings, SC Presidium resolutions and SAC Presidium resolutions effectively serve as judicial precedents. Thus, if the SC Judicial Board, SC Presidium or SAC Presidium have expressed their opinion on a given issue, the lower courts will most likely take a similar position in cases concerning this issue.

Tax disputes with individuals are considered by general jurisdiction courts. Disputes are usually initiated by the tax authorities, since collecting taxes, penalties and fines from individuals is only possible through litigation.

To collect taxes from an individual, the tax authorities file an application for a court order with a justice of the peace, who then issues the relevant court order and sends it to the individual's address. The individual can appeal against the court order within 10 days. If the individual fails to make such appeal, the court order is sent to the tax authorities or to a bailiff for execution. If the individual then sends his or her counterarguments to the justice of the peace, the latter must recall the order, and the tax authorities must bring the case to a general jurisdiction court under the ordinary procedure.

The application is filed with a district court. An appeal against the decision of a district court that has not taken effect can be made to the appellate court within one month from the date of the decision. The appeal must be considered. Appeals against district court resolutions are considered by the supreme court of the relevant Russian constituent region. If a losing party disagrees with the appellate court decision, an appeal can be filed with the cassation court within six months from the date of the appellate court decision. A judge refers the appeal to the cassation court only when there are grounds for reviewing the court decision. Appeals are considered by the presidium of the relevant constituent region's supreme court.

If a taxpayer has exhausted all other possible options for defending its rights in a tax dispute, and there are grounds to believe that in considering the dispute legal provisions or interpretations were used that violate general constitutional principles, the taxpayer can bring its case to the Constitutional Court. Such an action would, however, be the exception. Nevertheless, there have been cases where a taxpayer has succeeded in upholding his or her interests only through taking his or her case to the Constitutional Court.

Interpretations of regulations given by the Constitutional Court are generally binding, and must be applied by all state authorities and other participants in legal relationships.

IV PENALTIES AND REMEDIES

Under the Tax Code, in certain cases taxpayers and tax agents may be subject to tax liability. Liability has been established, *inter alia*, for:

a non-payment of tax in an amount of 20 per cent or 40 per cent in the case of a repeat offence or intentional offence;
b failure to file tax returns as a percentage of the tax amount due that was not paid under the returns;
c failure to submit documents to the tax authorities (200 roubles per document);
d doing business without registering with the tax authorities as a percentage of the income earned from such business activity; and
e failure to perform the responsibilities of a tax agent in an amount of 20 per cent of the amount of tax not withheld.

Penalties can be collected out of court from corporate taxpayers and sole proprietors, but can be collected from individuals only through court proceedings. The statute of limitations is three years after the tax period when the offence took place or from the date of the offence. Once the statute of limitations expires, the taxpayer cannot be held liable for the offence.

The Tax Code provides grounds for taxpayers to be exempted from liability, specifically by following the clarifications of an authorised government body. Taxpayers can request clarifications on tax law from MinFin and in certain cases from the tax authorities. Although such clarifications are not binding, they can exempt the taxpayer from penalties if he or she has complied with their guidelines. *Ad hoc* clarifications exempt taxpayers from penalties. If clarifications are provided to another taxpayer, but are forwarded by MinFin to the tax authorities and are entered into information databases, they can also serve as grounds for avoiding penalties.

The most widespread penalty is for failure to pay taxes (the penalty amounts to 20 per cent of the additionally charged tax). However, this penalty cannot be applied if the taxpayer overpaid in an amount exceeding the amount of additional tax charged. The overpayment should coincide in time with the failure to pay the tax, and exist until a relevant resolution is issued by the tax authorities. In this case, the budget does not incur any losses, and thus there are no grounds for holding the taxpayer liable. In practice, taxpayers often maintain a certain amount of overpayment to the budget without claiming it back as a means of protecting themselves from penalties.

In addition, the late payment of tax results in additional fees calculated as a percentage of the unpaid tax amount. Officially, this fee is not considered a type of liability. Rather, it is a compensatory payment charged for using the funds.

Fines are very common. Typically, in the case of a violation where the taxpayer is charged additional tax, it will also be charged an additional fee. The taxpayer will also be held liable for non-payment of tax at a rate of 20 per cent of the unpaid amount. Recently, tax authorities have increasingly held taxpayers liable for penalties at the rate of 40 per cent. Compliance with the clarifications of an authorised body or overpayment can provide exemption from additional fines.

If a legal entity is subject to a tax liability, penalties are charged to the entity itself and not to its corporate officers. Corporate officers can be held administratively liable under the Code of Administrative Offences but not under the Tax Code. Penalties have been established for corporate officers for violating filing deadlines, failing to provide information for tax control purposes, failing to meet the deadline for registering with the tax authorities and in certain other cases. Penalty amounts charged to corporate officers for such violations generally range from 100 to 3,000 roubles.

In addition to tax liability, tax evasion can result in criminal liability. Only individuals can be subject to criminal liability; legal entities cannot be held criminally liable. If a legal entity fails to pay taxes, its general director and chief accountant, along with other officers in certain cases, can be held liable.

The minimum unpaid tax amount prompting the application of criminal liability is 5 million roubles for legal entities and 900,000 roubles for individuals. The statute of limitations for such cases is six or 10 years, depending on the amount of unpaid tax.

The following must be considered. In 2014, the procedure for bringing criminal charges in relation to tax crimes changed. There is now no need to obtain audit materials from the tax authorities to bring such charges; law enforcement agencies may uncover and investigate instances of non-payment of taxes independently. A positive law provision here is that if a taxpayer voluntarily pays the additionally charged tax, the tax authorities are not obligated to refer the case to the relevant bodies for investigating tax offences. Even if a case is opened, the case must be closed if the additional tax is paid and it is the violator's first such offence.

Criminal liability also applies to tax agents for failure to withhold tax, or concealment of funds to be used to pay taxes.

There is no civil liability for non-payment of taxes. Until recently, any tax liability (including payment of additionally assessed taxes, fines and late payment interest, if any) should be borne by a taxpayer (in its own name and by its own funds) but not by any other third parties (i.e., any other companies or individuals). However, in 2017, the tax legislation was amended to allow another person to pay a tax on behalf of a taxpayer. Some amendments were also made to the bankruptcy laws. The revised version stipulates that if a corporate debtor has insufficient assets to pay taxes and repay other debts, the payables can be collected from persons who actually control such a taxpayer and are its beneficiary.

As a result, the number of cases on collection of corporate taxes from other persons has significantly increased at courts.

V TAX CLAIMS

i Recovering overpaid tax

In Russia, companies are entitled to refunds (or offsets against future payments) of overpaid or overcharged tax. Overpaid tax arises because of voluntary erroneous overpayment, while overcharged tax arises because of erroneous compulsory collection. A company is eligible for a tax refund only if it has no arrears for the relevant (or any other) tax. An offset against future payments can be made for this or any other tax of the same type; overpayments of federal taxes can be offset against federal taxes, but not against regional or local taxes.

To obtain a refund for overpaid taxes, a company must provide documents confirming that the taxes were actually overpaid. The company must also apply for a refund or offset of the overpaid tax within three years after the overpayment was made. If the three-year deadline to submit an application for a tax refund or offset is missed, the company can no longer claim it.

If the tax authorities fail to offset or refund the overpaid tax on time, the taxpayer can apply to a higher tax authority to invalidate the omission of the lower tax authority, and then to a court to invalidate the omission and compel the tax authorities to refund the overpaid tax amount. If the tax authorities unlawfully deny an offset or refund of overpaid tax, an appeal against such a denial can be made to a higher tax authority and then to a court. A motion filed in court can also contain a property claim for a tax refund. Interest is charged on the overpaid tax.

An overpayment can also arise because of an error during tax itemisation or because of adjusted returns filed by a company for prior periods claiming additional tax benefits. In such cases, the adjusted tax returns can be reviewed during a desk audit or a regular field audit, or a follow-up field audit if the initial audit was performed before the adjusted tax returns were filed.

To recover the overpaid tax, the company must file an application with the tax authorities within one month of the overpaid tax being collected, or with a court within three years of the overpaid tax being collected.

ii Challenging administrative decisions

Appeals of tax authority decisions are very common. In practice, appeals against non-regulatory certificates of the tax authorities can be made both on formal grounds (when the tax authorities fail to comply with procedures, deadlines and formal requirements as stipulated in the Tax Code) and on the merits.

Appeals against some certificates issued by the tax authorities can only be made on formal grounds. For example, if the tax authorities issue a resolution on charging additional tax, and based on this resolution a tax payment notice is generated, an appeal against the notice can be made only on formal grounds (e.g., violation of the deadline for issuing the notice, required information missing in the notice). However, in appealing against the notice, the taxpayer cannot appeal against additional taxes being charged on the merits. To appeal against the grounds for additional tax being charged, the taxpayer must dispute the initial resolution, stating all circumstances that resulted in additional taxes.

When appealing against a tax authority resolution, taxpayers can cite its inconsistency with Russian tax law, international treaties of the Russian Federation and the Constitution.

If any provision of Russian tax law is found to be unconstitutional, it becomes invalid retroactively; in adopting resolutions, the tax authorities cannot apply unconstitutional legal provisions or apply an interpretation of tax law provisions that differs from the Constitutional Court's interpretation.

When appealing against non-regulatory certificates, it is important to remember that the pre-litigation stage is mandatory, and a non-compliant taxpayer loses its right to litigate.

The deadline for appealing against a non-regulatory resolution to a higher tax authority is one year from the date the relevant resolution was issued, and to a court it is three months from the date of the higher tax authority's decision.

iii Claimants

Court claims are filed by entities whose rights have been violated.

Appeals against non-regulatory tax authority certificates can be made by the entities that the given certificate concerns (i.e., the entity charged under the certificate with additional liability).

An application for a refund of overpaid tax can be filed by the taxpayer who overpaid the tax. Payment of taxes must be made by the taxpayer independently (using its own funds); no third-party tax payments are allowed. As such, if a company (Company A) makes a tax payment for another company (Company B), Company A incurs excessive tax that it can refund, while Company B would still have taxes due, which it must pay independently.

If a tax agent withheld and paid an excessive tax amount, the application to refund the overpaid tax can be filed by the taxpayer or by the tax agent. If overcharged tax is refunded to the tax agent, it must repay this tax to the taxpayer.

If a company remitted excessive VAT to its contractor, the company can demand the excessive VAT amount from the contractor. For example, Company A provides services to Company B and charges 18 per cent VAT on such services. Company B pays VAT to Company A in full and claims a refund of the VAT paid. The tax authorities audit Company B, and indicate that the services provided were subject to zero per cent tax; thus, Company B should not have paid VAT to Company A. Accordingly, Company B has invalidly claimed VAT as being exempt.

Company B loses its litigated dispute with the tax authorities. The court confirms that Company B could not have exempted VAT, as the services acquired were subject to zero per cent tax, and Company B should not have paid VAT to Company A at the 18 per cent rate. Company B files a claim against Company A for repayment of improper enrichment (excessively paid VAT). The court sustains Company B's claim and orders Company A to repay the excessive VAT amount. In this situation, Company A could submit an adjusted VAT return applying the zero per cent rate to the disputed services (provided the relevant documents are available) and not the 18 per cent rate, and petition the tax authorities for repayment of the overpaid tax.

VI COSTS

The main costs that a company incurs in relation to a tax dispute are the state duty, representation and other legal expenses.

The state duty charged in tax disputes is rather low (see Section I), and is paid by the losing party.

The cost of representation and other legal expenses can be substantial, depending on the complexity of the dispute.

The law provides for charging reasonable legal expenses to the losing party in tax disputes. In practice, until recently taxpayers usually did not demand compensation for representation and other expenses. However, recently we have seen a relevant practice beginning to develop; taxpayers have started demanding compensation for legal expenses (including representation expenses) more frequently. In some cases, the courts have ordered the tax authorities to compensate rather large amounts (up to 3 million roubles), but in most cases the courts charge the losing party with negligible expenses, recognising actual expenses as unreasonable and reducing the amounts of actual expenses by five or 10 times (or more).

In certain cases, the courts have ordered the losing taxpayer to compensate expenses incurred by the tax authorities (e.g., expenses incurred by the authority's employees in travelling to the litigation venue), but such cases are infrequent.

VII ALTERNATIVE DISPUTE RESOLUTION

The main methods for resolving tax disputes in Russia are appeals to a higher tax authority or litigation. Virtually no other dispute resolution alternatives are used.

It is not possible to obtain a mandatory preliminary clarification or ruling. However, Russia's new Transfer Pricing Law, which took effect in 2012, allows for pricing agreements. During 2013, eight pricing agreements were concluded, and some more took place in the following years. Nevertheless, this tool has not become very popular because there are a lot bureaucratic obstacles to conclude such agreement.

Simultaneously with the new Transfer Pricing Law, the concept of a consolidated group of taxpayers was introduced in the Tax Code. Using consolidated groups of taxpayers prevents TP disputes regarding transactions among group members. Accordingly, the agreement establishing a consolidated group of taxpayers can also be viewed as an alternative resolution method for TP disputes. However, the current criteria for establishing consolidated groups of taxpayers are very high (e.g., aggregate assets valued over 300 billion roubles, aggregate annual taxes of over 10 billion roubles), so only a limited number of companies can use this option.

Double taxation treaties between Russia and other countries also allow for a mutual agreement procedure (MAP). In practice, the MAP is not very popular, and is used only rarely. However, because of the new TP rules, we believe this procedure could gain popularity in settling TP disputes, and that support for this procedure will grow.

In addition, in 2015, Tax Code amendments took effect, allowing taxpayers to switch to 'horizontal' tax monitoring. These changes were made following a successful trial run for this regime by several major Russian companies. Under this regime, taxpayers will regularly provide documents to the tax authorities that confirm the lawfulness of identified tax liabilities or give the tax authorities some access to their corporate IT systems. The regime eliminates the need for field tax audits (save for in exceptional cases) and allows the taxpayer to promptly obtain the tax authorities' reasoned opinion on disputed issues. It is also assumed that the new regime will help reduce the number of tax disputes. Taxpayers can switch to the new regime voluntarily if they meet the following conditions: on the date the taxpayer applies to switch to the new regime, tax accrued in the previous year must have exceeded 300 million roubles; income as per accounting records must have exceeded 3 billion roubles; and assets as per accounting records must exceed 3 billion roubles.

Applications to switch to the new regime must have been submitted by 1 July of the preceding year; in other words, based on the text of the law, it follows that the horizontal tax monitoring regime is applied officially starting from 2016.

Other alternative resolution methods for tax disputes (specifically mediation) are also being discussed, but at this time they are not legally available in Russia.

VIII ANTI-AVOIDANCE

The issue of legal and illegal tax optimisation is quite important in Russia.

Before 2017, this issue was not regulated legislatively, and for a long time the courts approached the legality or illegality of tax structuring as they saw fit, resulting in inconsistent judicial practice, ambiguity and uncertainty. In late 2006, the Plenum of the SAC adopted Resolution No. 53 on an Assessment by the Arbitrazh Courts of the Justification of Taxpayers Receiving Tax Benefits (Resolution).

The Resolution was designed to identify the key criteria for distinguishing justified from unjustified tax benefits. It specifically stipulates the presumption of good faith on the part of taxpayers. Under the Resolution, a tax benefit can be declared unjustified specifically if it is not related to real economic activity, or if the relevant transactions are not accounted for in accordance with their real economic substance, or transactions were recorded that lack any reasonable economic or other basis (business purpose).

Furthermore, receiving tax benefits is not considered to be an independent business purpose. The Resolution notes that the possibility of achieving the same economic result with a lesser tax benefit, obtained by the taxpayer through entering into other transactions either provided for or not prohibited by law, shall not be grounds for recognising the relevant tax benefit as unjustified. The Resolution lists certain criteria that could indicate an unjustified tax benefit (inability to perform certain transactions, transactions with goods that were not produced, etc.) and a range of criteria that, on their own, do not indicate an unjustified tax benefit (interrelationship of participants, agency arrangements, etc.). Another provision of the Resolution is also important: if the taxpayer did not account for transactions in accordance with their real economic substance, the court should determine the scope of the taxpayer's rights and obligations based on the real economic substance of a relevant transaction; that is, establishing that a tax benefit is unjustified and denying the taxpayer's application for this benefit or cost accounting, etc., is insufficient. It is important to establish the real tax obligation of the taxpayer based on actual relationships.

However, in June 2017, Article 54.1 was introduced in the Russian Tax Code to provide for a somewhat different approach to the possibility of reducing the tax base (accounting for expenses on transactions for tax purposes) than that set out in Resolution No. 53. Under this Article, it is important to provide evidence that there are no misstatements about business facts, taxable items to be recorded in tax and/or accounting books or disclosed in tax filings; or that:

a the primary purpose of the transaction (operation) is neither the non-payment (underpayment) nor offset (refund) of the tax amount; and

b the obligation under the transaction was discharged by a person who is a party to the contract or a person to whom the transaction obligation was assigned under contract or law (Article 54.1.2 of the Russian Tax Code).

To date, the court practice on this provision is mixed, with few cases considered. There is no consistency even in terms of the point in time from which it applies:

a to current relations, as it interprets the circumstances related to detection of an unjustified tax benefit in favour of a taxpayer (Resolution of the 13th Arbitrazh Appellate Court No. 13АП-14558/2017 of 13 September 2017 on case No. А56-28927/2016; Resolutions of the 17th Arbitrazh Appellate Court No. 17АП-11906/2017-АК of 23 October 2017 on case No. А60-12916/2017, No. 17АП-14023/2017-АК of 23 October 2017 on case No. A50-9057/2017, No. 17АП-8375/2017-АК of 23 October 2017 on case No. A50-7683/2017, No. 17АП-13676/2017-АК of 20 October 2017 on case No. A60-25288/2017 and others);or

b to tax periods after the Article came into force (19 August 2017) (Ruling of the Arbitrazh Court of the Republic of Karelia of 10 October 2017 on case No. A26-7252/2016).

On the one hand, novelties in the Russian Tax Code in the form of Article 54.1 significantly change the approach to an unjustified tax benefit. On the other hand, they do not rule out the possibility of applying the old approach by courts and tax authorities based on the position set forth in Resolution No. 53.

i Applying the Resolution No. 53: an example

In one case,[2] a company had a certain number of employees and paid unified social tax on payments made to its employees. A significant number of these employees were dismissed and subsequently hired by several smaller companies.

The company then entered into outsourcing agreements with these smaller companies. Under these agreements, the smaller companies provided employees to the company, which paid for the services provided by the smaller companies. Furthermore, the smaller companies were subject to a special tax regime and did not pay unified social tax. The tax authorities believed that the employees were transferred for the sole purpose of avoiding unified social tax (i.e., there was no business purpose). The actual relationship between the company and the employees did not change (e.g., the employees worked in the same roles, undertaking the same activities), and the smaller companies were created specifically to save on unified social tax (although formally they were independent).

Based on SAC Presidium Resolution No. 1229/09,[3]the SAC upheld the tax authorities' position. However, the SAC also noted that, when charging additional unified social tax to this company, the authorities should check whether it is entitled to any tax benefits, and to charge additional tax in accordance with the Tax Code taking such benefits into account.

ii Application of the internal Russian thin capitalisation rules: an example

It follows from a literal interpretation of the Tax Code that if a loan is received from a foreign group sister company, the internal Russian thin capitalisation rules are not applicable, and interest can be deducted in full. In the case at hand,[4] a loan was received by a Russian company from a foreign group sister company and the relevant loan interest was fully deducted. However, the tax authorities established that, *de facto*, the loan was provided by the foreign parent company, while the group sister company was used solely for technical purposes to transfer funds. Accordingly, the tax authorities applied the thin capitalisation rules to the Russian company and charged additional tax. The courts of three instances upheld the position of the tax authorities, and the SAC refused to retry the case. Interestingly, in this case, while neither the tax authority nor the court cited Resolution No. 53 on unjustified tax benefits, they still applied its concepts.

2 Case No. A81-2855/07.
3 Dated 30 June 2009.
4 Case No. A40-1164/11-99-7.

In general practice, if the tax authorities cite unjustified tax benefits (lack of business purpose, real relationship or substance) when charging additional tax, such cases are usually the most complex, and the courts examine the facts of the case and the evidence much more closely.

iii Challenge resale of Russian assets: an example[5]

The shares of the taxpayer were sold abroad and then bought back two years later at more than five times the original sale price. The tax authorities concluded that the profit received by the foreign resellers should be subject to withholding tax in Russia.

Thus, in 2010, the company sold the shares it held in the capital of a Russian coal mining company for 177 million roubles abroad. In 2012, it bought back the same shares, but at an increased price of 1.19 billion roubles. Mutual settlements for both transactions were formalised in October 2012. The income received by the foreign resellers was approximately 1.01 billion roubles.

The tax authorities stated that the companies involved in the transaction for the share buyback were related to a major Russian group that also includes the company.

They also drew the court's attention to the fact that the foreign buyer of the shares finalised the settlements for the 2010 transaction with the company only in October 2012, using the funds it had received from the company only a few days earlier following the buyback of the disputed shares. These circumstances raised doubts about the paid-for basis of the first transaction for a sale of the shares abroad and provided grounds to recategorise it as a distribution of property to a foreign company. The tax authorities stated that the difference between the price of the original sale and the share buyback, amounting to 1.01 billion roubles, received by the foreign companies that resold the shares constituted income from Russian sources and was subject to taxation at 20 per cent. The court backed the tax authorities and stated that the company's arguments regarding the paid-for basis of the two transactions (for the original sale of the shares and their subsequent buyback) were unsubstantiated. The court concluded that the taxpayer recognised the disputed transactions in a manner inconsistent with their actual economic substance.

IX DOUBLE TAXATION TREATIES

Russia has concluded double taxation treaties (DTTs) with many countries. Moreover, some treaties have recently been amended to provide additional regulations, specifically regarding information exchange and assistance in tax collection efforts. The Tax Code directly stipulates that international treaties take precedence over domestic law.

Russia is not a member of the Organisation for Economic Co-operation and Development (OECD), and the latter's comments on applying the Model Treaty are not mandatory or legally binding. Nevertheless, in recent years the courts have started taking these comments into consideration. However, no uniform position on their status and applicability has been developed. In addition, there are no similar domestic comments. The relevant authority for most treaties is MinFin; accordingly, it comments on their applicability.

5 Case No. A40-10532/17-140-122.

In recent years, the most interesting treaty-related cases have concerned the application of thin capitalisation rules, identifying the beneficial owner and the creation of a permanent establishment (PE).

By way of example,[6] in a dispute concerning the thin capitalisation rules, a Swiss company held a 20 per cent stake in the charter capital of a Russian company. The Russian company received a loan from the foreign company exceeding its own capital by more than three times. Under domestic Russian thin capitalisation rules, in this situation the total amount of the loan interest cannot be used to calculate profits tax in full. The interest exceeding the maximum must be requalified as a dividend and is subject to the relevant tax. However, the Russian company deducted the loan interest in full. Furthermore, the company proceeded from the fact that Russia's DTT with Switzerland contains a non-discrimination clause. According to the Russian company, this clause allows accounting for loan interest in full, because if the loan were granted by the Russian company the interest would be accounted for in full. Accordingly, the provisions of the domestic Russian thin capitalisation rules contain discriminatory conditions and cannot be applied because they contravene the Russian–Swiss DTT.

For several years, the courts upheld this approach. However, in 2011, the SAC reconsidered the position developed by the lower courts in one such case,[7] indicating that in that case the domestic Russian thin capitalisation rules were applicable, while the non-discrimination clause did not apply. Specifically, the SAC cited OECD comments on the Model Treaty.

Another interesting issue is the identification of beneficial owners to apply DTTs. In one case,[8] a Russian company obtained a loan from its Cypriot parent company, and under the relevant agreement was paying interest on the loan. On the basis of the Russian–Cypriot DTT, tax was not withheld in Russia when the interest was paid. The tax authorities believed that the Cypriot company was not the beneficial owner of the loan interest, as it had itself obtained a similar loan from a company registered in the British Virgin Islands (BVI). Interest from the Russian company was paid to BVI, and in some cases the interest was paid directly by the Russian company to BVI. The first instance and appellate courts upheld the taxpayer's position.[9] They cited the DTT with Cyprus, which does not require the recipient to necessarily have the actual right to the interest (to be the beneficial owner). The tax authorities have decided not to appeal against the courts' decisions further.

The tax authorities have also raised the issue of PEs. They closely examine the operations of non-taxable PEs working in Russia regarding their compliance with the definition of a non-taxable PE. Thus, the authorities look closely at whether business activities are preparatory or auxiliary in nature, or both, or constitute the company's core activity. In these disputes, evidence (including witness testimony) is very important.

More disputes involving the tax authorities concerning the application of DTTs are expected in the future.

In addition, significant changes introduced to the Tax Code by the 'de-offshorisation' law should not be overlooked. These changes pertain to three major areas: controlled foreign

6 Case No. A81-2855/07.

7 Dated 30 June 2009.

8 Case No. A40-1164/11-99-7.

9 Case No. A40-10532/17-140-122.

corporation rules, tax residency rules for legal entities and the concept of beneficial ownership. Relevant disputes are likely to arise in the three-year period following this new legislation, which took effect in 2015.

X AREAS OF FOCUS

The changes ushered in by the de-offshorisation law, which took effect in 2015, are currently the hottest topic in the tax field. While we fully expect to see relevant disputes, they are unlikely to arise before 2018.

Furthermore, during audits the following issues arise most frequently.

i Subject over form

The tax authorities have recently started to focus greater attention on this concept and on relatively new related issues, such as determining the beneficial owner, share deal versus asset deal, transitional payments and back-to-back payments. This trend is likely to continue.

ii Economic justification of expenses

The economic justification of expenses is a mandatory criterion used to account for any costs when calculating profits tax. Since companies' expenses decrease the profits tax base, the tax authorities have tended to pay special attention to this issue, particularly for the following:

a a company that is just launching its business activity, and therefore incurs overall losses;
b a company that incurs losses as the result of a specific transaction; and
c a company whose expenses are suspected of being economically advantageous or beneficial to third parties (other groups, companies, individuals or counterparties) rather than the taxpayer itself.

iii Cross-company charges and cost-sharing agreements

During audits, the tax authorities pay particular attention to the legality of deducting the costs incurred to pay for management and other services provided to group companies. The essential questions raised by the tax authorities are:

a the real nature of the services provided; the tax authorities check which services were provided and their scope. They ask for the relevant agreement and primary documents (invoices, certificates), as well as for detailed reports on services provided and tangible evidence (communications, presentations, draft documents, marketing materials, etc.);
b expense redundancy; the tax authorities check whether it was necessary to engage a third party to obtain the disputed services, or whether the company could have obtained the same results on its own. The tax authorities also check whether the company that paid for the services was the same entity that was actually in need of them; and
c the service fee; the tax authorities check the pricing and its conformity with the scope of services. Accordingly, if the list of services remains the same each year but the service fee increases substantially, there is a high likelihood that the tax authorities will challenge the company's position. If under the old TP rules it was difficult for the tax authorities to confirm the actual market value of such services, the new rules provide more grounds for the tax authorities to verify pricing accuracy.

On such matters, the courts generally uphold the taxpayers' position if the latter provide sufficient evidence that the services were actually rendered and of their relevance to the taxpayers' business. However, recently cases have emerged where the courts have dismissed taxpayers' claims because they could not justify substantial price changes and the scope of services. In future, the tax authorities' interest in this issue will remain high.

iv Accounting for loan interest

The tax authorities pay particular attention to the validity of accounting for loan interest. Most relevant disputes concern domestic thin capitalisation rules (see specific examples in Sections VIII and IX), interest-free loans and the calculation of arm's-length interest.

v Bad-faith suppliers

In the normal course of business, companies interact with numerous suppliers and face the risk of dealing with a 'bad-faith supplier'. This could lead to increased taxes for the buyer, although the impact may vary depending upon the tax authorities' claims. Under the best-case scenario, the buyer would have to settle the dispute with the tax authorities. Under the worst-case scenario, the buyer would have to pay additionally charged taxes, late payment interest and fines should the tax authorities judge the supplier, or relationships with the supplier, as non-existent or artificial.

As a result, ensuring the 'good faith' of a supplier before entering into any commercial relationships is of particular importance for a company. The main indicators of a supplier's bad faith are failure to pay taxes, failure to submit tax returns and the lack of any capital assets or employees.

Even though in most cases the arbitrazh courts have tended to favour taxpayers, there may be situations in which it is difficult to defend the taxpayer's position.

vi Beneficial ownership

The tax authorities have recently started to pay particular attention to determining the beneficial owners of passive income from Russia. This heightened interest on the part of the tax authorities may be the result of the latest confirmation of their right to collect withholding income tax from tax agents, which are also Russian legal entities.[10]

When applying reduced rates of withholding tax (as determined by a DTT), a taxpayer must be sure that the recipient of the income is their beneficial owner.

If the taxpayer fails to prove this, then it will be charged with additional assessed tax, a fine and penalties. Recent court practice has shown that companies are often unable to confirm beneficial ownership of income.[11]

In recent years, the courts have issued a number of decisions on the abuse of double tax treaties (DTT), some in favour of the tax authorities and others in favour of taxpayers. For example, there are two court cases on the question of applying the reduced tax rate under the Russia–Cyprus DTT and, in particular, on the question of identifying the beneficial owner of income.

10 Resolution of Plenum SAC # 57 dated 30 July 2013.

11 Case No. A40-11909/12, Case No. A40-12815/15.

The first case concerns a dividend payment of 300 million roubles on which the taxpayer was assessed to be liable to an additional tax of 30 million roubles as well as penalties and fines in the amount of about 5,5 million roubles and 750,000 roubles respectively, because a Cypriot company involved in the deal was not deemed a beneficial owner of the income.[12]

In the second case, the court examined the assessment of the 5 per cent reduced rate on dividend income under the Russia–Cyprus DTT, but the dispute was different. The court applied a literal interpretation of the tax treaty's provisions and ruled that compliance with the formal DTT requirements was sufficient grounds for applying the reduced tax rate.[13]

As Russia has no statutory framework that could ensure the strict regulation of provisions regarding the concept of beneficial ownership, court practice serves as the key tool that taxpayers can use to obtain information on the criteria for compliance with the respective definitions set by the Russian Tax Code and DTT. This trend will likely continue.

XI OUTLOOK AND CONCLUSIONS

Generally, there are two main trends regarding tax disputes in Russia. The first is the growing complexity of tax disputes, in which the tax authorities are raising increasingly complicated issues (e.g., beneficial ownership, thin capitalisation, TP). During audits, the tax authorities are questioning witnesses and performing expert examinations more frequently, and information exchange with foreign jurisdictions is improving. In this context, it is harder for taxpayers to win a dispute on the one hand, while on the other, the general number of cases has fallen substantially as there are fewer standard, straightforward cases.

The second trend concerns the shift of disputes away from litigation to the pre-litigation stage. Administrative procedures for adjudicating disputes are becoming more efficient. Interest in alternative resolution methods for tax disputes (advance pricing agreements, MAP, horizontal monitoring) is also growing. This trend is extremely beneficial for taxpayers, and will continue in future. However, certain efforts must be made towards this end, including legislative amendments. Currently, litigation remains the most effective avenue for resolving a tax dispute.

12 Decision No. 15АП-17143/2016 of 13 March 2017.

13 Case No. A76-20508/2016.

Chapter 29

SINGAPORE

Joanna Yap[1]

I INTRODUCTION

Tax disputes in Singapore are generally resolved in a non-contentious manner, as the Inland Revenue Authority of Singapore (IRAS)[2] tends to be amenable to engaging in discussions with taxpayers to reach a compromised outcome favourable to both sides first. Before taxpayers may initiate discussions with IRAS, they are expected to have provided all relevant information and even legal submissions to IRAS for its consideration. It is, therefore, paramount for taxpayers to maintain a proper and complete set of contemporaneous records of their business activities in support of their stance on the issues in dispute.

On the few occasions where discussions fail to yield a compromised outcome, taxpayers may choose to litigate the tax dispute as a last resort. Tax litigation in Singapore is relatively uncomplicated, with the relevant procedures and timelines to be complied clearly set out in the tax legislations.[3] Nevertheless, a taxpayer who opts to litigate a tax dispute must be prepared to expend considerable time, effort and costs. As such, a taxpayer would generally litigate a tax dispute only if it was financially justifiable.

The number of tax disputes before the tribunals and the courts on a year-to-year basis remains constantly low. Between 2014 and 2017, the tax disputes litigated before the tribunals and courts primarily concerned issues relating to whether gains arising from the sale of property or shares are considered capital or revenue in nature, deductibility of certain expenses and the exchange of information.[4] Of keen interest among the litigated cases during this period was Singapore's first income tax avoidance case.[5] After the Singapore courts provided clarity on the application of Singapore's general anti-avoidance rule provision in that case, IRAS appears to have little appetite to litigate cases that would test the boundaries of acceptable and illegitimate tax avoidance. This is, however, not surprising, as IRAS is generally conservative and risk-averse, preferring to take on taxpayers only in tax disputes where revenue exposure is significant, where it is necessary to defend its long-standing practice or where there is more than a reasonable chance of success before the tribunals and courts.

1 Joanna Yap is a partner at Withers KhattarWong.

2 Reference to IRAS in this article includes the Comptroller of Income Tax, the Comptroller of GST and the Commissioner of Stamp Duties as the case may be.

3 Income Tax Act (Cap 134), Goods and Services Tax Act (Cap 117A) (GST Act) and Stamp Duties Act (Cap 312).

4 See Section IX.

5 See Section VIII.

II COMMENCING DISPUTES

i Income tax

Disputes relating to income tax commonly arise with the filing of tax returns. Upon the delivery of the tax returns,[6] IRAS will conduct a review and may make an enquiry regarding anything that is stated (or that ought to be stated) in the tax returns and accompanying documents, such as financial statements and tax computations that may affect the tax liability of the taxpayer or another person in that year of assessment[7] or another year of assessment. Enquiries are made by way of letters sent to the taxpayer or his or her tax agent, and may shed light as to the potential issues in dispute. While there is no specific time frame set to complete the review, IRAS will usually treat the review as completed progressively as and when the issues are resolved. In exceptional circumstances where IRAS receives information affecting the tax liability of the taxpayer from other internal or external sources, it may conduct a further review. Such review is, however, subject to the time limits imposed on the Comptroller of Income Tax to make assessments.[8]

On completion of the review, IRAS would make an assessment and issue a notice of assessment to the taxpayer informing him or her of any tax payable by him or her, or refund due to him or her; and the place at which the tax can paid, his or her rights of objection to the assessment, and his or her obligation to inform IRAS of any errors in the notice if he or she is exempted from liability to furnish a tax return.[9] If the taxpayer does not agree with the assessment as reflected in the notice of assessment, he or she would have to file a written notice of objection stating the precise grounds of objection within 30 of the date of service of the notice of assessment.[10] For corporate taxpayers, IRAS has extended the deadline to file the notice of objections to two months from the date of service of the notice of assessment by way of an administrative concession.[11] In the event that the objection is late without reasonable cause or is invalid, IRAS is not obliged to accept the objection,[12] and the assessment (as shown in the notice of assessment) is deemed final and conclusive.[13] Notwithstanding that a notice of objection has been filed, the taxpayer is required to pay the tax assessed within one month of the date of service of the notice of assessment.[14]

Once an objection to an assessment has been filed, IRAS may request further information (such as books of accounts and documents) and legal submissions from the taxpayer. The taxpayer may also initiate meetings with IRAS to provide the necessary clarifications. Although there is no prescribed time limit by which IRAS must make a decision, IRAS as a matter of practice will generally complete the review within six months of the date of the taxpayer's last correspondence and receipt of completed information, and convey its decision to the

6 For corporations, tax returns refer to Form C-S or Form C.

7 Year of assessment refers to the year in which income tax is computed and charged. Each year of assessment begins on 1 January and ends on 31 December.

8 Under Section 74(1) of the Income Tax Act, the statutory time limit for the Comptroller of Income Tax to raise an assessment or additional assessment for any year of assessment is five years. The statutory time limit, however, does not apply in cases of fraud.

9 Section 76(1) and (8) of Income Tax Act.

10 Section 76(2) and (3) of the Income Tax Act.

11 IRAS e-Tax Guide 'Corporate Income Tax – Objection and Appeal Process'.

12 Section 76(4) of the Income Tax Act.

13 Section 84(2) of the Income Tax Act.

14 Section 85(1) of the Income Tax Act.

taxpayer.[15] If the taxpayer and IRAS are unable to reach an agreement on the tax dispute, or information has not been forthcoming from the taxpayer two years after the objection was filed, IRAS shall give the taxpayer the notice of refusal to amend[16] the assessment so that he or she may proceed to appeal to the Income Tax Board of Review.[17]

ii GST

As GST is a self-assessed tax, the taxable person (i.e., a person registered for GST) is required to file the GST return in respect of the goods and services made by him or her and make payment of GST within one month of the end of the prescribed accounting period.[18] Where IRAS disagrees with the content of the GST return (or where a GST return has not been timely filed), IRAS may to the best of its judgement make an assessment and notify the taxpayer of it. Penalties are statutorily imposed where incorrect GST returns are submitted or GST returns are not timely filed.[19] In practice, IRAS will usually notify the taxpayer of its concerns and provide him or her with an opportunity to address those concerns before issuing the assessments.

Any person who is aggrieved by an assessment or by any decision made by IRAS with respect to certain matters, such as the registration or cancellation of registration and the decision to treat persons as 'a single taxable person', may apply to IRAS for review and revision by filing a written notice of objection stating the precise grounds of objection within 30 days of the date that person has been notified of the decision.[20]

Once an objection has been filed, IRAS is obliged to conduct a review,[21] and may request further information and legal submissions from the taxpayer. The taxpayer may also initiate meetings with IRAS to provide the necessary clarifications. IRAS will within a reasonable time inform the taxpayer of its decision.[22] If the taxpayer disagrees with the decision of IRAS, he or she may file an appeal to the Goods and Services Tax Board of Review.[23]

iii Stamp duties

For stamp duties, any person who is dissatisfied with an assessment made by IRAS under any provisions of the Stamp Duties Act may apply to IRAS for review of the assessment by filing a written notice of objection stating the grounds of objection within 30 days of the date of assessment.[24] When an objection has been filed, the taxpayer is obliged to furnish further particulars and information in relation to the grounds of the objection if required to do so by IRAS in writing.[25] The taxpayer may also furnish legal submissions and initiate meetings with IRAS to provide the necessary clarifications. Notwithstanding that an objection has been filed, the taxpayer is required to pay the duty assessed.[26] As soon as practical after the

15 See footnote 11.
16 Section 76(6)(b) of the Income Tax Act.
17 See Section III.
18 The prescribed accounting period usually refers to a period of three months.
19 Sections 59 and 60 of the GST Act.
20 Section 49(1) and (2) of the GST Act.
21 Section 49(3) of the GST Act.
22 Section 49(3) of the GST Act.
23 See Section III.
24 Section 39A(1) and (2) of the Stamp Duties Act.
25 Section 39A(3) of the Stamp Duties Act.
26 Section 39A(8) of the Stamp Duties Act.

objection is determined, IRAS will inform the taxpayer in writing of the decision and the reasons for the decision.[27] If the taxpayer is dissatisfied with the decision of IRAS, he or she may lodge an appeal against the assessment to the High Court.[28]

III THE COURTS AND TRIBUNALS

i Income Tax Board of Review (ITBR)

The ITBR is specifically constituted under the Income Tax Act[29] to adjudicate appeals relating to income tax and consists of not more than 30 individual members appointed by the Minister for Finance. The quorum for hearing an appeal is usually three members, one of whom will be the Chairman or Deputy Chairman,[30] and the ITBR decides by a majority of votes.[31]

The ITBR generally has powers of a district court, such as the power to summon persons to give evidence and produce documents relevant to the appeal, and the power to award costs.[32] Hearings before the ITBR are *in camera* (i.e., closed to the public).[33] The ITBR may also at any time refer a case to the High Court for its opinion on a question of law.

Appeals from decisions of the ITBR are to the High Court, and appeal is only available if the issue in dispute is a question of law or of mixed law and fact, and the disputed tax exceeds S$200.[34] Any decision of the ITBR on a finding of fact is final, and there can be no appeal to the High Court.

ii Goods and Services Tax Board of Review (GSTBR)

The GSTBR is specifically constituted under the GST Act[35] to adjudicate appeals relating to GST and consists of not more than 50 individual members appointed by the Minister of Finance. As the GSTBR decides by a majority of votes,[36] the quorum for hearing an appeal is usually three members, one of whom will be the Chairman or Deputy Chairman.[37] The GSTBR has similar powers to the ITBR, and hearings before the GSTBR are *in camera*.[38] The GSTBR will not hear an appeal unless the taxpayer has submitted all returns, and all amounts shown in those returns as payable are paid or deposited with IRAS.[39]

Appeals from decisions of the GSTBR are to the High Court. There is no unfettered right of appeal to the High Court as an appeal against the GSTBR's decision may only be

27 Section 39A(5) of the Stamp Duties Act.
28 Section 40 of the Stamp Duties Act.
29 Section 78 of the Income Tax Act.
30 The Chairman and Deputy Chairman are appointed by the Minister for Finance and they must be a person who is either qualified to be a district judge or an accountant.
31 Section 78(14) of the Income Tax Act.
32 Section 80(5) of the Income Tax Act.
33 Section 83(1) of the Income Tax Act.
34 Section 81(2) of the Income Tax Act.
35 Section 50 of the GST Act.
36 Section 50(8) of the GST Act.
37 The Chairman and Deputy Chairman are appointed by the Minister for Finance and they must be a person who is either qualified to be a district judge or a public accountant within the meaning of the Accountants Act (Cap 2).
38 Section 56(1) of the GST Act.
39 Section 51(8) of the GST Act.

lodged if the issue in dispute is a question of law or of mixed law and fact, and the disputed tax exceeds S$500.[40] Hence, there can be no appeal to the High Court on any decision of the GSTBR on a finding of fact.

iii High Court and Court of Appeal

Appeals to the High Court from the ITBR and GSTBR are to comply with the procedures set out in Order 55 of the Rules of Court. An appeal under Order 55 is by way of a rehearing.[41] High Court cases are heard by a single judge *in camera*.[42] The High Court after hearing the case may confirm, reduce, increase or annul the assessment as determined by the ITBR;[43] or confirm, vary or annul the decision of the GSTBR, and make such further or other orders on costs or otherwise as it thinks fit.[44]

To appeal against the stamp duty assessment to the High Court, the taxpayer would require IRAS to state and sign a case setting forth the question upon which IRAS's opinion was required and the decision made by it. In addition, the taxpayer is required to pay the stamp duty assessed.[45] The procedures for filing an appeal are set out in Order 55A of the Rules of Court.

Appeals from the High Court are to the Court of Appeal,[46] (the final appellant court) where three judges who have the same powers as the High Court will usually sit to hear the appeal. The procedures to appeal to the Court of Appeal are set out in Order 57 of the Rules of Court, and the appeal is by way of a rehearing. Appeals from the High Court to the Court of Appeal for income tax and GST cases are heard *in camera*.[47]

While the taxpayer him or herself, or his or her representative (usually an accountant or a lawyer), may conduct the hearings before the tribunals, he or she would, however, have to be legally represented for the hearings before the High Court and the subsequent appeal to the Court of Appeal unless he or she wishes to conduct the hearing in person.

IV PENALTIES AND REMEDIES

i Penalties

Singapore's tax legislation provides for varying penalties, fines and even periods of imprisonment for different type of offences committed by taxpayer. The penalty a taxpayer may be liable for would vary with the severity of the offence committed.

For general income tax offences (where no penalties are specifically provided for), such as failure to comply with IRAS's notice to provide information, the penalty imposed is a

40 Section 54(2) of the GST Act.

41 Order 55 Rule 2 of the Rules of Court.

42 Section 83(1) of the Income Tax Act and Section 56(1) of the GST Act. Note that stamp duty appeals to the High Court are not heard *in camera*.

43 Section 81(4) of the Income Tax Act.

44 Section 54(4) of the GST Act.

45 Section 40(1) of the Stamp Duties Act.

46 Section 81(5) of the Income Tax Act and Section 29A of the Supreme Court of Judicature Act.

47 Section 83(1) of the Income Tax Act and Section 56(1) of the GST Act. Note that stamp duty appeals to the Court of Appeal are not heard *in camera*.

fine.[48] Strict liability income offences,[49] such as failure to give notice of chargeability,[50] to file a return[51] or to pay tax,[52] attract immediate penalties, and in default, incremental additional penalties for each day the notice is not given, the return is not filed or tax is not paid.

As for non-strict liability income tax offences such as filing of incorrect returns where the errors arose out of 'ignorance or negligence' or 'deliberately', the penalties imposed are on a sliding scale varying with the degree of culpability and quantified as a percentage of the tax undercharged. Penalties range from 200 per cent of the tax undercharged for ignorant and negligent errors[53] up to 400 per cent of the tax undercharged for deliberate and concealed errors,[54] and may include a fine and imprisonment on conviction.

A similar penalty regime applies to GST offences. As GST is a self-assessed tax, the penalties tend to be heftier. For example, the penalty imposed for failure to keep business records is a fine of up to S$5,000 or imprisonment on conviction.[55] Penalties are also imposed for improperly obtaining a refund,[56] and for collecting or attempting to collect tax without authorisation.[57] For stamp duty, failure to stamp an instrument with the requisite duty would result in the instrument being inadmissible in evidence in a civil court.[58] Penalties of up to four times the deficient duty payable may be imposed for unstamped documents or documents with insufficient stamp duties paid.

ii Voluntary disclosure programme (VDP)

Penalties for the various tax offences can be reduced if a taxpayer makes a voluntary disclosure of the errors in their tax matters under IRAS's VDP. To qualify for a waiver of penalties or a reduced penalty under the VDP, the taxpayer must make a timely and self-initiated voluntary disclosure,[59] and submit a complete and accurate VDP application.[60] In addition, the taxpayer must fully cooperate with IRAS to rectify errors, and pay or make arrangement to pay the shortfall in taxes and penalties imposed (if any). No penalty will be imposed for errors disclosed within one year of the statutory filing deadline. For disclosures made outside the grace period and disclosures of errors relating to stamp duty, a flat penalty of 5 per cent of the tax (or duty) payable will be imposed.[61]

48 Section 94 of the Income Tax Act.
49 Proof of *mens rea* (i.e., a guilty mind) is not required.
50 Section 94 of the Income Tax Act.
51 Section 94A of the Income Tax Act.
52 Section 87 of the Income Tax Act.
53 Section 95(2) of the Income Tax Act.
54 Section 96A of the Income Tax Act.
55 Section 46 of the GST Act.
56 Section 63 of the GST Act.
57 Section 65 of the GST Act.
58 Section 52 of the Stamp Duties Act.
59 A voluntary disclosure is considered timely and self-initiated if the disclosure was made before a taxpayer receives a query from IRAS; or the disclosure was made before the taxpayer receives notification from IRAS of the commencement of an audit or investigation.
60 See Annex F of IRAS e-Tax Guide 'IRAS' Voluntary Disclosure Programme' (6th Edition).
61 See IRAS e-Tax Guide 'IRAS' Voluntary Disclosure Programme' (6th Edition) for more details.

V TAX CLAIMS

i Recovering overpaid tax

A taxpayer who overpaid tax (or duty) and a penalty may generally submit a claim within a certain time to IRAS requiring it to refund the excess tax (or duty) and penalty paid. In practice, taxpayers rarely have to make a claim, as most tax refunds are given automatically. Tax credits are usually refunded by IRAS within 30 days of arising.

IRAS is not, however, obliged to make a refund (in whole or in part), particularly if it would:

a involve reopening assessments that are final and conclusive;
b result in allowing an objection that was filed out-of-time or was invalid;
c the tax and penalties were not received; or
d the refund would unjustly enrich the taxpayer.[62]

Where IRAS has given notification of its intent to appeal against the decision of the ITBR, it may withhold the repayment until determination of the appeal, but it would have to pay interest at a rate of 5 per cent per annum to the taxpayer from the date of the appeal.[63]

ii Error and mistake relief

Under the Income Tax Act, a taxpayer who overpaid tax may at any time within four years of the end of the year of assessment within which the assessment was made claim relief in respect of any error or mistake made in his tax or her return or statement made by him or her, or, where the taxpayer is exempted from making a return, in the relevant notice of assessment.[64] The phrase 'error or mistake' is not statutorily defined, but it would cover genuine arithmetical errors, omissions and even mistakes of law.[65] The relief, however, would not apply if the return or statement was computed on the basis of or in accordance with the prevailing practice of IRAS at the time the return or statement was made.[66]

Upon receiving the taxpayer's claim for relief, IRAS is bound to inquire into it and give, by way of repayment of tax or amendment to the assessment, such relief as it appears to be reasonable and just.[67] In deciding whether to accept the claim for relief, IRAS is entitled to have regard to all relevant circumstances of the case, and in particular whether the grant of relief would result in the exclusion from charge to tax of income of the taxpayer for other years.[68] In the event that IRAS refuses the claim for relief, the taxpayer may appeal against its decision to the ITBR.[69]

iii Challenging administrative decisions

While judicial review is another avenue to challenge decisions of IRAS or the tax tribunals, it may only be invoked only when all other available avenues have been exhausted. Judicial

62 Section 93 of the Income Tax Act, Section 90 of the GST Act and Section 75 of the Stamp Duties Act.
63 Section 93(8) of the Income Tax Act.
64 Section 93A(1) of the Income Tax Act.
65 See *AQP v. Comptroller of Income Tax* [2013] 2 SLR 155.
66 Sections 93A(3) and 93A(3A) of the Income Tax Act.
67 Section 93A(2) of the Income Tax Act.
68 Section 93A(4) of the Income Tax Act.
69 Section 93A(5) of the Income Tax Act.

review focuses on the process and the scope of the decision rather than the merits of the decision taken. Generally, judicial review would apply to decisions that suffer procedural impropriety,[70] or that are irrational or illegal. To file an application for judicial review, the taxpayer would first have to obtain leave from the High Court. Remedies available for judicial review are a declaration (either on a point of law, or that a decision is invalid or void), a prohibiting order,[71] a quashing order[72] and a mandatory order.[73]

VI COSTS

The award of costs by the tax tribunals and courts is entirely discretionary, whether in principle or in quantum.[74] Commonly, the tax tribunals and courts will award as per 'costs follow the event', in that the costs of action are usually borne by the losing party with the quantum to be agreed between the parties, and taxed[75] if no agreement is reached.

In circumstances where IRAS is awarded costs of an appeal by the tax tribunals, it may also be awarded all reasonable costs of the appeal, including a fee for any counsel or legal officer appearing on its behalf, and the cost is to be recoverable together with the taxes.[76] For appeals considered to be frivolous or vexatious, the tax tribunals may award additional costs to IRAS.[77]

VII ALTERNATIVE DISPUTE RESOLUTION

There are currently no alternative methods for resolving tax disputes. Taxpayers who do not want to be embroiled in tax disputes may apply, for a fee, to IRAS for an advance ruling (or adjudication) on the tax treatment to be applied to a proposed or specific transaction or arrangement based on an interpretation of the current tax legislation.[78] The ruling is private and confidential to the taxpayer, and is not published by IRAS. Further, the ruling is legally binding, and IRAS is bound to apply the law in the manner set out in the ruling once it is issued. The ruling issued by IRAS is also final, and cannot be subjected to the appeal process.

Although the ruling is final and binding on IRAS, the taxpayer is not obliged to follow the ruling, and he or she may prepare his or her return as he or she deems appropriate. However, the taxpayer must disclose in his or her tax return whether he or she had previously

70 Decisions made without following proper procedures prescribed by legislation or if the rules of natural justice have not been adhered to. Natural justice requires the decisions made by decision makers to be free from bias and that the decision maker approaches the decision-making process with fairness.

71 An order to restrain the public authority from doing something.

72 An order to quash a decision or action of the public authority.

73 An order to compel the public authority to perform its public duties or functions.

74 Sections 80(7) and 81(4) of the Income Tax Act, Sections 52(6) and 54(3) of the GST Act, and Order 59 of the Rules of Court.

75 Order 59 of the Rules of Court.

76 Section 80(8) of the Income Tax Act and Section 52(7) of the GST Act.

77 Section 80(11) of the Income Tax Act provides that ITBR may award additional costs of up to S$250 and Section 52(9) of the GST Act provides that GSTBR may award additional costs of up to S$1,000.

78 Section 108 of the Income Tax Act, Section 90A of the GST Act and Section 37 of the Stamp Duties Act.

sought an advance ruling, and if so, whether he or she had relied on the ruling. If IRAS subsequently issues a tax assessment based on the ruling disagreed by the parties, the taxpayer may object and appeal to the tax tribunals (or the High Court).[79]

VIII ANTI-AVOIDANCE

Singapore had enacted the general anti-avoidance rule (GAAR) provisions for the various tax types in the respective governing tax legislation.[80] The GAAR provisions specifically target arrangements[81] that have the purpose or effect of giving rise to a relevant tax advantage. The GAAR provisions in the GST Act and Stamp Duties Act mirror Section 33 of the Income Tax Act, which was introduced in 1988. As the GAAR provisions are broadly worded, the Court of Appeal has, in the first tax income tax avoidance case (*AQQ*),[82] provided the much-needed clarification on their application.

In considering whether the GAAR would apply to an arrangement, the courts would apply the following steps:

a to consider whether the taxpayer had derived a tax advantage from an arrangement that falls within the limbs set out in the GAAR;[83]

b if the arrangement has the effect of tax avoidance, to consider whether the arrangement falls within the statutory exception (i.e., the arrangement is carried out for *bona fide* commercial reasons, and has not, as one of its main purposes, the avoidance or reduction of tax);[84]

c if the statutory exception does not apply, to consider whether the taxpayer has satisfied the courts that the tax advantage arose from the use of a specific provision in the tax statute that was within the intended scope and Parliament's contemplation and purpose in terms of both legal form and economic reality in the context of the arrangement as a whole.[85]

In the event that the taxpayer is not able to satisfy the courts, the GAAR would apply and IRAS may exercise its discretion to counteract the tax advantage to disregard or vary the arrangement and make such adjustments as it considers appropriate.[86] Where there is more

79 See IRAS e-Tax Guide 'Advance Ruling System' (3rd Edition) and IRAS e-Tax Guide 'GST: Advance Ruling System' (7th Edition) for more details.

80 The GAAR for income tax, GST and stamp duties are set out in Section 33 of the Income Tax Act, Section 47 of the GST Act and Section 33A of the Stamp Duties Act respectively.

81 Section 33(2) of the Income Tax Act defines 'arrangement' to include a scheme, trust, grant, covenant, agreement, disposition and transaction, and to include all steps that carry the arrangement into effect.

82 *Comptroller of Income Tax v. AQQ and another appeal* [2014] SGCA 15.

83 The limbs for the application of GAAR include altering the incidence tax (or duty) payable, relieving any person from any liability to pay tax (or duty) or to file a return, reducing or avoiding any tax liability imposed or that would otherwise have been imposed on any person, and obtaining credits or refund of input tax that any person would not otherwise have been obtained. Section 33(1) of the Income Tax Act, Section 47(1) of the Stamp Duties Act and Section 33A(1) of the Stamp Duties Act.

84 Section 33(3)(b) of the Income Tax Act, Section 47(4) of the GST Act and Section 33A(3)(b) of the Stamp Duties Act.

85 See footnote 82.

86 Section 33(1) of the Income Tax Act, Section 47(1) of the GST Act and Section 33A(1) of the Stamp Duties Act.

than one method available to counteract the tax advantage, the courts generally would not intervene with IRAS's choice of method as long as IRAS has exercised its power fairly and reasonably, and that that method achieves the object of negating the tax advantage.[87]

As tax assessments are generally issued for GAAR cases, appeals against IRAS decisions to apply the GAAR would follow the usual appeal procedure. In the unlikely case that a tax assessment is not issued, the taxpayer would have to apply for judicial review to challenge IRAS. Unlike the usual cases where the burden of proof lies with the taxpayer,[88] IRAS bears the burden of proving that there was a tax avoidance arrangement, and that the counteraction method adopted was fair and reasonable.

Following *AQQ*, the IRAS issued the e-tax guide on GAAR,[89] stating that it would apply GAAR as per the guidance provided by the Court of Appeal. In addition, IRAS has stated that it would apply GAAR if the arrangement had any of the following certain features:

a circular flow or round-tripping of funds;

b setting up of more than one entity for the sole purpose of obtaining a tax advantage;

c change in business form for the sole purpose of obtaining a tax advantage; and

d attribution of income that is not aligned with economic reality.

While the e-tax guide sheds light on IRAS' internal policy on GAAR, it must be emphasised that the e-tax guide is not law.

IX DOUBLE TAXATION TREATIES

Recent cases concerning exchange of information arose from Singapore's obligation to furnish information to another competent authority under the double taxation treaties and the application of domestic tax legislation. Prior to 28 November 2014, IRAS was required to apply to the High Court for an order to obtain information protected under banking secrecy laws[90] or trust company secrecy laws[91] before the information was disclosed to the competent authority under the double taxation treaty.

The requirement to apply for a High Court order has since been removed as part of Singapore's ongoing commitment towards international cooperation against cross-border tax offences, including the application of a new internationally agreed exchange of information standard to all its existing treaty partners without the need to renegotiate the individual double taxation treaty on a reciprocity basis. To challenge IRAS' request for information, a taxpayer may apply for judicial review. Judicial review is the only avenue available for taxpayers wishing to challenge IRAS' request for information even after Singapore implements the common reporting standards[92] (CRS) in 2018.

87 See footnote 82.

88 The taxpayer usually bears the burden of proving that the tax assessment made by IRAS is excessive.

89 IRAS e-tax guide – Income Tax: The General Anti-avoidance Provision and its Application (First Edition) published on 11 July 2016.

90 The Banking Act (Cap 19).

91 The Trust Companies Act (Cap 336).

92 Singapore implemented common reporting standards with effect from 1 January 2017 with the first exchange to be done in 2018. For more information and a list of countries with which Singapore will be exchanging information, see IRAS website: www.iras.gov.sg/irashome/crs/.

As part of the commitment to implement certain standards under the Base Erosion and Profit shifting (BEPS)[93] project, Singapore has implemented country-by-country reports (CbCR) for multinational enterprises whose ultimate parent entities are in Singapore, and whose group turnover exceeds S$1.125 million for financial years beginning on or after 1 January 2017. These enterprises are required to file reports with IRAS within 12 months of the last day of their financial year, and the CbCR will be shared with countries with which Singapore has entered bilateral agreements for the exchange of CbCR.[94]

X AREAS OF FOCUS

As IRAS takes the view that maximising the level of voluntary compliance is the only sustainable means to ensure tax administration remains effective and efficient in the long run, IRAS continues to place a lot of emphasis on taxpayer's compliance and VDP. From 2017 onwards, IRAS has indicated that it would be focusing on the compliance of self-employed taxpayers and taxpayers dealing with wholesale chemical and chemical products, travel agencies, ticketing agents and logistic companies.[95] This is in addition to its ongoing focus on taxpayers who, *inter alia*:

a fail to file their tax returns;
b claim productivity and innovation credits;[96]
c claim for group relief;
d claim for tax exemptions for foreign-sourced dividends;[97] or
e receive different streams of income taxable at different rates.

Taxpayers who fall under the above categories can therefore expect to be audited and subjected to queries.

While the *AQQ* case in respect of the application of the GAAR has been concluded, the case itself is still far from being concluded. Even though IRAS won the battle in asserting that the GAAR applied to the arrangement undertaken, the taxpayer won the war, as it was not required to return the refunds it had received from IRAS owing to a strict reading of a provision concerning IRAS' power to raise an additional assessment. IRAS has commenced an action in the High Court to recover the tax refunds, and the outcome will be of keen interest to IRAS and tax practitioners, as the courts may need to address the interaction between restitution (and perhaps even equity) and tax. Should IRAS succeed, restitution (and perhaps even equity) is arguably an alternative available to taxpayers to recover overpaid taxes or obtain refunds.

93 BEPS refers to tax-planning strategies that take advantage of gaps and mismatches in tax rules to artificially profit from low or no-tax jurisdictions where there is little or no economic activity, resulting in little or no tax being paid.

94 See IRAS e-Tax Guide 'Country-by-Country Reporting' for details.

95 IRAS website: www.iras.gov.sg/irashome/Businesses/Companies/Getting-it-right/Getting-Companies-to-Comply.

96 An incentive that allows businesses that invest in certain qualifying activities to enjoy tax savings in the form of deductions or allowances of up to 400 per cent, or to opt for non-taxable cash out. See IRAS e-Tax Guide 'Productivity and Innovation Credit' (Fourth Edition) for details.

97 See IRAS e-Tax Guide 'Tax Exemption for Foreign Sourced Income' (2nd Edition) for details.

XI OUTLOOK AND CONCLUSIONS

To build on its commitment to the principle behind the BEPS project, on 7 June 2017 Singapore signed the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting to adopt minimum standards pertaining to countering harmful tax practices, preventing treaty abuse and enhancing dispute resolutions.[98]

In addition, on 21 June 2017 Singapore signed the Multilateral Competent Authority Agreements to Enhance Tax Co-Operation on Exchange of Information on the Automatic Exchange of Financial Account Information under CRS and CbCR (MCAAs). [99] Under the MCAAs, Singapore is able to widen its network for automatic exchange of information. While this may seem to open the floodgates to information, Singapore would only automatically exchange information with fellow signatories of the MCAAs that are able to meet the following; (1) there are safeguards to ensure confidentiality of information exchanged and prevent its unauthorised use; (2) there is full reciprocity in terms of the information exchanged; and (3) there are similar agreements in place with relevant financial centres including Hong Kong and Switzerland.

With information exchange between Singapore and its partners commencing in 2018, taxpayers who have not identified and managed their tax risks and potential tax exposures must quickly do so, and, if necessary, take advantage of any ongoing voluntary tax disclosure programmes. Taxpayers who fail to do so would subsequently find it difficult to block the exchange of information through judicial review, as they would not be familiar with IRAS' internal process for handling exchange of information with other competent authorities.

Like 2016, 2017 was a lacklustre year in the fields of direct and indirect taxes in terms of tax litigation, but this trend looks set to change in 2018 as it is anticipated that some taxpayers may attempt to block the exchange of information through judicial review. As there continues to be fast-paced development in the international sphere, taxpayers are encouraged to continuously review their existing corporate structures, tax compliance and tax planning strategies before further international tax policies are adopted into domestic law and practice.

98 See IRAS website: www.iras.gov.sg/irashome/News-and-Events/Newsroom/Media-Releases-and-Speeches/Media-Releases/2017/Singapore-To-Sign-The-Multilateral-Convention-To-Implement-Tax-Treaty-Related-Measures-To-Prevent-Base-Erosion-And-Profit-Shifting/.

99 MCAA is a multilateral framework agreement that provides a standardised and efficient mechanism to facilitate the automatic exchange of information without the need for several bilateral agreements to be concluded. See IRAS website: www.iras.gov.sg/irashome/News-and-Events/Newsroom/Media-Releases-and-Speeches/Media-Releases/2017/Singapore-Signs-Multilateral-Competent-Authority-Agreements-to-Enhance-Tax-Co-operation-on-Exchange-of-Information/.

Chapter 30

SWITZERLAND

Jean-Blaise Eckert[1]

I INTRODUCTION

As a preliminary remark, it should be emphasised that the Swiss tax dispute environment reflects the allocation rules of the fiscal powers between the federal power, referred to as the Confederation and the federal states called cantons. Switzerland has 26 cantons and approximately 2,600 municipalities. In Switzerland, taxes are levied at three different levels: federal, cantonal and municipal. According to Article 3 of the Federal Constitution, the cantons are sovereign insofar as their sovereignty is not limited by the Federal Constitution. This means that each canton independently generates income by levying taxes, unless the Federal Constitution gives the Confederation the exclusive right to levy a particular type of tax. At the cantonal and municipal levels, the tax laws vary depending on the canton and the municipality. The cantons are mainly responsible for the assessment, collection and general administration of their own taxes (e.g., income and equity taxes, inheritance and gift taxes, real estate capital gains and real estate transfer taxes). They also support the administration of federal direct taxes (federal income taxes in particular). Owing to the fact that the cantons still have much independence, this can result in significant differences from one canton to another. The municipalities may only levy the taxes that their canton's constitution empowers them to levy.

With regard to the resolution of tax disputes, Switzerland has a well established and efficient practice. When confronted with an unlawful tax assessment, the taxpayer is generally not obliged to immediately challenge said assessment in court. Rather, he or she may turn to the tax authority that issued the tax assessment decision being challenged, to force it to make a new decision. For the purposes of this chapter, this procedure will be called a formal complaint. A formal complaint is a quick and efficient procedure that allows numerous questions to be resolved with little cost, the majority of these being technical questions. This formal complaint procedure thus eliminates the need for court proceedings and generally takes a few months. However, for complicated issues, this way of appeal offers limited solutions. In such cases, tax authorities usually prefer to wait for a binding judgment made by a higher independent body (i.e., a tribunal). It is very common for taxpayers to exercise their right to challenge the tax assessment decision of a tax authority. Tax authorities then issue a decision on formal complaint.

If the taxpayer does not agree with this decision, he or she may start judicial proceedings before the competent administrative court. From an organisational point of view, administrative courts are fully independent from tax authorities. Judicial proceedings

1 Jean-Blaise Eckert is a partner at Lenz & Staehelin.

may take between one and two years before judgment, generally depending on the workload of the tribunals and the complexity of the matter. There are two levels of administrative courts (i.e., the lower administrative court and the second instance administrative court) before appealing to the Federal Supreme Court.

Contrary to the formal complaint procedure before tax authorities, proceedings before the lower administrative court, the second instance court and the Federal Supreme Court are subject to court fees depending on the amount in dispute. Those fees are only to be borne by the taxpayer if he or she loses. In the case where the taxpayer partially wins, he or she will have to pay part of the court fees. To the extent that the taxpayer wins in court, his or her adviser's costs may be partially borne by the state.

II COMMENCING DISPUTES

i Initiation of the tax assessment procedure

Each individual subject to tax in Switzerland needs to file a tax return each year in relation to income and wealth taxes on a self-assessment basis normally within three months of the end of the tax period, corresponding to the calendar year. Most cantons allow at least a deadline extension. The same applies to legal entities subject to corporate tax in Switzerland.

With regard to partnerships (sole or collective proprietorship), income is attributed to each partner and is apportioned according to the investment in the partnership. Each partner is responsible for filing his or her own personal tax return and tax is paid at personal income tax rates. Wealth tax is moreover paid on the company's assets.

Regarding withholding tax, stamp tax and VAT, the principle of 'spontaneous taxation' applies, meaning that the taxpayer must determine himself the amount of tax due, declare it and pay said amount to tax authorities.

In the field of taxes related to possession (e.g., cars, boats, dogs) and property transfer tax, taxation takes place by way of an administrative decision generally following the announce from the taxpayer. The latter then has to pay the tax.

ii Issuance of the tax assessment decision

After the filing of the tax return, the same is reviewed by the responsible tax commissioner and an assessment decision issued by the tax authority follows. In this respect, it should be noted that the cantonal tax authorities can assess cantonal income taxes in respect of individuals and legal entities, as well as direct federal tax, which includes income tax. Other taxes (e.g., withholding tax, stamp tax and VAT) are assessed by the Federal Tax Administration only.

The assessment decision determines the tax base, the applicable tax rate and the tax amount. This decision is an administrative decision, notified in writing to the taxpayer and jointly to the spouses. In the absence of an objection, it constitutes a final binding decision.

In the presence of indicators showing that the tax return would not be accurate, the tax authorities may deviate from it after investigation. In this regard, it should be noted that the taxpayer has additional duties relating to his or her general duty to collaborate with tax authorities for ensuring that the taxation is complete and accurate. On request, he or she must provide additional information, documents, accounting documents, etc.

In the case where the taxpayer does not comply with his or her obligation to file a tax return or if the taxable elements cannot be sufficiently determined, the tax authority is entitled to assess the tax due at its own discretion with regard to the factual elements at its disposal and empirical figures.

iii Initiation of tax disputes

Tax disputes usually start by way of an appeal by the taxpayer against a tax assessment decision rendered by a tax authority. At this early stage, the taxpayer has to file a formal complaint before the same tax authority that made the assessment decision. In the fields of withholding tax, stamp tax and VAT, disputes usually arise as a result of a tax audit conducted by the Federal Tax Administration.

iv Time limits

In situations where the taxpayer does not comply with his or her obligation to file a tax return or if the taxable elements cannot be sufficiently determined, the tax authority is entitled to assess the tax due at its own discretion with regard to the factual elements at its disposal and empirical figures.

As a general rule, the right to tax expires five years after the end of the accounting period. This time period is suspended during appeal proceedings. A new five-year time limit starts every time the competent authority takes measures aiming at determining or getting the payment of the tax due and informs the taxpayer. In general, there is an absolute time limit of 15 years.

v Voluntary disclosure

An important element of the Swiss tax disputes is the voluntary disclosure system. Under Swiss tax law, taxpayers are offered a voluntary disclosure programme for undeclared assets and income, which are subject to taxation in Switzerland. The voluntary disclosure programme is also available to heirs in the case of inheritance.

For both voluntary disclosure in inheritance cases and ordinary voluntary disclosure, there is no criminal prosecution (no penalties). The taxpayer thus only has to pay the due taxes and default interests for the past 10 years or the past three years before the decedent's death.

To benefit from the voluntary disclosure programme, the application must be filed for the first time in the taxpayer's lifetime and deemed voluntary. The taxpayer has to disclose all relevant information of the last 10 years and has to cooperate with tax authorities. Heirs only need to regularise the last three years before the testator passed away. The taxpayer must endeavour to clear the total tax burden eventually and act proactively in cases of financial difficulties.

The duration of the procedure depends on the canton involved and mainly on the complexity of the case.

Despite all that, the Federal Tax Administration announced that voluntary disclosures in Switzerland relating to assets held in jurisdictions with which Switzerland has an automatic exchange of information in place shall only be possible until 30 September 2018. After this date, the spontaneous character of the disclosure will certainly be deemed obsolete.

vi Revision

In the cases where the taxpayer was not aware of materially incorrect facts taken into account by the tax authority during the assessment or the audit, he or she may claim that the authorities have made an error of assessment based on the incorrect facts (petition for revision). Said petition for revision is only considered if important new facts or evidence are discovered and could not have been known during the ordinary proceedings, if the tax authority failed to consider important facts that were or should have been known, in the case of a significant violation of procedural principles, or if a crime or criminal offence influenced the tax assessment or decision.

vii Release of information

According to the Federal Constitution, all taxpayers, within a certain time and factual limits, have the right to access their tax files. This may be a useful tool for taxpayers.

III THE COURTS AND TRIBUNALS

i Formal complaint with the tax authority

When the taxpayer objects the assessment decision made by the tax authority, he or she may file a formal complaint with the same tax authority which issued the assessment decision, within 30 days as from notification. The formal complaint procedure is an official appeal procedure that forces the tax authority to issue a new decision.

This procedure is at the taxpayer's disposal regarding decisions issued in the fields of income tax (corporate income tax), wealth tax (capital tax), withholding tax, stamp tax and VAT for individuals and legal entities.

As to the form and content of the formal complaint, it must be filed in writing. With regard to federal income tax, the complaint does not need, in principle, to be substantially motivated. The taxpayer only has to express his or her unquestionable disagreement with the assessment decision. However, formal complaint against an assessment decision made at the tax authority's own discretion must be well motivated. In that case, the taxpayer has to demonstrate that the assessment decision is obviously inaccurate. For the taxes levied by the Federal Tax Administration, the form requirements are stricter.

If the formal requirements are met, the tax authority has to re-examine the tax assessment decision and may either modify in whole or in part the decision or reject the taxpayer's formal complaint.

ii Appeal before a first instance court (cantonal appeal commission)

As a preliminary remark, the proper delimitation of taxation remedies is rather complex because it depends on the type of tax in question, the jurisdiction of the tax authority and the precise characterisation of the contested decision. Moreover, owing to the growing complexity of the tax area, various specialised commissions of appeal have been created, both at the cantonal and federal levels.

An appeal before the cantonal appeal commission is open on decisions rendered in direct tax matters. In Geneva, the first instance administrative court is the competent court and is composed of one judge who acts as president and two other judges, specialised in tax matters.

As for formal complaint, the appeal must contain a presentation of the facts, conclusions and evidence. The deadline for appeal is 30 days as from notification of the contested decision on formal complaint. The appeal can be filed by either the tax authority or the taxpayer. The court's decision on appeal must be substantiated and communicated in writing to the appellant and to the authorities participating in the proceedings. Contrary to the formal complaint procedure, appealing before a cantonal appeal commission is not free of charge.

iii Appeal before the second instance cantonal court

A decision of a first instance court can be appealed to a second instance cantonal court within 30 days of service of the first instance court's decision. The appeal can also be filed either by the tax authority or the taxpayer.

The procedural principles are the same as those applying before the first instance court.

iv Appeal before the Federal Administrative Court

The Federal Administrative Court is the ordinary administrative tribunal of the Swiss Confederation. The main role of the Federal Administrative Court is to examine the legality of decisions in matters falling under the authority of the Federal Administration. Lower instances are mainly the federal departments and subordinate federal offices.

The Federal Administrative Court hears appeals against decisions of federal authorities, in the fields of withholding tax, stamp tax and VAT in particular. As a general rule, submissions should be made in an official language of Switzerland (French, German and Italian). Its judgments may be appealed before the Federal Supreme Court.

Generally speaking, fees are charged for proceedings before the Federal Administrative Court. Procedural costs are usually paid by the unsuccessful party. For pecuniary disputes, they may not exceed 50,000 Swiss francs.

v Appeal before the Federal Supreme Court (Second Public Law Division)

If the taxpayer considers that the final decision of the second instance cantonal court or of the Federal Administrative Court violates his or her rights, he or she may file an appeal before the Federal Supreme Court. Such appeal must be filed within 30 days of notification of said contested decision.

The Federal Supreme Court is the highest judicial authority within the federal state. It issues final rulings in tax matters.

It should be noted that the work of the Federal Supreme Court varies considerably from the cantonal and federal courts of first instance. This court actually does not re-establish the facts of the case. These facts may only be corrected by the Federal Supreme Court if it finds that they have been incorrectly established in a flagrant manner by the lower court, or that they have been based on a violation of law. This means that the Federal Supreme Court only takes its decisions applying the law on facts already determined.

In general, the Federal Supreme Court renders its rulings in the language of the decision being contested.

IV PENALTIES AND REMEDIES

i Criminal penalties

As a preliminary remark, it should be underlined that regarding direct taxes, the fact that the taxpayer seeks to save taxes is not punishable. In Swiss tax law, offences and sanctions are designed as follows.

Negligent failure to carry out procedural duties refers to situations, for example, where the taxpayer fails to file a tax return or does not with a duty to provide information. Regarding the sanction, for income and equity taxes, the penalty is limited to 10,000 Swiss francs. For other types of taxes, the limit differs.

The unlawful reduction of the tax due may be penalised on two main grounds. On the one hand, tax evasion (i.e., where the taxpayer with intent or negligently omits certain items in his her tax return, or generally causes a final assessment to be incomplete) belongs to the lowest category of criminal offences and is only subject to a fine. The fine may vary from one-third to three times the amount of tax evaded (Article 175(2) of the Federal Income Tax Act and corresponding cantonal provisions), with a statute of limitation of 10 years (Article 184(1 letter b) of the Federal Income Tax Act).

Regarding attempted tax evasion, the fine amounts to two-thirds of the amount determined for complete tax evasion. The statute of limitations is six years (Article 184(1 letter a) of the Federal Income Tax Act).

On the other hand, tax fraud is a qualified offence that requires the use of fraudulent documents (e.g., a balance sheet not showing the correct assets and liabilities). Inexact salary certificates are considered a more serious criminal offence. Indeed, Article 186 of the Federal Income Tax Act provides that the maximal penalties for this offence are imprisonment up to three years and a fine of a minimum of 10,000 Swiss francs. The statute of limitations in cases of tax fraud is 15 years according to Article 189(1) of the Federal Income Tax Act.

V TAX CLAIMS

i Recovering overpaid tax

Regarding income tax, in the situation where the taxpayer paid a too high portion of provisional taxes, meaning that the amount of tax actually due is lower than the amount provisionally paid, the overpayment is refunded. This procedure occurs automatically. In the case of overpaid taxes, these are refunded or set off against other liabilities due to the tax authority upon request. For federal income tax, the refund claim can be made up to five years after the year when the overpayment was made (Article 168 of the Federal Income Tax Act). In Geneva, however, the limitation period starts from the moment when the taxpayer becomes aware of the overpayment. In any case, the overpaid amounts bear interest in favour of the taxpayer.

ii Challenging administrative decisions

Administrative decisions may be challenged on the grounds that they are unlawful, by lodging a formal complaint or an appeal (see Section II). This would also be the case where administrative decisions would be contrary to legitimate expectation or to the Federal Constitution. In specific cases, the unlawfulness may also result from the taxpayer in question being discriminated against in relation to another taxpayer.

iii Claimants

Generally speaking, the rule is that only the taxpayer to whom the tax assessment has been noticed is entitled to bring a tax claim against the authorities. Depending on the case and the circumstances, other persons or entities may have the right to lodge appeal (e.g., another tax authority in inter-cantonal double taxation cases, legal representative, heirs, management of the bankrupt's assets). With regard to direct income tax, it should be underlined that the competent cantonal tax authority as well as the Federal Tax Administration has the right to lodge appeals against tax assessment decisions, without prior duty to lodge a formal complaint.

Regarding VAT, entities having their seat or a permanent establishment on the Confederation territory and that are united under a single direction may apply to be treated as a single taxable person (tax group). It should be noted that entities that do not exploit a business as well as individuals may be part of a group (Article 13 VAT Act). In the case of such tax group, the group representative lodges the VAT return consolidating the VAT accounting of each group entities. This entity will therefore be the addressee of the tax assessment decision. All entities are, however, jointly responsible for the tax due (Article 15 VAT Act).

With regard to withholding tax, the liable person is not the same as the one that has a right, under Swiss law or treaty law, to a partial or full refund of the withholding tax. Any person applying for a partial or a full refund has the right to lodge a formal complaint against the authorities.

In the field of tax at source, a formal complaint may be lodged by any interested person, meaning the taxpayer and the debtor of the taxable benefit.

VI COSTS

As a general rule, each party bears its own costs. The taxpayer may, however, recover from the state part of the costs in the case of success in front of the court. Even in the cases involving substantial costs, the taxpayer will only recover a small part of them.

Regarding the procedural costs, they shall be partially or fully borne by the losing party. Nevertheless, these costs may also be borne by the successful appellant if his or her behaviour caused or significantly delayed the investigation. Moreover, all or part of the costs incurred because of inquiry measures may be charged to the taxpayer or any other person who is required to provide information, in the situation where these inquiry measures have been made necessary by a breach of procedural duties.

VII ALTERNATIVE DISPUTE RESOLUTION

i Tax ruling procedure

Given the overall complexity of taxation in Switzerland, taxpayers have an interest in discussing the more complex cases with the tax authorities at an early stage, prior to the implementations of any actions. Prospective taxpayers, such as international corporations considering moving to Switzerland, can obtain confirmation of their future taxation. The same is true for individuals.

In this regard, tax rulings are commonly used in the Swiss tax practice, although Swiss tax law does not expressly refer to rulings. It should be noted that a tax ruling does not provide for any more preferential taxation than the applicable law does. This constitutes a quick and efficient way to provide for clarity in readiness for taxation. In order to obtain a ruling, the taxpayer has to disclose all relevant information, usually in the form of a letter.

As recently confirmed by the Federal Supreme Court, cantonal tax authorities are the competent authorities to accept tax rulings. In practice however, the cantonal authorities often consult the Federal Tax Administration with regard to their direct taxes. If the competent tax authority agrees with the taxpayer, the ruling request is sent back to the taxpayer with the stamp of the authority, which provides the taxpayer with confirmation from the state on the tax treatment of a transaction or a situation. Tax rulings are not public.

Regarding the binding effect of such rulings, the taxpayer is protected by the constitutional principle of good faith insofar as he relies on the information received by the competent tax authority. Swiss case law also especially emphasised the importance of implementing the facts precisely described in the ruling.

There is no legal entitlement for a taxpayer to obtain a binding ruling, even though tax authorities are most of the time willing to deal with ruling requests. This means that a denial or a refusal of a ruling request cannot be contested by taxpayers.

Finally, it is worth mentioning that rulings pertaining to withholding tax are to be obtained from the Federal Tax Administration, which is solely competent in this particular field.

ii Alternative dispute resolution means

With regard to alternative dispute resolution means, double taxation treaties concluded by Switzerland usually refer to mutual agreement procedure. This type of procedure is independent of Swiss domestic law procedures. Thus, the time limits provided for by domestic law have no influence on the mutual agreement procedure and vice versa. In particular, the 30-day deadline to file a claim against a tax assessment decision is not suspended by a request for mutual agreement procedure. In order, to save his or her rights according to Swiss tax law, the taxpayer will generally file a complaint against the tax authority, which will be suspended during the mutual agreement procedure. Depending on various conditions, recently revised double taxation treaties also provide for arbitration if the taxpayer requests the opening of an arbitration procedure, generally in transfer pricing cases.

VIII ANTI-AVOIDANCE

In Switzerland, anti-avoidance rules are not contained in a specific act. They actually take different forms.

i General tax avoidance theory

The Federal Supreme Court developed through the years a general tax avoidance theory, in principle applicable to all Swiss taxes. The application of this theory, applied by all Swiss courts and tax authorities, has the consequence that tax authorities have the right to tax the taxpayer's legal structure based on its economic substance if the following conditions are met: the taxpayer's legal structure is unusual, inappropriate or inadequate to its economic purpose; tax considerations are deemed to be the only motive for the transaction; and the transaction effectively leads to significant tax savings to the extent that it would be accepted by tax authorities.

Furthermore, on 7 June 2017, Switzerland signed the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (MLI) in Paris. The MLI will serve to efficiently amend double taxation agreements in line with the minimum standards agreed upon in the Base Erosion and Profit Shifting (BEPS) project. Switzerland will implement these minimum standards either within the framework of the MLI or by means of the bilateral negotiation of double taxation agreements. In December 2017, The Federal Council submitted the MLI for public consultation. It will then undergo the standard parliamentary approval process. The entry into force should, thus, not be expected before January 2019.

ii Transfer pricing

Even though Switzerland does not have a formal transfer pricing legislation, all related party transactions with Swiss entities must respect the arm's-length principle. Generally speaking, Swiss tax authorities follow the OECD transfer pricing guidelines. Where the transfer price does not correspond to the arm's-length price, a hidden profit distribution is assumed and taxable income is adjusted (Article 58 of the Federal Income Tax Act). The arm's-length principle is also applicable in choosing the method of determination of mark-ups.

iii Thin capitalisation

In Switzerland, the thin capitalisation rules are embodied in a circular letter issued by the Federal Tax Administration (circular letter No. 6 of 6 June 1997). This circular letter sets out safe harbour rules that require a minimum equity ratio for each asset class. Any excess amount of debt is qualified anew as dividend subject to withholding tax and interests paid for excessive debt are not deductible (Article 65 of the Federal Income Tax Act).

iv Controlled foreign companies (CFCs)

There is no CFC regime in Switzerland.

IX DOUBLE TAXATION TREATIES

Generally speaking, Switzerland's tax treaty network is undergoing extensive renewal in accordance with the OECD standard. Regarding the interpretation of international tax treaties, it is accepted that they must be interpreted in accordance with the rules of public international law. Section 3 – Interpretation of Treaties of the Vienna Convention on the Law of Treaties, which entered into force in Switzerland in 1990, thus applies for the interpretation of DTTs.

In a case of 5 May 2015, relating to total return swap agreements and other derivatives, the Federal Supreme Court denied the refund of withholding tax on the banks' declared dividend income for the main reason that the banks were not beneficial owners of the income, as the banks acted as a sort of intermediary companies that were legally, economically or factually forced to transfer the dividend income to their counterparties. Therefore, the banks could not claim the benefit of the double tax treaty (Switzerland – Denmark in this case). In this regard, the Court also answered the question left open by the Swiss Federal Administrative Tribunal regarding the interpretation of double tax treaties drafted and signed before 1977, which do not contain the beneficial ownership requirement. In this respect, the majority of federal judges stated that the beneficial ownership criterion is an implicit requirement in all 'old' tax treaties. Thus, even if the double tax treaty Switzerland – Denmark did not contain an explicit reference to this requirement, tax authorities are entitled to apply the beneficial ownership requirement. The Federal Tax Administration will continue to apply its strict administrative practice and refuse refund of withholding tax in situations where it is assumed that the beneficial ownership is affected owing to derivatives strategies. The opinion of the Federal Supreme Court has been confirmed in its subsequent judgements.

X AREAS OF FOCUS

In two recent cases, the Federal Supreme Court removed uncertainties surrounding tax rulings and offshore structures. In this regard, the Federal Supreme Court confirmed that the tax authorities should be more severe when dealing with exotic offshore structures. Moreover, the roles between the cantonal and federal tax authorities have been clarified, meaning that only cantonal tax authorities have the power to grant tax rulings.

Until February 2017, following a decision of the Federal Supreme Court, Swiss tax authorities had adopted a formalistic view on the notification deadlines to be respected to avoid the retaining of withholding tax (dividend notification procedure). The 30-day deadline for notification was seen as a forfeiture deadline rather than an indicative deadline. Consequently, in the case of non-respect of such notification deadline, withholding tax was immediately due on any dividends that were not declared in the notification procedure and interest on late payment was to be paid on the withholding tax due. However, on 15 February 2017, the Swiss Withholding Tax Act was amended in connection with the application of the notification procedure on intragroup dividends (withholding tax relief at source). It follows from this amendment that, although the 30-day deadline remained unchanged, interest for late payment is now prohibited. Therefore, during a period of one year following the entry into force of the new provisions, companies which paid such interest to the Federal Tax Administration have been able to claim these payments back. The new regulation also provides for a retroactive effect whereas the refund shall also apply to cases that occurred before the entry into force of the new provisions, unless the tax claims or the late payment interest claims are time-barred or have already effectively been assessed prior to 1 January 2011.

More generally, Swiss tax authorities also pay more attention to transfer pricing issues and take a stricter approach with regard to structures and intra-group transactions involving offshore entities and locations. The Swiss tax authorities are supposed to follow the OECD Guidelines, and therefore the methods said guidelines propose. It is, however, recommended to request a tax ruling depending on the complexity of the case.

Finally, the Federal Supreme Court has lately adopted larger views on the international mutual assistance in tax matters. In a recent case, the Court has allowed the transfer of data requested by the French tax authorities despite the fact that such data were stolen from a Swiss bank and delivered to the French authorities. Indeed, the judges held that the transmission of data took place out of Switzerland, which did not make it a punishable act under Swiss criminal law. Therefore, the French request for mutual assistance could not be deemed an act of bad faith, as was sustained by the lower court. This judgement has once more decreased the extent of the bank secrecy, reflecting Switzerland's will for broader cooperation against tax avoidance. In this connection, it must be borne in mind that the federal law on the automatic exchange of information has entered into force in 2017. The first exchanges are expected to be executed in 2018.

XI OUTLOOK AND CONCLUSIONS

Last year, we mentioned the then ongoing Swiss Corporate Tax Reform III (CTR III), which aimed to enhance the attractiveness of Switzerland for companies at the international level while consolidating international acceptance of Switzerland as a business location. This reform has been rejected in the popular vote and will, therefore, never see the light of day, thus paving the way for new projects of reform in the future.

Following the rejection of the CTR III, the Federal Department of Finance (FDF) has been forging ahead with work on a new corporate taxation proposal entitled Tax Proposal 17 (TP17). This reform aims at making a significant contribution to having an appealing location and, thus, to added value, jobs and tax receipts. It should additionally meet international requirements concerning corporate tax law. Generally speaking, TP17 contains several tax measures to maintain Switzerland's competitiveness, in particular the introduction of cantonal patent boxes and R&D tax deductions. In September 2017, the Federal Council initiated a three-month consultation on TP17. The FDF is now planning to submit the dispatch for Parliament to the Federal Council in spring 2018. Consequently, the earliest TP17 can possibly enter into force is 2020.

More generally, as mentioned above, it should be remembered that Swiss tax authorities take a stricter approach in many areas, such as in transfer pricing cases, and that many practices that have previously been accepted, in the field of offshore structures for instance, are being challenged more and more by Swiss tax administrations. This particularly comes as a result of the massive international effort led by the OECD to fight against tax avoidance.

Chapter 31

UNITED KINGDOM

Simon Whitehead[1]

I INTRODUCTION

Resolving tax disputes is complicated under the UK system. The enquiry process gives a great deal of control to Her Majesty's Revenue and Customs (HMRC or the Revenue) regarding the conduct of a dispute, and can limit the ability of a taxpayer to bring matters to a tribunal within the timetable they might wish. The remedies available in the tax tribunal can be limited and its jurisdiction restricted. In consequence, a variety of fora and causes of action may be available to address tax issues, and an early issue that will often arise is whether the taxpayer has chosen the wrong forum or action. The system has recently been further complicated by developments including the extension of HMRC's information-gathering powers, and the introduction of accelerated payment notices, follower notices and partner payment notices. These are discussed further below.

Tax disputes may also be resolved in a non-contentious manner. In 2012, HMRC published a commentary on its litigation and settlement strategy (LSS), LSS guidance and guidance on the use of alternative dispute resolution (ADR) in large and complex cases.[2] The LSS sets out the framework within which HMRC seeks to resolve tax disputes through litigation or ADR. The aim behind the LSS and updated guidance is to provide a mechanism to settle disputes in a non-confrontational and collaborative way. However, in practice, HMRC's often litigious and uncompromising approach to disputes, especially in cases where the revenue exposure is high, means that a large number of tax disputes are still brought to the courts and tribunals.

II COMMENCING DISPUTES

i Corporation tax

The usual way in which a tax dispute arises, in the context of corporation tax, is with the filing of a tax return. A company is required to provide a self-assessment of its corporate tax

1 Simon Whitehead is a founding partner at Joseph Hage Aaronson LLP.

2 HMRC's most recent commentary on the LSS (November 2013) and detailed guidance are available at www.hmrc.gov.uk/practitioners/lss-guidance-final.pdf. The LSS is at Annex 1 to the commentary. HMRC, 'Resolving Tax Disputes - Practical Guidance for HMRC staff on the Use of Alternative Dispute resolution in Large or Complex Cases' is at http://webarchive.nationalarchives.gov.uk/20140109143644/http://www.hmrc.gov.uk/practitioners/adr-guidance-final.pdf. HMRC's information page for taxpayers is at https://www.gov.uk/tax-disputes-alternative-dispute-resolution-adr.

liability on delivering a tax return.[3] Most claims for relief must be made in the tax return, although it may be possible to claim for a relief, allowance or repayment separately within specified time periods.[4]

Commonly, returns must be filed within 12 months of the end of the accounting period for which the return is made.[5] Companies must file their returns, accounts, computations and any claims for relief via HMRC's online Corporation Tax service[6] save for exceptional circumstances[7] A company may also, by notice to HMRC within 12 months of the filing date, amend its own return.[8]

HMRC has a period of 12 months from the date the return was delivered to issue a notice of enquiry, with provisions to deal with returns that are filed late.[9] An enquiry may relate to anything that is contained in (or required to be contained in) the self-assessment return, such as questions regarding any claim or election, or any amount that might affect the tax liability of the company or another company, in that accounting period or another accounting period.[10] HMRC can make only one enquiry into each tax return, unless the company has made subsequent amendments to the return.[11] If HMRC is otherwise out of time to issue a notice of enquiry into the original return, the scope of enquiry is limited to the amended content.[12] The scope of enquiry would also be restricted if the amendment giving rise to the enquiry consisted of the making or withdrawing of a claim for group relief.[13]

There is no maximum duration set for an enquiry and HMRC is entitled to maintain an enquiry as long as it still reasonably requires information relevant to the company's tax position. Subject to the options discussed below, generally the taxpayer must await the conclusion of the enquiry before it can take any steps to commence litigation. At present, HMRC may only issue a closure notice once it has reached a conclusion on all areas of dispute within an enquiry.[14] The Court of Appeal held that an enquiry is completed once

3 The corporation tax self-assessment rules are set out in Schedule 18, Paragraphs 1–20 of the Finance Act (FA) 1998, as variously amended. The self-assessment regime applies to accounting periods ending on or after 1 July 1999.

4 Section 42, Taxes Management Act (TMA) 1970; Schedule 39, Paragraphs 37–65, FA 2008 reduced the normal time limit for claims and elections; from 1 April 2010, the time limit is four years from the end of the accounting period to which they relate, unless a different time limit is prescribed within the legislation for that particular claim or election. Previously, the time limit was six years. Claims with regard to group relief, capital allowances, research and development tax credits, film tax relief, land remediation tax credits and vaccine research tax credits must also be made in the company's tax return. If an error or mistake has been made in a claim and subsequently discovered, the claimant may make a supplementary claim within the time allowed for making the original claim.

5 Schedule 18, Paragraph 14, FA 1998, subject to specific exceptions for companies that prepare commercial accounts for a period longer than 18 months. A return must also be filed within three months from the date on which the notice requiring the return was served.

6 HMRC's online Corporation Tax service is accessible at www.gov.uk/file-your-company-accounts-and-tax-return.

7 https://www.gov.uk/file-your-company-accounts-and-tax-return#other-ways-to-apply

8 Schedule 18, Paragraph 15, FA 1998.

9 Schedule 18, Paragraph 24, FA 1998.

10 Schedule 18, Paragraph 25, FA 1998.

11 Schedule 18, Paragraph 24(5), FA 1998.

12 Schedule 18, Paragraph 25(2), FA 1998.

13 Schedule 18, Paragraph 74(4), FA 1998.

14 Schedule 18, Paragraph 32(1), FA 1998

an officer of Revenue and Customs informs by notice the company that it has completed its enquiry and stated its conclusions.[15] The notice only takes effect once issued. HMRC must carry out the following steps to validly issue a closure notice:

a decide whether to complete its enquiry;

b establish whether amendments need to be made to the self-assessment return and, if so, what they should be; and

c communicate the completion of the enquiry and the conclusions to the taxpayer

Once a closure notice has been issued, HMRC cannot unilaterally withdraw it.[16]

If the taxpayer believes HMRC is unduly extending the enquiry, it can apply to the First-tier Tribunal for a direction that HMRC give a closure notice within a specified period and have the enquiry closed.[17] The Tribunal will give the direction unless it is satisfied that HMRC has reasonable grounds for not giving notice within the specified period.[18] The powers of the First-tier Tribunal in determining an application for a closure notice are quite broad and in some circumstances it can be used as a mechanism to determine substantive legal issues in dispute and if necessary make a reference to the CJEU for a preliminary ruling on EU law.[19] Enquiries should not be used as a method of obtaining information as to a third party's tax affairs. [20] Alternatively, a taxpayer who believes that HMRC's actions have resulted in an unacceptable delay to the enquiry process may submit a complaint to HMRC.[21]

Any question arising in connection with the subject matter of the enquiry while it is in progress may be referred to the First-tier Tribunal for determination while the enquiry continues, but only by agreement.[22] Written notice of referral specifying the questions being referred must be given to the Tribunal jointly by HMRC and the company. The requirement of HMRC's consent to refer disputes for determination while an enquiry remained in progress, rendering this remedy of limited utility to the taxpayer. An enquiry can legitimately remain open for many years, for example where the return might be affected by other pending litigation. Absent HMRC's consent, there would be no means to resolve a dispute on any entirely unrelated issue in the interim.

Following consultation exercises in 2014 and 2015, provisions to enable 'partial closure notices' were introduced in Section 63 of and Schedule 15 to the Finance (No. 2) Act 2017. The proposed legislation allows HMRC and taxpayers to conclude discrete matters during an enquiry where more than one issue is in dispute. HMRC will be able to issue a partial closure notice in agreement with a taxpayer, at its own discretion or when directed to so by the First-Tier Tribunal on application by a taxpayer. Taxpayers will have a right of appeal to

15 *Revenue and Customs Commissioners v. Bristol & West Plc* [2016] EWCA Civ 397, [2016] STI 1464.

16 *Revenue and Customs Commissioners v. Bristol & West Plc*.

17 Schedule 18, Paragraph 33(1), FA 1998.

18 Schedule 18, Paragraph 33(3) FA 1998.

19 *RCC v. Vodafone No. 2* [2006] EWCA Civ 1132, [2006] STC 1530; *Finnforest UK Ltd v. HMRC* [2011] UKFTT 342 (TC), [2011] SFTD 889, *The Claimants Listed in the Group Register of the Loss Relief Group LItigation Order v. HMRC* [2013] EWHC 205 (Ch).

20 *Estate 4 Ltd v. HMRC* [2011] UKFTT 269 (TC).

21 This process is discussed further at Section III. HMRC's complaint process is outlined at www.hmrc.gov.uk/complaints-appeals/how-to-complain/make-complaint.htm.

22 Schedule 18, Paragraphs 31A–31D, FA 1998, as inserted by Schedule 29, Paragraph 7, FA 2001. The Tribunal's determination is binding on the parties as if it were a decision on a preliminary issue in an appeal, and must be taken into account by HMRC in reaching its conclusions on the enquiry.

the First-Tier Tribunal against both the conclusions reached in the partial closure notices and any consequent amendment of the tax return. Taxpayers will also be able to apply for a postponement of any additional tax payable where they think it is excessive. Tax repayments arising from a partial closure notice need not automatically be repaid, for example, where tax is due in respect of other issues not covered by the partial closure notice.

Where HMRC is directed to issue a partial closure notice by the First-Tier Tribunal on application of a taxpayer, the partial closure notice and any consequent amendment will also be appealable to the Tribunal. Postponement of additional tax may also be sought. When the enquiry is completed, HMRC will issue a final closure notice and make a final amendment to the return, taking into account any partial closure notices and amendments to the return already issued. The measure will supposedly give HMRC and taxpayers greater certainty about tax owed on individual discrete matters without having to wait for all matters in a tax enquiry to be resolved.[23]

Once a closure notice has been issued, HMRC will have no power to amend the tax return other than to enforce the conclusions stated in the notice.[24] However, if at the conclusion of an enquiry, HMRC remains of the view that the original return is incorrect, it will issue a closure notice requiring the return to be amended.[25] This notice can be appealed against, and this is the most common way in which tax disputes proceed to litigation.

Once the time limit for an enquiry has passed, or an enquiry has been closed, the only way in which HMRC can examine a chargeable period is through the discovery process.[26] HMRC may issue a discovery assessment:[27]

a when it becomes aware of the non-assessment of income or gains that ought to have been assessed;

b if an assessment is or has become insufficient; or

c if a relief given is or has become excessive.[28]

If the taxpayer has submitted a tax return, HMRC's power is restricted by two conditions. First, a discovery assessment may only be made where the return was not made in accordance with 'practice generally prevailing'.[29] Second, either the understatement must have been careless or deliberate,[30] or HMRC could not reasonably be expected to be aware of the understatement based on the information made available to it by the taxpayer at the relevant time.[31] Similarly, if HMRC discovers that a return for an accounting period incorrectly states

23 HMRC 'Tax Enquiries: Closure Rules', 5 December 2015.

24 Schedule 18, Paragraph 34(2)(b), FA 1998.

25 Schedule 18, Paragraph 34, FA 1998.

26 Or in unusual circumstances of 'jeopardy' Schedule 18, Paragraph 30, FA 1998. This power is rarely used, and only in circumstances where HMRC believes the amount of tax stated as payable in the self-assessment is insufficient and there is likely to be a loss of tax to the Crown. The power may be exercised after notice of an enquiry has been given but before the enquiry is completed.

27 Schedule 18, Paragraphs 41–44, FA 1998. The tax so assessed will be in addition to the tax charged under the self-assessment; see also Section 29, TMA 1970.

28 Schedule 18, Paragraph 41, FA 1998. See also Section 29(1), TMA 1970.

29 Section 29(2) TMA 1970.

30 Section 29(4) TMA 1970.

31 Section 29(5) TMA 1970.

an amount that affects, or may affect, the tax payable for another accounting period or by another company, they may make a 'discovery determination' of the amount of tax due by the company based on the information available to the officer.[32]

A taxpayer who disagrees with a closure notice, an assessment or other decision made by HMRC can appeal against it by giving notice in writing to HMRC, stating the grounds of appeal.[33] The notice must normally be given within 30 days after the date of issue of the assessment or decision, although late appeals can be made in some circumstances.

Once a taxpayer has appealed there are three main options:

a a different HMRC officer can carry out a review of the decision;

b the taxpayer may ask the Tribunal to decide the matter in dispute; or

c the appeal can be settled by agreement at any time.

Reviews are not compulsory and, where HMRC carries out a review but the taxpayer still disagrees with the decision, the taxpayer can ask the Tribunal to decide the issue or continue negotiations with HMRC to settle the appeal by agreement.

ii Disclosure

During the course of an enquiry, HMRC may request that the taxpayer provide information and documents that are in that taxpayer's possession or power and that are relevant to its own tax position. If HMRC issues an information notice,[34] the taxpayer must produce the information within such time, by such means and in such format as provided for in the notice.[35] In relation to corporation tax enquiries, while the enquiry remains in progress, a company is entitled to amend its return, and to make or withdraw claims for group relief.[36]

Unless the issue of the notice to provide information has received prior approval from the Tribunal,[37] there is a right of appeal against it.[38] However, this appeal does not extend to any information or documents that form part of a taxpayer's statutory records.[39] An appeal

32 Schedule 18, Paragraph 41(2), FA 1998.

33 Schedule 18, Paragraph 48, FA 1998

34 Schedule 36, Paragraph 1, FA 2008. Copies of documents can be produced unless the notice stipulates that originals must be submitted. A taxpayer that fails to comply with a notice may be liable to pay penalties.

35 Schedule 36, Paragraph 7, FA 2008.

36 Schedule 18, Paragraph 74, FA 1998. Group relief claims may be made or withdrawn at any time up to the latest of (1) the first anniversary of the filing date for the claimant's company tax return; (2) 30 days after closure of any enquiry into that return (unless the enquiry, being otherwise out of time, was limited to matters to which a previous amendment making or withdrawing a group relief claim relates or that are affected by the amendment); (3) 30 days after notice of any amendment of that return by HMRC following such an enquiry; and (4) 30 days after determination of any appeal against an amendment within (3), or at a later time if HMRC allows it. These time limits override the normal time limits for amendment of a company tax return. Withdrawals of claims must be made by amending the return, and a claim can only be amended by withdrawal and replacement by another claim.

37 Schedule 36, Paragraph 13, FA 2008.

38 Schedule 36, Paragraph 29, FA 2008

39 Any entity that may be required to deliver a tax return is required to keep and preserve all records and documents that may be required to deliver a correct and complete return for an accounting period (e.g., invoices, receipts, expenses claims). These are the company's statutory records, which must be retained for six years after the end of the period to which the tax return relates or, with effect from 1 April 2009, for such shorter periods as may be specified in writing by HMRC; see Schedule 18, Paragraph 21, FA 1998, as amended.

must be made to HMRC, in writing and specifying the grounds of appeal, within 30 days of receipt of the notice.[40] If a taxpayer fails to make an appeal within the normal time limit, an appeal can still be made if HMRC agrees[41] or, where HMRC does not agree, the Tribunal gives permission.

Schedule 23 to the Finance Act 2011 introduced and extended a common set of information-gathering and inspection powers for HMRC covering income tax, capital gains tax, corporation tax and VAT; these are also known as HMRC's 'bulk and specialist information powers'. HMRC may, by written notice (also known as a data-holder notice), require a 'relevant data-holder'[42] to provide 'relevant data'.[43] The objective behind these provisions is to improve HMRC's data-gathering processes in order to ensure that interventions are better targeted against those who underpay tax;[44] for this reason, a data-holder notice must not be used to obtain information about the data-holder's own tax position.[45] The data requested may be general data, or data specific to a particular person or matter including personal data.[46] The type of information must be specified in the notice.

40 Schedule 36, Paragraph 32, FA 2008

41 HMRC must agree to a written request for a late appeal if it is satisfied that there was a reasonable excuse for not making the appeal within the time limit, and that the request was made without unreasonable delay after the reasonable excuse ceased.

42 Relevant data-holders include employers, employment agencies, payroll agents, deemed employers, banks and building societies, trustees, nominees, personal representatives, solicitors, agents (including insurance, patent and copyright agents), companies, stockbrokers, public bodies, the land registry, landlords, tenants, intermediaries, clearing houses, persons involved in the registration and administration of securities transactions, settlors, beneficiaries and merchant acquirers who process credit and debit card payments; see Paragraphs 8–27 of Schedule 23, FA 2011. Section 176, FA 2016 extends relevant data-holders to include providers of electronic stored value payments services that operate 'digital wallets' and Business intermediaries who facilitate transactions online. The categories broadly mirror those previously found in TMA 1970 but create some new ones, including charities and property managing agents. A person is still a data-holder if he or she previously fell within one of the categories of data-holder but no longer does so.

43 The Data-gathering Powers (Relevant Data) Regulations 2012 (SI 2012/847) came into force on 1 April 2012. They set out the information that data-holders must provide to HMRC on receipt of a data-holder notice. The Data-gathering Powers (Relevant Data) (Amendment) Regulations 2013 (SI 2013/1811), which came into force on 1 September 2013, set out the position in relation to merchant acquirer data-holders, and similar bodies. This includes information relating to employment-related payments, certain interest payments, payments derived from securities, rent and other payments arising from land, dealings in oil licences and payment transactions. The Data-gathering Powers (Relevant Data) (Amendment) Regulations 2016 (SI 2016/979), which came into force on 1 November 2016, specifies the data required by HMRC from two new categories of relevant data holder; namely, electronic stored-value payment service providers and business intermediaries, as introduced by the Finance Act

44 HM Treasury & HMRC, 'Overview of draft legislation for Finance Bill 2011' (December 2010) at http://webarchive.nationalarchives.gov.uk/20110203024958/http://www.hmrc.gov.uk/budget-updates/autumn-tax/tiins-all.pdf at p. 138.

45 Schedule 23, Paragraph 2(3), FA 2011.

46 Schedule 23, Paragraph 1(4), FA 2011. 'Personal data' is also a defined term under s1(1) of the Data Protection Act 1998 (DPA). In some circumstances a data-holder may also be a 'data controller' under s1(1) of the DPA. There is therefore a potential overlap between Schedule 23, FA 2011 and the DPA; it remains to be seen whether and to what extent a request that a data holder provide 'personal data' under Schedule 23, FA 2011 and Section 176, FA 2016 can be interpreted consistently with a data controller's obligations in relation to the same 'personal data' under the DPA.

If Tribunal approval is not obtained for the issue of a Schedule 23 data-holder notice, the data-holder may appeal a notice on any of the following grounds: it would be unduly onerous to comply with the notice, the data-holder is not a relevant data-holder or the data specified in the notice are not relevant data.[47]

There are four options for proceeding with an appeal:

a the appellant can require HMRC to review the matter in question;

b HMRC can offer to review the matter in question;

c the appellant can notify the appeal to the First-tier Tribunal for it to decide the matter in question; or

d the appeal can be settled by agreement between HMRC and the appellant.

Where the appellant requires HMRC to conduct a review, he or she can still appeal to the Tribunal if he or she disagrees with the review's conclusions, or if HMRC fails to complete a review within the required time.[48]

iii Other direct taxes

Virtually identical rules apply for other self-assessed taxes.[49]

iv VAT

For VAT, the onus is on the taxable person (i.e., the person registered for VAT) to file returns accounting for the VAT charged on and suffered in respect of any goods and services he or she supplies.[50] In circumstances where HMRC disagrees with the content of a VAT return (or where the return has not been filed on time), it may issue an assessment to tax in respect of any VAT it considers owing.[51] HMRC may also issue a default surcharge[52] where a registered person has not filed their VAT return on time, or an inaccuracy penalty[53] where they consider that a VAT return contains inaccurate information. Normally, HMRC will write to the taxable person in advance of issuing an assessment to highlight its concerns and provide an

47 Schedule 23, Paragraph 28, Finance Act 2011.

48 In direct tax cases, the taxpayer can request a review of a matter at any time after it has notified HMRC of the appeal (however, not once the Tribunal has been notified). HMRC has 30 days, or a longer period if reasonable, to give its view of the matter. From the day the Revenue gives notice of its view it has 45 days to carry out the review and give notice of its conclusions. By agreement, the 45-day period can be varied (Sections 49B and 49E, TMA 1970).

49 For personal income tax, see Sections 8–9C, TMA 1970 for returns, self-assessments, amendments or corrections to returns and assessments and enquiries; Sections 29, 34 and 36, TMA 1970 for HMRC's powers to issue assessments; Sections 31, 31A and 49, TMA 1970 for appeals by the taxpayer; and Sections 49A–49I, TMA 1970 for the appeal process. For partnerships, see Sections 12AA–12AD, TMA 1970 for partnership returns and statements, and amendments and corrections to partnership returns and enquiries; Sections 30B, 34 and 36 TMA 1970 for HMRC's powers to issue assessments; Sections 31, 31A and 49, TMA 1970 for appeals by the taxpayer; and Sections 49A–49I, TMA 1970 for the appeal process.

50 Section 25, VAT Act (VATA) 1994.

51 Section 73 VATA 1994.

52 Sections 59–70, VATA 1994. Provisions in Schedules 10–11, Finance (No 3) Act 2010, which introduce a consolidated penalty scheme for late filing of returns, are not yet in force.

53 A consolidated penalty regime for errors in returns for taxes including VAT was introduced in Schedule 24, Finance Act 2007, and applies to all return periods commencing on or after 1 April 2008 for which a return is required to be on or after 1 April 2009. For periods before this the previous regime of misdeclaration penalties applies, see Sections 63–64, VATA.

opportunity for that person to make representations to resolve the matter. In circumstances where the taxable person has sought a credit or refund of VAT,[54] HMRC may either agree to the adjustment or issue a decision rejecting all (or some) of the amendment sought.

If the taxable person disagrees with all or part of an assessment or decision issued or made against him or her, he or she must appeal to HMRC within 30 days of the date on which the assessment or decision was issued or made. The taxable person may then either request an internal review (or accept an offer of one, if made) by HMRC, or notify his or her appeal to the First-tier Tribunal (Tax). If a review is requested, and the taxable person disagrees with the outcome of that review, he or she may still issue an appeal to the First-tier Tribunal (Tax), provided he or she does so within 30 days of the date of that review decision.

Where there are issues of public law, it may be necessary to seek redress by way of judicial review.

v Stamp duty land tax

HMRC may investigate a land transaction return provided that it notifies the purchaser of its intention to do so within nine months of the filing date. The filing date is 30 days after the effective date of the transaction. Once the nine-month period ends, HMRC can still make a discovery assessment if the underpaid tax was caused by a deliberate or careless action by the taxpayer, or if the taxpayer did not provide sufficient information at the date of filing for HMRC to know that the tax was underpaid.

vi Ruling procedures

Taxpayers can request guidance as to HMRC's interpretation of tax law and may also request a formal ruling from HMRC on specific facts and transactions, where appropriate. The Taxes Acts provide that advance clearance or approval may be given by HMRC, but only for certain types of transaction (e.g., clearance for a company purchase of its own shares).[55]

HMRC will give a post-transaction ruling where there is doubt about the tax consequences of a transaction that has been carried out. The application must be made to the tax office dealing with the taxpayer's affairs.[56]

Such a ruling is binding on HMRC provided all relevant information is supplied for the particular transaction concerned and in respect of the particular taxpayer. This applies even if there is a subsequent court decision. There is no appeal against a ruling as such, except where rights to appeal are set out in statute. The taxpayer is not, however, bound to follow it in completing its return. If HMRC does not accept the return, the issue can then be the subject of an appeal.

54 Section 80, VATA 1994.

55 Sections 1044–1045, Corporation Tax Act (CTA) 2010.

56 In November 2011 HMRC published a comprehensive code of practice, CAP1 (Clearances and Approval 1: Obtaining HMRC's advice on non-business activities), on the provision of information and advice to taxpayers. This replaced the former Code of Practice 10, and provides guidance for taxpayers with queries relating to non-business activities on HMRC's interpretation of the law. HMRC's guidance on non-statutory clearance is at https://www.gov.uk/non-statutory-clearance-service-guidance.

III THE COURTS AND TRIBUNALS

i Internal review process

A taxpayer generally has 30 days to appeal against an HMRC decision by way of notice of appeal. The taxpayer may, however, also request a review of the decision. In VAT cases HMRC is obliged to offer a review of the matter, and seeking a review will delay the period for seeking an appeal until 30 days after the review decision. In direct tax cases, the taxpayer can request, or HMRC can offer, a review of the matter,[57] but only after HMRC has been notified by the taxpayer of the appeal.

An officer who has not previously been involved with the decision will carry out the internal review process; his or her aim is to provide a balanced and objective view.[58] If HMRC offers a review, the taxpayer then has 30 days to accept HMRC's offer[59] or, if they do not wish to accept the offer of a review, to notify the appeal to the tribunal.[60] If the taxpayer accepts HMRC's offer, HMRC has 45 days to complete the internal review procedure and notify the taxpayer of its conclusions, unless varied by agreement.[61] The taxpayer then has 30 days to notify the appeal to the tax tribunal.[62] The taxpayer will require leave to appeal from the tax tribunal once the 30 days have passed.[63] The matter will be considered settled in HMRC's favour if the taxpayer neither declines nor accepts HMRC's offer, nor notifies the tribunal in time.[64]

ii Complaints

HMRC published 'Your Charter' in February 2013.[65] The Charter outlines nine rights which taxpayers can expect from HMRC. These are the rights:

- *a* to be respected;
- *b* to have help and support to get things right;
- *c* to be treated as honest;
- *d* to be treated even-handedly;
- *e* to be professional and act with integrity;
- *f* to tackle people who deliberately break the rules and challenge those who bend the rules;
- *g* to protect the taxpayer's information and respect their privacy;
- *h* to accept that someone else may represent the taxpayer; and
- *i* to do all it can to keep down the costs of dealing with HMRC.

57 Section 49A, TMA 1970.

58 Revenue & Customs Brief 10/09.

59 Section 49C, TMA 1970.

60 Section 49H, TMA 1970. If the taxpayer wishes to notify the tribunal outside of this period, it will require leave from the tribunal; see Section 49H(3).

61 Section 49E(6), TMA 1970.

62 Section 49G, TMA 1970.

63 Section 49G, TMA 1970.

64 Sections 49C and 49F, TMA 1970.

65 HMRC, 'Your Charter' available at www.gov.uk/government/uploads/system/uploads/attachment_data/file/91888/charter.pdf.

A taxpayer may submit a complaint to HMRC in circumstances where it believes that HMRC has failed to uphold one or more of these rights.[66] The taxpayer should submit as much information as possible in order for HMRC to investigate the complaint.

After receiving the complaint, HMRC will try to resolve the issue as quickly as possible. Possible remedies may include an apology, payment for worry or distress or reasonable costs (these may include professional fees). If the taxpayer is unhappy with the decision, they may request that it is referred for consideration to a different HMRC complaints adviser. Following the second HMRC decision, the taxpayer may request a referral to the Adjudicator's Office. The Adjudicator will act as a fair and unbiased referee in the matter. If the taxpayer is unsatisfied with the Adjudicator's decision, they may request their MP to refer the complaint to the Parliamentary and Health Service Ombudsman. This may be a lengthy process, depending upon the particular facts and the willingness of either side to reach an agreement, and taxpayers should continue to pay any tax due pending the resolution of the complaint. It remains to be seen how successfully and quickly the complaints process will operate in practice.

iii Courts and tribunals

The first instance tribunal for most tax disputes is the Tax Chamber of the First-tier Tribunal. It sits as a tribunal of one to three tribunal judges, depending on the issue's complexity. Appeals from decisions of the First-tier Tribunal are to the Tax and Chancery Chamber of the Upper Tribunal by leave only on questions of law. The Upper Tribunal can also determine cases transferred from the First-tier Tribunal and judicial reviews of the tax functions of HMRC,[67] and can hear cases at first instance (i.e., bypassing the First-tier Tribunal), but only if such cases meet the category of 'complex' and the Upper Tribunal and both parties consent.[68] The Upper Tribunal also sits as a tribunal of one to three judges, one of whom must be a judge of the Chancery Division of the High Court. Both bodies are independent of HMRC. There are no set parameters for the time period for determining cases, but a case requiring a hearing of less than a week should be capable of being heard by either tribunal within a year.

Appeals from the Upper Tribunal are to the Court of Appeal (which sits as three judges), then to the Supreme Court, again only with permission and (except in extreme cases) only on questions of law. Appeals to the Supreme Court will not be granted permission unless the matter is of general public importance. It sits as a panel of an uneven number of no less than three (but usually either five or seven judges). The judges are independent of HMRC. Periods for hearings in the higher courts naturally tend to be longer. We would usually expect cases to take around 18 months to complete in the Court of Appeal, and two years in the Supreme Court.

Certain types of claim, as discussed below, must be brought in the High Court (either in the Chancery Division or the Administrative Court), rather than via the tribunal system. As an appellate body created by statute, the First-tier Tribunal has no general supervisory jurisdiction; claims concerning public law matters are therefore best brought by way of an

---

66 HMRC, 'Guidance – Complain to HM Revenue and Customs' at www.gov.uk/complain-to-hm-revenue-and-customs.

67 Section 15, Tribunals Courts and Enforcement Act (TCEA) 2007.

68 Rule 28, The Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (SI 2009/273) (FTR).

application for judicial review in the High Court.[69] Cases in the High Court should not take much longer than those in the First-tier Tribunal and in the area of judicial review tend to be quicker. Appeals from the High Court lie by permission to the Court of Appeal and then the Supreme Court.

IV PENALTIES AND REMEDIES

The UK applies a consolidated tax penalty regime that distinguishes between two main categories of penalties. It should be noted that different rules apply to accounting periods predating 1 April 2009.

The first type of penalty applies to the failure to make returns[70] and to pay tax.[71] These penalties take the form of an immediate penalty upon default, with incremental additional penalties depending on how late the tax is paid or the return submitted.[72] Penalties for failure to file a return or to pay tax will not be imposed where the taxpayer has a reasonable excuse.

The second type of penalty applies to errors in returns,[73] failure to give notice of chargeability to tax or unauthorised issue of VAT invoices.[74] These penalties operate on a sliding scale depending on the degree of culpability and are quantified as a percentage of the lost revenue.

In relation to penalties for errors, degrees of culpability are categorised as 'careless', 'deliberate but not concealed' or 'deliberate and concealed'.[75] Errors that are neither careless nor deliberate attract no penalty unless the person making the return later becomes aware of the error and fails to disclose it to HMRC, in which case it is treated as careless. The amount of a penalty ranges from 30 per cent of the lost revenue for careless defaults to 200 per cent in the most serious cases of deliberate and concealed action. Penalties can be reduced (and in the case of careless actions cancelled) if the person making the return discloses the error to HMRC. The amount of any reduction depends also on whether the disclosure was made following prompting by HMRC or was unprompted.

A similar system applies to penalties for failure to give notice of chargeability to tax or the unauthorised issue of VAT invoices, save that the 'careless' category is omitted. Instead, there is a catch-all category for cases where the failure was not deliberate. Again, the amount of the penalty ranges from 30 per cent of the lost revenue for actions that were not deliberate to 200 per cent for the most serious cases of deliberate and concealed actions involving offshore aspects.

69 *Pertemps Ltd v. Revenue and Customs* Commissioners [2015] UKFTT 512 (TC), [2015] STI 3256; Revenue *and Customs Commissioners v. Dhanak* [2014] UKUT 68 (TCC), [2014] STC 1525; *Abdul Noor v. Revenue and Customs Commissioners* [2013] UKUT 71 (TCC), [2013] STC 998, concerning a taxpayer's VAT appeal based on the public law concept of 'legitimate expectations'. See also *Hok Ltd v. Revenue and Customs Commissioners* [2012] UKUT 363 (TCC), [2013] STC 225.

70 Section 106, FA 2009; Schedule 55, FA 2009, as amended by Section 163 FA 2016.

71 Section 107, FA 2009; Schedule 56, FA 2009, as amended by Section 163 FA 2016.

72 Schedules 55 and 56, FA 2009.

73 Schedule 24, FA 2007, as amended by Section 163 FA 2016.

74 Schedule 41, FA 2008, as amended by Section 163 FA 2016.

75 Schedule 24, FA 2007, as amended.

As a further deterrent, HMRC may in certain circumstances, and where the potential lost revenue exceeds £25,000, publish the details of deliberate tax defaulters.[76] This power applies to tax periods commencing on or after 1 April 2010 and to offences committed on or after that date. In cases of serious fraud, HMRC has the power to launch criminal investigations that can lead to criminal sanctions if convictions are secured. Such an approach is only appropriate in the most serious cases.

The Finance Act 2016 has made certain amendments to support the strategy to tackle offshore tax evasion. These amendments will help identify those that hide behind companies and trusts when committing offshore tax evasion and restrict the protection from naming those offshore evaders who do not come forward to HMRC unprompted.[77]

V TAX CLAIMS

i Recovering overpaid tax

Tax may be overpaid because of an innocent error in a return or, more commonly, because a decision of the courts indicates that the previously accepted tax treatment was wrong. In recent years this has arisen most prominently where a decision of the CJEU has held that tax otherwise due under the terms of domestic legislation was in fact raised incompatibly with EU rights, and that the tax levy was therefore not due.[78] A similar circumstance will arise where the tax is found to be incompatible with an enforceable double taxation treaty. In those circumstances, the analysis would be that the terms of the double taxation treaty overrode the incompatible domestic legislation, so that the tax paid in accordance with that legislation was in fact paid under a mistake in respect of what the law actually required.[79]

In those circumstances, the most immediately obvious remedy would be to amend the tax return to reflect the tax actually owing consistent with a proper understanding of the position. Where this route is not possible, most usually because the period for amending the return has expired,[80] UK law provides for other means by which an overpayment of tax can be recovered.

76 Section 94, FA 2009, as amended by Section 164 FA 2016. This provision applies where a person incurs a penalty or penalties for one or more of the following: deliberate inaccuracy in a return; deliberately supplying false information or withholding information leading to an inaccuracy; or failure to notify liability to tax or the unauthorised issue of a VAT invoice. See HMRC's guidance at www.hmrc.gov.uk/defaulters/defaulters-list.pdf.

77 HMRC's 'Finance (No. 2) Bill 2016 Explanatory Notes Volume 2', Clause 152, 24 March 2016

78 See, e.g., Joined cases C-397/98 and C-410/98 *Metallgesellschaft Ltd v. IRC*; *Hoechst AG v. IRC* ECR I-1727; case C-446/03 *Marks & Spencer Plc v. Halsey* (Inspector of Taxes) [2005] ECR I-10837; case C-196/04 *Cadbury Schweppes* [2006] ECR I-07995; and case C-35/11 *Test Claimants in the FII Group Litigation*; case C-362/12 *Test Claimants in the FII Group Litigation*; case C-80/12 *Felixstowe Dock and Railway Company Ltd and Others v. HMRC*; *Prudential Assurance Co ltd v. Revenue and Customs Commissioners*[2016] EWCA Civ 376; [2016] STI 1430.

79 See Section IX. See, also, e.g., *Revenue and Customs Commissioners v. UBS AG* [2007] EWCA Civ 119, [2007] STC 588; *NEC Semi-Conductors Ltd v. Inland Revenue Commissioners* [2007] UKHL 25, [2007] STC 1265; *Commissioners for Her Majesty's Revenue and Customs v. FCE Bank plc* [2012] EWCA Civ 1290, [2012] STC 462; *Percival v. Revenue and Customs Commissioners* [2013] UKFTT 240 (TC).

80 Schedule 18, Paragraph 15(4), FA 1998 for companies and Section 9ZA (2), TMA 1970 for individuals.

First, the High Court retains an inherent jurisdiction to hear claims in damages and restitution unless implicitly or explicitly excluded by statute.[81] Where the ability to bring a High Court claim in restitution exists, it benefits from a number of distinct advantages.

Most importantly, if the overpayment of tax was made by mistake, such as the circumstances described above, then by reason of Section 32(1)(c) of the Limitation Act 1980, if the claim is brought as a High Court restitution claim, the limitation period of six years for seeking restitution of the tax overpaid does not commence running until the mistake is discovered or could, with reasonable diligence, have been discovered. In the context where the tax payment was originally made in accordance with the law as generally understood, but which was subsequently found to be incorrect by a judgment of the court (particularly of the CJEU), it has been held that the actual or constructive discovery of the mistake does not occur until the date of that judgment.[82] Thus, a claim brought within six years of a relevant CJEU decision declaring a UK tax to have been incompatible with EU law can cover all such payments going back to the first payment of the tax, or the UK's entry to the EU, whichever is the later. Other benefits of High Court restitution claims over statutory claims are that the rate of interest recoverable tends to be higher[83] and costs are usually recoverable by the successful party, whereas that is not generally the case for the statutory tribunal regimes.[84]

Second, with effect from 1 April 2010, the Finance Act 2009 introduced Paragraph 51A of Schedule 18 to the Finance Act 1998 (Paragraph 51A). This provision grants a general right to the recovery of overpaid corporation tax in most circumstances, subject to a limitation period of four years after the end of the relevant accounting period. There are similar provisions for income tax.[85] It is also subject to a defence that the mistake must not have been in accordance with 'practice generally prevailing at the time'. However, as of 14 January 2014, this defence cannot apply where the claim seeks to enforce EU rights.[86] The defence will be applied otherwise.

It remains an open question as to whether this overpayment remedy has the effect of excluding the ability to bring High Court claims in EU law matters, at least until the exclusion of the 'practice generally prevailing' defence on 14 January 2014. Although it is expressly stated that a claim under Paragraph 51A is the only mechanism by which HMRC

81 *Autologic Plc v. IRC* [2005] UKHL 54, [2006] 1 AC 118; *Monro v. Revenue and Customs Comrs* [2009] Ch 69; *Test Claimants in the FII Group Litigation v. Commissioners of Inland Revenue* [2012] UKSC 19, [2012] 2 AC 337; *Prudential Assurance Co Ltd v. Revenue and Customs Commissioners* [2016] EWCA Civ 376, [2016] STI 1430.

82 *Deutsche Morgan Grenfell Group plc v. IRC* [2006] UKHL 49, [2007] 1 AC 558.

83 Interest recoverable under statutory claims is set at the statutory rates that are intended to be below interest rates commercially available. Interest recoverable as part of a High Court restitution claim is at HMRC's actual rate of borrowing; see *Deutsche Morgan Grenfell Group plc v. IRC* [2006] UKHL 49, [2007] 1 AC 558. In some circumstances, interest is recoverable under a High Court claim on a compound interest basis. The circumstances in which interest is recoverable on such a basis is still the subject of litigation: see *Sempra Metals v. IRC* [2007] UKHL 34, [2008] 1 AC 561; *Littlewoods Retail Ltd v. The Commissioners for Her Majesty's Revenue and Customs* [2010] EWHC 1071 (Ch), [2010] STC 2072 and [2014] EWHC 868 (Ch), [2014] STC 1761; *Littlewoods Limited and Others v. The Commissioners for Her Majesty's Revenue and Customs* [2015] EWCA Civ, [2015] STC 2014; *Prudential Assurance Co Ltd v. Revenue and Customs Commissioners*.

84 See Section VI.

85 Schedule 1AB, TMA 1970.

86 Sections 231 and 232, FA 2013 introducing Paragraph 51(9) and (10) of Schedule 18, FA 1998; Revenue & Customs Brief 22/10; *Monro v. Revenue and Customs Comrs* [2009] Ch 69.

can be liable to a repayment of overpaid tax,[87] the Supreme Court has held, in relation to the predecessor provisions,[88] that the existence of the same 'general prevailing practice defence' rendered those provisions inapplicable to EU law claims, notwithstanding HMRC's contention that the defence would be disapplied in an EU law context, or the conclusion of the courts that those previous provisions were implicitly exclusive.[89] However, where the provisions of Paragraph 51A do not apply, the ability to bring a High Court restitution claim will remain. Thus, High Court restitution claims have recently been upheld to recover compound interest upon the repayment of overpaid VAT where it has been held that the statutory regime only entitles claimants to the recovery of simple interest.[90]

Third, claims for the recovery of under-declared input VAT and the recovery of over-declared output VAT, must be made within a period of four years from the date on which the return to which the under- or over-declared input or output VAT was to have been made.[91] Claims in respect of bad debt relief must be made within four years and six months from either the date on which the debt fell due and payable, or the date of the supply, whichever is the later.[92]

The recovery of interest on the repayment of overpaid VAT is governed by the statutory scheme outlined in Section 78, VATA 1994. The validity of this provision was upheld by the Supreme Court in *Littlewoods*.[93] Overturning the lower courts' finding that Section 78 should be disapplied, it was held that the adequate indemnity that Littlewoods was entitled to under EU law had been achieved by the national statute, and, therefore, it was not entitled to compound interest. However, the case was fact-specific to Littlewoods. The Supreme Court ruled that because Littlewoods' claim extended over 30 years, it received statutory simple interest more than 23 per cent higher than the principal sum of overpaid VAT and since statutory interest was 24 per cent of its actual loss, it had received 'reasonable redress', a definition of 'adequate indemnity' adopted by the Supreme Court. Section 78 was not endorsed as providing reasonable redress in all cases, and it remains to be seen if a claimant might attempt to argue that he or she had not been properly compensated for loss in overpaid VAT.

Unfortunately successive UK governments have shown a habit of using retrospective legislation to cancel, restrict or inhibit claims for the recovery of overpaid tax particularly in the enforcement of EU rights. In 2003 the UK sought to restrict the limitation period applicable to such claims issued after the date that change was announced[94] and in 2007[95] announced the cancellation outright of all claims already issued within time where the statutory limitation period being validly exercised was longer than six years. Both those provisions were found

87 Schedule 18, Paragraph 51(6), FA 1998.

88 Section 33, TMA 1970 and Schedule 18, Paragraph 51, FA 1998: see *Test Claimants in the FII Group Litigation v. Commissioners of Inland Revenue* (SC).

89 *Monro v. Revenue and Customs Comrs.*

90 *Littlewoods Limited and Others v. The Commissioners for Her Majesty's Revenue and Customs* [2015] EWCA Civ, [2015] STC 2014 .

91 Regulations 29 and 34, VAT Regulations 1995 (SI 1995/2518).

92 Regulation 165A, VAT Regulations 1995.

93 *Littlewoods Retail Ltd v. Revenue and Customs Commissioners* [2017] SC 70.

94 Section 320 Finance Act 2004.

95 Section 107 Finance Act 2007.

incompatible with EU law and unlawful by the CJEU[96] and Supreme Court.[97] In 2013 further retrospective legislation amended the Court rules to protect only HMRC from orders for interim relief.[98] Litigation is currently pending regarding the lawfulness and effectiveness of those provisions.

In 2015 a particularly egregious form of retrospective legislation was introduced in an orchestrated way in Finance (No. 2) Act 2015. First with effect from 8 July 2015 the interest rate on outstanding judgment debts owed by HMRC was reduced from the standard 8 per cent p.a. paid by defaulting judgment debtors to bank base plus 2 per cent p.a. simple (currently 2.5 per cent p.a.) just for HMRC.[99] Then on 26 October 2015 a further change was inserted into the same Finance Bill to impose a 45 per cent tax charge ring fenced from reliefs and withheld at source on successful claims for the recovery of overpaid tax.[100] The new charge replaces the current corporation tax charge of 20 per cent and applies to the interest component (and some principal amounts) where the rate of interest is calculated on the above basis, namely as a reflection of loss or gain and not on an uncommercial statutory rate. The charge applies even to past payments and judgments where appeals are still ongoing and in those cases will be backdated to the accounting period in which the receipt was recognised in the profit and loss account (although the charge itself will not actually be created until the appeals conclude in the future). Litigation was commenced challenging the lawfulness of these provisions which is listed for hearing in May 2017. While that litigation is pending, under the terms of this legislation, interest will accrue on the unpaid portion of any judgment debt at less than HMRC's cost of borrowing.

ii Challenging administrative decisions

Where there is no other right of redress or appeal against an action or decision by HMRC, a taxpayer may seek the judicial review of that decision.[101] This may arise, for example, in circumstances where an assessment to tax has been raised in accordance with the law but in circumstances where HMRC acted unreasonably in doing so.[102] An application for judicial review must be made promptly, and in any event within three months of the date when grounds for the application first arose.[103] Judicial review is a discretionary remedy, and the decision will only be overturned by the court in fairly extreme cases.

An application for judicial review must be made to the Administrative Court of the High Court, which can either decide the case itself or transfer it to the Upper Tribunal.[104]

96 Case C-362/12 *Test Claimants in the FII Group Litigation.*

97 *Test Claimants in the FII Group Litigation v. Commissioners of Inland Revenue* [2012] UKSC 19, [2012] 2 AC 337.

98 Section 234 Finance Act 2013.

99 Section 52 Finance (No. 2) Act 2015.

100 Section 38 Finance (No. 2) Act 2015.

101 Simon's Taxes A5.702; *R (on the application of Premier Foods (Holdings) Ltd)) v. Revenue and Customs Commissioners* [2015] EWHC 1483 (Admin), [2015] STC 2384.

102 *R v. Inland Revenue Commissioners, ex parte Unilever plc and related application* [1996] STC 681.

103 CPR 54.5(1).

104 *Simon's Taxes*, LexisNexis, A5.702.

iii Claimants

In a direct tax context, a claim for the recovery of tax wrongly paid can only be made by the party that paid the tax. In certain circumstances, the right to bring a claim can be assigned to another party.[105] HMRC will accept that, provided the relevant conditions are met, an assignment of a High Court claim can be made but tend not to accept that statutory claims are capable of assignment, although there are cases in which the assignment of statutory claims has been upheld.[106] In *New Miles Ltd*, the First-tier Tribunal allowed assignment of a right of appeal to the Upper Tribunal through substitution of the appellant, holding that such substitution was permitted as a 'change of circumstance' under Rule 9, FTR.[107] Rule 9(1) permits the substitution of a party 'if the substitution had become necessary because of a change in circumstances since the start of proceedings'. In *Skywell*, the First-tier Tribunal found that there was no such change in circumstances to justify the substitution of parties.[108]

Before the Court of Appeal in the *FII* case,[109] the claimants argued that losses and other reliefs expended to shelter an undue charge were recoverable by way of a High Court restitution claim. Such an argument would enable company groups that surrendered reliefs to offset undue liabilities of other entities to recover those reliefs (or their value) so expended. This argument has been unsuccessful to date but remains the subject of further possible appeal to the Supreme Court.

Claims for the repayment of overpaid VAT under the statutory schemes outlined above may only be made by 'taxable persons', that is to say the entity that is registered with and accounts for VAT to HMRC. However, following the CJEU decision in *Danfoss*,[110] where a person (such as an end consumer) has overpaid VAT in circumstances where it is not possible to obtain redress against the person to whom the tax was paid (by way of ordinary civil recovery proceedings), the Member State is required to provide that person with a mechanism through which he or she can obtain recovery of the overpaid sums. Issues connected with the practical application of the *Danfoss* case (and others) are the subject of ongoing litigation in the UK.[111]

VI COSTS

As a general rule, in the First-tier Tribunal each party bears its own costs. The Tribunal may make a costs order in situations where costs are 'wasted' by reason of the improper,

105 *Trendtex Trading Corporation and another v. Credit Suisse* [1982] AC 679, [1981] 3 All ER 520.

106 *Midlands Co-operative Society Ltd v. Customs and Excise Commissioners* [2002] STC 198; *New Miles Ltd v. Revenue and Customs Commissioners* (Hilton-Foster, applicant) [2012] UKFTT 33 (TC); *Skywell (UK) Limited v. The Commissioners for Her Majesty's Revenue and Customs* [2012] UKFTT 611 (TC).

107 *New Miles*, Paragraph 33.

108 *Skywell*, Paragraph 19.

109 *Test Claimants in the FII Group Litigation v. Revenue and Customs Commissioners* [2010] EWCA Civ 103; *Test Claimants in the Thin Cap Group Litigation v. Revenue and Customs Commissioners* [2009] EWHC 2908 (Ch).

110 Case C-94/10 *Danfoss and Sauer Danfoss*, judgment of 20 October 2011.

111 See in particular *Investment Trust Companies (in liquidation) v. Commissioners for Her Majesty's Revenue and Customs* [2015] EWCA Civ 82; [2015] STC 1280; [2015] BVC 10; [2015] STI 519; *The Commissioners for Her Majesty's Revenue & Customs v. The Earlsferry Thistle Golf Club* [2014] UKUT 0250 (TCC).

unreasonable or negligent act or omission of any legal or other representative;[112] or if a party acts unreasonably in bringing, defending or conducting the proceedings.[113] Whereas the old test for costs was that such conduct had to be 'wholly unreasonable', the new test introduces a lower hurdle. There is a growing body of case law concerning the interpretation of 'unreasonable' conduct.[114] Tribunals have held that a party (or their representative) acted unreasonably where they:

a failed to comply with tribunal directions;[115]
b introduced evidence at a late stage of the proceedings;[116]
c failed to attend a hearing;[117]
d attempted to rely on an argument which the Supreme Court had previously disposed of by majority judgment;[118]
e pursued a hopeless case which had an insufficient evidential foundation;[119] and
f failed to withdraw from proceedings sufficiently in advance of the hearing.[120]

The Tribunal has the general power to order costs in cases that are categorised as 'complex',[121] where costs will generally follow the event. However, once the taxpayer has been notified that the case is classified as complex, the taxpayer has 28 days to 'opt out' of the costs regime.[122]

In the Upper Tribunal, the High Court and the higher courts costs are, in principle, recoverable by the winning party. However, the rules governing their recovery are extremely complex.

i The Rees practice

HMRC has no intention of discontinuing from the Upper Tribunal and appeal courts its current costs practice (known as 'the Rees practice').[123] HMRC will consider exercising its discretion to waive its right to costs where HMRC is appealing an adverse decision, and in cases involving financial hardship or a point of law that, if clarified, would benefit taxpayers as a whole. HMRC may also adopt the Rees practice in First-tier Tribunal cases categorised as 'complex' unless the taxpayer has opted out of the costs regime.

112 Rule 10(1)(a), FTR and Section 29, TCEA 2007. Rule 35 of Tribunal Procedure (Amendment) Rules 2013 (SI 2013/477) inserted into Rule 10(1)(a), FTR that such an order also extends to 'costs incurred in applying for such costs'.
113 Rule 10(1)(b), FTR.
114 See in particular *Market & Opinion Research International Limited v. HMRC* [2013] STI 3285, Paragraph 8; *Gheorge Calin Cantana v. HMRC* [2012] STC 2138.
115 *JH & IM Ward (Partnership) v. Revenue and Customs Commissioners* [2014] UKFTT 108 (TC).
116 *Earthshine Limited v. The Commissioners for Her Majesty's Revenue and Customs* [2010] STI 2021.
117 *Enviroengineering Limited v. The Commissioners for Her Majesty's Revenue and Customs* [2011] UKFTT 366 (TC).
118 *Majid Alimadadian v. The Commissioners for Her Majesty's Revenue & Customs* [2014] UKFTT 641 (TC).
119 *Stephen Ho v. The Commissioners for Her Majesty's Revenue and Customs (Income Tax)* [2010] UKFTT 387 (TC).
120 *Tor View Self Storage Limited v. The Commissioners for Her Majesty's Revenue and Customs* [2015] UKFTT 0564 (TC)
121 Rule 10(1)(c)(i), FTR.
122 Rule 10(1)(c)(ii), FTR.
123 The Rees practice applies to both direct and indirect taxes. See HMRC, 'ARTG8660 – First-tier and Upper Tribunals: The tribunal hearing: Tribunals right to award costs, Rees practice' at www.hmrc.gov.uk/manuals/artgmanual/artg8660.htm#IDAOVH2H.

VII ALTERNATIVE DISPUTE RESOLUTION

Historically, ADR has not played a part in resolving tax disputes. Recently, however, HMRC published its LSS, commentary to the LSS and guidance on resolving tax disputes using ADR. When discussing ADR, HMRC refers to the use of 'mediation' rather than 'arbitration', as it feels that arbitration is not suited to the field of taxation.

Two pilot ADR projects, targeting different taxpayer profiles, were introduced by HMRC during 2011–2012 to explore when mediation might be appropriate for resolving tax disputes. Following the publication of two reports in July and September 2013 detailing the results of these pilot projects,[124] HMRC's ADR capacity was expanded to include a dedicated ADR function, facilitated by its Dispute Resolution Unit. HMRC's ADR guidance notes the commitment to using a collaborative approach wherever possible; in the vast majority of cases, this will involve disputes being settled by negotiation and agreement between the parties, or by litigation, without recourse to ADR.

HMRC considers mediation to be appropriate in a range of cases, including those where collaborative working relationships appear to have broken down and facilitated mediation may help to restore them, and those where the issues appear to be 'all or nothing', but there is a possibility that structured discussion might uncover an alternative approach that would enable HMRC to resolve the dispute in accordance with the terms of the LSS.[125]

In contrast, mediation is considered inappropriate where it would be more efficient to have an issue judicially clarified so that the precedent gained can be applied to other cases. Furthermore, mediation is not recommended where resolution can only be achieved by departing from an established HMRC viewpoint on a technical issue, and there are no exceptional facts or circumstances to justify a departure from law or practice.[126]

Taxpayers are encouraged to ask HMRC to consider using ADR. HMRC will respond within 30 days with an answer as to whether ADR is appropriate for resolving the dispute. If so, HMRC will then send the taxpayer a memorandum of understanding to complete, which will set out the process and confirm the taxpayer's agreement to participate in ADR.[127]

If a taxpayer's dispute cannot be resolved and HMRC have made an appealable decision, taxpayers can ask for their dispute to be referred to an independent tribunal for a hearing or may ask for a statutory review.[128]

VIII ANTI-AVOIDANCE

i General anti-abuse rule (GAAR)

Part 5 of the Finance Act 2013 took the significant step of introducing a GAAR to the UK, with effect from 17 July 2013. HMRC has also published and updated extensive guidance about the scope, objectives and application of the GAAR.[129]

---

124 HMRC, 'Alternative Dispute Resolution for SME's and individuals: Project Evaluation Summary', July 2013; 'HMRC, Alternative Dispute Resolution in Large or Complex cases: Pilot Evaluation Summary', September 2013.

125 HMRC, 'ADR – Resolving Tax Disputes', p. 7.

126 HMRC, 'ADR – Resolving Tax Disputes', p. 11.

127 See HMRC website at www.hmrc.gov.uk/complaints-appeals/how-to-appeal/adr.htm#1.

128 See HMRC website at https://www.gov.uk/guidance/tax-disputes-alternative-dispute-resolution-adr.

129 HMRC, 'HMRC's GAAR Guidance' (Approved by the Advisory Panel with effect from 30 January 2015), Parts A–C at www.gov.uk/government/publications/tax-avoidance-general-anti-abuse-rules.

The GAAR aims to target abusive tax avoidance schemes. It applies to corporation tax, income tax, capital gains tax, petroleum revenue tax, inheritance tax, stamp duty land tax,annual residential property tax and, following the Finance Act 2015, diverted profits tax.[130] VAT is excluded from its scope.

To determine whether a scheme should be counteracted as a result of being abusive, it must be determined if there are abusive arrangements that give rise to a relevant tax advantage and if it is reasonable to conclude that the tax advantage was the main purpose, or one of the main purposes, of the arrangements.[131] The objective test for abuse is whether entering into the tax arrangements, or carrying them out, cannot reasonably be regarded as a reasonable course of action in relation to the relevant tax provisions, having regard to all the circumstances (the double reasonableness test).[132] The development of such a reasonableness test and its boundaries are awaited when the test is applied in practice.

If tax arrangements are found to be abusive, these arrangements are to be counteracted by making adjustments.[133] If counteraction is used, consequential adjustments can be claimed to provide relief to the taxpayer to ensure there is not excessive taxation.[134] HMRC's intention is that the GAAR be applied initially by taxpayers themselves, through their own counteraction using self-assessment or in their accounts and adjusting any tax advantage on a just and reasonable basis. HMRC also has powers of counteraction on a just and reasonable basis.[135] Procedural amendments have been introduced, following the Finance Act 2016, to ensure that the GAAR procedure works efficiently in regards to marketed tax avoidance schemes, and to enable HMRC to provisionally counteract under GAAR, within assessing time limits, while maintaining the current procedural safeguards for taxpayers.[136]

The GAAR's counteraction measures will be subject to the usual appeals procedure, with normal time limits. If the matter proceeds to litigation, the burden of proof lies on HMRC to show that on the balance of probabilities the tax arrangement was abusive and that the counteraction imposed is just and reasonable.

Following a consultation in 2015,[137] the Finance Act 2016 introduced a new specific penalty, which came into force in September 2016, for all cases successfully counteracted by the GAAR. If a taxpayer submits a return, claim or document to HMRC which includes arrangements which are later found to be counteracted, then the penalty, 60 per cent of the counteracted value, will apply.[138] The aim of the penalty is to ensure an effective disincentive to enter into or engage in abusive tax avoidance.

The GAAR is a progression from the manner in which tax abuse has been countered by the courts in recent years using the *Ramsay* principle,[139] which introduced the principle of

130 Section 206, FA 2013.
131 Section 207, FA 2013.
132 Section 207(2), FA 2013.
133 Section 209, FA 2013 as amended by Section 156, FA 2016.
134 Section 210, FA 2013 as amended by Section 157, FA 2016.
135 Section 209, FA 2013 as amended by Section 156, FA 2016.
136 Schedule 43, FA 2013 as amended by Section 157, FA 2016.
137 HMRC's 'Penalties for the General Anti-Abuse Rule', Policy Paper, 9 December 2015.
138 Section 158, FA 2016.
139 *Ramsay (WT) Ltd v. IRC* [1982] AC 300.

purposive interpretation to tax disputes, whereby the wording of legislation is key, but where the purpose and context of the statute is considered as an aid to interpretation. *Ramsay* led to some uncertainty in the courts' approach to abuse (see *BMBF*[140] and *SPI*).[141]

A recent decision, in *UBS AG,*[142] illustrates the application of GAAR. The judges held that the transaction had 'no real world purpose of any kind', and found that a purposive interpretation would suggest that the scheme had been 'inserted for the sole purpose of tax avoidance'. This decision sheds some light on the courts' approach to abuse. However, it is yet to be seen how the rule will be developed.

As to the OECD BEPS proposals designed to combat the shifting of profits from one (high tax) jurisdiction to another (low tax) one, the UK has taken a very proactive approach to the implementation of the 15 action points. In March 2016, the UK government confirmed the implementation of hybrid mismatches (Action 2),[143] interest deductibility (Action 4),[144] intellectual property (Action 5),[145] transfer pricing (Actions 8–10)[146] and country-by-country reporting (Action 13).[147] The UK considers that its current CFC rules are compliant with Action 3, although on 26 October 2017 the EU Commission issued a preliminary decision concluding that the provisions that either fully or partially exempted non-trading financing income of CFCs amount to state aid contrary to the EU Treaty. According to the Commission, the UK provisions selectively benefit groups whose non-resident financing income derives from investments that do not produce UK tax deductions or interest income from third parties over those groups who do. A final decision can be expected by late 2018.

In relation to permanent establishment status (Action 7), the UK intends to retain the current 'preparatory and auxiliary' provisions in its treaties, and considers that the modern approaches to transfer pricing recover the appropriate slice of profit. In relation to disclosure of aggressive tax planning (Action 12), the UK considers that it already had disclosure rules and these are kept under review. There are, however, proposals to strengthen tax avoidance disclosure regimes regarding VAT and inheritance tax.

In relation to transfer pricing documentation (Action 13), the UK is not expected to implement specific rules as it considers that it already has sufficient powers to require information. Action 13 also deals with country-by-country reporting, For accounting periods starting before or after 1 January 2016, UK stand-alone entities and UK sub-holding companies are required to file when the parent company does not. Non-UK-headed multinational groups with a UK presence can file voluntarily. The UK is one of 65 countries to have signed a multilateral competent authority agreement for the automatic exchange of country-by-country reports.

On 7 June 2017, representatives from the UK and 67 others countries signed the OECD'S multilateral instrument (MLI) (Action 15) that will implement a number of tax

140 *Barclays Mercantile Business Finance Ltd v. Mawson (Inspector of Taxes)* [2004] UKHL 51, [2005] 1 AC 684.

141 *IRC v. Scottish Provident Institution* [2004] UKHL 52, [2005] 1 AII ER 325.

142 *UBS AG v. Revenue and Customs Commissioners* [2016] UKSC 13, [2016] 1 WLR 1005.

143 This was enacted in the Finance Act, 2016 with effect for payments from 1 January 2017.

144 This was enacted in the Finance Act, 2017.

145 This was enacted in the Finance Act, 2017 with effect from 1 July 2016.

146 This was enacted in the Finance Act 2016 and has effect for all accounting periods beginning on or after 1 April 20167 for corporation tax purposes.

147 The Finance Act 2015 gave the UK Treasury authority to introduce regulations implementing country-by-country reporting. The Taxes (Base Erosion and Profit Sharing) (Country-by-Country) Regulations 2016 were subsequently made on 26 February 2016 and came into force on 18 March 2016.

treaty measures updating an existing network of at least 1,100 bilateral tax treaties in order to implement the treaty-based recommendations of the BEPS process. It is the UK's intention to adopt Action 6 provisions via the MLI and not to implement the specific treaty abuse clauses. In relation to dispute resolution (Action 14), the UK is one of the countries that has committed to binding arbitration. This is also subject to the MLI.

ii Accelerated payment notices, follower notices and partner payment notices

The Finance Act 2014 introduced new provisions, which came into force in July 2014, under which HMRC has the power in certain circumstances to require payment of disputed tax in advance of ultimate resolution of the dispute.[148] In 2014/2015, around 10,000 such notices were issued, and the latest figures published by HMRC state that by September 2016 they had issued 60,000 in total.[149] The notices, since their introduction, have received a lot of criticism. Two thousand notices were withdrawn in 2015 and several hundred in 2016 for errors in the notices and the procedure followed. In *R (VVB Engineering Services) v. HMRC*,[150] a judgment handed down on 16 March 2017, it was noted that there were 4,116 applicants or potential applicants seeking interim relief from such notices.

HMRC may issue an accelerated payment notice (APN) in circumstances where HMRC has opened an enquiry into the taxpayer's return or an appeal is ongoing.[151] Where a notice is issued to a partner and an enquiry is opened into the partnership tax return, the notice is known as a partner payment notice (PPN), although the provisions are otherwise near identical.[152] The return or claim must[153] have been made in respect of a tax advantage arising from the arrangements in question. Further to this, one of the following requirements must be met:

a HMRC has given the taxpayer a follower notice in relation to the same return, claim or appeal;

b HMRC has allocated a Disclosure of Tax Avoidance Schemes reference number to the tax arrangements, or the scheme was included on HMRC's list of users who may be required to make an accelerated payment; or

c HMRC has issued a counteraction notice under the GAAR and at least two members of the GAAR Advisory Panel consider that entering into the tax arrangements was not a reasonable course of action.[154]

The APN or PPN must specify the amount of the payment.[155] The taxpayer has 90 days to object in writing, following which HMRC will confirm, withdraw or, where the taxpayer objects to the amount specified, amend the APN or PPN. There is no right of appeal against the confirmation of an APN or PPN, and the taxpayer must make the payment before the relevant payment date.[156] This also applies where an appeal is ongoing. If the taxpayer fails to

148 Sections 199–233, FA 2014 and Schedules 30–33, FA 2014.

149 HMRC press release, 16 September 2016.

150 [2017] EWHC 506.

151 Section 219(2), FA 2014.

152 Schedule 36, FA 2014.

153 Section 219 (3), FA 2014.

154 Section 219(4), FA 2014.

155 Section 220, FA 2014.

156 Section 222, FA 2014. If the taxpayer does not make written representations, the payment date will be 90 days from the date that the APN was issued. If they make written representations, the payment date will be

make the payment by the relevant date, HMRC may issue penalties, beginning at 5 per cent of the amount in question.[157] A recent decision held that a PPN can be issued to an LLP, as the relevant partners have the capacity to know of enquiries being opened, even if official notices were not sent to them.[158]

HMRC may issue a follower notice (FN) in circumstances where HMRC considers that there has been a final judicial ruling on a relevant issue to the disputed tax in question. The provisions operate in a similar fashion to those for APNs.[159] The notice must be issued within one year of the later of the date of the ruling or date on which HMRC received the claim or appeal, and cannot be issued to the same taxpayer in relation to the same tax arrangement, tax advantage, ruling or period. The notice must identify the ruling which HMRC considers to be relevant, its reasoning for this belief, the effects of the taxpayer objecting to the FN and that penalties may apply if the taxpayer does not take corrective action.[160] The taxpayer may amend the return (and notify HMRC) or object to the FN within 90 days by written representation.[161] HMRC will consider any objection and either confirm or withdraw the FN; there is no right of appeal from a confirmation of the FN. Penalties of up to 50 per cent of the disputed tax may apply if the taxpayer refuses to take corrective action, although this is subject to HMRC's discretion.[162]

IX DOUBLE TAXATION TREATIES

In theory, double taxation conventions are, like any international treaty, not directly enforceable by taxpayers; they are no more than contracts enforceable by the contracting states themselves. Rights granted to individuals under international treaties are only enforceable to the extent they are incorporated by legislation. It is also permissible under UK law for legislation to be introduced that contradicts the terms of treaties, since the sovereignty of the Crown extends to breaching treaties. However, where a treaty has been introduced into UK law and its terms might conflict with domestic legislation that is capable of more than one meaning, then the meaning that is consistent with the treaty is to be preferred.[163]

The Vienna Convention on the Law of Treaties was incorporated into UK law on 27 January 1980. Its rules of interpretation are binding and it is frequently relied upon by

the later of 90 days from the date of issue of the APN or 30 days following notification of confirmation of the APN by HMRC; see Section 223, FA 2014.

157 Section 226, FA 2014.

158 *Sword Services Ltd v. Revenue and Customs Commissioners* [2016] 4 WLR 113, [2016] STI 1799.

159 Section 204, FA 2014.

160 Section 206, FA 2014.

161 Section 208, FA 2014 and Section 207, FA 2014.

162 Section 208(2), FA 2014 and Section 211, FA 2014.

163 Lord Diplock in *Salomon v. Customs & Excise* [1967] 2 QB 116 at 143.

the courts in interpreting the terms of double taxation treaties.[164] The commentary to the OECD conventions can be relied upon to interpret the terms of treaties that follow the OECD Model.[165]

Double taxation conventions are incorporated into UK law by statutory instrument, which is secondary legislation that does not require passage through Parliament. The legislative power to do so is provided by Section 2, Taxation (International and Other Provisions) Act (TIOPA) 2010, although the important cases on its application concern the predecessor provision, Section 788, Income and Corporation Taxes Act (ICTA) 1988. Section 6, TIOPA provides that where the terms of a double taxation convention have been incorporated into law via a statutory instrument, they take effect 'despite anything in any enactment' but subject to two important restrictions.

First the treaty takes effect subject to the provisions in Part 2, TIOPA and Part 18, ICTA. Thus, the terms of a double taxation convention, even where incorporated into UK law by statutory instrument, can still be overridden by the insertion of an intentionally contradictory provision within those Parts.[166] Second, Section 6, TIOPA only enables incorporation into UK law by this mechanism of those provisions of double taxation conventions that afford relief from double taxation in relation to the various taxing provisions included in that Section. If the tax concerned does not meet any of these descriptions, no rights provided by the double taxation convention will be enforceable. Although the current wording of the provision is somewhat different from the predecessor provision (Section 788, ICTA), that previous provision had been held not to extend to charges upon apportioned profits under the controlled foreign companies (CFC) rules[167] or to advance corporation tax (ACT).[168]

164 See *Bayfine UK v. Revenue and Customs Commissioners* [2011] EWCA Civ 304; [2011] STC 707; *Revenue and Customs Commissioners v. Smallwood & Anr* [2010] EWCA Civ 778; [2010] STC 2045; *Paul Weiser v. The Commissioners for Her Majesty's Revenue & Customs* [2012] UKFTT 501 (TC); *Anson v. Commissioners for Her Majesty's Revenue and Customs* [2015] UKSC 44, [2015] 4 All ER 288.

165 For example, *The Felixstowe Dock and Railway Company Limited v. Commissioners for Her Majesty's Revenue and Customs* [2011] UKFTT 838 (TC), [2012] SFTD 366, Paragraph 19.

166 For example, in 1992 Section 808A was introduced into Part 18 of ICTA to override the interpretation given to the arm's-length test by the then tax tribunal, the Special Commissioners of Income Tax, which excluded consideration of the amount of the loan under the thin capitalisation terms of certain double taxation conventions. This provision was repealed by Schedule 10, Paragraph 1, TIOPA 2010.

167 *Bricom Holdings Ltd v. Commissioners of Inland Revenue* [1997] STC 1179.

168 The conclusion of the Court of Appeal and two members of the House of Lords in *NEC/Boake Allen*, the others offering no opinion on the point. *Boake Allen Ltd & Ors v. Revenue and Customs Commissioners* [2006] EWCA Civ 25; [2006] STC 606, and [2007] UKHL 25, [2007] 1 WLR 1386.

There has been considerable litigation on the meaning and application of the non-discrimination articles (NDA) in double taxation conventions that follow the standard OECD Model wording,[169] and from which the following principles derive:

a To establish whether the UK subsidiary of a company resident in the other contracting state is subjected to other or more burdensome taxation or requirements than another similar enterprise in breach of the NDA, the relevant comparison to make is with the treatment afforded to the UK subsidiary of a UK resident parent.[170]

b A breach of the NDA will, however, arise only where that difference in treatment is by reason of the foreign ownership of the UK subsidiary. In circumstances where the domestic legislation passes a tax liability from subsidiary to parent, it is permissible to refuse the same treatment to the cross-border group if the parent is not subject to UK tax. In those circumstances, the difference in treatment is not by reason of the foreign ownership, but by reason of the fact that the tax liability cannot be passed on to the parent, as it would not be liable to UK tax.[171] Conversely, the refusal of group relief between two UK-resident subsidiaries of a common foreign parent or link company (where group relief would be available had the parent been UK-resident) would offend the NDA, as the liability of the parent company to UK tax is irrelevant to the entitlement to group relief between its resident subsidiaries.[172]

c The subject UK provisions must be considered as a whole when establishing whether other or more burdensome taxation or requirements arise contrary to the NDA. In *Felixstowe Dock*, a UK-resident joint venture company owned by a Luxembourg company was refused the ability to surrender losses to offset the profits of other UK companies within the consortium in circumstances where, had that link company been UK resident, consortium relief would have been available. This was held by the First-tier Tribunal to breach the NDA in the UK–Luxembourg treaty, even though the tax was paid by the other UK companies under ownership unconnected with the Luxembourg treaty.[173]

d Where a UK subsidiary of a UK parent could, by invoking EU rights, override a restriction that otherwise applies under UK legislation, it may breach the NDA not to extend the same treatment to a UK subsidiary of a foreign parent, whether or not that parent is resident in another Member State.[174]

169 Specifically, the treaties with Japan, Luxembourg, Switzerland, the United States and Ireland. *Boake Allen* (HL); *Revenue and Customs Commissioners v. UBS AG*; *Test Claimants in the Thin Cap Group Litigation*; *Commissioners for Her Majesty's Revenue and Customs v. FCE Bank plc*; *The Felixstowe Dock and Railway Company Limited v. Commissioners for Her Majesty's Revenue and Customs*; *Percival v. The Commissioners for her Majesty's Revenue & Customs* [2013] UKFTT 240 (TC), [2013] STI 2308.

170 *Boake Allen* (HL).

171 *Boake Allen*.

172 *Commissioners for Her Majesty's Revenue and Customs v. FCE Bank plc*; *The Felixstowe Dock and Railway Company Limited*.

173 *The Felixstowe Dock and Railway Company Limited*.

174 This argument has only arisen for decision to date in the context of the disallowance of interest deductions for thin capitalisation reasons: *Test Claimants in the Thin Cap Group Litigation*, where while upholding the argument in principle the Court found it was inapplicable to those circumstances. It has also been litigated in relation to cross-border group relief: *Finnforest UK Limited & ors v. Revenue and Customs Commissioners* [2011] UKFTT 342 (TC), [2011] SFTD 889.

i The UK courts' approach to the interpretation of European law

The English courts' first encounters with EU law and the case law of the CJEU were something of a culture shock. According to Lord Denning in *Buchanan v. Babco*:

> *They adopt a method which they call in English by strange words – at any rate they were strange to me – the 'schematic and teleological' method of interpretation […] all it means is that judges do not go by the literal meaning of the words or by the grammatical structure of the sentence. […] To our eyes – short-sighted by tradition – it is legislation pure and simple. But to their eyes it is fulfilling the true role of the courts.*[175]

While the UK courts are now comfortable interpreting the EU VAT legislation in light of its scheme and purpose and seeking rulings in that field from the CJEU only selectively, they remain far less comfortable interpreting the TFEU in the context of challenges to direct tax provisions. Other than in minor cases, the UK courts have, therefore, tended to refer such cases to the CJEU, leading to a series of CJEU judgments on UK direct tax provisions over the past 10 to 15 years.[176] In *FII*, the UK courts sought no fewer than three references, in part to clarify the guidance received from the CJEU.[177]

To date, in the direct tax field the UK courts have thus been concerned mainly with implementing interpretative rulings given by the CJEU. In that connection, a key issue for the courts to decide has been whether, in the light of the CJEU's guidance, the relevant domestic provisions fall to be disapplied as unlawful, or whether they should be judicially moulded to achieve a conforming interpretation.[178] In a series of decisions, the English Court of Appeal, following earlier rulings of the House of Lords in the EU or the human rights cases of *Ghaidan v. Mendoza*,[179] *Pickstone v. Freemans*[180] and *Lister v. Forth Dry Dock*,[181] has departed significantly from traditional domestic principles of interpretation and construed UK provisions contrary to their wording to render them compatible with EU law (see in particular *IDT*,[182] *Vodafone II*[183] and the Court of Appeal's judgment in *FII*).[184] According to Lady Justice Arden in *IDT*:

175 [1977] 2 WLR 107.

176 Case C-264/96 *Imperial Chemical Industries v. Colmer* [1998] ECR I-04695; judgment of 8 March 2001 in Joined cases C-397/98 and C-410/98 *Metallgesellschaft Ltd v. IRC*; *Hoechst AG v. IRC* [2001] ECR I-1727; case C-446/03 *Marks & Spencer Plc v. Halsey (Inspector of Taxes)* [2005] ECR I-10837; case C-196/04 *Cadbury Schweppes* [2006] ECR I-07995; case C-374/04 *Test Claimants in Class IV of the ACT Group Litigation* [2006] ECR I-11673; C-446/04 *Test Claimants in the FII Group Litigation* [2006] ECR I-11753; case C-524/04 *Test Claimants in the Thin Cap Group Litigation* [2007] ECR I-02107; in case C-369/04 *Hutchison 3G and Others* [2007] ECR I-05247; case C-201/05 *Test Claimants in the CFC and Dividend Group Litigation* [2008] ECR I-02875; judgment of 6 September 2008 in case C-18/11 *Philips Electronics UK Ltd*; judgment of 13 November 2012 in case C-35/11 *Test Claimants in the FII Group Litigation*; judgment of 12 December 2013 in case C-362/12 *Test Claimants in the FII Group Litigation*; judgment of 1 April 2014 in case C-80/12 *Felixstowe Dock and Railway Company Ltd and Others v. HMRC.*

177 Cases C-446/04, C-35/11 and C-362/12, *Test Claimants in the FII Group Litigation.*

178 Case C-106/89 *Marleasing v. Comercial Internacional de Alimentación* [1990] ECR I-4135.

179 [2004] UK HL 30, [2004] 3 All ER 411.

180 [1989] AC 66.

181 [1989] 1 All ER 1334, 1991, AC 546.

182 *HMRC v. IDT Card Services Ireland Ltd* [2006] EWCA Civ 29, [2006] STC 1252.

183 *Vodafone 2 v. Commissioners for Her Majesty's Revenue & Customs* [2009] EWCA Civ 446, [2010] Ch 77.

184 *Test Claimants in the FII Group Litigation* (CA).

It is also clear from the Ghaidan case that the interpretation of legislation under Section 3 [of the Human Rights Act] or the Marleasing principle may involve a substantial departure from the language used though it will not involve a departure from the fundamental or cardinal features of the legislation. It is possible to read the legislation up (expansively) or down (restrictively) or to read words into the legislation.[185]

Further, when analysing the application of the *Marleasing* principle in *FII* the Court of Appeal noted that:

Statutory provisions can be read as subject to a limitation provided that the limitation does not go against the grain of the legislation.[186]

Thus, in *IDT*, the Court of Appeal held that it was possible to mould the UK provisions on VAT to fill a gap in the UK legislation that allowed taxpayers to avoid paying tax on phone cards in either Ireland or the UK. In *Vodafone II*, the Court of Appeal held that the exceptions to the UK CFC legislation could be extended so as to render the legislation compatible with Article 43 TFEU as interpreted by the CJEU in *Cadbury Schweppes*. In *FII*, the Court of Appeal held that the UK provisions on ACT could be moulded contrary to their wording to give the claimants a tax credit where EU law so required.

It may be noted that in all three cases the Court of Appeal moulded the legislation to prevent the taxpayer from obtaining what it perceived to be a windfall. In *IDT* this defeated the taxpayer's claim entirely, and in *Vodafone II* and *FII* it had the effect of imposing retrospectively on the taxpayer an evidentiary burden not envisaged by the unmoulded legislation.

The Court of Appeal's findings in these cases have not been considered by the Supreme Court. It may be noted, however, that the Supreme Court did consider and overturn another finding of the Court of Appeal in *FII*, in which it held that Section 33, TMA 1970 could be moulded contrary to its wording to give the claimants an exclusive statutory remedy for their EU law rights, barring them from using their common law remedies with the accompanying longer time limits. Further consideration of the issue of conforming interpretation by the UK courts, including the Supreme Court, seems likely in the coming years.

ii Specific rules relating to VAT

Current UK VAT thresholds

Registration	Threshold
Registration for taxable supplies	Taxable turnover of £83,000 in the previous 12 months
De-registration VAT	Taxable turnover of £81,000 or less in the previous 12 months
Registration for distance selling	Value of distance sales to UK customer exceeds £70,000 (if distance sales include excise goods, then registration is required regardless of the value)
Registration for acquisitions from other EU countries	Goods acquired exceed £83,000
Payment on account threshold	Annual VAT liability of £2.3 million or more. If the liability falls below £1.8 million, businesses can apply to stop making payments on account

185 *HMRC v. IDT Card Services Ireland Ltd*, Paragraph 89.

186 *Test Claimants in the FII Group Litigation* (CA), Paragraph 260.

Registration	Threshold
Intrastat thresholds	The exemption threshold for dispatches is £250,000 in 12 months and for arrivals £1.5 million in 12 months. The delivery terms threshold is £24 million. The low value consignment threshold is £150
Error reporting threshold	£10,000 or 1% of the total sales for the period (excluding VAT) subject to an upper limit of £50,000

Corrections to VAT returns

For errors that exceed the error reporting threshold, a declaration should be made to the VAT Error Correction Team on form VAT 652.[187] Errors below this threshold can be corrected by adjustment in the current VAT return.[188]

Partial exemption

In circumstances where a taxable person (i.e., one registered for VAT) makes supplies of goods or services that are subject to VAT, any VAT incurred by that taxable person in the process of making those taxable supplies (input tax) is recoverable. Where a taxpayer makes supplies that are exempt from VAT, it is not possible for that taxable person to recover input tax attributable to those supplies. Input tax incurred in these circumstances is referred to as 'blocked' input tax.

In circumstances where a taxable person will make 'mixed' supplies of both taxable and exempt services (also referred to as business and non-business activities), it is possible to attribute the input tax incurred in making the different supplies directly; that which is attributable to the taxable supplies will be recoverable in the normal way as outlined above. Often it is not possible to attribute input tax directly, because the same supply has been used in relation to both taxable and exempt aspects of the business. Such input tax is referred to as 'residual' input tax. To calculate what proportion of residual input tax may be recovered, it is necessary to use a 'partial exemption' calculation. There are two types: the standard method or a special method. The detailed mechanics of those calculations can be found in VAT Notice 706.[189]

X AREAS OF FOCUS

Following the introduction of the GAAR in 2013, there has been sustained political pressure on HMRC to safeguard the UK tax base by combating illegitimate avoidance and abuse. We have already seen considerable litigation testing the boundary between acceptable and illegitimate tax avoidance, which is only likely to increase.

This political focus on HMRC to counter tax avoidance and increase recoveries has produced extensive new powers. As discussed above, over the past two years, new legislation has extended HMRC's powers over disclosure and introduced powers to issue notices to collect tax even before any court ruling on a dispute and without any form of judicial safeguard. In 2015, an unsuccessful judicial review was brought in the High Court to challenge the exercise

187 HMRC guidance is found in VAT Notice 700/45.

188 HMRC guidance is found at 'Correct errors on your VAT Returns' at www.hmrc.gov.uk/vat/managing/problems/corrections/correct-mistakes.htm.

189 HMRC 'VAT Notice 706: partial exemption' at www.gov.uk/government/publications/vat-notice-706-partial-exemption/vat-notice-706-partial-exemption. See also HMRC, 'VAT Partial Exemption Toolkit', July 2014 at www.hmrc.gov.uk/agents/toolkits/vat-partial-exemption.pdf.

of this power.[190] There is an appeal outstanding to the Court of Appeal and it remains to be seen what the eventual outcome will be on this matter. As things stand, however HMRC has made it clear that it intends to continue to use, and even increase the use of, its power to issue such notices in the coming years.

In recent years both the Supreme Court and CJEU have applied and developed the 'no possibilities' test in relation to cross-border group relief on subsidiary losses.[191] In the *Marks & Spencer* case, the Supreme Court had previously found in favour of the taxpayer on the question of the relevant date at which the 'no possibilities' test should be applied. In February 2014, the Supreme Court considered the application of that test to group relief claims which had initially been made outside of the statutory time period and were later made again, within the statutory time period, upon dissolution of certain companies within the group. The Court held that the 'date of the claim' included those subsequent claims which had been issued within time. It also resolved the question of how to calculate a foreign loss for surrender for UK tax purposes in the company's favour, and found for HMRC on the limitation of claims which fell under the previous pay and file system. Prior to this, in December 2013 the CJEU handed down judgment in the third reference in the *FII Group Litigation*.[192] The Court held that, in removing a cause of action for recovery of tax paid without notice, retrospectively and without transitional provisions, the UK government had breached EU law principles of effectiveness, legal certainty and legitimate expectations. European law has continued to influence litigation in both the direct and indirect tax areas, and we see no reason why this trend will not continue, with numerous cases currently before the UK and European courts. Most recently, the Court of Appeal referred questions to the CJEU regarding the correct interpretation and application of the VAT Directive in relation to whether particular vehicle finance lease agreements constituted a supply of goods or services for VAT purposes.[193] Transfer pricing is another area in which the European Commission has continued to be particularly active.[194]

The availability of compound interest in claims against HMRC is another vigorously contested issue, owing to its financial significance. Following the House of Lords' judgment in the case of *Sempra Metals*,[195] it is clear that compound interest is in principle available for certain claims in the field of direct tax. Perhaps unsurprisingly, HMRC contends that, even in the field of direct tax, the availability of compound interest is restricted to the very specific circumstances of *Sempra Metals*. In the field of indirect tax, HMRC contends that there can be no liability to pay compound interest as statute exclusively provides for simple interest. These issues have been variously challenged over the past few years.[196] As mentioned

190 *R (on the application of Rowe) v. Revenue and Customs Commissioners* [2015] EWHC 2293 (Admin), [2015] BTC 27.

191 *Marks & Spencer Plc v. Revenue and Customs Commissioners* [2013] UKSC 30, [2013] 1 WLR 1586 and [2014] UKSC 11, [2014] 1 WLR 711; case 322/11 *Re K*, judgment of 7 November 2013; case C-123/11 *A Oy*, judgment of 21 February 2013.

192 Case C-362/12 *Test Claimants in the FII Group Litigation*, judgment of 12 December 2013.

193 *Mercedes-Benz Financial Services UK Ltd v. Revenue and Customs Commissioners* [2015] EWCA Civ 1211

194 See the European Commission's website at ec.europa.eu/taxation_customs/taxation/company_tax/transfer_pricing/index_en.htm.

195 *Sempra Metals Ltd v. HM Commissioners of Inland Revenue Sempra* [2007] UKHL 34, [2008] 1 AC 561.

196 For example, the *FII*, *CFC* and *Loss Relief Group Litigation* cases in the field of direct taxation, and the case of *Littlewoods* in the field of VAT.

above, in the area of VAT, the Supreme Court recently overturned a decision of the Court of Appeal that entitled claimants to compound interest on claims for recovery of unlawfully levied VAT.[197]

A further issue being debated in the UK courts is whether HMRC can, both in principle and in practice, run a defence to claims in restitution of unduly paid sums that the Exchequer has changed its position by spending those sums, believing that they were lawfully due. This question came up for decision before the High Court in the *Franked Investment Income Group Litigation*. The defence was rejected not only on grounds of EU and English law but also on the grounds that HMRC had failed to show on the facts a causal connection between the receipt of the tax and the payments.

In 2017, the Supreme Court resolved an issue of particular significance in favour of HMRC. The *Investment Trust Companies* case[198] involved the payment of unlawful VAT by investment trusts (ITCs) to their managers for management services. The managers then paid a proportion (the 75s) to HMRC and set the remaining proportion (the 25s) against input tax that the managers had paid to their third-party suppliers. The managers made claims under Section 80 VATA. HMRC repaid some of the VAT, but capped the claims at three years under Section 80(4). HMRC made further repayments for periods up until 4 December 1996 (the date when the cap was introduced), but refused claims after that date (the 'dead period') The trusts then brought claims against HMRC for restitution at common law and repayment under directly effective EU law rights. Overturning the Court of Appeal, the Supreme Court has held that the investment trusts had no common law claim in restitution as they lacked a direct transfer between them and HMRC. This limited recovery to the portions recovered by the managers through Section 80 VATA.

Finally, a large number of claims were recently issued that challenge the legality of Paragraph 51A of Schedule 18 to the FA 1998, which effectively removes the High Court's jurisdiction to hear cases seeking common law remedies in situations where statutory remedies are available through the tax tribunals. The claims are yet to be heard by the courts. Should these challenges succeed, a number of remedies that are arguably no longer available to claimants in tax matters will once again become available.

XI OUTLOOK AND CONCLUSIONS

2017 has been a busy year in the fields of direct and indirect tax, both in the domestic and European context. 2018 will again see the confluence of a number of forces. Continued public pressure on HMRC to challenge abusive tax arrangements is likely to be fuelled by the introduction of the ability to demand and collect tax in dispute without any prior judicial decision. It will be interesting to see how aspects of the GAAR, including the double reasonableness test, will be developed by the UK courts and whether the judicial review will ultimately be successful in the appeal courts. Against this, a number of group litigation actions seeking the repayment of taxes said to have been paid in breach of EU law over several decades, which have been proceeding through the courts for almost 10 years, have now reached a position where a breach of EU law seems to have been established, giving rise to a whole slew of questions concerning the level of recovery. Some of these issues have been considered by the courts in the past year while others remain to be determined or are subject

197 [2017].

198 *Investment Trust Companies (in liquidation) v. Commissioners for HMRC* [2017] UKSC 29.

to appeal. HMRC will continue to be faced with demands to recover more tax on one hand and demands to repay tax collected many years ago on the other. The environment in the short term once again looks to be uncertain and challenging.

Chapter 32

UNITED STATES

Edward L Froelich[1]

I INTRODUCTION

The Internal Revenue Service (IRS) is the primary United States government agency taxpayers face in federal tax disputes. The vast majority of tax disputes are resolved within the IRS's settlement apparatus, leading to certain important practical considerations.

i Overview of the US tax reporting and enforcement system

The United States tax system is self-reporting; each taxpayer prepares and files a return showing the amount of tax owed to the federal government.[2] For income tax returns, the starting point for every taxpayer is the gross income earned during the taxable year.[3] Various offsets, credits and deductions are applied, and a taxable income amount to which the appropriate tax rates are applied is determined. By filing a tax return, the taxpayer authorises the IRS to record an assessment of tax in that amount on its books. The IRS maintains a 'transcript of account' for each taxpayer, which reflects all the activity (e.g., the filing date of the return, date and amount of assessment, date of examination) that occurs with respect to each return filed by the taxpayer.[4]

Any IRS-initiated assessment, as opposed to a self-assessment by the taxpayer, can only be recorded after the IRS satisfies strict rules of procedure and notice, generally called deficiency procedures. These procedures entitle the taxpayer to judicial review of the IRS's proposed assessments prior to payment. The primary notice received by the taxpayer is formally called a statutory notice of deficiency (it is sometimes also called a 'ticket to the Tax Court') and allows the taxpayer 90 days in which to petition the United States Tax Court.[5] The Tax Court is the only forum in which a taxpayer can dispute a proposed income tax assessment without first paying the additional tax. In rare cases, such as if the IRS believes

1 Edward L Froelich is of counsel at Morrison & Foerster LLP.

2 This chapter focuses on federal tax disputes; however, the 50 states and the District of Columbia have similar voluntary, self-reporting systems of taxation, and similarly enforce their revenue laws through audits and collection. United States territories, such as the US Virgin Islands, have systems similar to the states.

3 One exception is federal estate tax, which is imposed on the value of assets in the estate as opposed to income earned by the estate (for which there is a separate income tax return).

4 The Internal Revenue Code imposes numerous information reporting obligations that, if not properly carried out, can result in significant penalties. However, this chapter does not focus in any depth on information returns or the penalties associated therewith.

5 For taxpayers outside the United States, the petition must be filed within 150 days of the date of the deficiency notice being mailed. See Section 6213(a) of the Code, Title 26, United States Code (USC) (hereinafter, Code).

that the taxpayer may transfer assets beyond the IRS's jurisdiction to avoid payment of delinquent taxes, the IRS may make a jeopardy assessment that allows it to prescind from the normal deficiency procedures and make an immediate assessment.

The great majority of individual US taxpayers pay taxes throughout the calendar year by authorising their employers to withhold from their salaries and to pay to the IRS income tax and employment taxes (e.g., social security). Depending upon the amount of their annual revenues, US corporations are required to make greater or lesser payments of income tax, called estimated tax payments, each taxable quarter or at more frequent intervals within the quarter. Self-employed individuals have a similar quarterly payment obligation. If after the conclusion of a particular taxable period the taxpayer believes that it has overpaid its tax, it may submit a claim for a refund to the IRS.

In addition to income and employment taxes, the Code imposes a variety of excise taxes. These are imposed on the manufacture or distribution of certain goods, such as fuel, and on services, including telecommunications and air transportation. As a general matter, the consumer bears the cost of excise taxes, and the manufacturer or distributor is essentially a collection agent for the government. As with other taxes, excise taxes are also self-reported by the manufacturer or distributor, and paid through periodic tax returns and deposits. Income tax is by far the largest revenue source for the government.

Disputes over excise taxes can be resolved both administratively and judicially.

Income earned in the United States by foreign persons is subject to withholding. Income subject to this withholding includes income that is 'effectively connected' with a trade or business within the US and certain investment income.[6] US payers to foreign persons generally act as withholding agents who collect the appropriate tax and pay it to the IRS. Tax treaties can beneficially modify the statutory withholding rules and rates. Because foreign persons are often outside the jurisdiction of the IRS, the IRS will generally audit the US withholding agent and impose any deficiencies on that person. Withholding agents can dispute assertions of deficiencies within the administrative apparatus of the IRS and can seek judicial relief if necessary.

ii IRS enforcement and guidance roles

The IRS is a federal agency within the United States Department of Treasury. The Commissioner of the Internal Revenue is the agency head (the Commissioner's side of the house). Legal counsel for the Commissioner is the Chief Counsel of the IRS (Counsel's side of the house). Together, these executive officials determine the programmes, policies and actions of the IRS. Ultimate supervisory authority over the IRS rests with the Assistant Secretary of the Treasury for Tax Policy and the Secretary of the Treasury.

Prior to a substantial reorganisation in 1999, the IRS audit and collection offices were divided geographically. The IRS is now divided into four operating divisions:

a Wage and Investment Division;
b Small Business/Self-Employed Division;
c Large Business and International (LB&I) Division (formerly Large and Mid-Size Business Division); and
d Tax Exempt and Government Entities Division.

6 Foreign corporations must file IRS Form 1120-F, 'US Income Tax Return of a Foreign Corporation', to report any tax due to the United States.

These divisions carry out the basic tasks of the IRS (primarily the audit function) with respect to the different types of taxpayers within each division. Each division is directed by an operating division commissioner, who reports directly to the Commissioner of the Internal Revenue.

The organisational structure of the Chief Counsel mirrors that of the Commissioner. Each operating division has its own operating division counsel (ODC), who reports directly to the Chief Counsel. The ODCs supervise 'field counsel', who in turn support the IRS agents who audit taxpayers 'in the field'. The Chief Counsel has numerous specialised attorneys in the IRS National Office in Washington, DC, whose task is to provide guidance to taxpayers on matters of interpretation of the Code and Treasury Regulations, and to assist with particularly technical or difficult questions on specific taxpayer cases when asked by IRS agents who are working on those cases. Such assistance can take the form of written memoranda to field agents, for example, Field Service Advice or Technical Advice memoranda. The Chief Counsel also maintains a cadre of dedicated trial attorneys to represent the IRS in cases filed in the US Tax Court. By statute, trial attorneys at the US Department of Justice Tax Division represent the government in tax cases in all other courts.

To handle the receipt and processing of tax returns, the IRS maintains several service centres throughout the country. These centres perform the bulk of all routine interactions with taxpayers, including issuing notices of adjustment, penalty imposition in certain circumstances, payment of refunds and change of address notices.

iii Enforcement

The main enforcement mechanism of the IRS is the audit function through which one or more IRS revenue agents review the tax returns of a specific taxpayer. Depending on the complexity of the tax return under examination, the revenue agent may be assisted by certain IRS specialists (such as financial products, international tax or economic experts).[7]

The IRS uses a statistical method, which is not disclosed to the public, to select individual returns. Some large corporate returns are routinely audited, although this practice is in the process of changing in light of LB&I's recent adoption of a 'campaign audit method', discussed in more detail below. In short, the campaign method focuses audit efforts on certain issues the IRS believes to be likely areas of tax avoidance and selects taxpayers based on whether they have such issues in their returns. Occasionally, the IRS pursues issue-specific audit 'initiatives'. These initiatives will focus on a particular area of tax compliance, and taxpayers are selected for audit consistent with the initiative's focus and goals. For example, in 2010 the IRS commenced a three-year worker classification audit initiative that focused primarily on the classification of workers as either employees or independent contractors. The IRS was concerned that there may have been widespread misclassification of workers. Accordingly, 6,000 US employers, including small and large businesses, were audited

7 The IRS has both civil and criminal audit functions. This chapter focuses on civil audit disputes. Criminal audits involve the investigation of possible tax crimes, such as tax evasion, and are principally carried out by a special office within the IRS called the Criminal Investigation Division (CID). CID agents are trained particularly in forensic audit skills. After an audit investigation has proceeded to a certain point, CID agents may refer a case to the US Department of Justice for prosecution and thereafter support the Department of Justice in any further prosecution efforts. CID agents are also authorised to seize property and assets of taxpayers, and are sometimes detailed to other federal prosecution efforts that involve financial crimes such as money laundering.

during the initiative. Subsequently, the IRS implemented another audit initiative targeting high-wealth individuals and their related entities. This initiative was precipitated primarily by the IRS's view that such individuals had a higher likelihood of tax non-compliance, especially with respect to tax reporting regarding their foreign assets and related income. As discussed later, offshore tax avoidance remains an overall enforcement priority of the IRS and the Department of Justice.[8]

A further enforcement mechanism is collection. Once a tax has been assessed, the IRS is authorised to perform certain collection activities. IRS revenue officers, as opposed to revenue agents, carry out collection activities. Taxpayers are entitled to certain procedural protections (the 'collection due process') prior to actual collection by the IRS. The protections can be overridden in certain cases where the IRS believes that assets may be transferred outside its jurisdiction. In that event, the only option for the taxpayer is to file a claim for a refund of taxes paid and, if necessary, pursue that claim in court.

iv Guidance

The IRS (sometimes in conjunction with the Assistant Secretary for Tax Policy) issues significant guidance every year to taxpayers. There are generally two kinds of guidance: formal and informal. Formal guidance includes Treasury regulations, revenue rulings and procedures, and form instructions. Informal guidance includes letter rulings to specific taxpayers called private letter rulings, written advice of the Chief Counsel, service centre advice and, to a lesser extent, the IRS's Internal Revenue Manual, which contains its own interpretation and implementation of the revenue laws.

II COMMENCING DISPUTES

Tax disputes begin with the IRS in one of two general ways: when the IRS decides to audit a tax return and disagrees with one or more of the positions reflected on the return; or when the taxpayer affirmatively seeks to recover tax it believes it has overpaid and the IRS refuses to repay it.

Taxpayers and the IRS can also raise disputes about the collection of taxes (e.g., a taxpayer might claim that the IRS did not follow proper procedure in levying on its bank accounts). Below, we focus on disputes over the merits of tax return positions rather than on the IRS collection efforts. In this context, almost all federal tax disputes begin in an administrative setting.

i Administrative phase of tax disputes: audits

The IRS's general authority to examine is based on Sections 6001, 6201 and 7602 of the Code. Section 6001 provides a general authority for the IRS to make regulations requiring every taxpayer to keep records and file returns. Section 6201 authorises the IRS to make enquiries, determinations and assessments of all taxes under internal revenue laws. Section 7602 and the following Sections authorise the IRS to examine any books, records, papers,

8 See src.bna.com/bLg (IRS 29 December 2015 statement discussing restructuring of LB&I organisation to create new executive positions, a number addressing cross-border issues) and 90 DTR G-4 (7 May 2016 remarks of Don Fort, Deputy Chief in the IRS CID, that international tax enforcement remains a 'huge priority' for the agency).

or other relevant data or material, of the taxpayer or third parties. Together, these provide the basic authority to conduct examinations of taxpayers and to request specific information during those examinations.

Types of audit

There are two types of audit: 'face-to-face' and 'correspondence'.

In a face-to-face audit, a revenue agent meets with the taxpayer to gather information either at the taxpayer's premises (in the field) or at the IRS office (in the office). Generally, corporate taxpayers and higher net worth individual taxpayers are examined through a field examination, whereas lower net worth taxpayers will be subject to an office examination. In a correspondence audit, the IRS service centre that received the return generates and delivers certain notices based on errors or discrepancies in the return. One common discrepancy involves dividends. The IRS receives notices that detail the dividend amounts received by each taxpayer in a taxable year. If the taxpayer did not fully report the dividend income on its return, the service centre will generate a notice that proposes an adjustment to the return based on the dividend income. In cases where there was a mistake in the dividend reporting to the IRS, the taxpayer can provide an explanation, and an employee in the service centre will review that explanation and act accordingly.

Income tax audits are generally conducted by revenue agents and international examiners (revenue agents who specialise in the US tax aspects of cross-border activities), while employment tax audits are carried out by employment tax agents. Estate tax audits are conducted by an estate tax attorney. Unlike all other audits, the lead IRS agent in an estate tax audit is required to be an attorney.

Initiating an audit

The IRS commences a face-to-face audit by sending a letter notifying the taxpayer that the return or returns for a particular period have been selected for audit.[9] A standard form letter is used that will indicate the specific operating division of the IRS that is performing the audit. In the letter, the IRS agent requests a time to meet with the taxpayer to discuss the development of an audit plan and issues preliminary information and document requests (IDRs). Responses to these initial IDRs are usually requested at the time of the first meeting. Prior to the audit, IRS agents will have performed background research on the taxpayer, including obtaining any publicly available information, and will have performed an overall risk analysis to identify possible return positions that the IRS considers to be aggressive. Such positions will receive extra focus during the audit.

In most circumstances, outside counsel is not retained by the taxpayer at this stage of IRS audit activity. Large companies have tax departments that include skilled tax professionals such as attorneys and accountants who can handle many audit issues. Smaller companies and individuals usually rely on their tax return preparer, who can be a certified public accountant, an attorney, a preparer service or a registered return preparer. As the audit develops and issues are brought into focus, outside counsel is sometimes retained. If necessary, the IRS will assemble an audit team consisting of a lead agent, supporting speciality agents (possibly

9 Correspondence audits typically begin with the service centre notifying the taxpayer of proposed changes to the return, and a request for information to explain the return position or positions giving rise to the adjustments. The IRS never uses email to inform a taxpayer of the commencement of an audit.

including international tax examiners if the audit raises cross-border issues) and an audit team manager. The taxpayer also requires a team to effectively respond to enquiries from the IRS audit team. Moreover, because it is now common for IRS LB&I audit teams to include IRS field counsel at the inception of the audit, taxpayers would be well advised to seek assistance of counsel (either in-house or external) to be prepared to respond in a careful and thoughtful manner to the IRS.

In late 2015, a high-level LB&I official announced the implementation of significant changes to the organisation and audit procedures of LB&I.[10] The new audit procedure will be 'campaign' focused, as opposed to traditional audits, which were driven by the size of the taxpayer under what was called the coordinated industry case (CIC) programme. The CIC programme has been superseded by the campaign method. At the division level, LB&I is looking at filing trends and deciding which issues pose the greatest risks of non-compliance. LB&I will then start audit 'campaigns' around these specific issues. Multiple campaigns can proceed simultaneously. Initially 13 campaign issues were identified. In November 2017, 11 more campaign issues were identified.[11] Many are international-related issues including inbound distributor transfer pricing, repatriation structures, non-filing of Form 1120-F US Income Tax Return of a Foreign Corporation, non-resident alien credit claims and controlled foreign corporation loan structures.[12] LB&I has not yet abandoned its traditional audit method, however, as IRS agents in the field are still conducting audits in this fashion. Nevertheless, LB&I management does anticipate a gradual transition to the campaign method.

The IRS examines the return (in the case of a large taxpayer, returns for a two-year period or 'cycle') and verifies the accuracy of the taxpayer's evaluation of its tax liability. On occasion, a taxpayer will amend the original return during the audit, seeking a refund based on further review of its return. Subject to certain procedural criteria set forth in IRS Publication 5125, the IRS agent may allow the claim at that time or defer consideration until the audit is complete. As noted above, some returns are merely informational returns. Nonetheless, these returns can also be subject to an audit. For example, if a law firm is considered a material adviser with respect to what is called a 'reportable transaction', the law firm must file an informational return with the IRS (Sections 6111 and 6112 of the Code). If the IRS wants to evaluate the accuracy of that filing, it can initiate an audit. Another example of informational returns that are regularly audited by the IRS are those filed by tax-exempt entities. Such entities generally file an annual return reflecting the various activities they undertook during the filing period. The IRS will look at the activities of the exempt entity to determine whether they are in keeping with its exempt purpose, and will also review activities that may have generated unrelated business income, which is taxable.

Audit ground rules

It is important to establish ground rules concerning the conduct of the audit. To the extent that a taxpayer can define the expectations of the audit, it can generally maintain a good

10 See 'IRS Large Business & International (LB&I) – Future Structure and Operations,' September 2015 at src.bna.com/bcr.

11 www.irs.gov/businesses/large-business-and-international-launches-compliance-campaigns-0.

12 Id. and www.irs.gov/businesses/large-business-and-international-launches-compliance-campaigns.

relationship with the auditor and keep the audit moving at an efficient pace. In addition, initiation of an audit by the IRS does not mean that the IRS has free rein in the conduct of the audit; there are recognised procedures and limits to the IRS's examination authority.

For audits of any complexity, ground rules should be established at the preliminary conference that occurs after the audit initiation letter is received by the taxpayer. The ground rules should cover:

a who the designated taxpayer contacts are;
b how production and copying of documents occurs on site;
c the general logistics for delivery and response to IDRs, and the maintenance of IDR logs so that the taxpayer can confirm completion of responses to the IDRs;
d scheduling of meetings; and
e establishing a hotline between the taxpayer's supervisor and the manager of the revenue agent.

On occasion, there may be misunderstandings between the taxpayer and the lead revenue agent. In those circumstances, the taxpayer should be able to seek input from the audit team manager.

The LB&I Division has adopted certain protocols for the issuance of IDRs and the use of summonses to enforce information requested by IDRs. IRS Directive LB&I-04-0613-004, as clarified by Directives LB&I-04-1113-009 and LB&I-04-021-044, requires examining agents to follow certain graduated enforcement steps in the event that specific information requested through an IDR is not provided by the taxpayer in a timely manner. The agent has little discretion to vary from them. The steps are issuance of a notice of delinquency to the taxpayer; in the event that the information is not provided 15 days later, the agent issues a letter that warns the taxpayer of the preparation of a summons; and if the taxpayer does not respond within 10 days from the date of this letter, the agent must issue a summons.

The tax bar expressed concern about the mandatory nature of this Directive, especially in circumstances where the taxpayer encounters unforeseen difficulties in obtaining the information requested by the IDR or where the location of the information, such as overseas, makes it impossible to meet any pre-agreed IDR response date. However, since the implementation of these new IDR protocols, there have been no reported summons or significant negative effects on LB&I audits. This is likely to be as a result of better communication between the taxpayer and the lead examining agent about what are realistic timelines for production of responses to IDRs, and the use of draft IDRs by the examining agent to prepare the taxpayer for the delivery of the formal IDR.

Form 8275 and Revenue Procedure 94-69 disclosures

A taxpayer has the option to attach Form 8275, 'disclosure statement', to its return. The Form discloses a particular position or positions taken by the taxpayer in the return, and in effect allows the taxpayer to notify the IRS that the IRS might disagree with one or more of its return positions. Such a disclosure's benefit is that it will prevent the IRS from asserting certain civil penalties against the taxpayer, specifically the Section 6662(b)(1) penalty for disregarding rules and regulations, and the substantial understatement penalty under Section 6662(b)(2).[13] It can be helpful in situations where the law is not clear on the

13 Treasury Regulation Sections 1.6662-3(c)(1)–(2) and 1.6662-4(e).

propriety of the return position, and if the taxpayer otherwise has a reasonable basis for such a position. Should the IRS decide to audit a return that has one or more positions so disclosed, the taxpayer should be prepared for the IRS to focus its examination on those positions.

Under the prior CIC programme, taxpayers could make a similar kind of disclosure after the initiation of the audit. Pursuant to IRS Revenue Procedure 94-69 (31 October 1994), if a CIC taxpayer provided a statement to the IRS no later than 15 days after such a statement is requested by the IRS, the statement would be deemed to be a qualified amended return,[14] and no penalties under Section 6662(b)(1) or (b)(2) can be imposed. As a general matter, the IRS will request such a statement at the inception of the audit. With the change to 'campaign' audits, this entire disclosure procedure could be removed by the LB&I division of the IRS.

Statute of limitations

Under Section 6501(a) of the Code, the IRS has three years from the time a return is filed to assess any additional tax with respect to that return. Whenever an audit is commenced, it is important to confirm that the IRS still has the authority to actually assess a tax with respect to the year under audit. Normally, the IRS audit team has already reviewed the statute, but taxpayers should confirm this independently. In cases of substantial omission of gross income – defined as an amount in excess of 25 per cent of the gross income stated in the return – the statute of limitations is six years from the time of filing the return (see Section 6501(e) of the Code).[15] For fraudulent or false returns, the statute remains open indefinitely. The statute also remains open in cases where no return has been filed, and in other specified circumstances such as where forms identifying income items from controlled foreign corporations are not attached to the income tax return.

If the IRS team determines that there is a year or less remaining on the statute for the return under audit, it will ask the taxpayer to consent to the extension of the statute through execution of Form 872. The request will be for a specific date in the future. As a general matter, it is prudent for taxpayers to sign these extension consents. If the IRS is faced with an expiring statute prior to the completion of the audit, it will be forced to consider issuing a protective notice of deficiency so that any potential tax collection is not lost. Protective deficiency notices are generally based on prior year return tax liabilities and adjusted upwards. As the audit progresses, if certain issues are not going to be challenged, the taxpayer may insist that an extension is limited only to specific audit issues. Form 872-R accomplishes this limited extension of the statute. As with all matters concerning the statute of limitations, a taxpayer should carefully consider its options before consenting to the extension.

IRS methods to obtain information during an audit

The IRS has several methods by which to obtain information from the taxpayer during an audit. The standard method is the information document request (IDR). Because of the

14 A qualified amended return normally must be filed prior to any contact by the IRS.

15 The United States Supreme Court in *United States v. Home Concrete & Supply, LLC,* 132 S Ct 1836 (2012), decided that Treasury Regulation Section 301.6501(e)-1(a)(iii) was invalid. This Regulation required overstatements of basis to be treated as substantial omissions of gross income under Section 6501(e) of the Code to the extent such overstatements resulted in a reduction of income exceeding 25 per cent of the reported gross income. Of particular importance was the fact that the Court chose not to defer to the Treasury Department's interpretation of the Code. Normally, Treasury Regulations are granted a high degree of deference by the courts.

broad investigative powers of the IRS, IDRs can request almost anything relating to a return position that assists the IRS in determining the accuracy of the return. The revenue agent will use Form 4564 to set forth specific questions and requests. An IDR can be used simply to pose a question (e.g., how many full-time employees did the taxpayer have during the taxable period?) As the audit proceeds, IDRs become more focused on the areas of concern to the IRS. The IRS may also ask for information informally, but for any material information, a taxpayer should make sure that this is requested through Form 4564. Generally, IDRs indicate a deadline for response. Taxpayers should make every effort to meet such deadlines, but in some cases the revenue agent may have requested a substantial amount of information that cannot be collected within the time frame specified. In those circumstances, a taxpayer should request additional time. A taxpayer is not required to create any new documents, such as a schedule of full-time employees, if one does not already exist. However, because it is important to maintain a positive relationship with the revenue agent, the taxpayer is sometimes well-advised to create such document to assist the agent in his or her review of information. An IDR may also request an interview with key taxpayer personnel or third parties to better understand the facts underlying a specific return position.

The IRS can also use extraordinary methods to obtain information from the taxpayer. Under Sections 7603, 7605 and 7609 of the Code, the IRS can issue summonses to compel taxpayers and third parties to provide information relevant to their audit. Taxpayers frequently dispute whether the IRS has such authority, even to the point of seeking a judicial resolution of whether the IRS summons is valid, but the US Supreme Court has acknowledged the broad authority of the IRS under these statutes.[16] Typically, the IRS does not use a summons unless the taxpayer has declined to provide information the IRS believes it needs for the audit. Should a taxpayer continue to decline to provide the information sought by the summons, the IRS has the option to seek judicial relief through a summons enforcement action. The US Department of Justice Tax Division will file the action on behalf of the IRS in the federal district court where the taxpayer resides or has its principal place of business. The taxpayer must be prepared to answer in court to justify its decision not to provide the requested information.

There are two special types of document requests that the IRS can use against the taxpayer:

a a designated summons, authorised by Section 6503(j) of the Code, the primary effect of which is to toll the statute of limitations while the IRS waits for the information requested in the summons; and

b a formal document request authorised by Section 982(c) of the Code. A formal document request enables the IRS to foreclose the taxpayer from using foreign-based documents in litigation that were subject to the request and not provided to the IRS during the audit.

16 See *United States v. Powell*, 379 US 48 (1964) (establishing requirements of a valid summons). Arguments against the validity of a summons based on irrelevancy are routinely rejected by courts. The most successful oppositions to IRS summons rest on the protections of attorney–client privilege or work product. Cf. *United States v. Clarke*, 134 S Ct 2361 (2014) (acknowledging that a taxpayer 'has a right to conduct [an evidentiary hearing] when he points to specific facts or circumstances plausibly raising an inference of bad faith' in the issuance of a summons).

Finally, the IRS can use its summons power against third-party record keepers, such as banks or other financial institutions, under Section 7609 of the Code. A third party may hold critical information, and may not object to a summons simply because the audit does not pertain to its liability. However, unlike the taxpayer, a third party can make a reasonable objection based on economic burden to comply with the summons, and should consider raising any such concerns with the revenue agent. The IRS does not generally have the authority to enforce a summons outside the jurisdiction of the United States.[17]

Should the return selected for audit involve a 'listed transaction' (i.e., a transaction that the IRS considers to be potentially abusive tax avoidance), the audit will generally be much more aggressive, and is likely to include third-party summonses, testimony under oath and attacks on privilege claims.

Responding to IRS requests in audits

As a general rule, it is preferable to provide the IRS with the information requested through IDRs rather than not providing any information and forcing the IRS to decide whether to use its summons power. The key to the successful conclusion of an audit is a good working relationship with the IRS audit team. With the exception of requests that seek protected or privileged information, or that would entail an unnecessary and excessive compliance burden, taxpayers should promptly and professionally reply to each IDR presented by the IRS.

It is, therefore, wise for taxpayers to review each request, and to clarify the meaning of any language and the scope of the request. For example, a request might be for all corporate minutes without any qualifications; in such circumstance, it is perfectly acceptable to ask the IRS for a date range and also for some specificity regarding what topics in the minutes are of interest. It is also important to review response materials for completeness and accuracy. Legitimate requests for relevant, unprotected information should generally be complied with through a written response.

Protected information

Taxpayers (even experienced corporate tax departments) can be careless in including privileged or other protected information in files that may be produced to the IRS. In the United States, there are several acknowledged protections that cannot be overcome by the IRS, despite its broad summons authority.

The first is attorney–client privilege, which prevents any communication between the client and its attorney in connection with legal advice from being discovered by the IRS.

A second kind of protection is the attorney work-product doctrine. Documents created in anticipation of litigation or trial are generally protected by this doctrine. The Federal Rules of Civil Procedure and federal case law have expanded the doctrine to include non-attorney representatives of a party, such as accountants or consultants. Thus, if a taxpayer has engaged a tax accountant to assist it in evaluating the strengths of its tax return position with a view to future litigation with the IRS, the evaluation created by the tax accountant would be protected under this doctrine.

A third type of protection is a statutory privilege under Section 7525 of the Code. Section 7525, in effect, imports the common law protections of the attorney–client privilege

17 As discussed below, parties to a tax treaty can assist one another in collecting information relevant to their respective jurisdictions, even to the point of issuing a summons on behalf of a treaty partner.

into the tax adviser–client relationship, regardless of whether the adviser is an attorney. The adviser must be a federally authorised tax practitioner (including, e.g., certified public accountants). The Section 7525 privilege thus protects communications between tax advisers and taxpayers in connection with tax advice. There are certain important limitations to this statutory privilege. It does not protect communications made in connection with the promotion of a tax shelter. Nor does it apply in the context of criminal tax proceedings. Both the attorney–client and Section 7525 privileges can be waived, however, if the communication is disclosed to third parties.

Finally, the Fifth Amendment of the United States Constitution prevents the government from compelling a taxpayer to make statements that could be viewed as an admission of criminal guilt.

Corporate tax accrual workpapers

A significant current issue for corporate taxpayers involves whether their internal tax accrual workpapers can be protected from IRS scrutiny under the work-product doctrine. Workpapers typically contain sensitive tax analysis regarding the strengths of a particular tax position that a company has adopted in its return. Thus, most corporate taxpayers are not enthusiastic about providing their workpapers to the IRS. Often the workpapers are provided to a company's external financial auditors, thereby waiving any attorney–client or Section 7525 privilege that might have protected them. Nonetheless, because such workpapers contain analysis regarding the litigation hazards of a particular tax return position, corporations have taken the position that they are work product (as this protection generally is not waived upon disclosure to outside financial auditors). As a general matter, the IRS does not ask for these documents. This is known as the 'policy of restraint'.[18] Nevertheless, the IRS maintains that it has the authority to request these documents, and has litigated the issue and prevailed in one federal circuit.[19]

Negotiating and closing an audit

As a general matter, revenue agents do not have authority to settle issues based on litigation risks. Nevertheless, there are opportunities during the audit to come to an agreement about what an adjustment should be. For example, where the proposed adjustment depends upon the valuation of certain minority interests in stock, it is possible to reach an agreement with the IRS audit team as to the proper discount value applied to determine the valuation of the stock and thereby agree on a valuation. Taxpayers should therefore apply creative thinking about how to come to a mutually acceptable resolution of an audit consistent with the general limitation on the audit team's settlement authority.

At the close of the audit there are several possible outcomes:

a if the IRS agrees with the taxpayer's return, it will issue a 'no change' letter, and the return is accepted as filed;

b if the IRS has proposed adjustments with which the taxpayer agrees, the audit will be closed as an 'agreed' case, and the tax liability is adjusted accordingly;

18 See IRS Announcement 2010-76 (24 September 2010).

19 *United States v. Textron*, 577 F3d 21 (1st Cir 2009) (tax accrual workpapers were not protected by the work product doctrine because they were not 'prepared for use in possible litigation'). But see *United States v. Deloitte*, LLP, 610 F.3d129 (DC CIR. 2010) and *Wells Fargo and Company v. United States*, 2013-1 USTC Paragraph 50368 (D Minn 2013) (both recognising limits on IRS summons authority).

c a taxpayer may disagree with all of the proposed adjustments, in which case the audit is closed as 'unagreed', and the revenue agent will prepare a revenue agent's report (RAR), which is delivered to the taxpayer under cover of a transmittal letter allowing the taxpayer 30 days within which to file a protest letter with the IRS Office of Appeals (Appeals); or

d a case might be partially agreed. In that event, the revenue agent will issue an RAR covering the unagreed issues.

It is important to bear in mind that if the RAR contains material errors, a taxpayer may find it fruitful to make another attempt at 'agreed' resolution of the issues affected by such errors. A taxpayer should consider preparing a written submission to the IRS audit team detailing the errors, and requesting either a retraction of the RAR, or a modified RAR that reflects the correct factual or legal circumstances. Given that revenue agents are increasingly imposing penalties along with tax adjustments, the possibility that such penalties are based on flimsy or erroneous grounds similarly increases. Every effort should be made to persuade the revenue agent to reconsider penalties prior to proceeding to Appeals.

Appeals

Appeals is the official settlement arm of the IRS for disputes arising from audits.[20] It is staffed by appeals officers located in 11 appeals offices throughout the country. The Chief of Appeals, located in the IRS National Office in Washington, DC, is the top IRS appeals executive, and is assisted by the Deputy Chief of Appeals in his or her duties. The mission of the Appeals Office is '[T]o resolve tax controversies, without litigation, on a basis which is fair and impartial to both the government and the taxpayer in a manner that will enhance voluntary compliance and public confidence in the integrity and efficiency of the Service'. An appeals officer is charged with making an objective evaluation of the taxpayer's case based on the hazards of litigation. Importantly, the Appeals Office is independent from the IRS audit team that has proposed the adjustments.[21]

An appeals officer learns of the taxpayer's position regarding the proposed adjustments primarily through the taxpayer's protest letter. Although the IRS provides Form 12203 to prepare a protest to the appeals office, most practitioners opt to draft a letter that contains the necessary information and explains the taxpayer's position in a manner similar to that in which a legal brief sets out the facts and supporting legal analysis before a court. The protest letter is addressed to the IRS audit team supervisor. The IRS audit team then forwards the protest letter to the appropriate appeals office, along with the audit team's written rebuttal to the protest letter.[22] Thus, it is possible that the IRS audit team, upon review of the protest letter, may change its legal analysis to respond to the taxpayer's argument, or may in fact be persuaded to concede certain issues.

20 For disputes with the IRS that have been filed in court, Appeals has no official settlement role (apart from Tax Court cases that have not previously been before Appeals, which are immediately referred to Appeals after the petition is filed in the Tax Court).

21 As noted in the instructions to Form 12203, 'Request for Review' (which is a form version of the protest letter): 'The local Appeals Office is separate from and independent of the IRS office that proposed the adjustment.'

22 The taxpayer is entitled to request an Appeals review in a location that is convenient to the taxpayer. However, Appeals may instead decide to assign the case to an appeals officer with particular expertise

Appeals review is an informal consideration of the contrasting positions. There is no testimony or formal hearing process. Instead, the appeals officer will convene a series of meetings to assist the officer in evaluating the litigation risks for both sides.[23] These meetings may be by telephone or in person. The first (pre-conference) meeting allows the IRS audit team to explain its position on the various adjustments that it proposes. IRS field counsel are likely to assist in that presentation. Because an appeals officer may not have *ex parte* communications with the audit team, a taxpayer must be allowed to attend this meeting.

After the pre-conference, the IRS audit team plays no further role in the appeals officer's consideration of the case. The second (i.e., conference) meeting is between the appeals officer, the taxpayer, and his or her representatives. The taxpayer always has the option to request that this be an in-person meeting. Depending upon the complexity of the case, the taxpayer may be invited to present its side of the case, reviewing the facts and the applicable law. Afterwards, the appeals officer will engage in a discussion of the case and the merits of both sides. It is at this juncture that settlement negotiations will occur in an effort to resolve the matter. This appeals procedure is highly successful: over 90 per cent of all cases before Appeals are settled. Traditional Appeals practice has been to engage in 'conference' dialogue only with the taxpayer; however, Appeals has recently indicated that it may invite the IRS audit team to participate in that discussion although not to discuss actual settlement ranges.[24]

Appeals has developed what is called the appeals judicial approach and culture (AJAC) project to make appeals more like an appellate judicial review function. Under AJAC, appeals will not find facts. Thus, new facts raised by a taxpayer with an appeals officer will be presented to the audit team for a response. If a taxpayer raises a new theory with Appeals, the appeals officer will also seek the audit team's response.

Mediation is available if the normal appeals consideration does not result in a resolution. The mediator is another appeals officer. The taxpayer may add another mediator of his or her own selection. Post-appeals mediation is voluntary. See Revenue Procedure 2014-63.

If, after settlement discussions, the taxpayer and the appeals officer agree on a resolution, Appeals will prepare an internal memorandum to record the analysis of the case, and for approval by his or her supervisor. The appeals officer will then prepare either a Form 870-AD or a closing agreement for the taxpayer that contractually binds the taxpayer and the IRS to the terms of the settlement.[25] If no settlement is reached, the appeals officer will prepare either a statutory notice of deficiency, giving the taxpayer the opportunity to seek relief in the US Tax Court, or a Form 870, which obtains the taxpayer's consent to the immediate assessment and collection of any tax due. Most taxpayers will elect to receive a statutory

regarding the issues raised by the RAR and the protest letter, or may in fact decline to have any in-person meeting based on factors such as resources and the complexity of the case. See IRM 8.6.1.4.1 (10-01-2016) (describing factors Appeals will consider in determining whether to conduct an in-person conference). In that event, the Appeals review would be conducted through telephone and mail.

23 If the case involves particularly technical or significant issues, such as transfer pricing or insurance tax issues, Appeals may assign an appeals case team to review the case, and include appeals officers with expertise in those issues on such a team. The appeals case team is led by an appeals case team leader known as an ATCL.

24 www.irs.gov/pub/irs-utl/atclfaqs.pdf.

25 Form 906, 'Closing Agreement on Final Determination Covering Specific Matters', will bind the IRS and the taxpayer except where there has been fraud, malfeasance or misrepresentation of material facts.

notice of deficiency. However, some may wish to pursue their case in court after payment of taxes, and so will request a Form 870, pay the tax due and begin proceedings for filing a tax refund action.

III THE COURTS AND TRIBUNALS

If efforts to resolve an issue within the administrative apparatus of the IRS have failed, a taxpayer has the option to file suit in federal court. A taxpayer thus is able to have its 'day in court' on the tax issue that the IRS has raised. As a matter of jurisdiction, there are four potential judicial venues in which to raise a federal tax claim: the US Tax Court, the US Court of Federal Claims, a federal district court or a bankruptcy court.

i Choice of forum

With the exception of the Tax Court, the above-mentioned courts hear tax cases just as they hear any other dispute that comes before them. They follow the Federal Rules of Civil Procedure (or similar versions of those rules) and apply the Federal Rules of Evidence at trial. They allow for a full range of discovery of the IRS, dispositive motions, oral arguments, motions *in limine* and trial, as well as all post-trial procedures, including appeal rights to a federal appellate court, and thereafter the ability to petition the court of last resort, the US Supreme Court.[26]

The Tax Court is a court of singular subject-matter jurisdiction (i.e., federal tax deficiency cases), and has some different rules of litigation; however, for the most part it operates just as the other courts with respect to discovery, motions and litigation. For some taxpayers, the US Tax Court is not available simply because they are not seeking to avoid payment of tax asserted to be due, but to force the IRS to repay tax they believe is overpaid. Thus, the only courts available to these taxpayers are the 'refund' courts (i.e., federal district courts or the US Court of Federal Claims). However, taxpayers who face proposed tax assessments after audit can choose between the US Tax Court and the refund courts. There are several points to consider when deciding which judicial venue is the best to hear a taxpayer's case:

a which forum has the most favourable precedent;

b what the comparative cost differences are, other than the fact that payment of taxes (and possibly interest and penalties) is required to obtain refund jurisdiction;

c which forum offers the best opportunity to settle early and favourably;

d where the taxpayer is most likely to prevail in trial; and

e where the taxpayer is most likely to prevail upon appeal, if necessary.

The specific circumstances of the case and issues involved will, of course, affect the answer to some of these questions. Thus, where the precedent gives a distinct advantage on the merits of the issues, this will improve the chances of settlement in that forum and the chances of prevailing in litigation. The US Tax Court may have more or less favourable case law than the refund courts. On the other hand, the US Court of Federal Claims, a tribunal separate from

26 While there is a right to appeal to the federal appellate court, there is no right of appeal to the US Supreme Court for tax cases. The Supreme Court takes these cases in its sole discretion.

the federal district courts, may have the most beneficial case law. A taxpayer should retain counsel to carefully analyse the applicable precedent in each forum, as this is one of the most important factors to consider in choice of forum.

ii Comparison of costs

The largest cost factor in any litigation is legal fees. The largest cost factor within those fees for large tax cases is the discovery phase of litigation. In general, the Tax Court rules encourage less formal discovery, and encourage stipulation to the greatest extent possible. Refund courts allow for broad-ranging discovery, including liberal use of depositions, as a way for the parties to gauge the other's case and to discover additional facts. Thus, on this basis the Tax Court overall typically incurs fewer legal fees. However, where a case is particularly contentious or involves large amounts or significant tax issues, this potential cost advantage of the Tax Court decreases because the parties will be less willing to resort to informal exchange of discovery and stipulation of facts.

Another cost factor relates to the procedural requirements leading up to the filing of suit, where the Tax Court is generally less costly. Tax Court jurisdiction depends upon receipt of the statutory notice of deficiency. This notice gives a taxpayer 90 days within which to file a petition in the Tax Court seeking redetermination of the proposed deficiency.[27] Refund court jurisdiction requires several steps. First, a taxpayer must pay the tax asserted to be due. (In jurisdictions other than the Federal Circuit, this will require payment of any assessed penalties and interest.) This amount is determined after audit and reflected on Form 870, which is signed by the taxpayer and which also waives a taxpayer's right to petition the Tax Court.[28] Form 870 records the taxpayer's consent to immediate assessment of the taxes. Second, the taxpayer must file a claim for refund within two years from the time of payment. Third, the IRS disallows the claim or fails to act on the claim within six months of the filing of the claim for refund. A taxpayer then has two years from the date of disallowance of the refund claim to file suit in a refund court such as the US Court of Federal Claims or a federal district court located in the appropriate venue.[29] Because the costs involved in preparing a Tax Court petition and a complaint in refund court are comparable, the more streamlined process for reaching the Tax Court will incur fewer fees overall.

A further cost is interest. Because the Tax Court does not require prepayment of the asserted taxes, interest continues to run on the deficient amount until resolution of the case. However, in the refund court, because payment, including assessed interest, must be made

27 Depending upon the complexity of the case, Appeals may take several weeks to draft and issue the deficiency notice. Further delaying the issuance of a notice is the practice for review and concurrence by IRS counsel.

28 Although the Federal Circuit (which hears appeals from the US Court of Federal Claims) does not require separate payment of assessed interest for jurisdictional purposes, the IRS is not prevented from pursuing collection of any assessed unpaid item, including interest. It is possible, but unlikely, that the IRS would agree to defer collection of assessed interest and instead instruct the Department of Justice Tax Division to counterclaim for that amount in court.

29 Arguably, if the IRS does not formally disallow the refund claim there is no limitations period within which to file suit. Although the IRS may argue that a more general six-year statute of limitations applies for claims against the United States. A taxpayer may request an immediate disallowance of a refund claim and thereby accelerate the beginning of this two-year period. If possible, taxpayers should time the filing of suit to coincide with the expiration of the statute of limitations for assessment to prevent the IRS from asserting any new tax issues (and assessments) in court.

prior to suit, interest does not run. Any repayment of taxes to the taxpayer as a result of the litigation will come with interest paid by the government. To some extent, the interest factor can be ameliorated through the expedient of a deposit. The IRS has established procedures by which a taxpayer can deposit (not pay) an amount with the IRS to cover a proposed tax deficiency should that tax deficiency be upheld by the appeals office. See Revenue Procedure 2005–13.

Finally, if the taxpayer loses in the Tax Court, taxes (and interest and penalties) must be paid to appeal the Tax Court decision or a bond must be posted. Since posting a bond is more expensive, it is rarely the option chosen.

iii Settlement opportunities

Settlement in the Tax Court and the refund courts is not uncommon. However, as a general matter, settlement discussions can take place at an earlier stage in the Tax Court than in the refund courts. In the refund courts, the Department of Justice Tax Division, not the IRS, controls the litigation. Litigators at the Justice Department typically seek substantial discovery, including depositions of key taxpayer witnesses, prior to entering into meaningful settlement discussions with a taxpayer. In the Tax Court, the IRS typically does not require significant discovery before consideration of settlement.

One factor that may weigh against selecting the Tax Court is the potential involvement of the IRS audit team. The extent to which IRS personnel who have been involved in a case while in audit will influence any resolution by settlement is probably greater in the Tax Court than in a refund court. Typically, in a refund court the Department of Justice attorney will be the first-line person to evaluate the litigation hazards, and will operate independently of IRS personnel with regard to the conduct of the litigation.[30] However, in a Tax Court proceeding, IRS personnel who were involved during the audit phase may in fact be assigned to the case in Tax Court, or act in some consultative capacity to the IRS trial team. If the IRS audit team was generally hostile, it would be reasonable to presume that this attitude might carry over into the IRS trial attorney's consideration, and thereby decrease the chances of a reasonable settlement discussion.

IV PENALTIES AND REMEDIES

The Code imposes both civil and criminal penalties. Civil penalties are located in Chapter 68, Sections 6651–6751. Criminal penalties are set forth in Chapter 75, Sections 7201–7217. Civil penalties generally are designed to encourage compliance with filing and payment deadlines, and to encourage accurate reporting of taxes and information. Criminal penalties also encourage proper reporting, but go further by punishing through fines and incarceration. As with the charge of any crime in the United States, the element of *mens rea* (i.e., intent) must be established by the government beyond a reasonable doubt to impose a criminal tax penalty.

30 As the client agency, the IRS routinely indicates whether the Department of Justice must consult with it prior to settling any case.

i Civil penalties

Civil tax penalties are numerous. They include:

a an estimated tax penalty (Sections 6654, 6655) for failure to properly estimate and pay tax due throughout the taxable year;
b delinquency penalties (Section 6651) for failure to file timely returns and pay tax due;
c accuracy-related penalties (Sections 6662, 6662A) for failure to accurately report items on a return;
d penalties relating to fraud (Section 6663);
e a variety of information return penalties (Section 6652, 6721–6725) for failures to accurately or promptly report required information; and
f abusive tax shelter penalties (Sections 6662A, 6700–6703, 6707–6708).

Certain penalties, such as the estimated tax and delinquency penalty, are often imposed by the IRS service centre. As a general matter, accuracy-related penalties are imposed after IRS examination.[31] Taxpayers are always afforded the opportunity to rebut the imposition of penalties either at the examination (or service centre) or Appeals level. Unresolved disputes concerning penalties, such as disputes about taxes, can be litigated in the various judicial fora.

Taxpayers can avoid the imposition of most civil penalties through a showing of reasonable cause. If a taxpayer can show that he or she acted with ordinary business care and prudence in the filing and preparation of his or her return, he or she will generally be able to show reasonable cause.[32] Reliance upon a tax adviser can constitute reasonable cause where the IRS disagrees with a return position. In that case, the IRS will review a number of factors, including whether the taxpayer acted in good faith by providing his or her adviser with all necessary information and whether the proposed return position was 'too good to be true'.[33] One notable exception is the relatively new accuracy-related penalty in Section 6662(b)(6) for underpayments of tax owing to a failure to meet the economic substance requirements set forth in Section 7701(o). There is no reasonable cause defence for this penalty.

31 Section 6751(b) provides that penalties, other than delinquency and those imposed by electronic means, cannot be assessed 'unless the initial determination of such assessment is personally approved (in writing) by the immediate supervisor of the individual making such determination or such higher level official as the Secretary may designate'. This Section provides some measure of protection against IRS examining agents who may act in a retaliatory or otherwise abusive fashion by imposing penalties without due consideration of the taxpayer's defences thereto.

32 For example, Treasury Regulation Section 301.6651-1(c), which sets forth this standard for delinquency penalties, provides: 'If the taxpayer exercised ordinary business care and prudence and was nevertheless unable to file the return within the prescribed time, then the delay is due to a reasonable cause.' It is important to note, however, that for filing deadlines, a taxpayer cannot delegate his or her duty to file on time to a tax return preparer. See *United States v. Boyle*, 69 US 241 (1985) (finding a penalty applied where the estate executor simply relied on the return preparer to file on time). For accuracy-related penalties, Section 6664(c) similarly provides that no penalty shall be imposed if it is shown that there was a reasonable cause for the inaccurate portion of the return and that the taxpayer acted in good faith with respect to that portion.

33 Treasury Regulation Section 1.6664-4(c).

ii Criminal penalties

Most tax criminals are guilty of tax evasion under Section 7201.[34]

The basic elements of tax evasion are the existence of a tax deficiency, an affirmative act constituting an evasion or an attempted evasion of the tax, and wilfulness. Evading payment of an income tax can be accomplished even when a taxpayer reports all taxable income on his or her return. A good faith misunderstanding of the law is a defence to a tax crime.

Good faith reliance on the advice of counsel or an expert tax preparer, after complete disclosure of all relevant facts to the tax adviser, is also a defence to the crime.

Other tax crimes are those:

a regarding collection or payment of tax (Section 7202);
b regarding filing, payment or supplying information (Section 7203);
c regarding making of fraudulent and false statements (Section 7206);
d regarding delivery or disclosure of fraudulent or false return, statements or other documents (Section 7207); and
e interference with revenue laws (Section 7212).

V TAX CLAIMS

i Recovering overpaid tax

A claim for refund of income taxes is essentially an amended tax return. In the same manner as an original tax return, a claim for refund can be subject to an examination by the IRS. Should the IRS disagree with the claim, and the taxpayer is unable to resolve the claim administratively, the taxpayer has the option to file an action for tax refund in a federal district court or the US Court of Federal Claims. These are collectively known as 'refund courts'.

Taxpayers seeking a refund from the IRS must ensure that they abide by the statute of limitations for making a refund claim. Section 6511 of the Code provides generally that a refund claim must be made within three years from the time the return is filed or within two years from the time that the tax sought to be recovered is paid. Failure to meet this time frame means an otherwise valid refund claim is forever barred, unless very specific mitigation criteria are met that allow for the assertion of an otherwise barred claim.

There are two more critical timing considerations, even if a refund claim is filed on time. Once the refund claim is filed, the taxpayer must wait six months before filing suit in a refund court. Attempts to file suit before this period has run will result in a dismissal of the lawsuit for lack of jurisdiction. Further, once the IRS formally disallows the refund claim under Section 6532(a), the taxpayer has two years within which to file suit. While the IRS and the taxpayer can agree to extend this period, once that period expires, no court has jurisdiction to hear the taxpayer's refund claim.

34 Section 7201 states: 'Any person who wilfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than \$100,000 (\$500,000 in the case of a corporation), or imprisoned not more than 5 years, or both, together with the costs of prosecution.'

ii Challenging administrative decisions

Taxpayers are always able to challenge IRS administrative decisions based on substantive and procedural grounds.

To the extent that a decision of the IRS is based on a statute and that decision is contrary to the intent or policy of the statute, then a taxpayer can make an effective argument to invalidate the decision. The IRS's formal decisions, as embodied in Treasury regulations, are accorded a high degree of deference by the courts, and taxpayers typically are hard-pressed to persuade a court to invalidate a Treasury regulation unless there is a clear case that the regulation contravenes the statute's language or purpose. Other, less formal, decisions, however, are not accorded such deference, and the taxpayer can argue with relatively increased success that these decisions should be disregarded because they are inconsistent with the relevant statutory framework. Mere arguments as to what is better tax policy will never be particularly effective, because the revenue agency is presumptively the best determiner of tax policy. Nonetheless, some courts have rejected proposed IRS actions based on the theory that the agency should be treating similarly situated taxpayers in a similar manner. Thus, where there is disparate treatment among similarly situated taxpayers, courts have held that the IRS action against the complaining taxpayer is invalid.[35]

Furthermore, all federal agency action is subject to federal statutory administrative law provisions. Pursuant to those provisions, courts are empowered to reject certain types of agency action where the agency acts in a way that is 'arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with the law'.[36] Courts sometimes disregard the IRS's exercise of its discretion based on this standard, such as in the transfer pricing context.[37] However, whether all IRS actions are subject to this standard is somewhat unclear. Regulations can be subject to challenges under federal administrative law. In 2015, the IRS lost a high-profile case in which the taxpayer challenged certain Treasury regulations that required sharing of equity-based compensation costs in connection with transfer pricing arrangements. The Tax Court decided that the Treasury Department and the IRS did not adhere to required procedures involving solicitation and response to comments to the proposed regulations, and did not substantiate its rules with factual support.[38]

With regard to constitutional challenges, in the context of state tax rules and actions taxpayers are sometimes successful. Taxpayers have successfully argued, for example, that a particular state taxation regime violates what is known as the doctrine of the 'dormant' commerce clause of the Constitution. This doctrine prevents state and local tax authorities from unfairly discriminating against other states' commerce. However, constitutional arguments against the imposition and collection of federal tax have been repeatedly rejected by the Supreme Court.

35 See *IBM Corp v. United States*, 343 F2d 914 (Ct Cl 1965), cert denied, 382 US 1028 (1966).

36 Final agency action is generally subject to review under this standard pursuant to the Administrative Procedure Act of 1946, PubL 79–404, 60 Stat237.

37 Most recently the IRS lost in *Amazon.com Inc and Subsidiaries v. Commissioner*, 148 T.C. No. 8 (2017) and before that in *Medtronic, Inc v. Commissioner*, TC Memo 2016-112, in which the Tax Court found that the IRS had arbitrarily and capriciously rejected certain key evidence supporting both taxpayers' transfer pricing positions.

38 See *Altera Corp v. Commissioner*, 145 TC No. 3 (2015), appeal pending.

With respect to disputes before the IRS Appeals Office, the IRS takes the position that it has no authority to settle cases where the taxpayer has refused to comply with the tax law because of moral, religious, political, conscientious or constitutional grounds.[39]

iii Claimants

As noted, a taxpayer must file a claim for refund of income taxes with the IRS to pursue a tax claim. Assignment of refund claims to a third party, for example, in the context of a sale of the taxpayer's business, does not give standing to the third party. In informal guidance from the Chief Counsel, a taxpayer's attempt to direct refund cheques to its purchaser failed. IRS issues are funded only to the person who overpaid and filed the refund claim. Citing the Anti-Assignment Act, the Chief Counsel stated that a claim against the government can be assigned only after the claim is allowed, the amount is decided and a warrant for payment is issued, none of which occurred before the taxpayer sold its refund claims to the buyer.[40]

With respect to excise taxes, there are specific statutory rules governing who has standing to file a claim for a refund. Depending upon the particular excise tax, standing may be limited to the person responsible for the payment of the taxes, or may include third parties such as those who bore the economic incidence of the tax, upon their satisfaction of certain procedural requirements.

VI COSTS

i Recovery of administrative and litigation costs

A taxpayer's ability to recover costs incurred in the administrative or litigation phase of a federal tax dispute is circumscribed by Section 7430 of the Code, which provides that a taxpayer who is the prevailing party in any administrative or court proceeding may be awarded a judgment for 'reasonable administrative costs incurred in connection with administrative proceedings within the Internal Revenue Service, and reasonable litigation costs incurred in connection with court proceedings'.

The statute defines 'prevailing party' as a taxpayer who substantially prevails as to the amount in controversy or with respect to the most significant issue or set of issues.[41] However, if the government can establish substantial justification for its position, no costs can be awarded. The government has substantial justification for its position if it has a reasonable basis in both law and fact. A further test to show substantial justification is whether the government's basis could satisfy a reasonable person. A taxpayer cannot be a prevailing party if it does not meet the net worth requirements of 28 USC, Section 2412(d)(1)(B).

The position of the government in the litigation context is what is set forth in the answer to the complaint (refund court) or the petition (Tax Court). The position of the government in the administrative context is the position of the government as of the earlier of the date of the statutory notice of deficiency or the receipt by the taxpayer of notice of the decision of Appeals.

Both the Code and the Federal Rules of Civil Procedure allow for sanctions against taxpayers and awards of costs in favour of the IRS.

39 Treasury Regulation Section 601.106(b).
40 Chief Counsel Advice 201111005.
41 See Section 7430(c)(4)(A)(i); Treasury Regulation Section 301.7430–5(a)(2).

Section 6673 authorises a court to award sanctions and costs against taxpayers in favour of the IRS. There are three types of actions that can be taken pursuant to this Section 6673. First, the Tax Court can penalise a taxpayer up to US$25,000 for instituting Tax Court proceedings primarily for delay or to advance a frivolous position, or without utilising administrative remedies. Secondly, the Tax Court can impose sanctions directly against an attorney for action that 'multiplied the proceedings […] unreasonably and vexatiously'. Thirdly, any other federal court can impose a penalty of up to US$10,000 against a taxpayer pursuing a 'frivolous or groundless' proceeding under Section 7433, which authorises civil damage actions against the United States with respect to illegal collection actions of the IRS.[42]

Rule 11 of the Federal Rules of Civil Procedure authorises federal district courts to impose sanctions on parties and attorneys where they have signed pleadings that are not 'well grounded in fact', or not 'warranted by existing law or a good faith argument for the extension, modification or reversal of existing law.' Rule 11 can support an award against the taxpayer for costs and other sanctions.[43]

VII ALTERNATIVE DISPUTE RESOLUTION

i ADR within the IRS

In addition to the ordinary audit and appeals process discussed in Section II, the IRS has instituted several ADR methods. All methods require the consent of both the taxpayer and the IRS.

The more widely used methods are fast-track settlement and post-appeals mediation. Fast-track settlement involves an appeals officer mediating a dispute between the taxpayer and the revenue agent. Post-appeals mediation involves the use of co-mediators to help the taxpayer and the appeals officer to reach agreement. Both methods can be effective, and should be considered by taxpayers in the appropriate circumstances.

ii ADR in the courts

ADR is also available in all the courts where a civil tax case might be heard. The ADR methods are fairly similar from court to court. As is the case with the rise of ADR generally in the United States, the advent of ADR in tax cases is explained by increasing litigation costs. Taxpayers should always consider using ADR, preferably even before the case is filed.

Tax Court ADR

As already noted, where a case has not already been reviewed by Appeals, it will be automatically referred to Appeals by the Tax Court for settlement.[44]

42 In addition, Section 7482(c)(4) allows a federal court of appeals or the US Supreme Court to impose a penalty on the taxpayer where the appeal was taken primarily for delay, or where the taxpayer's position on appeal is frivolous or groundless.

43 The US Court of Federal Claims and the Tax Court have similar rules. Under Rule 33(b), the Tax Court has awarded reasonable attorneys' fees. See *Versteeg v. Commissioner*, 91 TC339 (1988).

44 Treasury Regulation Section 601.106(a)(1)–(2).

Tax Court Rule 124, 'Alternative Dispute Resolution', became effective in May 2011. The goal of ADR in the Tax Court is to resolve any factual issue in controversy and takes several forms: voluntary binding arbitration (Rule 124(a)), voluntary non-binding mediation (Rule 124(b)) and a more general category of 'other methods' (Rule 124(c)).

ADR in the US Court of Federal Claims

The Court of Federal Claims hears several kinds of cases against the government, including constitutional takings, government contract disputes, military pay disputes and tax refund actions. Under Appendix H of the Rules of the Court, there are several types of ADR method: mediation, mini-trials, early neutral evaluation and non-binding arbitration. The settlement judge can act as a mediator or third-party neutral, or even conduct a mini-trial whereby the parties can obtain insight into how a fully litigated case might be resolved. In no case are parties compelled to pursue ADR, and any case, whether automatically referred to a settlement judge or not, can take advantage of ADR. While it is available and encouraged, ADR is not widely used in tax refund actions.

ADR in the federal district courts

The Federal Rules of Civil Procedure govern all federal district courts. Rule 26(f)(2) imposes a 'meet and confer' requirement on all parties to civil actions. The purpose of this rule is to facilitate settlement discussions between the parties at an early stage. Based on this rule, the district courts are construed with authority to establish and encourage the use of ADR methods.

Because each district can decide to what extent it wishes to employ ADR methods, ADR in the district courts is not uniform. For example, in the Southern District of New York, mediation is the only ADR method. In the Western District of Pennsylvania, Local Rule 16.2 sets out rules for mediation, early neutral evaluation and arbitration. In the Eastern District of Tennessee, in addition to these methods, the court requires mandatory mediation under Local Rule 16.4. The Eastern District of California is one of the most expansive of all district courts; under its Local Rule 16-271, all ADR methods are allowed.

VIII ANTI-AVOIDANCE

Generally applicable rules of anti-avoidance in the United States are judicial or 'common law' in origin. The doctrines of economic substance, the sham transaction doctrine and step transaction are applied in tax cases throughout the nation's federal courts. During examination, the IRS will also consider the application of these rules in the appropriate circumstances. In 2010, Congress passed legislation that codified the economic substance doctrine.

The economic substance doctrine states that every transaction that reaps tax benefits must be scrutinised to evaluate whether sufficient non-tax purpose attends the transaction. If a taxpayer engages in a transaction that has no non-tax purpose and is solely to obtain tax benefits, a court can reject the desired tax benefits. Such a transaction might be termed an economic 'sham'. The courts have not been uniform in whether a taxpayer's subjective intent regarding its business purpose is enough to defeat the application of the doctrine. Nevertheless, the absence or presence of a pre-tax profit is one factor courts almost uniformly consider in evaluating the economic substance of a transaction that purports to be a profit-making endeavour. There are certain fundamental exceptions to the broad application of this doctrine. For example, a taxpayer whose sole purpose in selling stockholdings is to realise tax losses to offset gains in the taxable year cannot be attacked on the basis of the economic substance doctrine. Another example is where Congress has explicitly conferred tax benefits on a particular transaction to encourage a certain activity or investment. In these situations, a taxpayer should not be treated as illegally avoiding taxes where the legislature has specifically allowed for such activity.[45] Furthermore, in the context of corporate acquisitions or reorganisations, it is common to structure a transaction in a certain way so as to minimise the tax liability.

With the codification of the economic substance doctrine in 2010, transactions must now pass both an objective and subjective test. Section 1409 of the Health Care and Education Reconciliation Act of 2010[46] added Section 7701(o), which codified the doctrine and incorporated new penalty provisions (discussed above). Under Section 7701(o), a taxpayer must ensure that a transaction produces economically meaningful changes (apart from federal income tax effects) and is infused with substantial non-tax purpose (apart from federal income tax effects). The statute provides special rules where pre-tax potential is a factor in the transaction.[47]

The step-transaction doctrine states that the tax benefits of a transaction can be limited to the substance of the transaction versus its form. Thus, if a taxpayer, in structuring an otherwise *bona fide* business transaction, includes a step that is not necessary to effect the transaction for the purpose of gaining a tax benefit, that step can be ignored by the courts. Another way of looking at the application of the doctrine is that it allows for the 'stepping together' of all of the parts of a transaction to ascertain its true nature.[48] For example, where a parent corporation sold the built-in loss assets of its subsidiary, thereby generating a tax loss, and then shortly thereafter repurchased most of those assets, the transaction is recast as a non-taxable liquidation, and the claimed tax loss is denied consistent with that recharacterisation.[49]

Borrowing from these common law general anti-avoidance rules, the IRS and the Treasury have developed anti-abuse rules specific to partnerships. These rules, set forth in Treasury Regulation Section 1.701-2, focus on two general types of abuse: abuse of the intent of the Code, particularly Subchapter K, which governs partnerships; and abuse of the benefits of the partnership form ('abuse of entity'). With regard to the rules against abuse of the Code and a partnership transaction, the following will be considered:

a whether the partnership is *bona fide* and the transaction at issue has a substantial business purpose;

b whether the transaction's substance matches its form; and

c whether the tax consequences of the transaction properly reflect income (aside from allowed deviations).

45 See *Sacks v. Commissioner*, 69 F3d 982 (9th Cir 1995) (investment in solar energy panels).

46 Pub L No. 111-152.

47 Owing to its relative newness, this statutory economic substance rule has not yet been substantively applied in any reported decisions.

48 *Commissioner v. Clark*, 489 US 726, 738 (1989) (doctrine requires 'linking together all interdependent steps with legal or business significance').

49 *Associated Wholesale Grocers, Inc v. Commissioner*, 927 F2d 1517 (10th Cir 1991).

If the IRS determines that a transaction is abusive, it has the authority to recast the transaction to be taxable.[50] The entity abuse rules generally empower the IRS to treat a partnership as an aggregate of its partners as appropriate to carry out the purposes of the Code and regulations.

IX DOUBLE TAXATION TREATIES

The United States has entered into numerous tax treaties with other countries.[51] These treaties generally provide for relief from double taxation in both jurisdictions. They also routinely provide for exchange of information between the jurisdictions' respective tax authorities to, *inter alia*, facilitate tax enforcement efforts. Without such agreements, the IRS would be prohibited by the Code from sharing taxpayer return information with other countries. Agreements to share tax information about taxpayers may cover income, estate, gift and other taxes.[52]

The general rule of treaty interpretation is to construe the treaty language consistently with the expectations of the signatories. The specific rules for treaty interpretation vary depending upon whether the issue is the imposition of US tax on foreign taxpayers or the imposition of foreign tax on a US taxpayer. The interpretation for the purposes of US taxation of foreign taxpayers is based on the treaty itself, any related protocols and agreements, Treasury regulations, rulings and case law. Furthermore, specific terms may vary in meaning from treaty to treaty.[53] For example, in *Harrison v. Commissioner,*[54] a German citizen and US resident employed by the German Defence Administration was not eligible for an exemption under the NATO Status of Forces Agreement because she did not qualify as a civilian of the German military under the specific definitions of that agreement. However, an established interpretation under one treaty may provide guidance as to the meaning of that term in another treaty.[55]

Cases requiring the application of these treaties involve both procedural and substantive issues. For example, in *Net Promotion, Inc v. United States*,[56] the French Tax Authority (FTA) began investigating the tax liability of a company with mailing addresses in France and Washington State. Pursuant to the US–France tax treaty, the FTA wrote to the IRS requesting certain financial information, including bank statements regarding an account at US Bank National Association (the Bank) owned by the taxpayer or its representative. Pursuant to IRS protocols, the request was reviewed and approved by the competent US authority. The touchstone for this approval was parity. In other words, the competent US authority found that the same type of information sought by the FTA would be available to the United States

50 *Nevada Partners Fund LLC v. United States*, 714 FSupp2d 598 (D Miss 2010) (multistep strategy using tiered partnerships involved transactions lacking economic substance, and IRS's recharacterisation as taxable under Section 1.701-2 ruled valid).

51 Currently there are 68 tax treaties in force. See www.irs.gov/businesses/international-businesses/united-states-income-tax-treaties-a-to-z.

52 The US may also enter into a separate agreement called a tax information exchange agreement to further facilitate information exchange with a country.

53 IRS Publication 901 contains short descriptions of each of the various treaties in force, and helpful schedules to compare and contrast these treaties.

54 *Harrison v. Commissioner,* 138 TC 17 (2012).

55 See Rev Rul 90-80, 1990-2 CB 170 (establishing the meaning of 'permanent establishment' in the US–Canada treaty in the context of other treaties).

56 110 AFTR 2d 2012-6949 (D Minn 2012).

upon request to France. Secondly, the competent authority judged that the FTA's request met a 'relevancy' threshold (i.e., that the requested information might produce information relevant to the taxpayer's French tax liabilities). The IRS issued a summons to the Bank that the taxpayer thereafter moved to quash in the district court. The district court evaluated the summons under the normal rules applicable to summons and found that the IRS, with the supporting affidavit of the competent authority, had made the required showing. The taxpayer argued that it had no nexus with France and therefore that the IRS improperly issued the summons. The court rejected this argument, noting that the question of whether in fact the taxpayer had French tax liabilities was not relevant to the question of the propriety of the summons.

What is important to note about this case is that, as long as the IRS satisfies the procedural requirements (including requirements for summons issued through a treaty provision), a summons issued pursuant to a treaty request will be honoured. It is up to the taxpayer to dispute with the foreign authority whether in fact it has any tax liability. A court will not second-guess the determination made by the competent authority that appropriate procedures were followed, including the determination that the information sought by the foreign tax authority is relevant to its investigation.[57]

Many cases involve the application of treaty provisions with respect to non-US nationals. In one case, *Retief Goosen v. Commissioner*,[58] a professional golfer disputed the imposition of tax on certain endorsement income he earned worldwide. The taxpayer, a non-resident alien, argued on various grounds, including that the US–UK tax treaty prohibited the imposition of the tax at dispute. Under the treaty, the United Kingdom taxes a UK resident non-domiciliary on non-UK-sourced income only to the extent the income is remitted to or received in the United Kingdom. The US is prohibited from taxing the UK resident on specified kinds of income to avoid double taxation. The court then focused on the taxpayer's evidence that the income he had earned had in fact been remitted to or received by the UK, and concluded that the taxpayer had not carried his burden of proof regarding the actual mechanics of the remittance in question. Where treaty benefits hinge on specific facts, taxpayers should be well aware of those facts and plan ahead to ensure that they will be able to defend their claim of treaty benefits upon later IRS audit. Retief Goosen is a particularly well-known individual, and therefore someone that the IRS is more likely to audit than others, and who may, rightly or wrongly, be perceived as tending to take additional risks on his returns.

The Tax Court again considered the interpretation of a tax treaty in the context of a professional golfer in *Sergio Garcia v. Commissioner*.[59] Here the question was whether Mr Garcia's product endorsement income fell under Article 12, addressing royalty income, or Article 17, addressing sportspersons' income, of the US–Switzerland tax treaty. The Tax Court relied upon the Treasury Technical Explanation, which gave an example of a professional singer's income that included sale of recordings of a live performance and concluded that the sales of the recordings constituted royalty income under Article 12, whereas income for the actual performance was covered by Article 17. Because the product endorsement income was not substantially connected to the taxpayer's golfing in the United States, the Tax Court concluded that it was royalty income that only Switzerland could tax.

57 See also *Villareal v. United States*, 524 Fed Appx 423 (10th Cir 2013) (similarly enforcing the Mexican Tax Authority request for information pursuant to the US–Mexico treaty).

58 *Retief Goosen v. Commissioner*, 136 TC 547 (2011).

59 *Sergio Garcia v. Commissioner*, 140 TC 141 (2013).

X AREAS OF FOCUS

Unquestionably, the IRS is devoting significant resources to enforcement in cross-border circumstances. Given today's increasing globalisation and the unprecedented mobility of taxpayers and capital, the IRS views this as a particularly fruitful area in which to crack down on abuses such as tax evasion, technical tax shelters and aggressive transfer pricing practices. As part of this focus, the IRS is working closely with certain major treaty partners to combat tax avoidance in their respective jurisdictions. The Joint International Tax Shelter Information Centre (JITSIC) provides coordination among these nations to identify and stop abusive cross-border practices. Such coordination will only increase in the future. The IRS has created a separate exchange of information (EOI) office with headquarters in Washington, DC. The office has one programme manager and 30 employees with varied backgrounds, including law, accounting and economics. The EOI office handles all cross-border requests for information pursuant to tax treaties or other information sharing agreements between the US and other nations. Of these requests, 70 per cent are from other nations and 30 per cent are requests from the US. A US taxpayer typically is not notified of a foreign government request for information if the IRS already has the information in its possession. Otherwise, the IRS will issue an IDR to obtain the information from the taxpayer. In late 2014, the IRS announced the creation of international practice units by LB&I's international practice networks (IPNs). The units are slide decks that train agents on international issues. The IPNs were formed to facilitate information sharing between IRS agents. There are almost 200 separate units at this time, which cover the various 'building blocks' of international tax.[60] The most recent practice unit titled 'Calculation of the IRC 956 Inclusion' focuses on the correct computation of controlled foreign corporation income included in the US owner's income.

Revelations involving US taxpayers' use of Swiss and other foreign banks to avoid taxation have shone a harsh spotlight on potential offshore tax abuses. The IRS's response has been equally harsh, through prosecution of US taxpayers and accomplices, and *in absentia*, indictments of foreign persons considered by the government to be complicit in offshore tax evasion. Switzerland's oldest private bank, Wegelin & Co, announced it would be ceasing operations after pleading guilty to facilitating tax evasion. To further combat perceived offshore abuses, the IRS has instituted an offshore voluntary disclosure programme that allows taxpayers to come forward and declare previously unreported foreign-sourced income and assets.[61] While taxpayers who take advantage of this programme escape criminal penalties, they pay a heavy civil penalty based primarily on the highest foreign asset value during an eight-year review period.

In August 2013, the United States Department of Justice and the Swiss government announced a disclosure programme that enables Swiss banks not currently under investigation to voluntarily disclose US account holders who are not in compliance with their US reporting obligations. Participating banks have paid substantial penalties, and in return are eligible for non-prosecution agreements with the US government. The Department of Justice recently announced that the last Swiss bank participants had resolved their liabilities under this programme.[62]

---

60 See 2014 TNT 240-10 (12 December 2014 Remarks by LB&I Deputy Commissioner (International)).

61 www.irs.gov/uac/2012-Offshore-Voluntary-Disclosure-Program.

62 www.justice.gov/opa/pr/justice-department-reaches-final-resolutions-under-swiss-bank-program (29 December 2016).

In addition to targeting offshore evasion, the IRS continues to devote substantial resources to auditing taxpayers' transfer pricing reporting and methods. The IRS Chief Counsel emphasised the enforcement efforts the IRS is undertaking in this area in remarks he made to Congress in 2012:

> *The IRS has continued to marshal, coordinate and augment its resources dedicated to transfer pricing enforcement. In 2011, a new executive position was created to oversee all transfer pricing functions, to set overall strategy in the area and to coordinate work on our most important cases. In building a new function devoted exclusively to tackling our transfer pricing challenges, within the past year we have been able to recruit dozens of transfer pricing experts and economists with substantial private sector experience who are now working hard to help us stay on the cutting edge of enforcement and issue resolution. This new transfer pricing operation will operate as a single, integrated team with a global focus, a unified strategy and a robust knowledge base.*

A survey of transfer pricing cases filed by public companies shows that the IRS is effectively carrying out its plans. Several major companies are disputing proposed IRS adjustments, including Coca Cola, Inc, which filed a petition in the Tax Court in December 2015 disputing a US$9 billion proposed transfer pricing adjustment, Amazon.com, Inc, Microsoft Corp, and The 3M Company. Amazon filed a petition in the Tax Court in late 2012 disputing US$1.5 billion taxes owing to proposed transfer pricing adjustments. The trial took place in early 2015, and was recently decided against the IRS.

Amazon's dispute is indicative of current IRS enforcement practices in the transfer pricing area. Like many multinational companies, Amazon entered into cost-sharing arrangements with its foreign subsidiaries. Pursuant to applicable Treasury regulations, those subsidiaries were required to make 'buy-in' payments to reflect the value of preexisting intangibles provided by Amazon for the development of the operations of its foreign subsidiaries. Among other issues, the IRS in audit focused on the value of the buy-in payment. To that end, the IRS audit team engaged outside economists to analyse and opine on the value of the preexisting intangibles. The IRS economists issued a report that concluded that the value of the intangibles was more than 10 times higher than the value used to determine the buy-in payment. The economists used a specific valuation method, the discounted cash flow method, and collected three sets of data (future cash flow estimates, cash flow timing and a discount rate) in the application of that method. In its petition to the Tax Court, Amazon attacked the discounted cash flow method and compared it to the method used by the IRS in *Veritas Software*, in which the Tax Court found that the IRS's determination was arbitrary, capricious and unreasonable.[63] The Tax Court agreed with Amazon and adopted most of the taxpayer's transfer pricing determinations.[64]

The IRS is also attuned to cross-border structures, which it considers to be potentially abusive and subject to economic sham analysis. For example, the IRS is currently targeting two structures: foreign tax credit generators and securities lending transactions. Foreign tax credit generators initially came to the attention of the IRS by way of information shared through JITSIC. According to the IRS, there are two kinds of abusive form of this transaction: one that is designed to recover the foreign tax claimed as a credit on the US income tax return, and one that is designed to eliminate the income that gives rise to the credit. Typically, some

63 *Veritas Software Corp v. Commissioner*, 133 TC.297 (2009).

64 *Amazon.com Inc and Subsidiaries v. Commissioner*, 148 T.C. No. 8 (2017).

form of fee is paid to share the benefits of the foreign tax credit claimed by the US party to the transaction. The IRS has been successfully battling with taxpayers over these transactions in audit and in the courts.[65]

According to the IRS, abusive securities lending transactions are designed to avoid the mandatory 30 per cent withholding on US-sourced income payments to foreign persons. The IRS has described these transactions in the following manner: typically they involve the transfer of US corporation stock held by a foreign person to a foreign affiliate of a US financial institution in a securities lending transaction. The affiliate is typically in a low-tax jurisdiction and is designated as the securities borrower. Pursuant to the transaction, the foreign affiliate will pay substitute dividends to the foreign customer in an amount equal to 70 per cent of any dividend paid on the underlying loaned shares. By relying on prior (and now modified) IRS guidance, specifically IRS Notice 97-66, the foreign affiliate argues that because both the foreign affiliate and the foreign customer were subject to the same 30 per cent US withholding tax rate, it can pay the substitute dividend to the foreign customer without withholding and paying any US tax. The transactions typically include an 'enhancement fee' valued at about 66 per cent of the lost dividend amount. According to the IRS, such enhancement fees vary depending upon the transaction. They could be direct fees paid to the foreign stockholder or increased interest income through over-collateralisation of the stock loans.

XI OUTLOOK AND CONCLUSIONS

Recent trends in IRS enforcement policy show an increasingly aggressive tax agency with respect to certain high-risk issues. These trends can be explained in large part by two factors: the desire to increase revenue in a deficit-ridden economy, and the related need to use limited resources as efficiently as possible. The IRS routinely receives fewer budgetary dollars than it requests, and in light of revelations regarding alleged targeting of certain advocacy groups, Congress has pared back the agency's budget. However, the agency must nevertheless meet the demands of its master, the federal government, for revenue. Its multi-pronged solution, while understandable, is not always welcome. First, it has begun to place increasing disclosure obligations on taxpayers, including disclosure of uncertain tax positions and of foreign assets. Through these disclosures, the IRS reasons, less of its audit resources have to be spent on finding potential underpayments. Second, it has pursued, both in legislation and enforcement, enhanced penalty imposition, thereby creating a more inhospitable environment for taxpayers who might take overly aggressive return positions or fail to disclose information. Third, it has begun to devote audit resources to risk-identified areas to maximise dollars collected for each audit dollar spent.

i Increased taxpayer disclosure

To the consternation of many in the Tax Bar, in 2009, the IRS proposed requiring companies to attach a schedule to their income tax returns that would disclose all uncertain tax positions that were reflected on their financial statements. Many were concerned that providing such

65 See *Pritired 1, LLC v. United States*, 108 AFTR 2d 2011-6605 (SD Iowa 2011), *Wells Fargo & Co v. United States*, 116 AFTR 2d 2015-6738 (D Minn 2015); *Bank of New York Mellon Corp v. Commissioner*, 140 TC 15 (2013), aff'd, 801 F3d 104 (2d Cir 2015); and *Santander Holdings USA, Inc v. United States*, 118 AFTR 2d 2016 (1st Cir 2016), reversing 116 AFTR 2d 2015-6795 (D Mass 2015). Because of the variety of structures, the IRS has stated that it does not view all generator transactions as equally abusive.

a schedule would provide a road map to the IRS of all the arguable positions in the return, and that the IRS would simply propose audit adjustments for those positions. One of the most controversial aspects of the proposal was a requirement that taxpayers describe the reason why the position was uncertain. In other words, a taxpayer would, in effect, have to tell the IRS what arguments could be made against the position it took in its return. After much discussion, the IRS proceeded with a somewhat more relaxed requirement in Form 'Schedule UTP', which was released in September 2010.[66] The IRS dropped the requirement to describe the reason for the uncertainty of the position, and also stated that it did not want the taxpayer to reveal information that was protected by work product. Form 1120, 1120L, 1120PC and 1120F filers that issue or are included in audited financial statements, and that have total assets equal to or exceeding US$50 million, must attach the schedule to their 2012 return (US$10 million for the 2014 filing year).

As a result of legislative changes in 2010, the IRS now requires individual taxpayers to identify specified foreign financial assets with their income tax returns.[67] The IRS issued Form 8938, 'Statement of Foreign Financial Assets', on which the information must be reported. As stated in the instructions for this form, the IRS will issue regulations requiring domestic entities to file Form 8938 if the entity is formed or availed of to hold specified foreign financial assets that exceed a certain reporting threshold.

ii Increase in penalties

As already noted, the IRS is increasingly imposing accuracy-related penalties in audit situations. Moreover, its authority to impose penalties has been broadened by recent legislation. The 2010 Health Care Act, as amended by the 2010 Health Care Reconciliation Act, created a new accuracy-related penalty under Section 6662 for disallowances relating to claimed benefits from transactions without economic substance, and a new accuracy-related penalty for underpayments relating to undisclosed foreign financial understatements.

iii Targeted audits

As noted, the operating division of the IRS responsible for auditing larger businesses, LB&I, has adopted a campaign audit method whereby it will no longer conduct general audits of these businesses. Instead, through a process of information gathering and analysis, LB&I will identify high-risk areas that will be developed into a series of 'campaigns'. Audit teams, called 'issue teams', will receive instruction much like the practice unit instruction discussed above, and will coordinate their audits with the broader LB&I effort to audit and oppose taxpayer positions in these areas.

66 For a more complete discussion, see www.mofo.com//files//Uploads/Images/101006-Schedule-UTP.pdf.

67 Taxpayers already have a requirement to file a separate 'Report of Foreign Financial Accounts', or 'FBAR', to notify the Treasury Department of foreign accounts held directly or indirectly.

Appendix 1

ABOUT THE AUTHORS

ADEYINKA ADEREMI

Streamsowers & Köhn

Adeyinka is a partner and the firm's head of chambers. He has garnered intensive and extensive experience in civil litigation and arbitration. He has represented clients before all hierarchies of the Nigerian courts and at tribunals.

He is a fellow of the Chartered Institute of Arbitrators and a member of the International Centre for Commercial Arbitration.

FRANZ ALTHUBER

DLA Piper

Franz Althuber is a partner and head of DLA Piper's Austrian tax group. Furthermore, he is co-head of the firm's European tax controversy group. His practice focuses on Austrian and international tax law, trust and estate planning, and corporate law. He advises large domestic and international companies as well as high net worth individuals in all fields of corporate law and tax law, including corporate restructurings, spin-offs and cross-border mergers. Furthermore, he regularly advises clients in the field of tax criminal law, and has significant experience with tax audits and tax litigation, including refund claims, VAT disputes and disputes regarding the liability of directors and officers.

As a well-known tax expert, he is included in several listings of leading Austrian tax lawyers, including *PLC Which Lawyer*, *International Tax Review's World Tax*, *Who's Who Legal, Chambers Europe* and *Chambers Global*. *Format*, Austria's weekly business magazine, ranks him among Austria's top 10 tax lawyers. He is a lecturer in tax law at the University of Applied Sciences in Graz, Austria, regularly holds seminars in his fields of expertise and has published more than 80 articles in leading Austrian and international law journals as well as several books, including a legal commentary on Austrian capital transactions tax and a practitioner's handbook on the tax liability of directors and officers.

JAKOB SKAADSTRUP ANDERSEN

Gorrissen Federspiel

Jakob Skaadstrup Andersen is head of tax at Gorrissen Federspiel. He has been a partner in Gorrissen Federspiel since 2003. He studied law at the University of Copenhagen (1992), was admitted to the Danish Bar in 1996 and gained the right of audience before the Danish High Court in 1998.

Mr Andersen is an expert in international tax matters, and his focus is multinationals involved in tax controversies with the Danish tax authorities, in particular transfer pricing matters.

Over the years, he has assisted a number of international clients establishing themselves in Denmark, and has assisted foreign and Danish clients with the acquisition of Danish and foreign entities by providing structural and due diligence advice. He also represents clients in front of the European Court of Justice.

Mr Andersen holds rankings from, *inter alia*, *Chambers Global*, *Chambers Europe* and *The Legal 500*.

DOMINIC C BELLEY

Norton Rose Fulbright Canada LLP

Dominic Belley is a tax litigator. He has represented taxpayers in civil, commercial, administrative, criminal and constitutional matters before the Court of Quebec, the Quebec Superior Court, the Quebec Court of Appeal, the Supreme Court of British Columbia, the Tax Court of Canada, the Federal Court, the Federal Court of Appeal as well as before the Supreme Court of Canada, as lead counsel for the appellant, the respondent and the intervener. He has argued over 100 cases on account of clients based in 7 out of the 10 Canadian provinces. His areas of practice include income tax, goods and services tax, fuel tax, tobacco tax, collection measures, access to and protection of tax information, judicial review of ministerial decisions and rectification. He has over 10 years of experience in teaching at the University of Sherbrooke and the Quebec Bar School. He is a governor of the Canadian Tax Foundation and a member of the Tax Court of Canada's Bench and Bar Committee. He is recognized in *Chambers*, *The Legal 500*, *Best Lawyers in Canada* and *LEXPERT*.

PEDRO MIGUEL BRAZ

Garrigues Portugal, SLP

Pedro Miguel Braz is based in Portugal where he is the partner in charge of the tax litigation department at Garrigues. He has two decades of experience, and is specialised in national and international tax litigation, assisting particularly Portuguese and multinational economic groups, financial institutions, insurance companies, and companies in the building and public works sector such as the automotive, energy and pharmaceutical industries.

Pedro is a member of the Portuguese Bar and has a postgraduate degree in tax management from ISCTE/OVERGEST. He was a lecturer of the postgraduate course in tax studies at the Faculty of Law of Lisbon University. He is also arbitror of the Portuguese Administrative Arbitration Board and a speaker at several conferences.

He features in *Legal 500* and *Chambers* and *Partners Europe*, where he is recommended for his skills in tax litigation.

JUAN CARLOS BUSTAMANTE

Bustamante & Bustamante Law Firm

Dr Juan Carlos Bustamante is a senior partner. He has provided legal advice in different areas of the law to individuals and to national and international companies from both the public and private sectors. Has also practiced in the field of business development, and in public procurement and negotiations under commercial agreements. He has handled contracts for repaying debt to the state; advised in matters of energy, insurance, contracts with banks, purchase/sale of moveable and immoveable property, grant of security, foreign investment, contracts for setting up trusts to pay liabilities under transactions with the state; and involving foreign financial institutions and in the issuance of bonds. He is an advisor in project financing and in drafting contracts related thereto.

Dr Bustamante obtained a doctorate in law from the Catholic University of Ecuador in 1985 and was admitted in 1985. He became a partner of Bustamante & Bustamante in 1968 and was a former professor of International Private Law for 30 years at the Universidad Católica del Ecuador in Quito and a former arbitrator of the National Mediation and Arbitration Center of the Chamber of Construction.

He is a member of the Quito Bar Association, the International Academy of Trial Lawyers and the Inter-American Bar Association. He speaks Spanish and English.

CLAUDIO F CÁRDENAS SALOMON

Chevez Ruiz Zamarripa y Cia, SC

Claudio F Cárdenas Salomon obtained his law degree from the Universidad Iberoamericana (UIA).

He has a master's in tax law from the Universidad Panamericana (UP).

In 2006 he started his professional practice. In 2008 he joined Chevez, Ruiz, Zamarripa y Cia, SC, and was promoted to firm associate in 2015.

ASEEM CHAWLA

Phoenix Legal

Aseem Chawla is a member of the Bar Council of India, and a fellow chartered accountant. He has pursued the executive education programme on comparative tax policy and administration of the prestigious Harvard Kennedy School. He has extensive experience in advising on a variety of tax matters including international tax, and has represented in tax appeals, litigation and contentious matters. He is frequently invited to speak at fora both inside and outside India.

Aseem is the vice-chair of the India Committee and Asia Pacific Committee of the American Bar Association Section of International Law, and is the co-editor of its publication, *India Law News*. He is the regional vice president of the Indo-American Chamber of Commerce. He is a member of the Executive Committee of the Bar Association of India and the Income Tax Appellate Tribunal Bar Association, New Delhi. He has been nominated as the joint editor of *Indian Advocate*, the journal of the Bar Association of India.

Aseem has been consistently adjudged over the years as one of the leading tax experts in the Asia Pacific region by *Chambers and Partners*, *Asialaw Leading Lawyers' Survey*, *Who's Who Legal* and *World's Leading Tax Advisers*.

Aseem has several publications to his credit, including CCH Wolters Kluwer's *A Compendium of Advance Rulings on Income Tax*.

He has contributed to the International Fiscal Association on 'exchange of information'. His contribution has also been acknowledged in the 10th edition of Kanga & Palkhivala's *Income Tax Commentary*, an acclaimed treatise on Indian income tax laws. Aseem is the lead contributory author of *A Global Analysis of Tax Treaty Disputes*, a forthcoming publication in the Cambridge tax law series. He is currently the co-author of the International Bureau for Fiscal Documentation's Global M&A Tax Research Platform.

He has also been identified among 40 leading Indian lawyers under 45. His name is mentioned in *100 Legal Luminaries of India*, published by LexisNexis.

GEOFFREY CLEWS

Old South British Chambers

Geoffrey Clews is a senior barrister who has specialised in contentious tax and trusts matters for more than 30 years. Geoff's practice covers all aspects of tax controversy. He advises clients in the course of tax investigations. He conducts the formal aspects of New Zealand's complex statutory tax disputes process. Before the courts at both trial and appellate levels, he litigates civil tax challenges and related issues, and defends criminal tax charges. For more than a decade, he has been consistently rated in *Chambers Asia Pacific* as an outstanding practitioner in disputed tax matters and is also highly rated by the *International Tax Review*, *Best Lawyers* and *Finance Monthly*.

Geoff is a member and past convener of the New Zealand Law Society's Tax Committee. He is a long-standing member of the International Fiscal Association and of the International Bar Association, for which he has acted as national tax reporter. He has also acted as national reporter to the Foreign Lawyer's Forum of the American Bar Association's Section of Taxation. Geoff is a Teaching Fellow in the University of Auckland Law School Masters' programme in taxation studies.

DAVID HAMZAH DAMIAN

DDTC Consulting

David Hamzah Damian is a partner of tax compliance and litigation services at DDTC. His expertise is wide, ranging across all areas of transfer pricing and customs, and all aspects of Indonesian taxation. He is well known for his research and advocacy skills, in particular for analysing cases and arguing appeals. He regularly handles cases in the Tax Court and the Supreme Court, and has a strong track record in tax appeal proceedings in transfer pricing, VAT, corporate income tax and customs cases, both in written submissions and at hearings.

David received his bachelor's degree in fiscal administration from the University of Indonesia. He holds an advance diploma in international taxation from the Chartered Institute of Taxation, UK. He has completed certificate C of the Indonesian tax consultant examination, and is licensed to practise as a registered tax consultant by the Directorate General of Taxes. He holds a licence to practise as a tax attorney in the Tax Court and in the Supreme Court.

PHILIPPE DEROUIN

Philippe Derouin

Philippe Derouin is a member of the Paris Bar with more than 40 years of experience. Before running his own firm, he had been a partner with major international law firms, namely Gide Loyrette Nouel, Linklaters LLP and Skadden Arps Slate Meagher & Flom LLP, for about 30 years. He was a member of the Paris Bar council and also chaired the French institute of tax advisors and the French branch of the International Fiscal Association.

MAURA DINEEN

Mason Hayes & Curran

Maura is a tax partner in the taxation department of Mason Hayes & Curran. She is a lawyer and a certified tax adviser. Maura has over 10 years' experience in advising domestic and international clients on a wide range of tax matters including mergers and acquisitions, inward investment, corporate restructurings, tax efficient financing structures and acquisitions of Irish real estate. She also regularly advises clients on stamp duty and VAT matters. She has particular experience in negotiating M&A and equity investment transactions from a legal tax perspective.

Maura was the national reporter for Ireland on the Taxation Committee of the International Bar Association in 2015 and 2016 and is currently a member of the Law Society Tax Committee and one of their representatives on the joint revenue committee for direct taxes.

CAROLINE P DOCCLO

Loyens & Loeff

Caroline Docclo graduated from the law faculty of the Université Libre de Bruxelles (the ULB) in 1985, and earned her special degrees in tax law, economic law and criminology from the ULB in 1987. She holds an LLM in taxation from NYU (1994).

She is a professor of international tax law at both the ULB's law faculty and the Solvay Brussels School of Economics and Management, and also at the High School of Economics at the Université de Liège.

She has been president of the Belgian branch of the IFA, she currently is a member of the Permanent Scientific Committee of the IFA, and she is also a member of the board of editors of the *Journal de droit fiscal*.

She has been a member of the Brussels Bar since 1987 and she passed the exam to become a member of the Supreme Court's Bar.

Tax procedure is an important part of her practice with the Brussels office of Loyens & Loeff.

MARIA EUGÊNIA DOIN VIEIRA

Machado, Meyer, Sendacz e Opice Advogados

Maria Eugênia Doin Vieira mostly focuses on tax litigation, drafting procedural strategies, and engaging in judicial and administrative discussions involving deficiency notices, administrative collections, compensation, tax credits, tax benefits, fees and public prices. In addition to direct and indirect tax litigation, her practice encompasses social security matters, with experience in both litigation and consultancy regarding social security and third-party contributions. Maria Eugênia provides legal assistance to clients in the commerce, industries, agribusiness, energy, telecommunications and pharmaceutical industries.

She received her bachelor of economics, laws and a master's degree in state law from Pontifícia Universidade Católica de São Paulo. She also gained a master's degree in tax law from IBMEC.

JEAN-BLAISE ECKERT

Lenz & Staehelin

Jean-Blaise Eckert is considered to be a leading lawyer in tax and private client matters in Switzerland. His practice covers private client, tax, contracts and commercial issues.

Jean-Blaise Eckert studied law at the University of Neuchâtel and was admitted to the Bar of Neuchâtel in 1989 and to the Bar of Geneva in 1991. He studied business administration at Berkeley's Haas Business School in the US where he acquired an MBA in 1991. He acquired a diploma as a Certified Tax Expert in 1994.

Jean-Blaise advises a number of multinational groups of companies as well as high net worth individuals. He sits on the board of a number of public and private companies. He has been nominated by *Chambers* in 2013 as a leading individual in tax. He is a frequent speaker at professional conferences on tax matters. He also teaches in the master's programmes of the University of Geneva and the University of Lausanne. He is the secretary general and member of the Executive Committee of the International Fiscal Association (IFA). He is also a reporter to the IBA and IFA congress on Swiss tax matters.

Jean-Blaise speaks English, French and German.

PAUL FARMER

Joseph Hage Aaronson LLP

Paul Farmer is a partner of Joseph Hage Aaronson LLP, a specialist London litigation firm. He has broad experience of litigation in the United Kingdom courts (lower courts and tribunals to the Supreme Court) and the Court of Justice of the European Union, his practice covering a range of EU law areas including tax, state aid and CFSP sanctions matters. Prior to joining Joseph Hage Aaronson LLP, Paul had been a partner in the awarding-winning tax litigation team at Dorsey & Whitney, which he joined in 2007 from a position as head of tax policy coordination at the European Commission. Before that, he was a practising barrister at Pump Court Tax Chambers, and held posts at the European Commission and the Court of Justice of the European Union (including *référendaire* to Advocate General Sir Francis Jacobs). He is ranked by both *The Legal 500* and *Chambers*, and is described as 'first class' and 'particularly attentive to the needs of his clients'. In 2006, he was LexisNexis Tax Lawyer of the Year. A frequent author and speaker on EU law, he co-authored the leading publication *EC Tax Law* with Richard Lyal of the Commission's Legal Service.

EDWARD L FROELICH

Morrison & Foerster LLP

Edward L Froelich is of counsel and leader of the federal tax controversy practice group at Morrison & Foerster LLP.

Mr Froelich represents clients in audit and litigation on all federal tax issues. He has litigated a number of tax cases and represented clients in numerous IRS audits and appeals proceedings. He is a former trial attorney of the Department of Justice Tax Division, where he litigated numerous cases, including complex corporate cases, in the US Court of Federal Claims. In private practice, he continues to litigate cases and represents clients in administrative controversies at both the audit and appeals level before the IRS. His government experience informs his approach to administrative controversies. His litigation experience has been crucial to securing the favourable resolution of matters with the IRS

Appeals Office and in court. His representation is varied, and includes large public companies, privately held companies, partnerships, trusts and individuals. Many of his clients are in the finance, technology and real estate industries. He has successfully dealt with a variety of issues, including international tax issues, income tax accounting issues, research credit issues, listed transaction issues, accuracy-related penalties, privilege and work product questions.

He gained his BA from Thomas Aquinas College (1988), his MA from the Catholic University of America (1991), a JD from the University of Virginia School of Law (1994) and an LLM from Georgetown University Law Center (1999).

HEINZ FROMMELT

Sele Frommelt & Partner Attorneys at Law Ltd

Heinz Frommelt is a partner with Sele Frommelt & Partner Attorneys at Law Ltd and of NSF Services Trust reg. Heinz Frommelt studied law at the University of Zurich, graduating in 1988 (*Dr iur*) and was admitted to the Bar in 1992. Heinz Frommelt acted as Minister of Justice in the government of the Principality of Liechtenstein from 1997 to 2001. His practice focuses on tax planning and asset structuring, but also on banking law, investment fund and insurance law. Heinz Frommelt has published on a range of tax issues and is active in various think tanks. He is Secretary of the International Fiscal Association, Liechtenstein branch, a member of the Liechtenstein Chamber of Lawyers, the International Association of Young Lawyers and DACH Europäische Anwaltsvereinigung (European Lawyers' Association).

ISABELLA GIRALDO

Lewin & Wills

Ms Giraldo is a lawyer who graduated from Universidad de Los Andes (J D equivalent) with a Graduate Degree in Taxation. She is an associate of the tax group with experience in tax litigation and tax planning. Over the past years, she has acquired specialised knowledge handling tax controversies, and has represented clients' interests before the Tax Authorities and the Tax Courts. Her experience has allowed her to propose original defence strategies for clients. She has handled more than 100 tax litigations and has also settled approximately 50 controversies with the Tax Authorities, whenever the law in Colombia has allowed it.

Ms. Giraldo has represented individuals and corporations from diverse sectors of the economy, in controversies regarding: (1) national taxes (i.e., income tax, wealth tax, VAT, etc.); (2) local taxes (i.e., industry and commerce tax, stamp tax, real estate tax, local contributions, etc.); (3) tax penalties; (4) transfer pricing; and (5) other contributions.

JOHN GULLIVER

Mason Hayes & Curran

For more than 25 years, John has advised Fortune 500, FTSE 100 and other major multinationals in respect of international tax. He regularly works with some of the world's leading tax lawyers and advises on transactions structured in and through Ireland.

He has a particular focus on advising groups in respect of the use of Ireland as their EMEA intellectual property operating platform with a view to maximising the benefit of the 12.5 per cent Irish tax rate.

John was educated at the University of London (LLB (hons)), is an associate of the Institute of Chartered Accountants and the Irish Institute of Tax and is a UK chartered tax adviser. John represents Ireland on the influential Paris-based ICC Commission on Taxation, which works with the G8 and G20 governments on international tax policy.

FABIO J GUZMÁN-ARIZA

Guzmán Ariza, Attorneys at Law

Fabio J Guzmán-Ariza is the managing partner of the Guzmán Ariza law firm. He is a graduate of the Massachusetts Institute of Technology and the PUCMM law school in Santiago, Dominican Republic (LLB, *summa cum laude*, 1981), where he headed his law class. Mr Guzmán-Ariza is a former professor of civil law and dean of the Law Faculty at the Universidad Católica Nordestana, and a former judge in the Disciplinary Committee of the Dominican Bar Association. Presently, in addition to his duties at the firm, he is the editor and director of publications of *Gaceta Judicial*, the leading legal journal publisher in the Dominican Republic, arbitrator at the Chambers of Commerce in Santo Domingo and Santiago, Dominican Republic, and one of the most important authors on the Dominican legal system.

Mr Guzmán-Ariza has published extensively on matters of real estate law, civil procedure, company law and legal drafting, including the following books: *Real Property Registration Law 108-05 Annotated*, *Condominium Law 5038 Annotated*, *The Language of the Dominican Constitution*, *The Procedure by Default in Civil and Commercial Matters* and *Company Forms*.

As an expert on legal drafting, he prepared the final text of the Criminal Code of the Dominican Republic, enacted in 2014, and is currently reviewing the text of the proposed new Civil Code of the Dominican Republic. Mr Guzmán-Ariza is a numerary member of the Dominican Academy of Letters and a corresponding member of the Royal Spanish Academy, and a co-author of the *Dictionary of Dominican Spanish*.

MICHAEL HENDRICKS

Flick Gocke Schaumburg

Michael Hendricks started his professional career as a tax inspector. After completing a three-year degree course at the University of Applied Sciences of North Rhine-Westphalia, he qualified as a graduate in tax administration in 1991. He then went on to study law at the University of Münster, from which he graduated in 1996, having financed his legal studies by working for a tax consulting firm.

Upon completion of his academic legal education, Michael Hendricks served as a research assistant at the Institute of Tax Law of the University of Münster for several years. Parallel to this, he completed his Referendariat (two-year practical legal training) between August 1999 and August 2001.

In November 2001, Michael Hendricks joined the Bonn office of Flick Gocke Schaumburg as a lawyer. He became an associate partner in 2008 and has been an equity partner since 2012. From the inception of his law practice, he has specialised in tax litigation and international tax law. Michael Hendricks has extensive litigation experience both before tax courts throughout Germany and before the Federal Tax Court. He also represents clients in tax matters in international mutual agreement or arbitration procedures.

Michael Hendricks completed a PhD on international tax procedural law in 2004 and qualified as a tax consultant in 2006. He has been a lecturer in international and European tax law at the University of Passau since 2007, where he was appointed honorary professor in September 2012.

STEFAN HOLZER

DLA Piper

Stefan Holzer is a senior associate at DLA Piper and is a member of the Austrian tax group. Stefan Holzer is qualified both as an attorney-at-law and as a certified public tax adviser. Prior to joining DLA Piper in 2016, Stefan worked as a tax adviser at Deloitte in Vienna and as an associate at an Austrian law firm. Stefan has primarily specialised in tax law, particularly in fiscal criminal law and tax litigation.

MASAKAZU IWAKURA

TMI Associates

Masakazu Iwakura is a senior partner at TMI Associates. He is qualified to practice in Japan and the state of New York.

His areas of practice include mergers and acquisitions, tax, insurance, intellectual property and litigation. He handled, *inter alia*, JAPAN POST's acquisition of Toll Holdings, Idemitsu Kosan's acquisition of Showa Shell Sekiyu shares from Royal Dutch Shell, the integration of UFJ Bank Group and Mitsubishi Tokyo Financial Group (MUFG), the demutualisation and GPO of the Dai-ichi Mutual Life Insurance Company and the tax lawsuits including historical one where SCJ nullified NTA's imposition of huge corporate tax on the Industrial Bank of Japan and one regarding the banking tax against the Tokyo and Osaka Metropolitan governments.

Mr Iwakura has lectured on corporate law, mergers and acquisitions law, intellectual property law and tax law at various law schools and universities for more than 25 years. He was a visiting professor of law at Harvard Law school in 2007 and 2013 and a lecturer at Kyoto University Law school from 2005 to 2007; furthermore, he has been professor of law at Hitotsubashi University, Graduate School of International Corporate Strategy since 2006.

PAUL KRAAN

Van Campen Liem

Paul Kraan obtained a master's degree in both civil and tax law, as well as a master's degree in economics from the University of Amsterdam. He was then admitted to the bar in the Netherlands back in 1998. His practice focuses on dealing with all sorts of matters of international taxation, advising multinational enterprises, high net worth individuals and investment funds on Dutch tax matters, particularly those with an international dimension, such as the impact of EU (case) law and the application of bilateral and multinational tax treaties. Paul has ample experience with cross-border tax planning, both in relation to M&A transactions and within the context of corporate restructurings, such as centralisation of IP and supply chain optimisation projects. He is a member of the board at The Netherlands Association of Tax Attorneys (NVAB) as well as an active member of the IBA tax committee. Over the past two decades, Paul Kraan has litigated a substantial number of cases before the Dutch tax courts.

THOR LEEGAARD

KPMG Law Advokatfirma AS

Thor Leegaard has been with KPMG since 2002 and a tax partner since 2007. He was educated at the University of Bergen and has an LLM in taxation from the London School of Economics. Thor started his career with the Norwegian tax administration in Oslo, and later worked for the International Bureau of Fiscal Documentation where he focused on UK and Irish tax developments.

Thor covers company law and domestic and international tax law as well as European law issues connected to taxation, and has extensive M&A experience. He has handled a number of complex disputes on administrative level, and has practical experience from tax litigation, including litigation before the EFTA Court of Justice.

Thor is a member of the tax law committee of the Norwegian Bar Association.

SŁAWOMIR ŁUCZAK

Sołtysiński Kawecki &Szlęzak

Sławomir Łuczak graduated with a law degree from University of Poznan. He joined SK&S in 1998 and become a partner in 2007. He previously gained experience in a recognised French audit firm. He has broad experience in international tax law, and in representing clients in tax and customs matters before the tax and customs authorities and administrative courts. He advises also on tax issues in relation to restructuring projects and consolidation. He is a member of the International Fiscal Association, Association Europénne d'Etudes Juridiques et Fiscales and Regional Council of Attorneys in Warsaw.

GUGLIELMO MAISTO

Maisto e Associati

Guglielmo Maisto founded Maisto e Associati in 1991. He is a professor of international tax law at the Catholic University. He acted as a consultant to the Ministry for European Community Affairs and as a member of the EU Joint Transfer Pricing Forum.

He is member of the delegated board of trustees of the International Bureau of Fiscal Documentation in Amsterdam, and represents the Italian Association of Industries at the OECD Business Industry Advisory Committee in Paris.

He is a member of several law societies, and of the editorial boards of various Italian and foreign tax legal journals. He is a member of the permanent scientific committee of the International Fiscal Association, and has acted as general and national reporter at several of its annual congresses.

MUNACHISO MICHAEL

Streamsowers & Köhn

Munachiso is a senior associate with the firm and heads the dispute resolution practice of the Abuja Office of the firm. He has represented clients on diverse areas of law at the different court hierarchies. He is an Associate member of the Chartered Institute of Arbitrators and the Chartered Institute of Taxation, Nigeria.

MARIA MIKHAYLOVA

PwC Legal

Maria Mikhaylova is a director in PwC's legal tax and customs dispute resolution group.

Maria has extensive experience in tax and has defended clients in more than 50 cases over the past three years. She has represented major Russian and multinational companies in a broad range of tax cases, from pretrial dispute resolution through to all tax litigation stages.

Maria's professional expertise also includes the creation of the largest consolidated groups of taxpayers in Russia, transfer pricing claims, VAT and profits tax disputes, customs disputes and many other practical aspects of tax and customs law.

Maria regularly participates as an expert and speaker in external and internal tax dispute resolution client seminars.

Maria was also recommended as a professional in tax practice by *Tax Controversy Leaders 2017* and by *International Tax Review*.

EBERECHI MAY OKOH

Streamsowers & Köhn

Eberechi is a senior associate with the firm and has advised different multinational companies on foreign investment regulations, taxation and offshore incorporations among other areas. She heads the Portharcourt office of the firm and is a member of the Chartered Institute of Arbitrators, Nigeria and an associate of the Chartered Institute of Taxation, Nigeria.

MAGDALENA POLAK

Sołtysiński Kawecki &Szlęzak

Magdalena Polak graduated with a law degree from the Cardinal Stefan Wyszyński University in Warsaw, specialising in the business law programme. She is a third year advocate trainee at the Warsaw Bar of Advocates. She joined SK&S in 2015. She previously gained experience in the tax team at PwC Poland. She is a member of the International Fiscal Association, International Fiscal Association YIN and board member of Social & Cultural Association of Yemenis in Poland.

YANA PROSKURINA

PwC Legal

Yana Proskurina is an ex-PwC Legal partner. She has over 15 years' experience of tax dispute resolution in a broad range of industries, serving a clientele that includes consumer and industrial product manufacturers, and companies in the automotive and oil and gas sectors.

She specialises in providing ongoing consulting on various tax matters; representing clients in the pretrial (administrative) stages of tax disputes (negotiations with tax offices, involvement in reviews of tax audit materials, etc.); and representing clients in arbitrazh courts at all stages of litigation.

Yana's in-depth experience, comprehensive approach and passion for client service have helped her to achieve a successful track record of wins in hundreds of tax disputes, as well as in preventing a significant number of tax disputes, and leading complex tax consulting projects.

Yana's tax dispute and resolution practice is well known in the Russian market and highly recommended by international and Russian ratings of law firms in tax law: *The Legal 500*, *Chambers & Partners* and *Pravo.Ru*.

Yana was also recommended as a professional in tax practice by *Tax Controversy Leaders 2015* and by *International Tax Review*.

ADRIÁN RODRÍGUEZ

Lewin & Wills

Adrián Rodríguez is a partner and co-head of the tax practice of Colombian law firm Lewin & Wills. In addition to Colombia, Mr Rodriguez is licensed to practice law in New York and Illinois. He is a member of the NYU International Tax Practice Council, and a director in the Executive Committee of the Latin American Law Firms Tax and Legal Services Network (Lataxnet) since 2014.

Mr Rodriguez represents clients in tax controversies and litigation before the Tax Office and the Tax Courts. He advises domestic and international clients in Colombia and Latin America in a variety of industries and projects, with an emphasis on international and domestic corporate taxation, outbound and inbound international investments and related M&A and corporate law issues. Mr Rodriguez has experience in, among other matters: domestic and regional tax mitigation; tax treaties; income and withholding taxes; VAT and other indirect taxes; transfer pricing; tax controversies; debt-equity transactions; reorganisations and M&A; infrastructure projects and privatisations; financing, structuring and restructuring joint ventures; corporate and project finance; bilateral investment treaties; and in the coordination of regional tax planning advice. Mr Rodriguez also advises high net worth families and individuals in a variety of international and domestic tax, international investments, and legal issues.

MANUEL SÁINZ ORANTES

Chevez Ruiz Zamarripa y Cia, SC

Manuel Sáinz Orantes obtained his law degree from the Universidad Panamericana (UP).

In 1981 he started his professional practice in fiscal law, specialising in tax and constitutional litigation.

In 1994 he joined Chevez Ruiz Zamarripa y Cia, SC as a partner.

ARTURO SELMAN NAHUM

Philippi Prietocarrizosa Ferrero DU & Uría

Arturo Selman is a senior associate at Philippi Prietocarrizosa Ferrero DU & Uría. His work focuses on resolving tax disputes in the administrative and judicial stages of the process. Prior to joining Philippi Prietocarrizosa Ferrero DU & Uría, he worked at the tax litigation office of the legal subdepartment of the Chilean IRS as an attorney of the Chilean IRS before the tax courts and the Supreme Court.

Mr Selman gained his law degree from Universidad Diego Portales and holds a master's degree in taxation and a postgraduate diploma in taxation from the Faculty of Economics and Businesses of Universidad de Chile and a postgraduate diploma in procedural tax law from the Law School of Universidad de Chile.

He is professor of the diploma in taxation and the diploma in business taxation at Universidad de Chile, a collaborator at the Tax Study Centre of Universidad de Chile, a member of the editorial board of the *Tax Law Yearbook* of Universidad Diego Portales and a member of the Chilean Tax Law Institute and the International Fiscal Association. He is the author of several academic articles about tax law and taxation.

PATRICIO SILVA-RIESCO OJEDA

Philippi Prietocarrizosa Ferrero DU & Uría

Patricio Silva-Riesco is director at Philippi Prietocarrizosa Ferrero DU & Uría, and the head of the tax dispute resolution group of the firm. Prior to joining Philippi Prietocarrizosa Ferrero DU & Uría, he worked in the Chilean IRS from 1992 until 2011. When he left the Chilean IRS, he was national chief of tax litigation and crime prosecution. In that position, he had to implement the transition to the new tax courts, including the litigation of the first cases ever litigated in those tax courts in different parts of the country.

Mr Silva-Riesco gained his law degree from Universidad Central, a master's degree in tax management from Universidad Adolfo Ibáñez, a master's degree in tax administration and treasury from Instituto de Estudios Fiscales (Madrid) and a master's in tax law from Universidad de Chile.

He is a professor of the master's in tax law at University de Chile, a member of the Chilean Tax Law Institute and the International Fiscal Association, author of several academic articles about tax law and co-author of the book *Fiscal Crime in Latin America* (Madrid).

CHRISTOPH SIEGER

Guzmán Ariza, Attorneys at Law

Christoph Sieger is resident partner at the firm in the Bávaro, Punta Cana office, and head of the firm in the eastern region of the Dominican Republic (Punta Cana, Bávaro, La Romana, Bayahibe, Miches). He received his doctorate in law from Christian Albrechts University in Kiel, Germany (*magna cum laude*). He later undertook postgraduate studies in international tax law at Robert Kennedy University in Zurich, Switzerland, and obtained his degree in Dominican law from UAPA University in Santiago, Dominican Republic (*magna cum laude*).

His international background and legal training – doctorate in German law, postgraduate studies in international tax law in Switzerland, law degree in Dominican law – provide him with a unique perspective: understanding the needs, expectations and concerns of foreign investors in the Dominican Republic, while knowing the ins and outs of its legal system and customs.

Dr Sieger is the legal adviser to major international hotel chains, resorts, condominium projects, and real estate developers on real estate, tourism, corporate, construction, labour and tax matters. He is also an expert on international taxation and estate planning.

He lectures nationally on tax and corporate law and internationally on Dominican real estate law. He is currently the President of the Dominican German Chamber of Commerce.

IOANNIS STAVROPOULOS

Stavropoulos & Partners Law Office

Ioannis Stavropoulos, managing partner of Stavropoulos & Partners Law Office, was admitted to Athens Bar in 1986 and to the Supreme Court of Greece in 1997. He studied at the Law School of the University of Athens (LLB, 1983) and the University of Kent, UK (LLM, 1985). As a tax consultant or tax attorney, he has dealt with numerous cases concerning the application of double taxation treaties, transfer pricing and EU direct taxation and VAT legislation. A number of his cases constitute leading jurisprudence published in Greek and international legal and tax journals. He has participated in legislative and scientific committees either as an expert or representing various organisations. During 2012 to 2014 he actively participated, as an expert, in the tax reform committee that redrafted all the major tax legislation and codes in Greece. As a business lawyer, he has taken part in major merger and acquisition projects, domestic and international share and asset transactions as well as antitrust cases. He has published articles on various tax issues and has participated as a speaker in numerous conferences. He participates in the Taxation Committee of the American Hellenic Chamber of Commerce as well as in tax and legal committees of various federations and chambers.

ETIGWE UWA

Streamsowers & Köhn

Etigwe is the partner in charge of the dispute resolution practice of the firm. He was called to the Nigerian Bar in 1990 and is regarded as one of the finest litigators of his time. He was conferred with the rank of Senior Advocate of Nigeria in 2010.

He is a fellow of the Chartered Institute of Arbitrators, UK and a member of the Association of International Petroleum Negotiators.

JOUNI WECKSTRÖM

Waselius & Wist

Jouni Weckström a specialist partner with specific focus on taxation . He has broad experience in various areas of tax law with special focus on tax litigation. Jouni is recognised as one of the leading tax specialists in Finland by international legal directories such as *Chambers Europe* and *Chambers Global*. With a background as a former tax litigator in Helsinki, Jouni has been involved in numerous tax disputes, and consequently his special areas of practice have included complex transfer pricing disputes, fundamental cases related to constitutional tax matters as well as cases with extensive EU dimensions. Jouni has advised various domestic and foreign multinationals in group structuring or restructuring. He has also acted as an adviser for a number of national and international investors in cross-border investment structuring. Jouni has also advised on transaction and real estate-related VAT issues as well as on some complex cross-border VAT arrangements.

SIMON WHITEHEAD

Joseph Hage Aaronson LLP

Simon Whitehead is a founding partner of Joseph Hage Aaronson LLP, a specialist London litigation firm, where he practises in tax litigation. He was previously the partner in charge, international, of Dorsey & Whitney, and head of its award-winning tax litigation team. He has practised exclusively in tax litigation in the UK for over 15 years. He is best known for actions against the UK Revenue for the recovery of taxes claimed to have been overpaid on the basis of a breach of EU treaty rights, or the terms of double taxation conventions. He has represented taxpayers in most of the seminal cases in the area in the UK, including the

Marks & Spencer group relief action (C-446/03 *Marks & Spencer v. Halsey*) and the *Boake Allen* case, which was the leading case on the interpretation of the non-discrimination clause in double taxation treaties. He is top rated for tax litigation by both leading UK rating publications, *Chambers* and *The Legal 500*, and has won many awards. His team has ranked top for contentious tax in the *Chambers UK Guide* since 2008, and he is quoted as having 'boundless energy and enthusiasm', as 'very creative', 'excellent on case management' and 'a recognised leading authority in the areas of EU tax law'. His team has also ranked top for tax litigation by *The Legal 500* since 2009, with Simon quoted as being 'relentless in achieving the best outcome for his clients'.

He was selected as the lead and test case solicitor in almost all the current group litigation orders in the Chancery Division of the High Court of England and Wales, in which multinational company groups challenge the lawfulness of various UK corporate tax imposts, including the *ACT Group Litigation*; the *Loss Relief Group Litigation*; the *CFC and Dividend Group Litigation*; the *Thin Cap Group Litigation*; the *FII Group Litigation*; and the *ROSIIP Group Litigation*.

Simon regularly contributes articles to specialist tax publications such as *Taxation, Tax Journal* and *International Tax Review*.

JOANNA YAP

Withers KhattarWong

Joanna Yap is a partner in the firm's tax and private client practice group specialising in tax advisory, tax litigation and private client matters. She has more than 15 years of experience advising in all areas of Singapore taxation, in particular income tax, goods and services tax, property tax, stamp duties and tax treaties. Previously with the Inland Revenue Authority of Singapore as its legal counsel, she has advised the Authority on complex and novel points of revenue law. She has also successfully represented the Authority in criminal prosecution cases and appeals before the Singapore tax tribunals and courts as lead and co-counsel in landmark cases, including Singapore first income tax avoidance cases.

Joanna graduated with an LLB (hons) from the University of Manchester where she was awarded the R G Lawson Prize. She is an accredited tax practitioner (income tax and goods and service tax) with the Singapore Institute of Accredited Tax Practitioners. She also co-authored 'Singapore Income Tax, Singapore Law Commentaries of Singapore Commercial Laws and Goods and Services Tax', *The Law and Practice* (2nd Edition, 2015), LexisNexis.

HIROYUKI YOSHIOKA

TMI Associates

Hiroyuki Yoshioka is a senior associate at TMI Associates. He is qualified to practice in Japan and the state of New York.

He provides legal advice with regard to Mergers Acquisitions including various types of corporate reorganisation as well as tax and accounting aspects of such transactions. He also has abundant experience in joint venture transactions, various general corporate matters, turnaround or insolvency matters, personal data protection issues and tax disputes and litigations. He has regularly worked on international transactions and represented both Japanese and overseas clients in a wide variety of cross-border deals since he started his career as lawyer in 2008.

DANIELLA ZAGARI

Machado, Meyer, Sendacz e Opice Advogados

Daniella Zagari specialises in tax procedural law, and has outstanding experience in complex and strategic cases, both individual and collective. She has extensive experience in several fields, including in the electric, telephony, electronics, retail, cosmetics, pharmaceutical, industry, foreign trade and financial institutions fields.

She received her bachelor of laws and a master's degree in civil procedure law from Universidade de São Paulo. She also gained a postgraduate degree in civil procedure law from Centro de Extensão Universitária.

She is recognised by *Chambers Latin America 2017* in tax: litigation and recommended by *The Legal 500*, 2015 edition, in tax. Classed among the most-admired attorneys in tax and the electric energy fields by *Análise Advocacia*, 2015 edition. She is mentioned as a leading lawyer in corporate tax by Leaders League, 2015. She was recognised as being among the leading tax lawyers in 2015 by Women in Business Law (Euromoney).

Appendix 2

CONTRIBUTING LAW FIRMS' CONTACT DETAILS

BUSTAMANTE & BUSTAMANTE LAW FIRM

Av. Patria E4-69 and Av. Amazonas
Cofiec Building, 4th, 5th, 10th, 11th and 16th Floors
Tel: +593 2 256 2680 ext. 248
Fax: +593 2 255 9092
jcbustamante@bustamante.com.ec
www.bustamanteybustamante.com.ec

CHEVEZ RUIZ ZAMARRIPA Y CIA, SC

Vasco de Quiroga 2121, 4° Piso
Colonia Peña Blanca Santa Fe
01210 Mexico City
Mexico
Tel: +52 55 5257 7016/7043
Fax: +52 55 5257 7001/7002
msainz@chevez.com.mx
cfcardenas@chevez.com.mx
www.chevez.com

DDTC CONSULTING

Menara Satu Sentra Kelapa Gading
5th Floor (Unit 0501) and 6th Floor
(Units 0601, 0602 and 0606)
Jl Bulevar Kelapa Gading LA3 No. 1
Summarecon Kelapa Gading
Jakarta 14240
Indonesia
Tel: +62 21 2938 5758
Fax: +62 21 2938 5759
david@ddtc.co.id
www.ddtc.co.id

DLA PIPER

Schottenring 14
1010 Vienna
Austria
Tel: +43 1 531 78 1000
Fax: +43 1 533 52 52
franz.althuber@dlapiper.com
stefan.holzer@dlapiper.com
www.dlapiper.com

FLICK GOCKE SCHAUMBURG

Friedrich-Ebert-Allee 13
53113 Bonn
Germany
Tel: +49 228 9594 637
Fax: +49 228 9594 100
michael.hendricks@fgs.de
www.fgs.de

GARRIGUES PORTUGAL, SLP

Av da República, 25
1050-186 Lisbon
Portugal
Tel: +351 21 382 12 00
Fax: +351 21 382 12 90
pedro.miguel.braz@garrigues.com
www.garrigues.com

GORRISSEN FEDERSPIEL

Axeltorv 2
1609 Copenhagen V
Denmark
Tel: +45 33 41 41 41
Fax: +45 33 41 41 33
jsa@gorrissenfederspiel.com
www.gorrissenfederspiel.com

GUZMÁN ARIZA, ATTORNEYS AT LAW

12 Pablo Casals
Serrallés
Santo Domingo 10125
Dominican Republic
Tel: +1 809 255 0980
Fax: +1 809 255 0940
csieger@drlawyer.com
fguzman@drlawyer.com
www.drlawyer.com

JOSEPH HAGE AARONSON LLP

280 High Holborn
London
WC1V 7EE
United Kingdom
Tel: +44 20 7851 8888
Fax: +44 20 7117 1838
swhitehead@jha.com
pfarmer@jha.com
www.jha.com

KPMG LAW ADVOKATFIRMA AS

Postboks 7000 Majorstuen
0306 Oslo
Norway
Tel: +47 4063 9183
thor.leegaard@kpmg.no
kpmg.no

LENZ & STAEHELIN

Route de Chêne 30
1211 Geneva
Switzerland
Tel: +41 58 450 70 00
Fax: +41 58 450 70 01
jean-blaise.eckert@lenzstaehelin.com
www.lenzstaehelin.com

LEWIN & WILLS

Calle 72 No. 4-03
Bogota
Colombia
Tel: +57 312 5577
Fax: +57 211 7626
arodriguez@lewinywills.com
igiraldo@lewinywills.com
http://lewinywills.com

LOYENS & LOEFF

Neerveldstraat 101–103
1200 Brussels
Belgium
Tel: +32 2 743 43 43
Fax: +32 2 743 43 10
caroline.docclo@loyensloeff.com
www.loyensloeff.com

MACHADO, MEYER, SENDACZ E OPICE ADVOGADOS

Avenida Brigadeiro Faria Lima, 3144 – 11th Floor
São Paulo 01451-000
Brazil
Tel: +55 11 3150 7000
Fax: +55 11 3150 7071
dz@machadomeyer.com.br
med@machadomeyer.com.br
www.machadomeyer.com

MAISTO E ASSOCIATI

Piazza Filippo Meda 5
20121 Milan
Italy
Tel: +39 02 776 931
Fax: +39 02 776 933 00

Piazza D'Aracoeli 1
00186 Rome
Italy
Tel: +39 06 4544 1410
Fax: +39 06 4544 1411

2 Throgmorton Avenue
London EC2N 2DG
United Kingdom
Tel: +44 20 73740299
Fax: +44 20 73740129

g.maisto@maisto.it
www.maisto.it

MASON HAYES & CURRAN

South Bank House
Barrow Street
Dublin 4
Ireland
Tel: +353 1 614 5000
Fax: +353 1 614 5001
jgulliver@mhc.ie
mdineen@mhc.ie
www.mhc.ie

MORRISON & FOERSTER LLP

2000 Pennsylvania Avenue, NW
Suite 6000
Washington, DC 20006-1888
United States
Tel: +1 202 887 1500
Fax: +1 202 887 0763
efroelich@mofo.com
www.mofo.com

NORTON ROSE FULBRIGHT CANADA LLP

Suite 2500
1, Place Ville Marie
Montreal
Quebec H3B 1R1
Canada
Tel: +1 514 847 4318
Fax: +1 514 286 5474
dominic.belley@nortonrosefulbright.com
www.nortonrosefulbright.com

OLD SOUTH BRITISH CHAMBERS

Level 3
3-13 Shortland Street
PO Box 1993
Shortland Street
Auckland 1140
New Zealand
Tel: +64 9 307 3993
Fax: +64 9 307 3996
geoff.clews@taxcounsel.co.nz
www.taxcounsel.co.nz

PHILIPPE DEROUIN

140, rue du Faubourg Saint Honoré
75008 Paris
France
Tel: +33 1 42 25 88 91
Fax: +33 1 42 25 88 44
philippe.derouin@cabinet-derouin.com
www.philippe-derouin.com

PHILIPPI PRIETOCARRIZOSA FERRERO DU & URÍA

Av El Golf 40, 20th Floor
Las Condes
7550107 Santiago
Chile
Tel: +562 2429 3881/+562 2364 3765
Fax: +562 2364 3796/+562 2364 3796
arturo.selman@ppulegal.com
patricio.silvariesco@ppulegal.com
www.ppulegal.com

PHOENIX LEGAL

First Floor, 254, Okhla Industrial Estate
Phase III
New Delhi
India
Tel: +91 11 49830000 / 49830015
Fax: +91 11 49830099
aseem.chawla@phoenixlegal.in
www.phoenixlegal.in

PWC LEGAL

White Square Office Centre
10 Butyrsky Val
Moscow 125047
Russia
Tel: +7 495 967 6280
Fax: +7 495 967 6001
maria.mikhaylova@ru.pwc.com
www.pwc.ru

SELE FROMMELT & PARTNER ATTORNEYS AT LAW LTD

Meierhofstrasse 5
PO Box 1617
9490 Vaduz
Fürstentum
Liechtenstein
Tel: +423 237 11 55
Fax: +423 232 00 06
heinz.frommelt@sfpartner.li
www.sfpartner.li

SOŁTYSIŃSKI KAWECKI & SZLĘZAK

ul Jasna 26
00-054 Warsaw
Poland
Tel: +48 22 608 7000
Fax: +48 22 608 7070
slawomir.luczak@skslegal.pl
magdalena.polak@skslegal.pl
www.skslegal.pl

STAVROPOULOS & PARTNERS LAW OFFICE

58 Kifissias Avenue
151 25 Maroussi
Athens
Greece
Tel: +30 210 36 34 262
Fax: +30 210 36 33 204
i.stavropoulos@stplaw.com
www.stplaw.com

STREAMSOWERS & KÖHN

16D Akin Olugbade Street
Victoria Island
Lagos
Nigeria

Block C Terrace 3, Stallion Estate
Lobito Crescent
Wuse 2
Abuja
Nigeria

77B Woji Road
GRA Phase II
Port Harcourt
Rivers State
Nigeria

Tel: +234 1 271 2276 / +234 1 271 3846 / +234 1 291 0589
Fax: +234 1 271 2277
etigwe@sskohn.com
yinka@sskohn.com
eberechi@sskohn.com;
munachiso@sskohn.com
www.sskohn.com

TMI ASSOCIATES

23rd Floor, Roppongi Hills Mori Tower
6-10-1 Roppongi, Minato-ku
Tokyo 106-6123
Japan
Tel: +81 3 6438 5511
Fax: +81 3 6438 5522
miwakura@tmi.gr.jp
hyoshioka@tmi.gr.jp
www.tmi.gr.jp/english/

VAN CAMPEN LIEM

J J Viottastraat 52
1071 JT Amsterdam
The Netherlands
Tel: + 31 20 760 1600
Fax: + 31 20 760 1699
paul.kraan@vancampenliem.com
www.vancampenliem.com

WASELIUS & WIST

Eteläesplanadi 24 A
00130 Helsinki
Finland
Tel: +358 9 668 95243
Mobile: +358 40 523 2020
jouni.weckstrom@ww.fi
www.ww.fi

WITHERS KHATTARWONG

80 Raffles Place
UOB Plaza 1 #25-01
Singapore 048624
Tel: +65 6238 3333
Fax: +65 6534 1090
joannayap@witherskhattarwong.com
www.khattarwong.com

Law
Business
Research

ISBN 978-1-912228-16-4