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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 seventh 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 United Kingdom 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 European Commission decisions against past tax rulings in Belgium, Ireland and Luxembourg, and the BEPS Project reaching a crescendo in the announcement of a ‘diverted profits tax’ to impose an additional tax in the United Kingdom when it is felt that a multinational is subject to too little corporation tax even in an EU context and a digital services tax in the United Kingdom introducing provisions that appear in principle to pre-empt the Commission’s action in the area. The general targeting of cross-border tax avoidance now has European legislation behind it with the passage last 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 Joseph Irwin in the editing and compilation of this book.

**Simon Whitehead**
Joseph Hage Aaronson LLP
London
February 2019
Chapter 1

TAX APPEALS TO THE EUROPEAN COURT OF JUSTICE

Paul Farmer

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 value added tax (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 questions concerning the interpretation 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. 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. Moreover, the lower courts’ right to refer remains notwithstanding any decision of a superior court quashing a reference that they have made.

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 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. The author gratefully acknowledges the contributions of Francisco Alvarez Silva to the seventh edition of this chapter.
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 (\textit{acte clair}). The threshold for \textit{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'.

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. 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. 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 that 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 \textit{inter partes}, whether it applies rules of law and whether it is independent'.

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. 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.

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

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6 Ibid., Paragraph 16.
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.\textsuperscript{12} Although not a requirement of EU procedure, advocates general of the Court have indicated a preference that the referring court also provide what it believes to be the likely answer to the questions referred as a useful guide to the CJEU as to how the referring court regards the questions to be relevant.

II THE CJEU: COMPOSITION AND PROCEDURE\textsuperscript{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 nature and complexity of the case, this can take place before a panel of three, five or, very rarely, in a Grand Chamber of 15 judges, or before the whole Court (28 judges). Those entitled to submit written observations can also appear at the hearing, regardless of whether 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 on grounds of complexity and the multiplicity of questions and parties. 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.

\textsuperscript{12} Joined cases C-320/90–322/90 \textit{Telemariscabruzzo v. Circostel} [1993] ECR I-393.
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 occurs, the advocate general may revise the opinion, or where the oral procedure is reopened, give a second opinion.\textsuperscript{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.

\section*{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.\textsuperscript{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,\textsuperscript{16} it is not directly concerned with the rights

\textsuperscript{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).

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

\textsuperscript{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.
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 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 challenge brought by the UK in 2013 to the then 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

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

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

Austria 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 Austrian tax authorities to be unlawful, he or she is entitled to appeal against the respective administrative act in question. Austria has a multi-level appeal system with respect to tax matters.

The first level is an ‘administrative appeal’. Thereafter, there are two levels of ‘judicial appeal’, namely to the Federal Tax Court and ultimately to the Supreme Administrative Court (see Section II for more details).

The taxpayer can also file a complaint with the Constitutional Court if the contested decision of an Austrian court infringes his or her constitutional rights (see Section II).

Austria does not allow for alternative dispute resolution with respect to taxes. However, with the objective of avoiding future tax disputes a taxpayer may contact the competent Austrian tax authority and ask for informal answers to tax questions or informal tax rulings in advance. As of 1 January 2019, Austria allows for binding rulings in the area of reorganisations, tax groups, international tax law, and questions of abuse of law; value added tax (VAT) rulings are allowed as from 1 January 2020 (see Section VII for more details).

II  COMMENCING DISPUTES

i  Tax dispute resulting from original tax decree or a tax audit

In principle, Austria has an assessment-based tax procedure. This means that a taxpayer is required to file a tax return. Following such return, an Austrian tax authority will issue a tax decree which determines and assesses the due tax. If the taxpayer disagrees with a tax notice, he or she can file an appeal within one month after delivery.

Any tax return that is filed with the Austrian tax authorities is subject to a plausibility check before a tax decree is issued. Normally, the taxpayer’s information is reviewed in more detail only if certain aspects of the filed tax return are unclear to the Austrian tax authorities. More often such review is made after the tax assessment. Under Austrian statutory law, any tax notice may be corrected by the Austrian tax authorities without further reasoning given within one year.
Further, a tax decree can be amended as a consequence of a tax audit within the statutes of limitation, which, generally, is six years after the year for which the tax return was filed. In the case of deliberate tax evasion the statute of limitation is 10 years. However, if the Austrian tax authorities undertake investigative actions within the respective last year, the statute of limitation is extended for one additional year. In any case, the right to assess taxes is time-barred after 10 years.

ii Subject matter of the appeal

If a decree by an Austrian tax authority infringes the taxpayer’s rights, an administrative appeal can be filed by the taxpayer within one month after the delivery of the decree. This deadline may, upon the application of the taxpayer, be (also repeatedly) extended by the Austrian tax authorities for ‘good reason’. The appeal has to be filed with the Austrian tax authority that issued the decree.

iii Administrative appeal procedure

After the administrative appeal has been filed the Austrian tax authority will review the case and render an administrative appeal decision. However, there will be no administrative appeal decision if the taxpayer has requested that the authority refrains from doing so in the administrative appeal or if the taxpayer only claims that a regulation is not in line with the statutory law, a statutory law is unconstitutional or that international conventions are unlawful. Also, there will be no administrative appeal decision if the decree that shall be appealed against has been issued by the Federal Ministry of Finance. The objective of this procedure is a level of administrative self-control.

The Austrian tax authority’s decision on the administrative appeal becomes final and binding if the taxpayer does not request the submission of the matter to the Federal Tax Court within one month after the delivery of the administrative appeal decision.

If the Austrian tax authority does not render its administrative appeal decision within six months after the filing of the administrative appeal, the taxpayer may lodge a complaint with the Federal Tax Court for the reason of the inactivity of the Austrian tax authority. In this case the Federal Tax Court will grant the Austrian tax authority an additional period of three months (which can be extended once for good reason), after which the Federal Tax Court becomes competent for the decision of the appeal. The Austrian tax authorities often require up to one year to render a decision.

iv Judicial appeal procedure

If the taxpayer is not satisfied with the administrative appeal decision by the Austrian tax authority, he or she must request submission of the appeal to the Federal Tax Court within one month after the delivery of the decision. If the submission is requested in time, the appeal procedure is deemed undecided and the Federal Tax Court becomes competent for the appeal. The Federal Tax Court is competent from the beginning if the taxpayer has requested a direct decision by the Federal Tax Court in the appeal and the Austrian tax authority has forwarded the appeal to the Court.

Taxpayers may represent themselves in Federal Tax Court procedures. Alternatively, they may be represented by a professional representative such as an attorney at law, a (registered) tax adviser or a certified public accountant. Federal Tax Court procedures follow the principle of official investigation. The Federal Tax Court will investigate the facts and circumstances ex officio. It may reject the appeal as unfounded or allow the appeal, which leads to the
annulment or revision of the contested decision or decree. The Federal Tax Court can change the contested decision in all directions, including to the detriment of the taxpayer. If the taxpayer does not request a public hearing, it is up to the court’s discretion to decide in a closed session or to hold a public hearing before its decision.

v Legal appeal to the Supreme Administrative Court

A legal appeal against a decision of the Austrian Federal Tax Court may be filed with the Supreme Administrative Court, which is the second and last judicial instance in tax matters in Austria. The legal appeal can either be filed by the taxpayer or by the Austrian tax authority. The legal appeal must be submitted within a period of six weeks, which cannot be extended. The legal appeal is decided upon by the Supreme Administrative Court. There is no minimum threshold amount necessary to file a legal appeal. The legal appeal has to be addressed to the Federal Tax Court, which decides whether the procedural requirements are met.

In order to be admissible, the matters brought before the Supreme Administrative Court must address fundamental questions so that the Court may ensure the uniformity of the application of the (tax) law. The Supreme Administrative Court decides on the admissibility of the legal appeal based on these criteria. A legal appeal to the Supreme Administrative Court may even be possible if the Federal Tax Court considers it inadmissible. In this case, additional arguments must be made in the legal appeal.

The Supreme Administrative Court does not decide on the facts and circumstances of the case, but only rules on questions of law and errors of law or procedure, which might have influenced the wrong ascertainment of facts. The Supreme Administrative Court will not perform any factual investigations, nor will it review the facts and circumstances provided by the Federal Tax Court. No new facts will be considered by the Supreme Administrative Court. Only if procedural rules have been neglected, which, if considered appropriately, would have led to a different fact finding, may the Supreme Administrative Court annul the contested decision and refer the case back to the Federal Tax Court.

At the Supreme Administrative Court representation by an attorney, a (registered) tax adviser or a certified public accountant is mandatory. The Court decides either by an annulment of the contested decision (referring the case back to the Federal Tax Court) or by a rejection of the legal appeal. In rare cases, where there is no need for further investigation of the facts and circumstances, it has also the authority to rule in the case by changing the contested decision. Additionally, the Supreme Administrative Court is obliged to refer a case to the Constitutional Court if it considers a legal provision to be incompatible with the Austrian Constitution or to the European Court of Justice if a question arises that needs to be interpreted under EU law or in the case of doubts with regard to the compatibility of a domestic tax provision with EU law.

vi Alternative procedure before the Constitutional Court

If a taxpayer is of the opinion that a decision of the Federal Tax Court infringes their constitutional rights or is based on an unconstitutional or otherwise unlawful provision, they may also directly address the Constitutional Court within a period of six weeks after the Federal Tax Court’s decision. The appellant may request that the Constitutional Court refer the case to the Supreme Administrative Court, if the Constitutional Court holds that no constitutional rights of the taxpayer have been violated (this procedure is called ‘successive legal appeal’). The Constitutional Court and Supreme Administrative Court may also be addressed simultaneously (‘parallel judicial appeal’).
vii Suspension of execution of tax claims

An appeal against a decree by an Austrian tax authority does not have the effect of suspending the execution of such decree. The disputed amount, hence, must be paid, even if an appeal is filed. Together with the filing of the appeal, the taxpayer may apply for suspension of execution in whole or in part. A suspension of execution must be granted by the Austrian tax authorities (1) unless the appeal, from a reasonable perspective, appears to be almost certainly unsuccessful; (2) if and to the extent that the appealed decree does not deviate from the tax return or other requests made by the taxpayer; or (3) if the taxpayer’s conduct does not indicate a risk with regard to the collection of the tax claim. If the appeal is finally unsuccessful, interest is chargeable for the period during which the payment of the Austrian tax was suspended. The interest rate is the base interest rate plus 2 percentage points (currently resulting in an interest rate of approximately 1.38 per cent). If, on the other hand, instead of applying for a suspension of execution, the taxpayer pays the Austrian tax when due and payable and, consequently, the taxpayer’s appeal is successful, the taxpayer may in turn also claim interest (at the same rate) in respect of the amount paid.

Alternatively, the taxpayer may ask for a deferral of payment even before an appeal is filed. This might be of particular interest to the taxpayer if the taxpayer (for whatever reasons) cannot file the appeal in time and, therefore, has applied for and been granted an extension of the deadline for the filing of the appeal. Because a suspension of execution can only be applied for once an appeal has been filed, a deferral of payment may provide the necessary protection against an execution of the tax claim by the Austrian tax authorities. If a deferral of payment is granted, interest arises on the deferred payment at the rate of the base interest rate plus 4 percentage points (resulting in an interest rate of currently approximately 3.38 per cent) if the amount exceeds €750.

III THE COURTS AND TRIBUNALS

In Austria there are two kinds of tax courts, competent for different taxes. An administrative court in each of the nine federal Austrian states is competent in the case of municipal or provincial taxes assessed by the local or provincial administrative authorities (e.g., tourism levy), while the Federal Tax Court is competent for federal taxes, assessed by the (federal) tax authorities, which include the most important Austrian taxes, such as income tax, corporate income tax (CIT) and VAT, real estate transfer tax, stamp duty and consumption taxes.

The Federal Tax Court has its seat in Vienna and six further locations in other larger cities in Austria. Generally, the Federal Tax Court’s decisions are made by both professional judges and lay judges, all of whom are completely independent from the Austrian tax authorities and not subject to any instructions. Normally, the Federal Tax Court decides by a single professional judge unless the taxpayer has requested (or the competent judge in specific cases holds) that the decision shall be made by a ‘senate’, which is a body comprising a professional judge and two lay judges. When the Federal Tax Court decides in fiscal criminal law matters, the senate comprises two professional judges and two lay judges.

As mentioned in Section II, an appeal against the Federal Tax Court’s decision can be brought before the Supreme Administrative Court in the case of legal issues of fundamental importance or, if the taxpayer claims violation of his or her constitutional rights, before the Constitutional Court.
Decisions of the Supreme Administrative Court are made by a panel of five professional judges. In matters of fiscal criminal law and in certain procedural matters, a panel of three professional judges decides.

The Constitutional Court regularly decides as a senate of six, whereby the president of the court does not cast a vote. The Constitutional Court may, however, also decide as a larger senate or in a plenary sitting.

IV PENALTIES AND REMEDIES

i Criminal penalties or sanctions

Penalties or sanctions for tax offences, if any, are not imposed in tax disputes. Rather, if the Austrian tax authorities believe that a taxpayer has committed a tax offence, they will initiate, or cause to be initiated, (separate) fiscal criminal proceedings against the taxpayer.

The tax authorities are competent for smaller offences (negligent offences or intentional offences with evaded taxes of not more than €100,000).

The Austrian criminal courts are competent for intentional offences with evaded taxes of more than €100,000 (in some cases an overall perspective may result in several offences being considered collectively with respect to this threshold).

Intentional tax evasion is sanctioned with a fine of up to twice (or in the case of commercial tax evasion up to three times) the evaded tax amount or up to two (three) years of imprisonment. In the case of qualified forms of tax evasion (e.g., use of falsified documents or fictitious structures), up to 10 years of imprisonment is possible.

Under Austrian law not just individuals but also legal persons can be subject to fiscal criminal proceedings.

Decrees of the Austrian tax authorities in fiscal criminal matters can be appealed to the Federal Tax Court and ultimately (in principle) to the Supreme Administrative Court. Court decisions in a fiscal criminal case can be appealed to the Court of Second Instance and further (in certain cases) to the Supreme Court for Civil and Criminal Matters.

ii Administrative charges

Administrative charges, by contrast, may be imposed as part of a tax dispute in tax matters. The most important administrative charges in tax matters are the following:

a If a tax return is not filed on time, the tax office can impose a late filing charge. The amount of the late filing charge is at the discretion of the Austrian tax authority, but must not exceed 10 per cent of the assessed tax.

b If a tax amount is not paid when due, the tax authority can impose a late payment charge, which is usually the case when VAT or withholding taxes are levied ex post in a tax audit. The late payment charge is always 2 per cent of the amount of tax due, increased by an additional 1 per cent three months after the initial imposition of the late payment penalty and another 1 per cent (to a total interest of 4 per cent), after a further three months period has elapsed. No further increases are possible.

c If a difference arises between Austrian income tax or CIT prepayments and the assessed tax, such difference bears interest beginning from 1 October of the year following the years in which the tax arises until such time that the difference amount is actually paid. This situation may arise also as a result of ex post tax audits. The interest rate is the base interest rate plus 2 percentage points (currently resulting in an interest rate of approximately 1.38 per cent).
Administrative charges will rarely be assessed during a tax remedy, unless new late payments are detected. Both late filing charges and late payment charges are administrative acts against which an appeal is possible. If, however, the underlying tax is appealed against, no separate appeal is necessary against the late payment charge. Additionally, the tax authorities may impose enforcement charges to enforce certain actions of taxpayers (e.g., to file a tax return), which may amount to up to €5,000.

V TAX CLAIMS

i Recovering overpaid tax
A taxpayer is obliged to pay taxes either by way of self-assessment (e.g., VAT, wage withholding tax) or by way of a formal tax assessment in a decree issued by the Austrian tax authorities (e.g., CIT, real estate transfer tax). If a taxpayer pays a tax that is not due or in the case of overpayments, the taxpayer can claim repayment. An overpayment may result from (quarterly CIT or monthly VAT) prepayments. The tax is repaid to the taxpayer upon request after the annual assessment, unless the amount can be credited against other due and payable tax liabilities of the same taxpayer. It is also possible to file a request for a reduction of prepayments already during the year, if it becomes clear that the prepayments will result in an overpayment. In the case of withholding taxes any amount withheld mistakenly can be reclaimed from the competent tax authority by the recipient of the payments (the actual taxpayer).

ii Challenging administrative decisions
Basically, administrative decisions may only be challenged if they are unlawful. The unlawfulness may result from the administrative act being incompatible with the Austrian constitution or with specific tax law provisions. The basic constitutional principle in the area of direct taxation is the principle of equal treatment. A similar situation has to be taxed similarly unless there are reasonable grounds to do otherwise. Therefore, a taxpayer that has been treated unlawfully has to appeal against the respective decree. Discrimination in terms of unequal treatment of similar situations may render the decree unconstitutional.

iii Tax waiver
A taxpayer may apply for a tax waiver if the imposition of the tax would be unfair given the overall circumstances. The Austrian tax authorities are rather reluctant to grant a tax waiver. The inadequacy can either be of a personal or factual nature. Personal inadequacy requires that the imposition of the tax results in personal risks for the taxpayer or his or her family. Such personal risks do not have to be life threatening. Rather, it is sufficient if the taxpayer would need to dispose of property to pay the tax and such disposal would be considered squandering. Factual inadequacy requires that the application of the law leads to results that are – beyond reasons of personal inadequacy – obviously not intended by the law and which would result in an abnormal burden for the taxpayer. If compared to similar cases, the situation of the taxpayer must be atypically burdensome. As an example, a tax waiver is in principle possible in the case of protection of the taxpayer’s good faith. The taxpayer may have been in good faith if he or she has relied on recent case law or statements by the competent tax authority (e.g., informal rulings, described in Section I) or public releases by the Ministry of Finance (e.g., legally non-binding guidelines).
iv Claimants

In Austria, like in Germany, tax court litigation aims at challenging taxes assessed in the (contested) tax decree. As a consequence, only the taxpayer to whom the contested tax decree has been addressed by the Austrian tax authority may appeal this decree.

VI COSTS

An appeal against a tax decree is free of charge. Representation costs are, however, unrecoverable, even if an appeal is successful.

Successful proceedings against a tax court’s judgment, however, warrant a claim for a partial refund in the form of a lump-sum payment amounting to approximately €1,100 plus a refund of the court fees paid (which currently amounts to €240 in the case of both the Supreme Administrative Court and the Constitutional Court).

VII ALTERNATIVE DISPUTE RESOLUTION

Austria does not allow for alternative dispute resolution procedures with respect to tax matters.

With the objective of reducing future tax litigation, Austria allows for taxpayers to contact the competent Austrian tax authority and ask either (1) informally for a non-binding statement or (2) formally for a tax ruling. It is at the discretion of the Austrian tax authorities whether they want to issue a statement or ruling. Also, there is no legal remedy if they decide not to issue a statement or ruling or if the taxpayer considers the content of the issued statement or ruling to be unlawful.

Under Austrian law binding rulings can only be requested regarding a limited scope of matters. With effect from 1 January 2019 the catalogue of these matters has been extended and comprises reorganisations, tax groups, international tax law and questions of abuse of law; as of 1 January 2020 VAT tax rulings will also be allowed.

The application for a binding ruling triggers administrative fees. The fee amounts to €500 if the binding ruling request is denied or withdrawn in time. Otherwise, the fee depends on the taxpayer’s annual turnover. The base fee is €1,500. If the taxpayer’s annual turnover exceeds €400,000, the base fee is gradually increased up to a maximum of €20,000 (where turnover exceeds €40 million). The Austrian tax authorities do not charge any administrative fee for the issuance of informal rulings.

If a ruling is obtained it reduces the risk that the Austrian tax authorities will take a divergent view (e.g., in tax audits). For a ruling to be binding the actual facts and circumstances may not deviate from the facts and circumstances on which the ruling was based. In this case, the Austrian tax authority is bound by a ruling granted based on the law.

The protection of the taxpayer against tax audits deviating from rulings applies to both binding rulings and also informal rulings (in the case of the latter due to the protection of good faith).

On the basis of double taxation conventions (DTCs), which contain a provision that reflects Article 25(3) of the Model Tax Convention of the Organisation for Economic Co-operation and Development (OECD MTC), cross-border advance pricing arrangements can be negotiated by the Ministry of Finance on a bilateral or multilateral basis. Within the European Union, the outcome of such arrangements is also subjected to a mandatory
Austria

A new system of ‘horizontal monitoring’ will start in 2019, which will be available on a voluntary basis and is open for certain reliable and very large enterprises with an annual turnover of more than €40 million as well as banking institutions and insurance companies. Participants will be reviewed by inspectors of the Austrian tax authorities on an ongoing basis instead of *ex post* tax audits. This system aims to reduce uncertainty and result in less tax litigation.

VIII ANTI-AVOIDANCE

As of 2019 Austria has amended its general anti-avoidance rule by implementing the principle purpose test, as stipulated in Article 6 of the Anti-BEPS Directive (EU 2016/1164). Hence, a transaction is regarded as abusive if one of its principal purposes is the saving of taxes. In addition, the Austrian tax law follows the substance over form approach.

IX DOUBLE TAXATION CONVENTIONS

Austria maintains a dense network of DTCs with all major jurisdictions across the world. Most Austrian DTCs are limited to income tax, CIT and property taxes. Additionally, there are some DTCs dealing with inheritance taxes (which are still in force, although Austria no longer levies inheritance tax).

Under the Austrian DTCs Austrian taxation rights may be limited or excluded. Hence, the Austrian DTC network may provide protection for a non-Austrian taxpayer investing into Austria. However, Austrian tax laws often require substance and beneficial ownership in order to be able to rely on tax reliefs.

i BEPS/MLI

For quite some time, Austrian tax audits have focused on international activities. One of the reasons for this is the OECD report regarding BEPS published in 2013. As suggested by BEPS Action 3, Austria has implemented controlled foreign corporation legislation, which will enter into force in Austria on 1 January 2019 in line with the Anti-BEPS Directive (EU 2016/1164). With respect to BEPS Action 13, a master file and local file transfer pricing documentation system as well as country-by-country reporting for large affiliated enterprises has been established, applicable for accounting years starting on or after 1 January 2016. As recommended by BEPS Action 15, Austria has signed the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (MLI) on 7 June 2017.

Austrian tax law comprises a regime limiting interest expense deduction paid by Austrian companies to low-taxed non-Austrian affiliates. The Ministry of Finance takes the position that the Austrian interest deduction limitation regime is equally effective to the interest limitation rule set out in Article 4 of the EU Anti-BEPS Directive. In this case, Austria would have time to introduce the interest limitation rule set out in Article 4 of the EU Anti-BEPS Directive until 1 January 2024. However, on 7 December 2018 the European
Commission held that the Austrian regime is not equally effective and, therefore, Austria is obliged to introduce an interest limitation regime as set out in Article 4 of the EU Anti-BEPS Directive by 31 December 2018. It remains to be seen how the Austrian legislature will react.

X OUTLOOK AND CONCLUSIONS

Globalisation has resulted in more and more international fact patterns. The Austrian legislature and the Austrian tax authorities have reacted to this internationalisation and have increased their efforts to respond to these developments.

It is to be expected that tax audits will increasingly focus on international transactions. Also transfer prices will be focused on more often in tax audits.

In addition, international measures (e.g., BEPS or the EU-wide requirement to register ultimate beneficial owners) as well as national measures such as the limitation of Austrian banking secrecy have increased the complexity of tax cases and will, in turn, contribute to an increasing number of tax procedures and tax litigation in the future.

Another trend nowadays is that Austrian tax audit findings not only may result in tax proceedings and ultimately tax litigation, but fiscal criminal procedures are also increasingly being introduced. Therefore, taxpayers must consider more carefully than ever how to avoid and prepare for future tax disputes and tax litigation.
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,4 the taxpayer has the burden of demonstrating the exact amount of income (Article 352 CIR1992). Also, proportional surtaxes apply (Article

1 Caroline P Doclo 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.
4 Corporate taxpayers are expected to verify the deadline for filing their tax return on the website of the Treasury, although there is no legal provision imposing that rule.
In addition, 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).

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)). They may investigate the taxpayer’s situation for a period of three years from the beginning of the assessment year. 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. However, the consultation of databanks does not qualify as an investigation. 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.

The tax authorities may also investigate for a seven-year period without prior notification upon request of another country with which Belgium is bound by an exchange of information agreement (Article 333 CIR1992).

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).

The tax authorities are also allowed a one-year time extension to investigate on 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 deliver such information in the form that the tax authorities require.

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5 The Law of July 2017 inserted the rule in the Code as if it were an interpretative provision. However, the Supreme Court decided that under the old law, surtaxes did not apply where the tax return was merely late (Cass., 15 March 2018).

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

7 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.

8 Cass., 20 May 2016.


11 Seven years in the case of a wilful attempt to defeat or evade tax.
The tax authorities may also access the premises where the taxpayer conducts a business during business hours (Article 319 CIR1992). The right to access the premises cannot lead to a raid.\(^\text{12}\)

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 \textit{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).\(^\text{13}\) The tax authorities may also 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).

In criminal matters, 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 (Article 32 of the Criminal Procedure Code). The Supreme Court has expanded this rule to pieces of evidence obtained by the tax authorities and used to establish a tax.\(^\text{14}\)

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).

\section*{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.\(^\text{15}\)

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.

\begin{flushleft}
\textsuperscript{12} Cont. Court, 12 October 2017.
\textsuperscript{13} 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).
\textsuperscript{15} There is no threshold amount or \textit{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).
\end{flushleft}
Before assessing the tax, the tax authorities must reply to the arguments of the taxpayer (notification of assessment)\(^{16}\) (Articles 346 and 352 \textit{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.\(^{17}\)

Despite the taxpayer’s disagreement, the tax may be assessed and established as a debt.\(^{18}\)

\textbf{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,\(^{19}\) the tax may be assessed within three years of the beginning of the assessment year (Article 354 CIR1992).\(^{20}\) 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.\(^{21,22}\)

The tax may be assessed within the seven-year period even if the authorities did not first make use of the three-year period of Article 354 CIR1992 in the absence of a timely tax return.\(^{23}\)

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

- \textit{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;\(^{24}\)
- \textit{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

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\(^{16}\) A mere unsigned note is not akin to a notification of assessment (Cass., 5 January 2017).

\(^{17}\) See Cass., 21 November 2013.

\(^{18}\) See Cass., 18 October 2012.

\(^{19}\) The tax authorities are not required to demonstrate that the tax return is incorrect (Cass., 20 February 2014; Cass., 2 December 2016).

\(^{20}\) 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).


\(^{22}\) 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.

\(^{23}\) Cass., 17 November 2016.

\(^{24}\) The time extension is not subject to investigations with third persons (Cass., 17 June 2016).
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 judicial procedure 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;25

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; and

e  taxes still due after a mutual agreement procedure may be assessed within the 12-month
period after the procedure has been closed.

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).26

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.27

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

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.28 The cause of a tax debt is not the
wrongful behaviour of the taxpayer but the taxable transaction.29

25 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). It also held that a decision to discontinue prosecutions is not a decision ending the
26 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 CIR1992 (Const. Court, 124/2011, 7 July 2011.
28 Cass., 8 September 1999.
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 (Article 443 ter CIR1992).

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 same rule applies to self-assessed taxes.

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). 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 until 31 December 2017 (Act of 5 May 1865 on interest-bearing loans). As of 1 January 2018, the rate has been 4 per cent in favour of the Treasury, and 2 per cent in favour of the taxpayer (Articles 414 and 418 CIR1992).

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 or her 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 or she 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 or she 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 or she 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).

30 See also Cass., 22 September 2011; Cass., 2 March 2017.
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.\footnote{32}

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.\footnote{33}

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.\footnote{34}

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 has been assessed, and he or she has not decided on a complaint against the contested surtax (Article 376/1 CIR1992).\footnote{35}

An error that results from a standpoint of the taxpayer when filling in the tax return is not a clerical error.\footnote{36} 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.\footnote{37}

New legislation or case law cannot be viewed as new circumstances that may lead to rescission.\footnote{38} 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.iv).\footnote{39}

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 issue is whether a ruling of the ECJ stating that a national

\footnote{32} Cass., 21 September 2012.
\footnote{33} Cass., 11 May 1965.
\footnote{34} Cass., 29 September 2017.
\footnote{35} A tax on tax may be viewed as double taxation (Cass., 2 January 2017).
\footnote{36} See Cass., 19 January 2012.
\footnote{37} Cass., 10 March 2016.
\footnote{38} A decision of the Council of State cannot justify a rescission (Cass., 21 December 2017).
\footnote{39} Const. Court, 54/2005, 8 March 2005.
Belgium

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 a petition before the court of first instance (the tribunal) within three months and three days after the decision has been sent. The petition must address the validity of the tax bill and not the validity of the director’s decision.40

The director’s decision is irrevocable if the taxpayer does not file a petition against it.41 If the tax director fails to render his or her 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.

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.42

Tax cases are handled by independent judges specialising in tax matters. Ordinarily, tax cases are submitted to a chamber of one judge.43 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.44 When the law does not provide for any preliminary administrative review, the taxpayer may submit its case directly to the tribunal.45 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 or her 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

40 Cass., 11 May 2018.
41 Cass., 21 September 2012.
43 Tax cases are not necessarily referred to public prosecution.
44 Cass., 25 January 2018; see, however, ECJ 8 March 2001, Metalgesellschaft, Hoechst (C-397/98).
extensively described the facts in its appeal, it may use them as the basis for arguments that were not submitted 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.\(^{46}\)

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).\(^{47}\) However, a taxpayer may lodge an appeal before the end of the six-month waiting period and it will be admissible.\(^{48}\) 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.\(^{49}\)

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.

\[\text{ii Right to appeal}\]

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.

The tribunal’s decision is suspended during the appeal procedure and the period during which an appeal can be lodged (Article 377 CIR1992).

\[\text{iii Appeal on a point of law}\]

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.

\(^{46}\) 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).

\(^{47}\) 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).


\(^{49}\) Cass., 5 May 2017.
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 and the court of appeals to which the case is referred must settle the case in line with the Supreme Court’s dictum.\textsuperscript{50}

\textbf{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).

\section*{IV PENALTIES AND REMEDIES}

\textbf{i Administrative penalties}

Any understatement of income tax as well as any infringement to transfer pricing reporting obligations 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 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/CIR92). The aggregate amount of tax and surtaxes cannot exceed the amount of unreported income (Article 444 CIR1992).\textsuperscript{51} The tax authorities must restate the facts that justify the penalty, its legal ground and the justification of the amount of the penalty.\textsuperscript{52}

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).

\textbf{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).\textsuperscript{53}

\textsuperscript{50} ‘Pot-Pourri’.

\textsuperscript{51} The Constitutional Court held that the judge must be allowed to give conditional sentences (Const. Court, 55/2014, 27 March 2014).

\textsuperscript{52} Cass., 19 October 2012.

\textsuperscript{53} 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).
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.54

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).55 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).56 In specific circumstances, 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.57

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). As of January 2018, the rate has been 2 per cent (Article 418 CIR1992).

The statute of limitation on the recovery of annulled taxes is 10 years from the annulment.58

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

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.59

55 The complaint against a tax unduly withheld is admissible even if the taxpayer does not report the income in his or her tax return (Cass., 14 January 2016).
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.60

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.61 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.62

### iii Claimants

Tax complaints and appeals must be filed by the taxpayer on whom the tax is imposed.63 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).64

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61 Even the Constitutional Court refused to submit to the European Court of Justice the issue of the euro-compatibility of the fiscal deduction of antitrust fines imposed by the European Commission (Const. Court, 161/2012, 20 December 2012).
62 On the issue of whether an alternative rule may replace an invalidated legal provision, see Cass., 4 September 2015.
63 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.
64 See, however, Cass., 12 February 2016.
VI  COSTS

i  Duty for listing a case
As from 1 February 2019, a tax on filing a petition or a further appeal applies if the amount in dispute exceeds €250,000.

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, 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.

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.

**iii Arbitration**

Belgium signed the Multilateral Instrument in June 2017. The ratification process is in progress.

When signing the MLI, Belgium adopted its arbitration provision. Belgium prefers the Baseball procedure.

**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. Sham is a fraud.

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. 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 or her legal act or series of legal acts, one of the following transactions:

* 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

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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.69

Belgium implemented the Anti-Tax Avoidance Directive (ATAD). It considered that Article 344(1) CIR1992 did not need to be modified in order to comply with the ATAD.

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 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).70

X  AREAS OF FOCUS

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, etc. (Article 207 CIR1992).

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XI  OUTLOOK AND CONCLUSIONS

The current tax procedure is the result of a reform specific to the tax procedure in 1999 and an ongoing reform of the judicial procedure commenced in 2007.\textsuperscript{71} 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.

\textsuperscript{71}  And continued by recent reforms named ‘Pot-Pourri’, Sections I to VI.
Chapter 4

BRAZIL

Daniella Zagari and Maria Eugênia Doin Vieira

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 payroll taxes;
d tax on manufactured products;
e tax on financial transactions;
f contributions for interventions in the economic domain; and
g 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

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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, political, 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. If 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 STJ 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.

If 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, if 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-

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\(^5\) 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 with the United States and the Common Reporting Standard, 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). 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

There is a continued focus on the dispute between taxpayers and tax authorities regarding the credits registration applicable to the industrial, commercial and services operations aiming at reducing the tax burden. The tax authorities have already indicated their concern with this situation, and are conducting specific tax audits to identify and assess these controversial credits.
Also, as a result of the recent decisions issued by CARF against taxpayers, there has been an increase in major discussions on the judicial sphere regarding goodwill amortisation expenses, transfer pricing, taxation of foreign profits and stock options. This refers to assessments that were already confirmed by CARF, as most new assessments on those matters are still challenged on the administrative sphere.

Furthermore, there is a significant number of disputes involving payroll taxes because of the amendments to the labour law and the recent change to most ancillary obligations that are now presented in digital form.

Considering 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 and allow an exception to those decisions, especially as superior courts do not reassess proof.

In this sense, it is essential to review internal proceedings, documents, 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.
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. 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). Specific taxes also apply to fuel and tobacco.

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.

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

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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.
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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

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

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

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.

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 Lévis 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.

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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*, 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*, 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

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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. (Also see Atlas Tube Canada ULC, 2018 FC 1086.)

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. The CRA must prove misrepresentation on the balance of probabilities,
and misrepresentation must take place when filing the return, not at another time. 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, 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.

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.

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.
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). 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), the examination for discovery, the satisfaction of undertakings made at discovery and the request for a date of hearing. Once the date of hearing is scheduled by the hearings coordinator, the parties have 90 days from that date to serve their expert reports, 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, 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. 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, 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 Section 92 et seq. of the Rules.
21 Section 123 of the Rules.
22 Section 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.
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, 2018 QCCA 730, the Quebec Court of Appeal 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 Supreme Court of Canada.


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 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. 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 a 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. (Valiant Cleaning Technology Inc v. The Queen (2018 TCC 637.).

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

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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.
with the following conditions: the application is made within one year of the expiration of 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*, 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*.

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

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33 *Patterson Dental Canada Inc v. The Queen*, 2014 TCC 62.
34 *Quebec v. Services environnementaux AES Inc* (2013) SCR 838.
allegedly erroneous writing and focus on the parties’ common intention. If a writing contains an error that triggers unintended tax consequences, 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. 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, taxpayers are entitled to arrange their affairs to minimise the amount of tax otherwise payable. This principle has been consistently recognised in case law as well as by the CRA. 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, 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, in which the Supreme Court of Canada

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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.
established the following approach. After it has been found that the sham doctrine does not apply, 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* 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*, 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.
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 93 countries. Four treaties are signed but not yet in force. Eight treaties are under negotiation or renegotiation. Canada also has tax information exchange agreements with 24 countries.

One treaty is signed but not yet in force (Antigua and Bermuda). Five treaties are currently under negotiation.

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) (Rona Inc, 2017 FCA 118). 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 expectation of confidentiality when they deal with their

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, Taiwan, 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, Lebanon, Madagascar and Namibia.

47 Australia, Brazil, China, Germany, Denmark, the Netherlands, San Marino and Switzerland.

48 Anguilla, Aruba, Bahamas, Bahrain, Bermuda, the British Virgin Islands, Brunei, the Cayman Islands, Cook Islands, Costa Rica, Dominica, Grenada, 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 Belize, Gibraltar, Liberia, Montserrat and Vanuatu.
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. *Atlas* should be watched closely.

Second, 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 coordinated efforts to get taxpayers’ information, especially when domestic laws are deemed inefficient by the local tax authorities. The next steps seems to be full access and exchange among countries through centralised databases.

Finally, a recently observed trend nationally is the taxpayer’s almost constant impossibility to win a judicial challenge of a GAAR assessment. *Oxford Properties*, 2018 FCA 30; *Satoma Trust*, 2018 FCA 74; and *Pomerleau*, 2018 FCA 129, have all been found in favour of the CRA. This is a source of concern. Time will tell whether it is a temporary setback or a change of scope of a permanent nature.

**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.
I INTRODUCTION

Litigation is prevalent in Colombia. Beginning from the initiation of the tax audit through to the final ruling from the highest tax court on appeal, the litigation proceeding regularly lasts between eight and 10 years. Taxpayers in tax controversies subject to litigation often win their cases; however, usually 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 those where material amounts are under discussion. The taxpayer does not need to pay a fee to file for litigation. Currently, an insurance policy or a guarantee is also not required. The only condition is that the representation is carried out by a licensed attorney.

There is no permanent less adversarial way of resolving a tax dispute. According to the legal regulations, the tax authorities are not authorised to resolve tax controversies through less adversarial mechanisms. However, there have been certain occasions in which the Colombian legislator has enacted temporary settlement facilities for tax controversies. In these events, usually the taxpayer must pay the officially assessed tax increase plus a reduced amount of the penalties and lateness interest. Such amounts (1) were established by the law; (2) were non-negotiable; and (3) depended on the phase or stage of the tax controversy.

II COMMENCING DISPUTES

Regardless of the tax or return under discussion, the proceedings explained below will be the same. Local tax authorities must also follow such mandatory proceedings when collecting 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 limitations of a tax return is three years as from the last permitted filing day, or as from the date the return was filed, when filed late. However, if the taxpayer requested a tax refund, said three years will be counted as from the date of the refund filing. If the taxpayer was subject to 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.

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1 Adrián Rodríguez P is a partner at Lewin & Wills.
If the tax return assessed tax losses, the statute of limitations will be between 12 and 15 years depending on when such tax loss was offset. A tax return offsetting tax losses from previous fiscal years has a statute of limitations of six years.

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

**Challenge brief**
The Tax Office issues a challenge brief proposing the challenges to the tax return. In this document, which is not yet an official tax assessment, the tax authorities may question any aspect of the tax return (i.e., income, costs, expenses, deductions, tax benefits, tax credits, etc.) and proposes 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 Tax Office’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 must notify to the taxpayer the official assessment. This document can either entirely or partially confirm the proposed 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 is served, the taxpayer may file a motion for reconsideration. The legal division of the Tax Office reviews and decides on the motion. At this stage, proof and evidence can also be requested or produced by the taxpayer.

If 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. If 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 additionally assessed tax or reimburse the assessed lower balance in favour, plus any accrued lateness interests. The penalty, however, will only be reduced to 50 per cent.

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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 taxpayer is not served with the decision to the motion within a year, the controversy is deemed to be ruled in favour of the taxpayer. In Colombia, this situation is called *silencio positivo*.

A situation of *silencio positivo* is likely to be recognised by a tax court, so national and local tax authorities are very careful to avoid it, but there are still occasionally cases of *silencio positivo*.

**Litigation**

As from the notification of the decision that decides the motion for reconsideration or as from the notification of the official assessment, 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 lower tax court analyses whether 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.

If it considers that the requirements were 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 requiring amendment.

Because of the current backlog in the tax court, admission of the lawsuit may take approximately two to six months as from the date of its filing.

**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 them in writing, which will also speed up the process.

**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.

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

Ten working days as from the date the first instance ruling has been served, 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 comply 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).

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 for not being obliged to make 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: the first one imposing the penalty for not executing such filing; and the second one 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. Two months as of the date said resolution has been notified, the taxpayer is entitled to file a motion for reconsideration against this resolution. 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, indicating the taxpayer’s tax liability, but it will not impose a penalty.

Hereon, 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, observing specific deadlines. 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. Note that instead of beginning the proceeding described in such Section, the Tax Office can issue a notice (instead of a challenge brief) claiming the amendment of the return. Under this proceeding, the proposed penalty should be lower: 20 per cent of the higher tax due or the lower balance in favour assessed.

v  **Amendment of tax returns within the due dates**

The process and deadlines to amend the returns are as follows.

**Amendment to increase the tax due or reduce a refundable balance**

This amendment may be filed 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 a refundable balance**

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

vi  **Requesting tax exemptions**

In Colombia, tax reliefs can only be claimed through tax returns. Notwithstanding, some tax reliefs require government clearance before taxpayers can claim them in their returns.

**III  THE COURTS AND TRIBUNALS**

In Colombia there are only specialised tax tribunals in Bogotá. 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: the amount under discussion, and the place where the tax return was filed.
The highest-level court for tax purposes is the ‘Consejo de Estado’. Below there is the State Administrative Tribunal and, lastly, the lowest rank court is the administrative judge. If the amount in discussion is lower than 100 mandatory minimum wages (MMW), 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 100MMW, the lawsuit should be filed before the State Administrative Tribunal, and the court of appeal will be the Consejo de Estado.

In each level or 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 the first instance ruling. Parties usually file for appeals. The Tax Office will always file an appeal to prevent investigations by the National Controller.

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

The rulings issued by a tax court are limited to the claims of the plaintiff and 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 obliged 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 million, 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 pays the taxes due (with the delay interests), or amends its tax return.

V TAX CLAIMS

i Recovering overpaid tax

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

4 In 2017, MMW in Colombia was equal to US$220 (approximately).
Colombia

Filing a reimbursement application
The taxpayer must file an application for reimbursement before the Tax Office within five years from the payment date. This application does not have special legal requirements, other than clearly stating 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 of the amended application, and the Tax Office can extend the 50-day period for 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 of 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 overpaid tax is entitled to reimbursement by 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 obliged 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 was the case law of past years.
Notwithstanding the above, on 20 September 2017, the Consejo de Estado issued a ruling recognising that tax authorities, whenever defeated, can also be sentenced to reimburse the litigation costs accrued by the taxpayer. In opinion of the Court, it is unconstitutional to conclude that a tax authority can never be sentenced to reimburse litigation costs accrued by an unlawfully audited taxpayer. This ruling differs from the case law of past years.

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 tax disputes settlements. However, through the last tax reforms, the Congress enacted temporary tax controversy settlement facilities, under very specific conditions: (1) the amounts due by the taxpayer were determined by law and could neither be reduced nor increased; (2) it was available for a short period of time; and (3) it was exclusively aimed at taxpayers in an audit or in litigation.

Such facilities have since expired, but it is likely that in the upcoming 2019 tax reform act, a new version of these facilities will be offered.

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’.

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. Currently, the CTC has the ability to exchange tax information with approximately 62 countries.

All the above was anchored on Colombia’s admission process as 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 policy 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 tax officers ‘accusing’ taxpayers 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 section 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. The likelihood of these discussions resulting in litigation is high, because of the materiality of the amounts 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

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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.
I INTRODUCTION

For tax dispute resolution administrative appeal is the starting point. Once a taxpayer has exhausted all possibilities of administrative appeal and a final decision has been made, the decisions can be appealed to the courts. A case must be brought before the courts no later than three months after the administrative appeal boards have issued a 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 after receiving the case. Additionally, a tax dispute resolution can be filed to the Danish Parliamentary Ombudsman (the Ombudsman).

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

- the National Tax Tribunal;
- the national tax boards of appeal;
- the valuation boards of appeal; and
- the motor vehicle boards of appeal.

All appeals must be submitted to the Tax Appeals Agency. Submission triggers a fee of 400 kroner. The Tax Appeals Agency distributes the cases between the appeal boards based on competences. The Tax Appeals Agency functions as secretariat for the boards of appeal and the National Tax Tribunal (the Tribunal). The Tax Appeals Agency can also make decisions in certain appeal cases. These appeal boards will be described further in Section III.

In Denmark, there is no special tax court. Therefore, an appeal to the courts will be processed as an ordinary civil case and will be processed according to the civil law procedure rules with the necessary adjustments. In 2017, the average processing time in civil cases before the district court was 14.6 months and 11.9 months in appeal cases before the high courts. For cases brought before the Supreme Court, the average processing time was 11.5 months in 2017.²

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

Submission of a case before the courts triggers a court fee. The fee cannot exceed 2,000 kroner. In cases of an appeal before the Supreme Court, the submission fee is 3,000 kroner.

Additionally, a listing fee, equivalent to the court fee, must be paid prior to the trial proceedings.

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II COMMENCING DISPUTES

A tax dispute will usually be initiated because of a disagreement between the taxpayer and the tax authority. The disagreement could, for example, be an amendment of the taxpayer’s income report or in case the taxpayer wants to challenge an advance tax ruling from the tax authority.

This section contains the following aspects:

- access to amend a former assessment of taxable income;
- the process of administrative appeal;
- the process of appeal before the courts;
- expert survey and valuation; and
- the taxpayers’ 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 their tax assessment to the tax authority. A former assessment of taxable income can be amended. However, there is a statute of limitation. As a starting point, a tax assessment can be amended until 1 May in the fourth year following the relevant income year. This applies for both the taxpayer and the tax authority. If the tax authority intends to adjust a taxpayer’s assessment, the tax authority is obliged to notify the taxpayer no later than 1 May in the fourth year after the relevant income year. The notification shall be followed up by a final assessment no later than 1 August in the fourth income year following the relevant income year.

In the 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 in the case of controlled transactions.

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

If the tax authority initiates an amendment of a taxpayer’s assessment, the authorities must notify the taxpayer. The notification must contain a general description of the basis for the intended amendment, including new facts or circumstances that trigger the amendment. Once the taxpayer receives the notification, the taxpayer will be granted a certain period of time in order to submit remarks.

If the taxpayer wishes to initiate an amendment of a tax assessment, the taxpayer must notify the tax authority with said request within the same time limit of four years. The request must contain the basis for the intended amendment. The tax authority will draft a decision proposal after reviewing the request. Hereinafter, the taxpayer is granted a certain period of time to submit remarks. Once the tax authority has received the taxpayer’s potential remarks, the tax authority will determine the case.

Certain protective mandatory rules apply to taxpayers in order to strengthen the their legal position and for the purpose of legal certainty. One rule provides the possibility to employ a tax reservation in relation to transactions (e.g., a sales agreement or a deed of gift). The tax reservation serves as a guarantee if the transaction has unintended effects. In this case, the transaction may be terminated or may have a different content (e.g., if the tax authority does not accept the anticipated tax consequence of the terms in an agreement the parties can, owing to the tax reservation, amend or annul the agreement with retrospective effect). The
tax reservation is only valid if certain conditions are fulfilled. For instance, the tax reservation must be clear, in writing and be notified to the tax authority no later than at the time when the tax authority was informed about the transaction.

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

In general, the advance tax ruling will be binding for the tax authorities in the following five years. However, if the advance tax ruling concerns a valuation, the ruling will only be binding for a period of six months. Depending on the circumstances, the tax authority can set out a shorter period in which the ruling will be binding.

The taxpayer is required to pay a submission fee of 400 kroner (2019) to obtain an advance tax ruling.

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

ii The process of administrative appeal

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

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

Some formal requirements must be met, when a case is submitted. For example, an appeal must be submitted no later than three months from the date when the taxpayer received the decision from the tax authority. The complaint must be in written form and the reason for the appeal must be stated. There are no formal requirements for submission of an administrative appeal. However, the appeal must be submitted electronically on the Tax Appeals Agency’s website.³

Submission of a case triggers a fee of 400 kroner for the taxpayer. The litigation process is rather informal. Both parties will be granted the opportunity to provide additional remarks during the process.

The taxpayer may request a meeting with the responsible caseworker. Generally, it is advantageous to request a meeting. However, it will likely prolong the processing time. During the meeting, the facts and the legal arguments will be discussed with the caseworker in an informal manner.

Once the preparation of the case is finished the Tax Appeals Agency will issue a preliminary decision, which will be sent to the parties for their review.

The taxpayer can request for a meeting with the members of the relevant appeal authority. Following such a meeting, the appeal authority will issue a decision based on the preliminary opinion, the comments provided by the parties and the information and arguments presented at an eventual meeting with the parties.

³ https://skatteankestyrelsen.dk/klager/.
iii  The process of appeal at the courts

According to the Danish Constitution, all decisions issued by a public authority can be brought before the courts. The court system is based on a two-instance principle. As a starting point, all cases start in the district court. Hereinafter, the decision can be appealed to the High Court. If a case is of fundamental character, it is possible to apply for a third-instance permission. The demand must be filed to the Ministry of Justice. If the request is granted the taxpayer may bring the case before the Supreme Court.

With permission from the first instance court a case can also be transferred to the High Court. In this situation, the case can be brought before the Supreme Court without special permission.

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

A tax dispute will be processed according to the Danish procedural rules for civil cases, with the necessary adjustments. For instance, only questions that were originally part of the initial decision can be reviewed by the courts. However, the taxpayer can involve new questions if permission is granted by the court. New questions can be processed in the dispute if it can be considered as 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 reviewed as a part of the case.

iv  Expert survey and valuation

The claimant and the tax authority have a right to request an expert opinion in tax disputes handled by the appeal boards or the courts. Such a request must be filed to the relevant district court.

An expert opinion is admissible when the parties disagree on factual circumstances (e.g., when the parties disagree on the valuation of real estate or shares). An expert opinion cannot be provided to clarify legal disagreements.

The expert opinion must be submitted to the court.

Neither the courts nor the administrative appeal authorities can decide on the procurement of an expert opinion if none of the parties has requested such procurement.

The requesting party must initially bear the expenses; ultimately, the court decides which party has to bear the expenses based on, inter alia, which party the opinion favours. However, the appeal boards can decide that the tax authority shall cover all expenses relating to the procurement of the expert opinion.

The court can decide to appoint more than one expert if requested 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 due to a party’s relevant objections to the first expert opinion.

v  Postponement of contested payable taxes

A taxpayer can apply for a postponement of the contested payable taxes. The tax authority usually grants postponement requests. However, the tax authority tends to reject the application if there is a reasonable risk of the taxes not being paid (e.g., if the taxpayer is moving abroad). Furthermore, the tax authority can require collateral for payable taxes as a condition for granting a postponement.
The postponement period of four years can be extended in the event the appeal lasts longer than four years. The postponement will always lapse when the appeal board delivers its decision. The taxpayer must file a new application for postponement if the administrative decision is brought before a court.

Additionally, a complaint can be filed to the Ombudsman or the courts.

### III THE TRIBUNALS AND BOARDS OF APPEAL

The 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; and
- d. the motor vehicle boards of appeal.

#### i The Tax Appeals Agency

The Tax Appeals Agency is an independent authority and functions as secretariat for the appeal boards. If a taxpayer wishes to contest a decision of the tax authority, the appeal must be submitted to the Appeals Agency. After receiving a complaint, the Appeals Agency will gather all relevant information and once the preparation of the case is completed, the agency refers the case to the relevant appeal board.

#### ii The National Tax Tribunal

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

The Tribunal rules in the following types of cases:

- a. appeal of a decision issued by the tax authority if the appeal has not been decided by any of the other appeal boards;
- b. appeal of a decision issued by the national tax board;
- c. appeals brought to the Tribunal by the Ministry of Taxation concerning decisions containing EU law interpretation; and
- d. additional different case types.

#### iii The national tax boards of appeal

Denmark is divided into 19 local boards, which are located across Denmark. The Minister of Taxation appoints the members. The boards of appeal are competent to rule in the following tax disputes: disputes concerning taxable income; property value tax; advance registrations, deductibility; advance tax rulings; and certain other types of taxable income.

#### iv The valuation boards of appeal

The valuation boards of appeal are divided into 10 local boards, which are located across Denmark. The Minister of Taxation appoints the members. The valuation boards of appeal
make decisions in cases when the dispute concerns valuation of properties and appeal of decisions regarding the taxation of land. However, the valuation boards of appeal may choose to refer the case to the Tribunal if the case has fundamental importance for other taxpayers.

v  The motor vehicle boards of appeal
In Denmark, there are four local motor vehicle boards of appeal. The Minister of Taxation appoints the members. 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 upon the recommendation of the dealerships organisation for the automobile industry. The boards of appeal can process disputes regarding registration fees and related matters.

vi  The Ombudsman
The Danish parliament is obligated to appoint an Ombudsman. The Ombudsman works independently from the Danish parliament. The Ombudsman functions as a ‘public watchdog’. The Ombudsman accepts complaints about public authorities, including complaints about 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 (e.g., complaints on long processing time). The Ombudsman is competent to handle complaints concerning all parts of the public administration, with a few exemptions. For instance, the Ombudsman is not competent to handle complaints concerning the courts and consequently, the Ombudsman is not competent to handle cases in which the court has issued a ruling. A complaint must be submitted no later than one year after the administrative act or behaviour that gave rise to the complaint.

A compliant to the Ombudsman has suspensory effect if:

a  the complaint to the Ombudsman is a complaint about a decision made by one of the appeal boards;

b  the complaint is filed to the Ombudsman within three months after the decision of the relevant appeal board; or

c  the decision of the relevant appeal board is appealed to the civil courts within one month after the Ombudsman has finished reviewing the case.

Otherwise, the complaint to the Ombudsman will not have suspensory effect. After reviewing a case, the Ombudsman may state criticism and recommend that a public authority amend the decision. The Ombudsman cannot render a decision himself. Owing to the complexity of Danish tax law; the Ombudsman has established a special tax office in order to strengthen the taxpayer’s legal position.

IV  PENALTIES AND REMEDIES

i  Administrative sanctions
In the case of intentional tax evasion or in the case of gross negligence the Danish tax authorities may impose a fine.
V  TAX CLAIMS

i  Recovering overpaid tax

As a starting point the 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.

If repayment of overpaid taxes is granted, the refunding cannot be paid before the expiry of the income year to which the claim relates.

Certain taxes (e.g., withholding taxes) require an application to the tax authority before the overpaid taxes are repaid.

ii  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 protective mandatory rules.

According to a ruling from the European Court of Justice in Danfoss and Sauer Danfoss, companies can bring a claim directly against the Ministry of Taxation, irrespective of the fact that it is the company's suppliers who have paid duties to the tax authority.

VI  COSTS

The expenses in connection with an appeal brought before the appeal boards are significantly lower than the expenses in connection with a case before the courts. It is possible to obtain cost reimbursement from the tax authority if an individual or a company is part of a tax dispute. Cost reimbursement can be obtained by submitting an electronic application to the tax authority. An application must be submitted no later than three years after the date the decision became final.

The reimbursement will be 100 per cent of the costs, if the ruling is fully or predominantly in favour of the taxpayer. If the ruling is in favour of the tax authority, the cost reimbursement is 50 per cent.

Generally, the cost reimbursement covers expenses connected to legal advice, expert valuation and the gathering of evidence. The cost reimbursement does not cover the submission fee.

VII  ALTERNATIVE DISPUTE RESOLUTION

Currently, there is no possibility for alternative dispute resolution in tax disputes. However, there are several remedies to avoid disputes, for example, the possibility of an advance tax ruling, the possibility of using a tax reservation and the access to require an amendment of a previous tax assessment.
VIII DOUBLE TAXATION TREATIES

Denmark has concluded double taxation treaties with approximately 85 jurisdictions. Generally, the double taxation treaties concluded by Denmark are based on the OECD Model Treaty. Most treaties provide a reduction in the withholding tax rate on outbound dividends, interest and royalty payments.

IX AREAS OF FOCUS

The tax authority has been subject to major structural change. Before 2018, the tax authority was organised as one unit, but since 1 July 2018, the tax authority has been divided into seven different independent agencies. The main purposes of this division were a political intention to strengthen the organisation, increased specialisation, and enhanced professionalism and quality of the tax authority. Additionally, the tax authority is now divided into the following specialised units:

- the Debt Collection Agency;
- the Property Assessment Agency;
- the Tax Agency;
- the Motor Vehicle Agency;
- the Customs Agency;
- the Development and Simplification Agency of the Ministry of Taxation; and
- the Administration and Services Agency of the Ministry of Taxation.

X OUTLOOK AND CONCLUSIONS

The rules on the procedures regarding the tax authority’s case handling are expected to be subject to modernisation in 2019. The scope of the modernisation is to strengthen the administrative procedures and to lower the lengthy review time in the administrative complaint system.

There have been major complications with the digital collection of tax in Denmark. Therefore, a bill regarding support of the government’s new debt collection IT system has been proposed. The bill will, inter alia, introduce new rules regarding court fees and time-barring, including new rules on the appropriation and cancellation of debt.

The Danish parliament has proposed that Directive 2017/1852/EU on tax dispute resolution mechanisms in the European Union should be made applicable in Denmark. Consequently, a set of rules regarding complaints on double taxation have been introduced, as well as a system to solve disputes related hereto. Generally, the system consists of three phases: (1) submission of the complaint; (2) mutual agreement procedure; and (3) the settlement of the dispute by arbitration.

Furthermore, an adjustment of the rules on cost reimbursement is proposed. The proposed bill suggests that cost reimbursement should be granted in cases comprehended by the Danish law on tax dispute resolution mechanism in the European Union.
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, 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 regarding tax matters, and establishes the main taxes – income tax, capital gains tax, value added tax (VAT), 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: 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. 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: 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. Owing 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.

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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 changed in 2017 under the new anti-money laundering law, Law 155-17, and its enabling regulations. The new statute was approved in record time based on the recommendations of the Financial Action Task Force of Latin America (GAFILAT), a G7 regional organisation. The statute 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. 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 the near future, 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 because taxpayers can request from the DGII a formal and binding opinion for their cases beforehand. Also, the fines and interest for late payments can very often be negotiated with the DGII, 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 or that are clear-cut 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.

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7 This can serve as an advanced clearance.
8 The capital gains taxes for the sale of Verizon Dominicana were negotiated directly between the former Dominican President, Leonel Fernández, and the former US Secretary of State, 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

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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 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 obliges the executive branch to set up a special fund to reimburse the taxpayer in these cases. 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.

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. 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.

With the tax reform of 2012, much more extensive transfer pricing rules were established as were, 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 the near future 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.
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.

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.

II COMMENCING DISPUTES

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. 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, in the FTA’s decisions issued in 2016 or earlier, the scope is more limited, applying only in matters relating to, inter alia, income taxation, inheritance 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.

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 2018 the three-year period will end on 31 December 2021. 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 taxpayer for any given tax year. As an example, for tax year 2018, ending on 31 December 2018, tax assessment shall be completed by 31 October 2019 and accordingly the appeal of the Unit shall be filed by the end of February 2020. 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 if 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. Although having an oral hearing is the main rule according to the law, it may be departed from if an oral hearing would be
manifestly unnecessary in view of the nature of the matter or for another reason. Taking into consideration also the fact that tax matters have become more complex and may contain challenging legal questions, there are reasonable grounds to expect that the number of oral hearings held in tax proceedings will increase in the future. 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 relating to income taxation and value added taxation. The advance rulings issued by the Central Tax Board have significant precedential value and many of them 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.

IV PENALTIES AND REMEDIES

The rules on punitive tax increase are scattered in different tax laws; however, gradually as of 2018 the varying stipulations are widely being harmonised. A punitive tax increase is imposed in matters relating to income taxation, real estate taxation, inheritance and gift taxation and transfer taxation. Further, specific stipulations are included in the Finnish Procedures Act on Payments of Unprompted Taxes2 relating to, inter alia, VAT and tax prepayment with, however, similar harmonised structure of stipulations to the other areas of taxation.

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2 In Finnish: laki oma-aloitteisten verojen verotusmenettelystä (9.9.2016/768, as amended).
mentioned. It should be noted, however, that this harmonised regime is applied in matters relating to real estate taxation and transfer taxation only as of 1 November 2019. The exact dates of applicability should be reviewed in more detail case by case.

As a rule, the FTA imposes a punitive tax increase if the taxpayer has failed to fulfil his or her tax-related obligations, unless the failure was only minor or there was a valid reason for the delay. The tax increase may, however, be remitted if it would be disproportionate under the circumstances.

The tax increase shall be in general 2 per cent of added income or 10 per cent of added tax. It may also be increased if the failure of the taxpayer is repetitive or reflects gross negligence, in which case the tax increase shall be 3 to 10 per cent of added income or 15 to 50 per cent of added tax. On the other hand, the tax increase may be decreased if the case at hand is open for interpretation or unclear.

Should a taxpayer request an adjustment on his or her own initiative and to his or her detriment, the tax increase is 0.5 per cent of added income or 2 per cent of added tax if the taxation period has expired. However, if the taxation period has not yet expired, a fee for late tax return is imposed instead of a tax increase. The fee is €50 for individual taxpayers and estates and €100 for corporate taxpayers. It may not be imposed if the filing of the tax return has been delayed for reasons that are not related to the taxpayer, if the failure is minor or if there was a valid reason for the delay.

Certain significant punitive tax increases may also be payable regardless of whether there are any unpaid taxes claimed by the FTA. For instance, a failure to present transfer pricing documentation within a stipulated time frame may be sanctioned with a maximum amount of €25,000.

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 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 (2018). 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 with 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 re-characterised 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 if 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. If 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 tax prepayment; 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

Until now, means of alternative dispute resolution, such as arbitration or mediation, have not been utilised in tax disputes in Finland. However, the Council Directive (2017/1852/EU) on Tax Dispute Resolution Mechanisms in the EU, 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, is currently in the process of being implemented in Finland.

According to the government bill, the implementation is carried out by enacting of a new Act on Dispute Resolution Mechanisms in International Tax Disputes. The proposed Act stipulates an alternative dispute resolution procedure that may be applied to cross-border tax disputes relating to the interpretation of double taxation conventions or the EU Arbitration Convention (90/436/EEC). The relevant parts of the procedural rules are also applied to the alternative dispute resolution procedures stipulated in the double taxation conventions and the EU Arbitration Convention. The Act is proposed to enter into force on 1 July 2019 and the procedure would be available to complaints that are filed on 1 July 2019 at the earliest and concern tax years beginning 1 January 2018 or later.

In 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 about the arbitration proceedings conducted by Finland. It should be noted, however, that arbitration may also be carried out in accordance with the EU Arbitration Convention, which may be applied to transfer pricing disputes.

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 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.

In addition to general anti-abuse rules (GAAR), Finnish tax legislation includes some specific rules (SAAR) implemented to complete the GAAR legislation. However, even though Finland has an extensive network of double tax treaties, the treaties Finland has entered do not include GAAR, nor do they have any stipulations as to the applicability of the Finnish GAAR in the tax treaty environment. In light of this, even if there may be various views, it can be concluded the Finnish GAAR may be applied in denying the tax treaty benefits, but only with respect to clear tax avoidance schemes.

Further, Finland has signed the Multilateral Convention to Implement Tax Treaty Related Measures to prevent BEPS (MLI) with specified effects upon the tax treaties of Finland. In terms of treaty abuse, however, Finland has chosen to take the Principal Purpose Test approach: that is, the denial of all or part of the benefits that would otherwise be provided based on a tax treaty, where the principal purpose or one of the principal purposes of any arrangement or transaction, or of any person concerned with an arrangement or transaction, was to obtain those benefits.

Finland is within the purview of the EU Anti-Avoidance Directive (ATAD), as amended by the second directive (ATAD II). What is interesting to note is the fact that the GAAR by ATAD contains, \textit{inter alia}, the ‘main purpose or one of the main purposes’ formulation, whereas the threshold to apply the Finnish GAAR is higher as it can be applied when basically the only purpose of the arrangement is the avoidance of taxes.

**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.

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. Various holding structures, including reinvestments in acquisitions structures in connection with mergers and acquisitions are also 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

In a very recent ruling by the Helsinki administrative court, a company in the wind farming industry was issued a feed-in tariff by the Finnish Energy Authority. In the claim made by the Finnish Tax Recipients’ Legal Services Unit it was insisted that the company had in fact committed to produce electricity against the state-contributed feed-in tariff and therefore the feed-in tariff was to be a counterpart to the sale of such service (to the Finnish Energy Authority). It was further claimed that the feed-in tariff received by the company should be considered a subsidy directly linked to the price of the electricity sold by the company. The subsidy should thereby, according to the claim, be treated as a consideration to be added to the VAT base of the sales by the company. The claim was dismissed yet the decision of the Helsinki Administrative Court can be appealed to the Supreme Administrative Court. The final decision will have definitive impact widely in the renewable energy sector and it will create an important precedent in outlining the scope of the VAT Act and the VAT Directive.

The Supreme Administrative Court issued two important rulings in 2016 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. The court ruled that the FTA had no right to demand the data for the tax assessment purposes. This case has been appealed and is, therefore, still pending, although the final ruling is expected early in 2019.

Very recently the SAC issued yet another precedential case (2018:173) concerning transfer pricing. In its ruling, the SAC stated that contrary to what the FTA had argued, the Transfer Pricing Guidelines issued by the OECD in 2010 could not be applied in a case that concerned the selection of valuation methods by the company in tax years 2006–2008. The SAC held that the Transfer Pricing Guidelines of 1995 were to be applied, as they had been issued at the time when the company’s tax returns in question were due. Thus, it follows from the ruling that the selection of valuation methods cannot be assessed in the light of such guidelines that have been published only after the methods in question were selected and applied in the tax years assessed. Consequently, the amendments made to the OECD Guidelines in 2017 should not, as a principal rule, be applicable to intra-group transactions carried out in 2016 or earlier.

3 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.
The Supreme Administrative Court issued two precedential cases (2017:145 and 2017:146) concerning transfer pricing of intra-group 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 re-characterisation 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 intra-group 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.

Further, it should be noted that Finland is currently in the process of implementing the EU Anti-Tax Avoidance Directive (ATAD, 2016/1164/EU). The ATAD has brought about legislative amendments especially with regard to interest deduction limitation and taxation of controlled foreign companies (CFCs). The amendments will enter into force on 1 January 2019.

Finally, it can be stated that the various ongoing and newly introduced legislative reforms will likely give rise to divergent interpretations also in the future, which could lead to an increasing amount of tax disputes.
Chapter 10

FRANCE

Philippe Derouin

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, apart from voluntary disclosure programmes, and a very effective method was terminated in 2010. A first attempt at enhancing the relationship between businesses and the tax authorities was unsuccessful due to the lack of interest and means from the French tax authorities; a new attempt is in the process of being initiated. In contrast, the French criminal legislation on tax matters has been amended and refined over the past few years.

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 legislature 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 tend to slowly decline: in 2017, 44,287 audits with accounting checks were carried out with businesses, and 3,613 thorough audits of personal situations took place with individuals.

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1 Philippe Derouin, a member of the Paris Bar, runs his own law firm, Philippe Derouin.
The total amount of reassessments and penalties slowed down to €17.9 billion in 2017, partly because the voluntary disclosure programme for individuals holding assets abroad has come to an end. Corporation tax reassessments also went down to €3.9 billion. The total amount of taxes and penalties assessed in serious frauds (defined as triggering 40 per cent penalties or more after a tax audit) increased to €6.5 billion, although this represents the same 30 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 decreased to approximately 52.5 per cent of the assessed amounts. This proportion has been relatively stable over a longer period and slightly increased to 57 per cent in 2015 and 2016 as a result of the voluntary disclosure programme. A 52 to 57 per cent proportion of recovery 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 or in pursuance of court decisions upon disputes. The figure of €8 billion per year accordingly represents a rough estimate of the current French market of tax controversy, an estimate that was subverted by the €10 billion cost to the government of the 3 per cent dividend tax litigation in 2017–2018.

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 challenge to the 3 per cent corporation tax surcharge on amounts distributed by French companies from 2012 onwards provided a recent example. Petitions were filed by certain taxpayers and by the French Association of Large Businesses, before the Council of State in the spring of 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 EU Directive points to the ECJ. The Constitutional Council found the law to be discriminatory and unconstitutional in a ruling of September 2016. The law was amended at year-end to extend the benefit of an exemption for intra-group dividends to domestic, European and most third-country
France

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. A similar result was reached in Belgium with respect to the ‘fairness tax’ that was introduced in 2013 and was inspired by the French surcharge. The cost to the French government totalled approximately €10 billion and required an extraordinary surcharge to partly finance it.

Similar procedures are based upon the same lines; others are less radical or have narrower scopes 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 a 2008 ruling by the European Court of Human Rights (ECHR) 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 value added tax (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:

- specify the tax that is being challenged;
- provide a summary of the facts, pleas and arguments;
- be signed by the taxpayer or an authorised agent; and
- 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 on any matter of tax fraud, which is widely defined, whatever the tax involved. Approximately 900 such procedures are held each year. Until recently, such procedures could be initiated at the request of the French tax authorities only. As of October 2018, the tax authorities must report matters where tax penalties of 40 per cent or more are applied in certain situations to the public prosecutor for a decision upon the opportunity to initiate criminal proceedings. 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. 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.

2 C cass; Ass plén 14 June 1996 Kloeckner, bull civ AP No. 5.
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, 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 reopening the case before reaching a decision.

### 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. 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

### PENALTIES AND REMEDIES

#### 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.

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³ Council of State 2 June 2010 No. 318014 Fondation de France.
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 retrospective effect of tax measures.
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 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, hidden activities and ‘abuse of the law’. Where the 80 per cent surcharge applies, tax intermediaries may be subject to a penalty equal to 50 per cent of the revenue derived from services to the offending taxpayer or €10,000, whichever is higher.

The deliberate nature of offences (mens rea) must be demonstrated by the tax authorities, who 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.

**Name and shame**

Where the 80 per cent penalty is applied for fraud or ‘abus de droit’ and there is no criminal prosecution, the tax authorities may decide to publish on their website the name, profession and place of activity of the offending taxpayer, together with the nature and amount of evaded tax and related penalties. The publication is suspended if and when the tax and penalties are challenged until a final decision is reached.

### 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 is now available in tax matters. 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, or the double the profit made from the offence, whichever is higher, and a prison sentence of up to five years. Where the offence 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 fixed fine may be raised to €3 million and the imprisonment to seven years. The same penalties would
be applicable in cases of tax fraud carried out as an organised group. Any accessory to such
offences may be charged with the same penalties. Publication of the court ruling, exclusion
from public procurement and suspension of civic rights also apply.

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. As previously mentioned, around 1,000 criminal tax proceedings are initiated each
year.

The limitation period applicable to the offence of tax evasion extends to six years. Under a ‘repentance provision’ any 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 national laws applied are contrary to EU law; and
compensation for the damage incurred.

The amount of outstanding tax repayments plus interest is assessed each year in the
finance bill. In the finance bill for 2019, it stands at approximately €20 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 petition an administrative judge to review certain
administrative decisions that they deem illegal.

When examining such a petition, the administrative judge who finds the act to be
illegal may declare it null but the judge may not decide upon the corresponding tax charges
and must remand the case to the administrative authorities for a new decision.

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.

5 Information report No. 1310 to the National Assembly of 17 October 2018.
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 used to be a policy of the French tax authorities not to settle when they contemplated filing a criminal complaint or when the taxpayer tried to delay the procedure in bad faith. As a matter of law, this is no longer the case. 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.

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. These specific penalties do not automatically apply where the motivation to evade tax was not exclusive but only one of the purposes of the transaction.

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 invited 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 and 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 activities7 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 foreign withholding they deem inappropriate, sometimes with reason.

The French tax department reports that 212 mutual agreement 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.

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 shortlist of these states and territories now extends to territories blacklisted by the European Union and 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

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6  bofip.impots.gouv.fr, BOI-ANNX-000306, updated each year.
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.
9  Currently, an order of 8 April 2016.
10  Article L80A of the LPF.
XI  OUTLOOK AND CONCLUSIONS

French authorities regularly emphasise the need to combat fraud and tax avoidance, especially in cross-border contexts.

Parliament has substantially reinforced the means available to the authorities and increased the obligations placed on taxpayers, as well as imposed tougher penalties for breaches. More often than not, these specific measures need to be, and effectively are, checked to the fundamental rights protected by the Constitution and international instruments.
Chapter 11

GERMANY

Axel Cordewener and Michael Hendricks

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 to have the governmental action in question reviewed by the courts. It is common practice for 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. German 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 (and usually not even allowed) 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 3.24 million and 5.24 million administrative appeals were lodged annually over the past few years (from 2009 to 2017). 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 the regionally competent tax court for judicial review. Alongside the ordinary branch of the judiciary, which deals with civil and criminal law matters, the German judiciary comprises special branches (with specialised judges) for labour (general), administrative, social and tax law. The structure of the tax branch is particular in the sense that it is the only branch that only consists of two court levels: the regional (first instance) tax courts and the Federal Tax Court in Munich.

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1 Axel Cordewener is of counsel and Michael Hendricks is a partner at Flick Gocke Schaumburg.
2 Article 19, Paragraph 4 German Constitution.
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. However, it should be mentioned that the traditional career path of a tax judge starts in the tax authorities, and even though in recent years a number of tax courts have increasingly started to recruit tax specialists from law firms, others are still strongly dominated by former public servants (which, according to unofficial statistics, has an adverse impact on taxpayers’ success rate). Germany has a total of 18 lower (first-instance) tax courts. Over the past few years (2009 to 2017), an average total of about 37,900 new legal actions were filed annually with these courts.

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 often told about the decision the court is contemplating during a hearing. 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 19 per cent in 2017. 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 the Federal Tax Court. 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 who is fully successful 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 usually 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

Typically, disputes between a taxpayer and the tax authorities are about the lawfulness of a tax assessment notice. Under certain circumstances, 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 as such, and they are included in a formal separate 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 separate assessment notice as unlawful, he or she may not challenge the (subsequent) personal tax assessment notice but must contest the underlying separate assessment notice.3 Statute provides for such declaratory notices of assessment in numerous situations.4 One such group are cross-border scenarios: for example, those involving the German controlled foreign company rules, also referred to as add-back taxation.5 In the context of local taxes – for example, trade tax – similar preparatory assessment notices are provided for (e.g., fixing the tax base for the relevant type of tax, to which the competent municipality will then apply the respective tax rate). Any separate or preparatory assessment notice that is considered unlawful by the taxpayer 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 separate or preparatory 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 subsequent tax audits that spark disputes. The tax authorities are entitled to use their findings from tax audits by amending existing notices (tax assessment notices, but also separate and preparatory assessment notices). 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 issued by the tax authority in the wake of the audit report that may be submitted by the taxpayer to the courts for review once an administrative appeal procedure has been unsuccessful.

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

3 Section 351, Paragraph 2, General Tax Code.
4 See generally Section 180, General Tax Code.
5 See the special provision in Section 18, Foreign Tax Act.
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). Moreover, in particular as regards transactions with an international dimension (e.g., transfer pricing), local tax auditors may be supported by specialists from the Federal Central Tax Office.

iii Administrative appeal procedure

Before a judicial review of the lawfulness of a separate or preparatory 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 after the taxpayer has received the relevant notice.6 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 very 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.7 The question of which of the 18 lower tax courts is regionally competent to hear the case hinges on which tax authority issued the administrative appeal decision being challenged. The action brought by the taxpayer must clearly identify the specific decision that is being challenged. 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.

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6 Section 355, Paragraph 1, General Tax Code.
7 Section 47, Paragraph 1, Code of Procedure for Fiscal Courts.
Once the claim has been substantiated, the tax authority is given the opportunity to submit its response. Any such response by the tax authority may, in turn, be commented on by the taxpayer in a written reply, and usually the tax authority will be given the opportunity for a rejoinder. The written procedure is not legally limited to two statements by each side, but only in very complex cases will a further exchange of written arguments take place. 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 may 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 may invite the taxpayer to withdraw his or her action in order to avoid its dismissal and to reduce the court fees. 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, where 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 it normally needs to be substantiated within two months thereof.\textsuperscript{8} Revision proceedings currently take about 18 months on average.

\section*{vi \hspace{1em} 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.\textsuperscript{9} On average, the Federal Tax Court decides on the complaint within six months of it being filed.

\section*{vii \hspace{1em} 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.\textsuperscript{10} The complaint needs to be filed and substantiated within one month of the complainant being notified of the final judicial decision.\textsuperscript{11} 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;\textsuperscript{12} or that the courts violated the right to a hearing enshrined in the Constitution.\textsuperscript{13}

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.

\textsuperscript{8} Section 120, Paragraphs 1 and 2, Code of Procedure for Fiscal Courts.
\textsuperscript{9} Section 116, Paragraphs 2 and 3, Code of Procedure for Fiscal Courts.
\textsuperscript{10} Section 90, Paragraph 1, Law on the Federal Constitutional Court.
\textsuperscript{11} Section 93, Paragraph 1, Law on the Federal Constitutional Court.
\textsuperscript{12} Federal Constitutional Court, order of 7 July 2010, Case No. 2 BvR 748/05 et al.
\textsuperscript{13} Federal Constitutional Court, order of 13 April 2010, Case No. 1 BvR 3515/08.
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 obliged 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.

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. 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 above (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 time limits of two or four years, respectively). Upon application by the taxpayer, the competent authorities of the states

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14 Section 361, General Tax Code.
15 Section 69, Code of Procedure for Fiscal Courts.
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 Federal Central Tax Office (based in Bonn). 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 separate 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. The legal redress department is not bound by the opinion of the official who was responsible for the notice concerned. It may consider the administrative appeal partly or even fully justified, and will then amend the notice accordingly.

ii Decision on legal actions

If the tax authority (partly or fully) 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. 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. Each senate at the Federal Tax Court likewise consists of five judges, but there are only professional and no lay judges. Similarly to the lower tax courts, the line taken by a senate of the Federal Tax Court 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 assisted by specialised departments of 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:

- 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);
- 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
- 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).

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16 Section 6 Code of Procedure for Fiscal Courts.
17 Federal Court of Justice (Criminal Division), judgment of 2 December 2008, Case No. 1 StR 416/08.
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. 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. 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 separate notice of assessment, as the case may be). Given that the administrative appeal procedure as well as judicial proceedings almost always concern the administrative notice or the separate 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 –

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18 Section 218, Paragraph 2, General Tax Code.
19 Article 3, Paragraph 1, Federal Constitution.
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). It is, however, conceivable that competitors’ complaints could be based on the violation of EU state aid rules, if applicable.

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 (see Section I). 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):

<table>
<thead>
<tr>
<th>Value of the matter in dispute</th>
<th>Fees for administrative appeal proceedings before the issuing authority</th>
<th>Fees for legal action before the lower tax court</th>
<th>Fees for revision proceedings before the Federal Tax Court</th>
</tr>
</thead>
<tbody>
<tr>
<td>€300,000</td>
<td>No fee</td>
<td>€9,848</td>
<td>€12,310</td>
</tr>
<tr>
<td>€3 million</td>
<td>No fee</td>
<td>€50,144</td>
<td>€62,680</td>
</tr>
<tr>
<td>€30 million</td>
<td>No fee</td>
<td>€438,944</td>
<td>€548,680</td>
</tr>
</tbody>
</table>

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. Accordingly, it is important to apply in good time for any binding ruling to be sought. The General Tax Code 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. 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.

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.

At 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 Federal Central Tax Office in Bonn 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

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20 Section 89, General Tax Code.
21 Section 204 et seq., General Tax Code.
22 Section 178a, General Tax Code.
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 DT Ts. 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 General Tax Code.

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. It 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. 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.

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 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. This principle was confirmed by the Federal Tax Court in a judgment of 11 January 2012.

26 Case No. I R 27/11.
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.

It should also be mentioned that protection under EU law is taken very seriously by German tax courts. The German Federal Tax Court, in particular, is the court with the highest number of references to the European Court of Justice in the whole of the European Union. Apart from EU law questions related to customs duties, VAT and excise duties, German tax courts have been playing a major role in the development of protection of individuals and enterprises under the fundamental freedoms, and a new area that is currently being explored is that of EU state aid law.

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.
Chapter 12

GREECE

Ioannis Stavropoulos

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 regard to tax disputes has fallen from 142,852 in 2012 to 29,184 in 2018, while the number of pending appeals before the Administrative Court of Appeal has fallen from 11,322 in 2012 to 8,946 in 2018, 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 3,608 in 2018.2

Moreover, fundamental steps were taken in the tax procedure with the introduction of a uniform Tax Procedure Code3 (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.

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1 Ioannis Stavropoulos is the managing partner of 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.
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 pre-emptive 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 pre-emptive 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.

4 Pol 1069/4 March 2014.
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. Its decisions are 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. 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.

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6 Ibid.
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, 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 Revenue7 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 and unified real estate possession tax 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.

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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.

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

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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).

**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. 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 (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 (Convention 90/436/EEC) and the mutual agreement and arbitration

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9 Article 47, L3943/2011.
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 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:

- the legal characterisation of the individual steps that an arrangement consists of is inconsistent with the legal substance of the arrangement as a whole;
- the arrangement is carried out in a manner that would not ordinarily be employed in what is expected to be reasonable business conduct;
- the arrangement includes elements that have the effect of offsetting or cancelling each other;
- the arrangements are circular in nature; and
- 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.


12 Pol 1129/30 August 2017 and Pol 1049/7 April 2017 further clarify the application of Article 63A of TPC.
MCAA), which was signed by Greece in Paris in January 2016. On 15 June 2018 the Independent Authority for Public Revenue (IAPR) published a circular where it listed the jurisdictions with which Greece intends to implement the CbC MCAA. The first exchange of report with respect to the fiscal year ending 31 December 2016 was due in June 2018, while for the following year ending 31 December 2017 the report is expected to be exchanged by 31 March 2019.

Additionally, Greece recently 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 (Articles 3–5), dividend transfer transactions (Article 8) and the artificial avoidance of PE status (Articles 12–15).

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. 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 fairly recently issued judgment, 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

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.
15 A list of these can be found on the website of the International Economic Relations Directorate.
16 No. 1445/2016.
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\(^\text{17}\) 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.

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.
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.

Dispute procedures involve settlement of tax disputes at the administrative level and in court. From the issuance of a tax assessment, the maximum time frame for the settlement of a tax dispute at the administrative level is 15 months. Subsequently, taxpayers who disagree with the DGT decision have to pass the 15-month appeal proceeding. There is no set time limit within which the Tax Court must issue a verdict. Practically speaking, however, the verdict is very likely be issued within three to 18 months from the last proceeding. There are no cost burdens on the taxpayer to resolve the dispute either at the objection or appeal stage.

All tax disputes fall under the jurisdiction of the Tax Court with the exception of criminal tax offences and third-party claims with respect to seized goods. In 2017, 65 per cent of the Tax Court verdicts were in favour of the taxpayer, with 55 per cent of decisions being fully approved and the rest partially approved.2 Once the Tax Court verdict is issued, the taxpayer or the DGT may challenge the Tax Court verdict by filing a reconsideration application to the Supreme Court within three months of the copy of the Tax Court verdict being received by either party. The Supreme Court is required to issue a decision within six months of the date the reconsideration application files have been completely received. The party that lodges a civil review case to the Supreme Court must pay the cost of registration, and the losing party must bear the cost of the civil review proceeding. In 2017, 87 per cent of Supreme Court decisions rejected the reconsideration application.3

The Tax Court is not bound by previous court decisions. This often makes the Tax Court’s judgments inconsistent. The taxpayer is also likely to be dealing with similar cases that for the previous tax year have been settled with the court. It is also worth mentioning that most tax objection filings are rejected by the DGT. The DGT itself is pressured by the

1 David Hamzah Damian is a partner and Ganda Christian Tobing is a senior manager at DDTC Consulting.
2 http://www.setpp.kemenkeu.go.id/statistik.
‘targeting system’ of the government, which requires the DGT to collect a certain amount of tax revenue as determined by the government and failure to do so may affect the DGT tax officials’ key performance indicator.

It is not surprising that the Indonesian Chamber of Commerce and Industry recently received complaints about tax audits where there were 700 taxpayers being examined in the preliminary evidence audit (pre-investigation) process, including some large taxpayers and multinational enterprises.4 Tax officials’ ‘overly aggressive and scary’ actions5 may likely be an impact of overzealous tax collection, which may affect business confidence and have negative effects on the business climate. The ‘overly aggressive and scary’ actions may be traced back to the quality of the tax audit, which 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. The pressure of a high-tax revenue target will have an impact on the tax officials’ interpretation of the law, which causes the aggressive tax audit approach.

Although the aggressive approach of tax audits is most likely linked to the high-tax revenue pressure, the government and the house of representatives increased the revenue target in the 2019 state budget by 15 per cent from the 2018 budget at 1,548 trillion rupiah. The tax revenue target in the 2019 state budget amounting to 1,780 trillion rupiah consists of 1,572 trillion rupiah in taxes revenue and 208 trillion rupiah in excise and customs duties. In order to reach the target, the government of Indonesia plans to strengthen tax services in order to encourage voluntary disclosure, monitor the implementation of automatic exchange of information and access to financial information for tax purposes, monitor the post-amnesty programme, increase the effectiveness of business development services to small and medium-sized sectors, law enforcement, and continue comprehensive tax reform with respect to tax legislation and the infrastructure of tax administration. Law enforcement seems to be a high priority, and information technology will be key with respect to the future of tax compliance and monitoring self-assessed tax payments in Indonesia. However, the implementation of these policies in 2019 will be challenging owing to the political election process currently under way in Indonesia.

With regard to law enforcement policies, in August 2018 the DGT issued Circular Letter No. SE-15/PJ/2018 (CR-15) regarding a tax audit policy which in particular sets out the DGT’s aim to revitalise the audit process through determination of a list of priority targets for tax audit. The list of priority targets for tax audit was compiled as a result of the relevant tax office determining which taxpayers should be included based on the list of priority targets for potential investigation. The list of priority targets for potential investigation is a list of target taxpayers alleged as non-compliant taxpayers. The indicators of non-compliance for corporate taxpayers are the intra-group transaction value, the tax invoices issued, the audit result in previous years, and the results of analysis of other information, data, reports or complaints, including results of data analysis from the Center for Tax Analysis.

The DGT is also focused on the possibility of collecting tax revenue on specific kinds of income in certain sectors, for example, by introducing withholding tax applicability to parties involved in buy–sell transactions under certain conditions. Taxpayers involved in distribution, agent and retailer schemes may be implied by DGT Circular Letter No. SE-24/PJ/2018 (CR-24) regarding tax implications on income received by the buyer.

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4 https://epaper.kontan.co.id/news/478363/Stop-Bikin-Takut-Pembayar-Pajak#.
related to certain conditions under buy–sell transactions. CR-24 extends the definition of bonus and prizes that was set out in the Income Tax Act by including conditional rebates arising from active business afforded in the distribution of goods and retail business sectors as a kind of bonus or prize income, and stipulates that the seller withhold tax at a rate of 15 per cent of the conditional rebate paid to the buyer, which is basically similar to withholding tax rate for passive income. Therefore, the CR-24 would apparently be regarded as ultra vires by regulating beyond the scope of the Circular Letter.

Applicable from 1 January 2019, the DGT has simplified the mechanism of the tax treaty application by changing the regulation as regards the reporting of the certificate of domicile (CoD) of a foreign taxpayer in cross-border transactions. This will significantly reduce tax disputes arising from administrative matters of tax treaty application. Further, Indonesia’s participation in the Multilateral Instrument to implement tax treaty related measures sponsored by the OECD and G20 has also affected the anti-tax treaty abuse measures in domestic regulation. In 2018, the DGT issued DGT Regulation No. 25/PJ/2018 (DGT Reg 25/2018) revoking DGT Reg 10/2017. Pursuant to DGT Reg 25/2018, treaty abuse is deemed to have occurred if there are transaction arrangements, directly or indirectly, with the aim of obtaining the tax treaty benefits, which is contrary to the object and purpose of tax treaty. The form of tax treaty benefits stipulated in the domestic measures are a reduction of the tax burden or no tax imposed in any jurisdiction (double non-taxation). In practice, however, the domestic anti-tax treaty abuse regulation is adopting the economic substance doctrine by highlighting the conditional circumstances of the foreign taxpayer, such as tax payment in its domicile, assets and employees as indicators of sufficient economic substance in order to access the tax treaty benefits. Having no detailed guidance in determining the reasonable ‘sufficient economic substance’, the implementation of the anti-tax treaty abuse measure is likely to become uncertain.

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
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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.

With respect to excises disputes, the taxpayer is entitled to file an objection letter against the DGCE notice of excises collection within 30 days of being notified. The DGCE must issue an objection decision within 60 days of the receipt of the objection letter. Prior to filing an objection, the taxpayer is required to provide a cash or bank guarantee or excise bond from the insurance company equivalent to the amounts of excises assessed. Taxpayers who disagree with the DGCE objection decision may file an appeal to the Tax Court within 60 days from the date of the objection decision. The taxpayer must pay at least 50 per cent of the total underpaid excises before filing an appeal to the Tax Court.

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 and verification. Other tax letters issued by the DGT could be subject to dispute depending on the content of such letters. 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.

According to the DGT audit policy, the DGT can also audit a taxpayer based on selective criteria. The DGT has recently stated to focus on a list of priority targets for potential investigation, which is a list of target taxpayers alleged to be non-compliant taxpayers. As mentioned above, CR-15 uses various factors to determine whether a taxpayer is included in the list of priority targets or not, including indication of a high level of non-compliance by a taxpayer. The indicators of non-compliance are determined based on the type of taxpayer (corporate or individual) and the type of tax office the taxpayer is registered with. In general, the indicators for corporate taxpayers include:

- the existence of an intra-group transaction with a value of more than 50 per cent of the total transaction value;
- the issuance of more than 25 per cent of tax invoices to taxpayers whose taxation registration numbers begin with 000 in a tax period;
- no audit on all taxes for the past three years; and
as a result of analysis of other information, data, reports or complaints, including results of data analysis from the Center for Tax Analysis.

For individual taxpayers, the indicators include:

- **a** non-compliance with tax payment and submission of annual tax returns;
- **b** no audit on all taxes for the past three years; and
- **c** as a result of analysis of other information, data, reports or complaints, including results of data analysis from the Center for Tax Analysis.

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.6

In addition, the CR-15 stipulates the tax audit criteria based on concrete data. While the GRT Law is silent on the definition of concrete data and only states the confirmation result of tax invoices and withholding slip as examples of concrete data, the CR-15/2018 extends the classification of concrete data by including any data or information that could directly prove the non-compliant behaviour of taxpayers. The audit timeline for special tax audits based on concrete data is in total one month and 10 days from the issuance of the audit instruction letter. Considering the time frame of the special audit based on concrete data, taxpayers should be aware and prepare to face a special audit based on concrete data especially in relation to the tax year in which the issuance of assessment will expire.

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.7 However, this would not be the case for a taxpayer who does not maintain proper accounts and records. In such case, the DGT can 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

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by Supreme Court judges.\textsuperscript{8} 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.\textsuperscript{9}

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:

\begin{itemize}
\item\textit{a} an indefinite timeline if filing an application for the first time;
\item\textit{b} a DGT decision is made within six months of receipt of the first application;
\item\textit{c} a second application is filed within three months of the DGT decision on the first application; and
\item\textit{d} a DGT decision is made within six months of receipt of the second application.
\end{itemize}

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

\textsuperscript{8} See Supreme Court Decision No. 1026/B/PK/PJK/2014.
\textsuperscript{9} See Supreme Court Decision No. 877/B/PK/PJK/2013.
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.10 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 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.

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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.

Legitimate businesses should declare their taxes properly according to the law and should not be afraid of tax audits if everything is in order. The operations of tax audits are to verify what has been reported in the tax return and by doing so it is intended to ensure that those who should be paying taxes are actually doing so and those who have reported their taxes have done so correctly. The DGT shall ensure that any past practice agreed to is respected, and if that practice is overturned, then it should be done prospectively and not retrospectively. When there is a tax audit, the taxpayers have to recollect claims made years ago and if they do not have the details and documents to support the transactions then they face the consequences of the expenses being disallowed. The taxpayer is, therefore, recommended to have a proper tax risk control, especially documentation and the rationale to justify any specific transactions.

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\(^\text{11}\) and on the Supreme Court website.\(^\text{12}\) 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.\(^\text{13}\) Contrary to that, a full Supreme Court decision, even one concerning a tax dispute, is provided by the Supreme Court on its website.\(^\text{14}\)

\(^\text{11}\) www.setpp.depkeu.go.id/Ind/News/Risalah.asp.
\(^\text{12}\) putusan.mahkamahagung.go.id/pengadilan/pengadilan-pajak.
\(^\text{14}\) 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.15

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.16 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).

Currently, there are 63 judges associated with the Tax Court, with a small minority having a law education background, and the majority with an accounting background and general tax knowledge. Most members of the Tax Court are retired tax or customs officials. It is therefore not surprising that there has been criticism regarding the independence of the Tax Court.17 The number of tax disputes filed with the Tax Court in 2017 amounted to 9,580 applications, with an average of 9,806 cases annually during the period 2012–2017. In 2017, 65 per cent of the Tax Court verdicts were in favour of the taxpayer, with 55 per cent decisions, among others, fully approved and the rest partially approved. The Supreme

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15 See Supreme Court Decision No. 274/B/PK/PJK/2011.
Court received 2,187 applications for reconsideration of the Tax Court verdict in 2017, up 18 per cent from reconsideration application in 2016. Lastly, the percentage of winning at the Supreme Court was 13 per cent in 2017, as the majority of Supreme Court decisions uphold the Tax Court verdict.

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 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 if 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.19

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.

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. Rather, the doctrine of substance over form implicitly embodied in Article 4, Paragraph 1 of the Income Tax Law and in the Indonesian Accounting Standards is generally considered as the Indonesian general anti-avoidance rule. In many cases, the Tax Court implemented the substance over form doctrine to interpret the term ‘beneficial owner’ in Indonesian double tax treaties.20 Recently, however, the Supreme Court held that the decision of the Tax Court to implement the substance over form principle to recharacterise an interest payment transaction under the scope of interest clause in the Indonesia–Netherlands double tax treaty was incorrect.21

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;

19 See Supreme Court Decision No. 566/B/PJK/2013.
21 See Supreme Court Decision No. 135/B/PK/PJK/2017.
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

e the beneficial owner test: this was modified from limitations on benefits rules (DGT Regulation No. 25/PJ/2018). 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 the OECD, Indonesia expressed its support on the OECD views that BEPS presents a high risk to state revenue. Indonesia has responded to the BEPS Action Plan outcome by implementing some regulations as follows:

<table>
<thead>
<tr>
<th>No.</th>
<th>BEPS Outcome</th>
<th>Response</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Taxation of the Digital Economy</td>
<td>No response</td>
</tr>
<tr>
<td>2</td>
<td>Hybrid Instruments</td>
<td>Response via MLI, but no implementing regulation issued yet</td>
</tr>
<tr>
<td>3</td>
<td>Controlled Foreign Corporations (CFC)</td>
<td>Ministry of Finance Regulation No. PMK-107/PMK.03/2017</td>
</tr>
<tr>
<td>4</td>
<td>Limitation of Interest Deduction</td>
<td>Ministry of Finance Decree No. PMK-169/PMK.101/2015</td>
</tr>
<tr>
<td>5</td>
<td>Harmful Tax Practices (HTP)</td>
<td>No HTP regime based on the OECD peer review report</td>
</tr>
<tr>
<td>6</td>
<td>Treaty Abuse</td>
<td>Response via MLI and the issuance of the DGT Regulation No. 25/PJ/2018. Under MLI, Indonesia chose to adopt both the principal purpose test and the simplified limitation on benefits</td>
</tr>
<tr>
<td>7</td>
<td>Permanent Establishment Arrangement</td>
<td>Response via MLI</td>
</tr>
<tr>
<td>8–10</td>
<td>Transfer Pricing and Value Creation</td>
<td>No response</td>
</tr>
<tr>
<td>11</td>
<td>BEPS Data Analytics</td>
<td>No response</td>
</tr>
<tr>
<td>12</td>
<td>Mandatory Disclosure Rule</td>
<td>No response</td>
</tr>
<tr>
<td>13</td>
<td>Transfer Pricing Documentation</td>
<td>Minister of Finance Regulation No. PMK-213/PMK.03/2016</td>
</tr>
<tr>
<td>14</td>
<td>Dispute Settlement</td>
<td>Response via MLI</td>
</tr>
<tr>
<td>15</td>
<td>Multilateral Instrument</td>
<td>MLI signatories, but not ratified yet</td>
</tr>
</tbody>
</table>

Apparently, the BEPS effects in Indonesia will significantly affect transfer pricing and the entitlement to treaty benefits rules. These topics have been the major issues in the international tax disputes arena in Indonesia.

The DGT has issued a regulation on tax treaty application to strengthen the anti-tax treaty abuse rule (DGT Regulation No. 25/PJ/2018). Prior to the issuance of DGT Reg
25/2018, the DGT issued DGT Regulation No. 10/PJ/2017, which contains the principal purpose test where treaty abuse is considered to have occurred where one of the purposes or the sole purpose of the transaction arrangement is to obtain the treaty benefit, which is contrary to the object and the purpose of tax treaties. Under DGT Reg 25/2018, the treaty abuse may be considered to have occurred if there are transaction arrangements either directly or indirectly with the aim of obtaining the tax treaty benefits, which is contrary to the object and purpose of treaty. The form of tax treaty benefits stipulated in the domestic measures is a reduction of the tax burden or no tax imposed in any jurisdiction (double non-taxation). In addition to the transaction purpose test, DGT Reg 25/2018 also sets out the criteria that must be fulfilled to obtain the tax treaty benefits based on the economic substance doctrine.

The criteria to obtain tax treaty benefits are as follows:

1. There is economic substance in the establishment of the entity and carry out of transaction;
2. The legal form is same as the economic substance in the establishment of the entity or carry out of transaction;
3. The business activities are managed by a company’s own management that has sufficient authority to carry out the transactions;
4. 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;
5. It has sufficient employees with the expertise and certain skills in accordance with its line of business; and
6. 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 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 concerning economic substance. It seems that the wording of the anti-treaty abuse rules makes it easy for the DGT to assume treaty abuse and, as such, will be tempted to presume intention simply because of the presence of benefits. 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. The authors agree with Dennis 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. Therefore, 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.

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IX   DOUBLE TAXATION TREATIES

Indonesia has concluded and ratified tax treaties with 68 countries, the legal status of which prevails over Indonesian domestic tax laws according to Article 32A of the Income Tax Law. Although Indonesia is not a party to the Vienna Convention on the Law of Treaties (VCLT), it has a law concerning international treaties which establishes that international treaties shall be applied in good faith. This is similar to what is directed in the VCLT. As demonstrated in the non-tax case of *Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)* at the International Court of Justice, Indonesia considers the provision of the VCLT by virtue of customary international law and therefore considers itself bound by its provision.23

With regard to tax cases, 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 by considering application of Article 27 of the VCLT.24 The VCLT was also considered by the Supreme Court in its decision concerning the branch profits tax (BPT) rate, where the Supreme Court held that the BPT rate in tax treaties prevails over the clause in production sharing contracts in the oil and gas sector.25

The use of the OECD works on tax treaty interpretation and application are also considered by the Court. The Tax Court quoted the revised Discussion Draft of the OECD Commentary (2012) as an aid in the interpretation of tax treaties concerning the term ‘beneficial ownership’.26 In another case, the OECD Report on the Attribution of Profits to Permanent Establishment was cited as a primary reference with regard to the deductible expenses of permanent establishments.27

Some Indonesian scholars observed that the Tax Court does not take into account the legal status of interpretation materials, but rather whether such materials have a persuasive value for the judges to decide a case.28 The use of the OECD Commentaries in interpreting uncertain or unclear meaning in a tax treaty is considered widely accepted by most judges in the Tax Court and Supreme Court. In some cases, the judge prefers to use the latest version of the OECD Commentaries, even if the tax treaty in question was signed and came into force a long ago. We also observed that the Tax Court is willing to apply a dynamic interpretation when the interpretation materials considered are not domestic laws or regulations, but on the other hand, tends to apply a static interpretation when it comes to domestic legislation.

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,

25 See Supreme Court decision No. 1542/B/PK/PJK/2018.
26 See Tax Court Decision No. 61550/PP/M.XA/13/2015.
27 See Supreme Court Decision No. 2974/B/PK/PJK/2018.
both domestic and international, are also targeted. As mentioned above, the withholding tax applicability to the conditional rebate in the distribution of goods and retail sectors is also highly targeted.

For individual taxpayers, the post-amnesty programme will be enforced by targeting taxpayers who are potentially non-compliant from a list of targeted taxpayers for tax audit purposes. The increasing impact of the benefit of tax amnesty attracts the DGT to focus on the access to wealth information, such as banking information and land ownership of wealthy individuals. The use of data and information from the automatic exchange of information and data exchange with other institutions will potentially be challenging in the future. In particular, the effort of the DGT to meet the optimal inspection coverage of 2 per cent of individual taxpayers, especially sole proprietors, might be based on the use of data or information provided by third parties.

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 programme to promote lower compliance costs, and to encourage efficient and effective tax administration through, *inter alia*, electronic self-assessment mechanisms and the payment of taxes in currencies other than the Indonesian rupiah. 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.

The tax revenue collection policy will be focused on intensified law enforcement and the continued implementation of the exchange of information.

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29 Financial Note and State Budget 2016 – II.3-2.
30 One of the team advisers is our firm’s managing partner, Darussalam: jakartaglobe.id/economy/ finance-ministry-sets-two-teams-reform-tax-office.
I INTRODUCTION

The Irish tax regime provides opportunities to avoid litigation through various means, including by making voluntary qualifying disclosures, and these ways of rectifying tax issues reduce the incidence of tax litigation. However, tax disputes are common and are likely to increase in the future as the Irish Revenue Commissioners (Revenue) now has access to increased information on taxpayers’ international activities and has allocated additional resources to review compliance in areas such as transfer pricing.

The Irish tax appeals system has been significantly reformed and a new tax appeals regime came into operation on 21 March 2016. Substantial changes were introduced, and a new independent Tax Appeals Commission (TAC) 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 (which the TAC replaced) 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 TAC may hold the hearing or part of the hearing in private. A further change is that the TAC is obliged to publish appeal determinations no later than 90 days after notifying the parties of the determination, and there are currently more than 80 determinations available to review on the TAC 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 on point of law only (but not on fact) on a TAC’s determination, a party can request the TAC to state and sign a case for the opinion of the High Court. The case stated is prepared by the TAC. Further recourse can be made from the High Court to the 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 TAC and courts requires the hiring of specialist tax litigation counsel. This process is typically time-consuming and lengthy, particularly given that there were almost 4,000 outstanding appeals at one point in 2018 and only three Commissioners to hear the appeals. The number of appeals made in 2017 increased to 1,751, which is almost double the number of appeals made in 2016. In 2018 there was a further increase of the number of appeals made to nearly 2,000. The TAC increased recruitment of administrative staff and case managers in 2017, which it is hoped will help to relieve the backlog.
Costs can be substantial, particularly if the case proceeds to the courts system. However, one of the aims of the TAC was to reduce the costs of tax disputes. Unlike the previous tax appeal system, appeals to the TAC can be dealt with without the requirement for a hearing, which can have a significant impact on the cost of an appeal. Furthermore, the Finance Act 2018 provides for some amendments to the tax appeals procedure, including removing the requirement to provide certain detailed information at the very early stages of an appeal and clarifying the authority given to the TAC to determine a new appeal on the basis of a previous determination involving a similar or related matter without the need to hold a new hearing which could result in the reductions of costs of tax disputes.

The Revenue has had some success in litigating aggressive domestic tax avoidance under the Irish general anti-avoidance provision previously contained in Section 811 of the Taxes Consolidation Act 1997 (TCA 1997), and more recently has been focusing on specific anti-tax avoidance provisions. However, in the Supreme Court judgment in Revenue Commissioners v. Droog, 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 TCA 1997, which is the Irish tax code. It should be noted that Section 811 of the TCA 1997 applies to transactions commenced on or before 23 October 2014. Amended general anti-avoidance rules set out in Section 811C of the TCA 1997 apply to transactions commenced after 23 October 2014.

II COMMENCING DISPUTES

i Initiating tax disputes

Tax disputes could arise from civil law matters or criminal matters. The vast majority of tax disputes relate to civil law matters.

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 TAC and not in the first instance to the Revenue. However, taxpayers are entitled to avail of an internal review facility with the Revenue prior to pursuing an appeal before the TAC. If the taxpayer is not satisfied with the outcome of the internal review, that taxpayer may pursue an appeal to the TAC.

Tax disputes may also arise where a settlement cannot be reached during the course of a Revenue audit. 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 TAC. 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.

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2 The TAC has the authority under Section 949U of the Taxes Consolidation Act 1997 to adjudicate on an appeal without a hearing, where it considers it appropriate.
3 [2016] IESC 55.
ii  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 judgement ought to be made. As a general rule, an assessment in respect of a chargeable period cannot be made more than four years after the end of the accounting period in which the tax return in respect of such chargeable period was filed. In respect of the chargeable period prior to 1 January 2013, no time limit applies where the Revenue has reasonable grounds to believe that a tax return made is insufficient owing to fraud or neglect or in cases of tax avoidance transactions. The current law is that no time limit applies in respect of chargeable periods from 1 January 2013, where:

a  a taxpayer fails to file a return for a chargeable period;

b  the Revenue is not satisfied with the sufficiency of the return;

c  the Revenue has reasonable grounds to believe any form of neglect (as defined) or fraud has been committed by or on behalf of the taxpayer; or

d  the Revenue is of the opinion that the taxpayer has been involved in a tax avoidance transaction within the meaning of Section 811 or Section 811C of the TCA 1997.

iii  Disclosure
There is no statutory requirement on a taxpayer to disclose any particular information in the course of an appeal to the TAC. However, the TAC can require that the taxpayer and the Revenue submit a written 'statement of case', which would typically contain an outline of the relevant facts, a list and copies of the relevant documents that will be relied upon, details of any witnesses, details of statutory provisions being relied upon and any case law being relied upon. The burden of proof is on the taxpayer (except in cases where the Revenue attempts to raise an assessment outside the statutory time limit of four years). Therefore, it is in the interest of the taxpayer to provide as much evidence as possible in support of the appeal. In addition, the TCA 1997 provides the Revenue with significant powers to request the production of information, books and records from a taxpayer. The Revenue also has the power to call for the production of information in relation to a taxpayer’s liability from third parties such as financial institutions.

iv  Revenue rulings
There is no practice for the Revenue to provide binding tax rulings. While it is possible to apply to the Revenue for guidance or opinion in relation to certain matters, such opinions 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. Certain Revenue opinions are subject to the exchange of information requirements in respect of tax rulings set out in the Council Directive (EU) 2015/2376 (the EU Directive) and the OECD framework. The EU Directive was implemented in Ireland by the Administrative Cooperation in the Field of Taxation Regulations 2016. It is not confined to intra-EU situations, applies to relevant opinions issued on or after 1 January 2017, and also has a look-back measure whereby information in relation to opinions 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), were to be exchanged. The OECD framework is also in effect, and applies to certain opinions issued on or after 1 April 2016. Similar to the EU Directive, there is a look-back provision whereby relevant opinions issued or modified in the tax years 2010 to
2013 (and in effect on 1 January 2014) and all relevant opinions issued or modified between 1 January 2014 and 31 March 2016 were to be exchanged. Unlike the EU Directive, under the OECD framework relevant opinions must be exchanged only with certain countries.

v Avoiding disputes

There are a number of ways in which a taxpayer can reduce the risk of a tax dispute. Ireland’s tax regime is one of self-assessment but there are mechanisms for the taxpayer to rectify errors identified after the tax returns are filed. A ‘self-correction’ facility permits taxpayers to regularise their tax affairs without incurring a penalty where they detect certain minor errors. This facility has limited application but the voluntary ‘qualifying disclosure’ regime is more widely available and 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 whether the disclosure was ‘unprompted’ or ‘prompted’ (e.g., after notification of a Revenue audit), the category of default (e.g., deliberate behaviour or carelessness) and 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.

vi Freedom of information requests

The Freedom of Information Act can be a useful tool for taxpayers as it allows individuals to request access to records, amendments of records or reasons for a decision of a public body, including the Revenue, in respect of information created after 21 April 1998 subject to certain exemptions.

III THE COURTS AND TRIBUNALS

i The courts

An appeal of a notice of assessment is determined by the TAC. The right to have an appeal reheard by a circuit court judge 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 TAC require the TAC, 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 on the
request of the Revenue. 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.

Tax disputes arising from criminal matters commence in the district court, which could then send the case to a higher court depending on a number of factors. A conviction or a sentence delivered by the district court can be appealed to the Circuit Criminal Court.

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. There is a strict time limit to seek a judicial review.

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 TAC 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 TCA 1997 or any other applicable tax legislation 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 at the rate of 0.011 per cent per day or part of a day 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 need to be established:

- 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’);
- 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
- 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, 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.

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4 [2002] IR, 84.
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.

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 opinions may also now fall within the new exchange of information arrangements in respect of tax rulings.

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

Although currently the use of the alternative dispute resolution mechanism in Ireland is rare, this is expected to change in the future. Directive 2017/1852 on Tax Dispute Resolution Mechanisms in the European Union (the Directive) was published on 10 October 2018 and applies to claims submitted after 1 July 2019 in respect of tax years commencing on or after 1 January 2018. The Directive must be implemented by Ireland by 30 June 2019. Under the Directive, tax authorities would be required to resolve multi-jurisdictional tax disputes through a mutual agreement procedure (MAP), failing which such disputes would be resolved through binding arbitration.

On 7 June 2017, Ireland along with almost 70 other countries signed the OECD’s Multilateral Instrument (MLI), which, when it comes into force, will incorporate certain recommendations made under the OECD’s BEPS project into many of Ireland’s double taxation treaties. The MLI provides that mandatory binding arbitration will apply in cases where a dispute cannot be resolved through the MAP currently provided for in the Model OECD Tax Treaty. Ireland has opted to adopt this provision of the MLI and this new dispute resolution mechanism will amend the double taxation treaties that Ireland has signed with other countries provided the other countries have also opted to adopt this provision of the MLI.

VIII ANTI-AVOIDANCE

Ireland’s general anti-avoidance legislation is provided for in Section 811 of the TCA 1997 in respect of transactions commenced on or before 23 October 2014 and in Section 811C of the TCA in respect of transactions commenced after 23 October 2014. Section 811 of the TCA 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.6 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

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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’ 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’.

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’.

Section 811C of the TCA 1997 amends the general anti-avoidance rules in respect of transactions commenced after 23 October 2014 and tries to address some of the deficiencies of Section 811 of the TCA 1997. The definition of a ‘tax avoidance transaction’ is amended so that additional matters such as the form and substance of the transaction are considered when determining whether a transaction is a tax avoidance transaction. In addition, the Revenue is not required to form an opinion that a transaction is a tax avoidance transaction (as under Section 811 of the TCA 1997) but when having regard to the relevant matters, ‘it would be reasonable to consider’ that a transaction is a tax avoidance transaction. These amendments lower the threshold for a transaction to be a tax avoidance transaction, but they also make it unclear whose responsibility it is to reasonably consider whether a transaction is a tax avoidance transaction. Section 811C of the TCA 1997 provides for the same exclusions as Section 811 of the TCA 1997, which are discussed above.

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7 The Irish legislative body.
IX DOUBLE TAXATION TREATIES

The MAP article in double taxation treaties is the way in which disputes between tax authorities in relation to the application of double tax treaties are addressed. As noted above, the MAP in Ireland’s treaties will amended by the MLI when it comes into force.

There have been very few cases before the Irish courts involving double taxation treaties. One 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). 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.

Another Irish case is the High Court case of O’Brien v. Quigley, which concerned the existence of a ‘permanent home’ for the purposes of the tiebreaker provisions of the double taxation treaty (DTA) between Ireland and Portugal. The Revenue tried to claim taxing rights for the tax year 2000–2001 while the taxpayer was resident in Ireland as well as Portugal. Therefore, the taxing rights had to be determined in accordance with ‘tie break’ provisions of the DTA, which provide that that an individual shall be deemed to be a tax resident where he or she has a permanent home available to him or her. The High Court held that for a permanent home to exist there must be an element of personal link between the taxpayer and the accommodation and the taxpayer must intend to use the premises or keep it available for his or her permanent use. On that basis, the court held that the taxpayer did not have a permanent home in Ireland.

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 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 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.

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8 [2007] IEHC 250.
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. 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.

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

It is expected that the Revenue will continue to focus on artificial tax avoidance schemes, and seek to challenge these under Section 811 or Section 811C of the TCA 1997 and more specific anti-avoidance provisions.

As exit tax came into effect in Ireland on 1 January 2019, it is expected that the Revenue will focus on companies exiting Ireland as well as companies in liquidation and companies that have sold their trade apparatus.

Transfer pricing is a relatively new concept in Ireland, but various changes to the Irish transfer pricing rules are currently under consideration such as the extension of transfer pricing rules to non-trading income and small and medium-sized enterprises. Changes to the current transfer pricing rules are expected to be introduced as early as 1 January 2020. It is expected that compliance with the transfer pricing rules 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). A significant proportion of the Revenue reviews of the research and development (R&D) credit claims have found material non-compliance with the terms of the relief and have yielded settlement payments which are often due to overstatement of R&D expenses and failure to provide sufficient documentation in support of the R&D credit claim. Owing to the amount of the R&D credit claims made and the success of Revenue interventions, it is expected that the Revenue will continue to focus on this area.

The status of independent contractors for tax purposes has also been an area of recent 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

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Department of Finance ran a consultation process in 2016 on the use of intermediary-type employment structures and self-employment arrangements but no legislative change has resulted from the consultation as yet.

The European Union Directive 2018/822 (the Directive) came into force on 25 June 2018 and it must be transposed into Irish law by 31 December 2019. Under the provisions of the Directive, EU-based tax advisers, accountants, lawyers, banks, financial advisers, other intermediaries and, in some cases, taxpayers will be obliged to report to their local tax authorities all cross-border arrangements that have particular characteristics concerning taxes imposed by an EU Member State. The reporting obligation will not commence until August 2020, but arrangements occurring after 25 June 2018 must be reported. The information reported to the Revenue will be exchanged with other EU Member States quarterly, with the first exchange occurring on 31 October 2020.

On 21 June 2016, the Council of the European Union agreed on the Anti-Tax Avoidance Directive (ATAD), which sets out anti-avoidance rules across five specific areas: controlled foreign corporation (CFC) rules, deductibility of interest, exit taxation, hybrid mismatches and a general anti-avoidance rule (GAAR). Further to this, on 29 May 2017, the Council of the European Union adopted a Directive amending the ATAD. This Directive, known as the ATAD 2, extends the scope of the ATAD to hybrid mismatches involving third countries (i.e., non-EU countries) and targets other types of mismatches not covered by the ATAD. The deadline for implementation of the 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).

Some of the ATAD measures have already been transposed into Irish law. The Finance Act 2018 introduced an exit tax and a CFC regime with effect from 1 January 2019. A consultation is being undertaken before the introduction of the interest limitation and anti-hybrid rules required under the ATAD. Ireland’s GAAR is likely to require little change to comply with the ATAD.

Measures introduced in the Finance Act 2016 were intended 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. Ireland has ratified the MLI but the ratification has not yet been deposited with the OECD. It is expected that the ratification process will be completed in due course.

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. 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

The implementations of the ATAD, the ATAD 2 and the OECD BEPS strategy will continue to change the Irish tax landscape as well as the international landscape.

Ireland’s relatively low corporate tax rate of 12.5 per cent on trading income, a limited withholding tax regime, the ‘knowledge development box’ and various other incentives particularly for R&D activities means that Ireland is still a focal point for international tax strategies. The introduction of the CFC rules is not expected to adversely affect Ireland’s attractiveness as a tax location considering the broad exemptions to the CFC rules that are provided for in the legislation. 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 intra-group written agreements and other legal documentation appropriately reflect the substance of that which occurs in Ireland. If the underlying legal structures are simply boilerplate intra-group agreements, the Irish taxpaying corporate should anticipate foreign tax authority challenges.

In addition, a recent UK tax court decision on company tax residence\(^\text{12}\) has highlighted the importance of Irish incorporated companies with foreign (including US) parents, 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 group-wide 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 discretion and not justify their decisions with respect to the wider group structure but have the ability to account for their decisions for the company pursuant to their duties and obligations as directors of that company.

The increased cooperation and automatic exchange of information between the tax authorities will increase the scrutiny on international tax structures and it is expected that it will lead to an increase in disputes with the Revenue as well as disputes over taxing rights with foreign tax authorities.
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). 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 2018 and relating to the situation as at 31 December 2017, show that the number of cases pending before the tax courts of first instance was 263,117, and the number of cases pending before the tax courts of second instance was 154,518.

Moreover, the same statistics highlight that in 2017:

- around 70 per cent of cases filed before the tax courts of first instance and around 57 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; and

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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 ‘Appendici statistiche e guida alla relazione sul monitoraggio dello stato del contenzioso tributario e sull’attività delle commissioni tributarie – anno 2017’, issued in June 2018 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.
the amount of cases won by taxpayers before the tax courts of first instance was around 31 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 39 per cent (45 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 on productive activities (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.

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).

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\(^9\) 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.\(^\text{13}\)

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.\(^\text{14}\)

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);\(^\text{15}\) and

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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
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

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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'.

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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 and recent favourable settlement procedures regarding tax claims

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.\(^{21}\)

On 23 October 2018, the Italian government enacted Law Decree No. 119\(^{22}\) (the Decree) containing, *inter alia*, provisions entailing the settlement of tax claims and pending litigations. The most important provisions introduced by the Decree are summarised below.

**Settlement of tax audit reports**

Under Article 1 of the Decree, taxpayers may settle tax claims provided in tax audit reports issued by 24 October 2018 and that, at the same date, have not yet been followed by a notice of assessment, nor by an invitation to appear by the tax authorities to discuss the matter. Article 1 applies in respect of income and corporate tax, withholding tax, IRAP, VAT, capital tax on foreign-held real estate, capital tax on foreign-held financial assets, and social security contributions. The settlement shall concern the whole tax audit report (no cherry-picking of the tax claims is allowed). By 31 May 2019, taxpayers shall pay the taxes and social contributions due (or the first of 20 quarterly instalments) and file the relevant tax return. No penalties and interest shall be applied, except for EU own resources (e.g., VAT and customs duties), for which interest on arrears shall be due. Tax losses cannot be used to offset the tax base resulting from the audit reports. According to Paragraph 9 of Article 1, for the tax years covered by the tax audit reports (up to fiscal year 2015) the deadline for tax assessment shall be postponed by two years. The wording of the law makes no distinction, with respect to such postponement, between cases where the taxpayer opts for the settlement and those where the taxpayer does not.

**Settlement of notices of assessment and tax recovery deeds**

Under Article 2 of the Decree, taxpayers may settle notices of assessment and tax recovery deeds with regard to which the deadline for filing the appeal before the tax court of first instance was not expired as of 24 October 2018 and for which, at the same time, the taxpayer has not already filed an appeal. In order to settle, taxpayers must pay the relevant taxes (or the

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\(^{20}\) This rule was introduced by Legislative Decree No. 156/2015.

\(^{21}\) In such cases, penalties may be lowered down to one-tenth of the minimum penalties due.

\(^{22}\) Converted into law by Law No. 136 of 17 December 2018.
first instalment), without penalties and interest, by 23 November 2018, or the subsequent deadline for filing the appeal before the tax court (the payment can be split in up to 20 quarterly instalments).

**Settlement of pending litigations**

Under Article 6 of the Decree, tax disputes with the Italian Revenue Agency related to assessment deeds (or deeds imposing only penalties) and pending before Italian tax courts may be settled by paying only the taxes charged, without interest and penalties. The amounts to be paid depend on the outcome of decisions previously rendered by the Italian tax courts (if any):

a 5 per cent of the taxes charged in the cases where the dispute was pending before the Supreme Court as of 19 December 2018 and the tax courts of first and second instance have both ruled in favour of the taxpayer;

b 15 per cent of the taxes charged in the cases where the tax court of second instance has ruled in favour of the taxpayer by 24 October 2018;

c 40 per cent of the taxes charged in the cases where the tax court of first instance has ruled in favour of the taxpayer by 24 October 2018;

d 90 per cent of the taxes charged in the cases where the tax dispute is still pending before the tax court of first instance; and

e 100 per cent of the taxes charged in the cases where the last decision rendered by a tax court by 24 October 2018 has ruled in favour of the Italian Revenue Agency.

Where the above-mentioned decisions have ruled only partially in favour of the taxpayer, with reference to the part of the tax claim that has been upheld by the court of first or second instance, 100 per cent of the taxes charged have to be paid. In respect of the part of the tax claim that has been rejected by the relevant court (in favour of the taxpayer), the above-mentioned reductions apply.

With regard to disputes concerning the application of penalties not linked to the existence of an outstanding tax claim, 40 per cent of the penalty challenged; in this respect: the percentage of the penalty to be paid, in order to settle the dispute, is reduced to 15 per cent where the last decision rendered, as of 24 October 2018, by a tax court is in favour of the taxpayer.

In order to settle the case, taxpayers shall submit a specific application and pay the amounts due (or the first instalment) by 31 May 2019 (the payment can be split in up to 20 quarterly instalments). The pending litigation proceedings concerning the disputes at stake are not suspended unless requested by the taxpayer.

**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:
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;23

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;24 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

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.25 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),

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23 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).

24 Until 31 December 2015, if 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 (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.

25 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.
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 Convention26 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).27

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.28

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),

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26 Convention on the elimination of double taxation in connection with the adjustment of profit of the associated enterprises (90/463/EEC).
27 It is worth noting 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.
28 If 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.
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:

- 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;
- 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;
- 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
- 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 (as amended by Directive No. 2017/952 of 29 May 2017) of the Council of the European Union (ATAD), which transposes the recommendations developed by the OECD in the context of the BEPS project.

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.

On 28 November 2018 the Italian government approved the Legislative Decree aimed at implementing into Italian law the provisions contained in the above-mentioned Directive. On 28 December 2018, this Legislative Decree (No. 142 of 29 November 2018) was published in the Italian official gazette.

IX  DOUBLE TAXATION TREATIES

In interpreting double taxation treaties, Italian courts and tax authorities pay little attention to foreign case law and practice. 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.

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 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.

The notion of PE was broadly interpreted by case law. For instance, in Philip Morris, 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.

29 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.

30 Judgment No. 18055 of 4 August 2010.


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.33

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).34

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)35 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 permanent establishments (PEs) of foreign banks (and companies),36 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.37 In PE assessments, the tax authorities tend to take the view that the profits

34 Judgment No. 4600 of 26 February 2009.
35 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 recent decisions, 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 Judgments No. 27018, of 15 November 2017 and No. 25529 of 16 November 2018).
36 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.
37 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;
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.\(^38\) However, in March 2016, the Italian Revenue Agency issued a Circular Letter\(^39\) 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 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,\(^40\) 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.

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38 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.

39 Circular Letter No. 6 of 30 March 2016.

40 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
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.
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.
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.

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\(^5\) 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.\(^\text{17, 18}\)

Nevertheless, it should be noted that such prior notification is not necessary under certain conditions.\(^\text{19}\)

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.\(^\text{20}\) 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.\(^\text{21}\)

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

\(^{17}\) 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. 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.

**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.

**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. In addition, the District Director may, when taxpayers fail to file taxes, determine the tax base or the tax amount.

A reassessment or determination shall be made by sending a reassessment notification or determination notification.

A reassessment shall be accompanied with the reasons for such reassessment. 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.

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.

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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 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, 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.

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.

Although the trial shall basically be in writing, upon request, the requestor shall be provided with a chance to orally make an opinion.

In addition, although a trial for request for review shall be *ex officio*, the requestor may submit a written opposition, or submit evidentiary documents or materials, and the Disposing Agency may submit documents and other materials that establish the facts on which the disposition is based.

The requestor and the Disposing Agency may inspect the documents and materials and request the provision of copies of such documents.

**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.

To make the judgment, the Director-General shall send a certified copy of the written judgment supplemented with the reasons for judgment.

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, are satisfied:

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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).
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.
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,\textsuperscript{60} and (3) the district court having jurisdiction over the location of the general venue of the defendant (the state),\textsuperscript{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.\textsuperscript{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.\textsuperscript{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,\textsuperscript{64} but it is at the SCJ’s discretion as to whether to accept it.

\textbf{IV \quad PENALTIES AND REMEDIES}

\textit{i \quad Tax}

\textit{Delinquent tax}

Delinquent tax is an ancillary tax whose tax base is the amount of unpaid tax.\textsuperscript{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.\textsuperscript{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.\textsuperscript{67}

\textit{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

\textsuperscript{60} Article 12, Paragraph 1 of the Administrative Case Litigation Act.
\textsuperscript{61} Article 12, Paragraph 4 of the Administrative Case Litigation Act.
\textsuperscript{62} Article 285, of the Civil Case Litigation Act (Act No. 109 of 1996).
\textsuperscript{63} Article 312, Paragraph 1 and 2 of the Civil Case Litigation Act.
\textsuperscript{64} Article 318, Paragraph 1 of the Civil Case Litigation Act.
\textsuperscript{65} Article 60, Paragraph 1 of the Act on General Rules for National Taxes.
\textsuperscript{66} Article 60, Paragraph 2 of the Act on General Rules for National Taxes.
\textsuperscript{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.\(^\text{68}\) 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.\(^\text{69}\) The amount of such additional tax shall be 15 per cent multiplied by the fixed amount or underestimated amount.\(^\text{70}\)

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.\(^\text{71}\) 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.\(^\text{72}\) Imposition of substantial additional tax is often a controversial issue in tax audits.

\section*{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.\(^\text{73}\) 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.\(^\text{74}\)

Other actions subject to criminal penalty include refusal to answer to a tax audit, in the absence of reasonable ground.\(^\text{75}\)

\begin{itemize}
\setlength\itemindent{1em}
\item\(^\text{68}\) 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).
\item\(^\text{69}\) Article 66, Paragraph 1 of the Act on General Rules for National Taxes.
\item\(^\text{70}\) 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).
\item\(^\text{71}\) Article 67, Paragraph 1 of the Act on General Rules for National Taxes.
\item\(^\text{72}\) 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.
\item\(^\text{73}\) 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.
\item\(^\text{74}\) 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.
\item\(^\text{75}\) Article 127, Items 2 and 3, Article 128 and Article 129 of the Act on General Rules for National Taxes.
\end{itemize}
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. 1,010.
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 30.7 months in 2017.84

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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).
84 Status of Mutual Negotiation in 2017, 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, and the tax authority actively applies these rules. In addition, there are comprehensive anti-avoidance rules for corporate reorganisation and comprehensive anti-avoidance rules for consolidated tax return.

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 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. The Income Tax Act and Inheritance Tax Act have similar rules.

The IBM case is one of the cases where the application of such anti-avoidance rule was an issue. 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.

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. In the case, the SCJ held that 'unreasonably reduce the burden of corporation tax' means

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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.
91 Supreme Court, decision of 18 February 2016 (Zeimu-sosho-shiryo, Vol. 266, No. 12802).
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,\textsuperscript{94} and the imposition of corporation tax in the amount of ¥26.5 billion was upheld.

**IX DOUBLE TAXATION TREATIES**

As of 1 December 2018, Japan has executed 74 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.\textsuperscript{95}

Under the Japanese Constitution, the prevailing view is that the Constitution prevails over treaties.\textsuperscript{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,\textsuperscript{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'\textsuperscript{98} because the Japan–Singapore Tax Treaty was prepared based on the OECD model tax treaty.

Japan has become a party to the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting, which will enter into force in Japan on 1 January 2019.

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\textsuperscript{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.

\textsuperscript{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.

\textsuperscript{96} Article 98, Paragraph 1 of the Constitution of Japan.

\textsuperscript{97} Supreme Court, Decision of 29 October 2014, Minshu, Vol. 63, No. 8, p. 1881.

\textsuperscript{98} Article 32 of the Vienna Convention on the Law of Treaties.
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 and the use of APA has become more common.

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.

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. Filing a report of assets and debts is also required when the income and assets of a taxpayer are more than a certain amount.

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.

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.\textsuperscript{104}

The number of tax litigations has decreased recently compared with those days\textsuperscript{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.

\textsuperscript{104} For example, (1) the Industrial Bank of Japan, Limited case (Supreme Court, Decision of 24 December 2004, \textit{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; (5) the Takefuji Corporation case (Supreme Court Decision of 18 February 2011, \textit{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, \textit{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 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.

\textsuperscript{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 17

MALAYSIA

D P Naban, S Saravana Kumar and Chris Toh Pei Roo

I INTRODUCTION

Compared to its counterparts in neighbouring jurisdictions, the Malaysian Inland Revenue Board (IRB) has arguably adopted a more aggressive approach in recent years. While the Singaporean contributor to this publication described the Inland Revenue Authority of Singapore (IRAS) as ‘generally conservative and risk-averse’ last year,2 the IRB is known, by contrast, for its tendency to issue strongly worded statements in the Malaysian press. Among others, the IRB has defended criticisms of its alleged high-handed tactics (described by some quarters as ‘tax terrorism’) on grounds of promoting efficiency and increasing revenue collection.3

Perhaps not uncoincidentally, tax disputes are strongly litigated in the country, with statistics presented by the IRB at the National Tax Conference in June 2018 showing a balance of 915 cases that have yet to be resolved in the Malaysian courts. On the one hand, the continued capability of the courts to efficiently hear and decide the ever-increasing number of tax disputes remains a valid concern. On the other hand, the healthy appetite for litigation in Malaysian taxpayers may perhaps be reflective of a renewed confidence in the judiciary’s ability and impartiality in providing long-due clarification in areas of tax law where genuine disagreement and uncertainty exists.

Cases of interest from the past year are outlined below.

i High Court

The following decisions were rendered by the Kuala Lumpur High Court (KLHC) in the past year:

a a landmark decision upholding the imposition of safeguard duties by the Ministry of International Trade and Industry in the steel sector;4

b reinforcing the trite principle that double taxation agreement provisions shall prevail over that of the Income Tax Act 1967 (ITA);5

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1 D P Naban is a senior partner, S Saravana Kumar is a partner and Chris Toh Pei Roo is an associate at Lee Hishammuddin Allen & Gledhill.
that Section 127(3A) is an enabling provision which does not allow the Minister to take away an entitlement to tax incentive of a taxpayer;\(^6\)
d that an advance ruling by the IRB under Section 138B ITA amounts to a decision amenable to judicial review. In this case, the KLHC allowed the taxpayer’s judicial review application on the grounds that the advance ruling had been tainted with illegality;\(^7\) and
e that the ITA cannot be used by the IRB as an instrument to fish for information on the clients of law firms.\(^8\)

ii Court of Appeal
The Court of Appeal (COA) allowed the taxpayer’s appeal and held that taxpayers who have relied on the IRB’s stance as contained in public rulings issued under Section 138A(1) ITA cannot be precluded from obtaining relief in respect of errors or mistakes under Section 131(4) ITA.\(^9\)

The COA upheld the KLHC’s granting of a stay of the civil recovery proceedings commenced by the government of Malaysia against the taxpayer pending the taxpayer’s appeal to the Special Commissioners of Income Tax (SCIT).\(^10\)

The COA agreed with the taxpayer’s preliminary objection that an order by the High Court for the production of notes of proceedings from the SCIT is not an appealable decision under Section 67 of the Courts of Judicature Act 1964 (CJA).\(^11\)

Although a softer approach in tax collection has been indicated under the new regime,\(^12\) the pressing need for revenue will undoubtedly influence the IRB’s stance and policy in the coming year.

II COMMENCING DISPUTES
i Income tax

The self-assessment system
The self-assessment system has been implemented in Malaysia since 2001 for companies and since 2004 for businesses, partnerships, cooperatives and salaried individuals. Under the previous official assessment system, taxpayers would be assessed on income tax under the ITA by the IRB pursuant to the tax returns they filed. By contrast, taxpayers under the self-assessment system would file their tax returns based on computations of their own tax liability, resulting in deemed assessments and payment of taxes accordingly.

To ensure compliance and to avoid tax leakages under the self-assessment system, the IRB is equipped with wide powers by the ITA. Among others, Sections 78 to 81 of the ITA

\(^7\) IBM Malaysia Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri [2018] 1 LNS 1010.
\(^8\) Bar Malaysia v. Ketua Pengarah Hasil Dalam Negeri [2018] 4 CLJ 635.
grant the Director General of Inland Revenue (DGIR) the power to call for specific returns and production of books, bank account statements, access to buildings and documents, and for all such information that may be relevant. Armed with such powers, audits are carried out by the IRB on a post-assessment basis, including desk audits (from the IRB’s office) and field audits (at the taxpayer’s premises with prior notice).

Preliminary findings letters are issued to taxpayers, who will usually be afforded a chance to respond to any issues raised. Audits are concluded with a final audit findings letter pursuant to which taxpayers can choose to sign a letter of acknowledgment of the IRB’s position and to pay. Where taxpayers decline to do so, notices of assessment (Form J) or notices of additional assessment (Form JA) will be issued in respect of such taxes alleged to have been underpaid. Section 91 ITA only allows assessments to be raised within a period of five years after a year of assessment (YA), except in circumstances of fraud, wilful default or negligence. In practice, time-barred assessments are common as the IRB appears to adopt the view that negligence exists where taxpayers’ tax treatment differs from their own.

**Disputing assessments**

There are two ways for taxpayers to dispute tax assessments by the IRB: they may appeal to the Special Commissioners of Income Tax (SCIT) or undergo judicial review.

**SCIT appeal**

A taxpayer aggrieved by an assessment raised against him or her can file a notice of appeal (Form Q) to the SCIT together with the grounds of the appeal within 30 days from the date of service of the assessment upon him or her. Upon receipt of the Form Q, the DGIR has a 12-month review period during which dispute resolution proceedings will be conducted to explore the possibility of an amicable settlement. Such proceedings can result in an agreement under Section 101(2) between the DGIR and the taxpayer on the proper amount of taxes payable.

If no agreement is reached during the review period, the Form Q will be forwarded to the SCIT for registration of the appeal. Case management will be conducted, during which directions are given for the filing of cause papers and for a hearing date to be fixed. Recently it has become common for hearing dates to be fixed two to three years after registration because of the large number of appeals pending. At any time before completion of the hearing, the taxpayer may arrive at an agreement for settlement with the DGIR that can be recorded before the SCIT.

Where there is no settlement, the SCIT will hear the case and give its deciding order for the assessments to be confirmed or discharged. Parties dissatisfied with a deciding order may appeal to the High Court on questions of law by requiring the SCIT to state a case for the opinion of the High Court (appeal by way of case stated). Upon hearing and determining the question of law in such an appeal, the High Court may, inter alia, order such assessments to be confirmed, discharged or amended. Parties dissatisfied with the High Court’s decision have a further right of appeal to the Court of Appeal. A taxpayer cannot appeal to the Federal Court for a matter originating at the SCIT.
Judicial review

Under certain circumstances, a taxpayer may also file a judicial review application at the High Court to challenge a tax assessment.

Taxpayers cannot commence judicial review as of right but must first obtain leave of the court to so. The threshold for leave to be granted is ordinarily low and will be satisfied where it is proven that the application is not frivolous. Even where an alternative remedy exists in the form of an SCIT appeal, the courts have held that taxpayers would not be barred from judicial review so long as exceptional circumstances are proven. The three categories of exceptional circumstances are a clear lack of jurisdiction, blatant failure to perform some statutory duty and a serious breach of the principles of natural justice. Decisions of the High Court in judicial review proceedings are appealable to the Federal Court.

Judicial review is especially apt where the dispute involves questions of law as opposed to factual disputes, which should be resolved by the SCIT as the tribunal of fact. Judicial sentiment on the role of judicial review in challenging abuses of power is perhaps best reflected in the Federal Court’s recent pronouncement in the landmark case of *Indira Gandhi* that ‘the boundaries of the exercise of powers conferred by legislation is solely for the determination by the courts’ and that ‘if an exercise of power under a statute exceeds the four corners of that statute, it would be *ultra vires* and a court of law must be able to hold it as such’.

However, the courts have also dismissed judicial review applications where it was held that exceptional circumstances did not exist. Taxpayers intending to pursue judicial review should thus obtain legal advice at the earliest opportunity to evaluate whether this is suitable.

Stay or payment

Once an assessment is raised, taxes are ordinarily due and payable whether or not an appeal is made. Payment have to be made within 30 days of service of the notice of assessment upon the taxpayer, failing which the amount of taxes unpaid shall be increased by an amount of 10 per cent. Where taxes have been increased under Section 103(5) ITA, a further increase of 5 per cent of any amount of taxes remaining will be made after the expiry of 60 days from the date of such increase.

Unlike the High Court, the SCIT does not have the power to grant a stay of the effect of tax assessments raised by the IRB. Where payment has not been made and the courts have not granted a stay, the government of Malaysia may commence civil recovery proceedings against the taxpayer to seek recovery of such taxes as a debt due to the government.

However, taxpayers may still be able to obtain a stay of the civil recovery proceedings if special circumstances can be proven. The courts have held that Sections 103 and 106 ITA

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17 Section 103 ITA.
18 Section 103(5) ITA.
19 Section 103(7) ITA.
20 Section 106 ITA.
do not prevent the court from exercising its inherent jurisdiction to grant a stay where special circumstances exist. 21 This has recently been confirmed by the Court of Appeal in Berjaya Times Square. 22 The IRB has since withdrawn its motion for leave to appeal to the Federal Court.

ii Goods and services tax

The Goods and Services Tax Act 2014 (the GST Act 2014) was repealed in 2018 by the Goods and Services Tax (Repeal) Act 2018 (the GST Repeal Act 2018). This section will briefly address common issues in GST appeals since there are still such appeals pending resolution.

Under the short-lived GST regime, taxable persons must furnish returns on a monthly or quarterly basis depending on the total amount of their taxable turnover. 23 Where such returns have not been filed or contain incorrect information, best judgement assessments 24 may be issued by the Director General of Customs (DGOC) against the taxable person.

A person dissatisfied with any decision by a GST officer may make an application for review to the DGOC within 30 days upon notification of the decision. 25 The DGOC will aim to arrive at his decision within 60 days of receiving the application; in practice, however, decisions on such applications can generally be expected within six months.

A person dissatisfied with the DGOC’s decision may file an appeal to the GST Tribunal within 30 days after the decision is communicated to him. 26 The hearing will be conducted before a single Tribunal member or a panel of three members, and the appellant may opt to represent himself or appoint representatives. 27 Decisions of the GST Tribunal can be appealed to the High Court, 28 which can then be further appealed to the Court of Appeal.

The authors are aware of no appeals that have been made from the GST Tribunal to the High Court in the few years that the GST Act 2014 had been in force. Since the GST Act 2014 was abolished by the GST Repeal Act 2018, pending appeals at the GST Tribunal will now be heard by the Customs Appeal Tribunal (Customs Tribunal). 29

Decisions of the Customs Tribunal are deemed to be an order of a Sessions Court and are enforceable as such. 30 Parties dissatisfied with the Customs Tribunal’s decision may appeal to the High Court on a question of law or of mixed law and fact, 31 and there is a further right of appeal to the Court of Appeal.

22 Berjaya Times Square, see footnote 10.
23 Monthly (taxable turnover exceeding 5 million ringgit), quarterly (taxable turnover not exceeding 5 million ringgit).
24 Section 43 GST Act 2014.
25 Section 124 GST Act.
26 Section 126 GST Act.
27 Usually a GST agent or an advocate and solicitor.
28 Section 148 GST Act.
29 Section 5(3), GST Repeal Act 2018.
30 Section 141V, Customs Act 1967 (CA 1967).
31 Section 141W, CA 1967.
iii Sales and service tax
The process for filing returns, and the raising of and appeals against assessments is similar under the Sales Tax Act 2018 and Service Tax Act 2018 regimes.

Taxable persons must file their returns by the last day of the month following the end of the taxable period to which the return relates.32 Where such returns have not been furnished or contain incomplete or incorrect information, or where a taxable person has failed to apply to be registered as such, best judgement assessments may be raised by the DGOC against him or her.33

A person aggrieved by the DGOC’s decision may make an application for review to the DGOC within 30 days after being notified of such decision. The DGOC will then review his decision and aim to decide on the application within 60 days after receiving it.34 In practice, however, applicants may have to wait up to six months for the DGOC’s decision.

The DGOC’s decision on an application for review may be appealed to the Customs Appeal Tribunal in writing within 30 days after the decision is communicated to the taxable person. The legal effect of the Customs Tribunal’s decision, and the appeal process, have been discussed in Section II.ii.

III THE COURTS AND TRIBUNALS
i The Special Commissioners of Income Tax (SCIT)
The SCIT is an institution created by the ITA 1967, which prescribes for a minimum of three Commissioners. Appointment of the Commissioners is by the Yang di-Pertuan Agong (the Ruler) and their tenure, remuneration and allowance are as determined by the Minister of Finance (MoF).35 The procedure for hearings at the SCIT and their powers are stipulated under Schedule 5 of the ITA 1967.

SCIT appeals are heard before a panel of three Commissioners, with at least one having judicial or other legal experience. Two or more appeals may be heard concurrently, and taxpayers may be represented by either an advocate or tax agent or both during the hearing. Subject to the ITA, the SCIT are also statutorily empowered to regulate their own procedure. Where not otherwise provided for, the procedure and practice at the subordinate court or the High Court are to be adopted and applied with the necessary modifications.36

Practical and institutional improvements to the SCIT have been contemplated in recent months. Among others, the SCIT’s independence have been questioned considering that the tenure and remuneration of the Commissioners are determined by the same MoF who oversees the running of the IRB. Further, the limited number of SCIT Commissioners have also appeared to struggle with the increasing volume of tax appeals in recent years.

ii GST Appeal Tribunal
The hearing of GST appeals pending at the now-defunct GST Tribunal have been taken over by the Customs Tribunal.

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32 Section 26, Sales Tax Act 2018; Section 26, Service Tax Act 2018.
33 Section 27, Sales Tax Act 2018; Section 27, Service Tax Act 2018.
34 Section 96, Sales Tax Act 2018; Section 81 Service Tax Act 2018.
35 Section 98, ITA 1967.
iii Customs Appeal Tribunal

The Customs Tribunal was created by the CA 1967.\(^{37}\) The appointment of the chairman and a maximum of two deputy chairmen from members of the Judicial and Legal Service is prescribed, together with a minimum of seven other members deemed to have sufficient knowledge of experience in customs or taxation matters. Tribunal members are appointed by the MoF, who also determines the terms, conditions and remuneration of the appointment.\(^{38}\)

Tribunal hearings are heard before a panel of three members, but may be heard before a single Tribunal member where deemed fit by the chairman in the interests of expediency and efficiency. Where a Tribunal appeal has been lodged, the same issues cannot be raised between the same parties in another court\(^{39}\) unless the other proceedings have been commenced earlier or unless the Tribunal appeal is withdrawn, abandoned or struck out. Through an amendment in 2018,\(^{40}\) advocates and solicitors who were previously barred from appearing at the Tribunal are now able to do so.

iv High Court, Court of Appeal and the Federal Court

Appeals from the SCIT to the High Court are made by way of case stated (see Section II.i, ‘The self-assessment system’) on questions of law. The High Court, in its role as an appellate court in such appeals, would be slow to disturb fact findings by the SCIT, but may intervene where such findings have been wholly unsupported by facts or evidence.\(^{41}\) High Court decisions can be appealed to the COA within 30 days of the High Court’s decision. COA appeals are heard and decided by a panel of three judges.

Appeals to the Federal Court (FC) from COA decisions are possible in proceedings commenced by way of judicial review at the High Court. Prospective appellants cannot appeal as of right but must first obtain leave to appeal from the FC through an application for leave filed within a month from the date of the COA’s decision. For leave to be granted, applicants must satisfy the court that the question proposed to be answered involves a question of general principle decided for the first time, or a question of importance upon which further argument and a decision of the FC would be to public advantage.\(^{42}\) FC appeals are heard and decided by a panel of between five and 11 judges.

IV PENALTIES AND REMEDIES

i Penalties

The ITA imposes various responsibilities on taxpayers and their principal officers. These obligations are enforced through offences and penalties in the form of fines and even imprisonment listed in Part VIII of the Act.\(^{43}\)

Common offences include failure to furnish returns (fine of between 200 and 20,000 ringgit and imprisonment of up to six months; a special penalty equal to treble the amount

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\(^{37}\) Section 141B, CA 1967.
\(^{38}\) Section 141C, CA 1967.
\(^{39}\) Section 141N, CA 1967.
\(^{40}\) Section 11, Customs (Amendment) Act 2018 amending Section 141Q, CA 1967.
\(^{42}\) Section 96, Courts of Judicature Act 1964 (CJA 1964); Appeals against decisions of constitutional importance may also merit leave under Section 96(b) CJA 1964.
\(^{43}\) Sections 116 to 120, ITA 1967.
of taxes underpaid to which the failure relates can be imposed for failure to furnish returns for two YAs or more) and furnishing of incorrect returns (fine of between 1,000 and 10,000 ringgit and a special penalty of double the amount of taxes underpaid to which the failure relates). Where a taxpayer has not been prosecuted for the furnishing of incorrect returns, a penalty of up to the amount of tax to which such failure relates (100 per cent penalty rate) may still be imposed by the DGIR.

ii Voluntary disclosure programme

On an ad hoc basis, special voluntary disclosure programmes (SPVDs) may be implemented by the IRB under which taxpayers would be encouraged to make voluntary declarations of income through reduced penalty rates.

The current SPVD was announced in the government’s 2019 budget speech and the IRB’s subsequent media release in November 2018.\textsuperscript{44}\textsuperscript{44} Beginning 3 November 2018 until 30 June 2019, taxpayers who make voluntary SPVD disclosures will be subjected to a lower penalty rate of between 10 and 15 per cent compared to the penalty rate of between 80 and 300 per cent after the SPVD period.\textsuperscript{45}\textsuperscript{45}

V TAX CLAIMS

i Recovering overpaid tax

A taxpayer who has overpaid in taxes can submit a claim for a refund within five years after the end of the YA to which the claim relates.\textsuperscript{46}\textsuperscript{46} A taxpayer dissatisfied with the refund amount may appeal to the SCIT within 30 days after being notified of this amount. Where a refund is due, compensation for a late refund may also be obtained in accordance with the formula prescribed by the ITA.\textsuperscript{47}\textsuperscript{47}

ii Relief for error or mistake

Further, a taxpayer who has overpaid in taxes owing to an error or mistake in a return or statement furnished to the IRB may also seek repayment of the amount overpaid through an application for relief to the DGIR in respect of such error or mistake.\textsuperscript{48}\textsuperscript{48} A taxpayer dissatisfied with the DGIR’s decision on the application can bring an appeal within six months upon being informed of the decision by requesting the DGIR to forward the application to the SCIT. Unsatisfactorily, however, the ITA does not prescribe a time limit for the DGIR’s decision to be made and applications may occasionally languish under review.

Importantly, Section 131(4) of the ITA states that no relief shall be given if the error or mistake was made on the basis of the ‘practice of the DGIR generally prevailing’ at the time when the return or statement was made. An issue that arose for determination in Rapid

\textsuperscript{44}\textsuperscript{44} http://lampiran1.hasil.gov.my/pdf/pdfam/IRBMMediaRelease_021120182_SPECIALVOLUNTARYDISCLOSUREPROGRAMME.pdf.

\textsuperscript{45}\textsuperscript{45} The reduced SPVD penalty rates are listed in the IRB’s Media Release dated 2 November 2018.

\textsuperscript{46}\textsuperscript{46} Section 111 ITA 1967 (or within five years after the assessment was raised where the overpayment was subsequent to an assessment raised).

\textsuperscript{47}\textsuperscript{47} Section 111D ITA 1967.

\textsuperscript{48}\textsuperscript{48} Section 131 ITA 1967.
Growth Technology\textsuperscript{49} was whether or not a taxpayer who had relied on a public ruling by the DGIR would be precluded from obtaining relief on the basis that the public ruling amounts to a ‘practice of the DGIR generally prevailing’.

On the final appeal, the COA held that Section 131(4) ITA cannot prevent a taxpayer from obtaining relief. In doing so, the COA agreed with the taxpayer’s arguments that both the ITA\textsuperscript{50} itself and the DGIR public rulings have drawn distinctions between public rulings and ‘practice of the DGIR generally prevailing’.\textsuperscript{51}

\section*{Challenging administrative decisions}

The availability of judicial review to dispute tax assessments by the IRB has been discussed in Section II.i, ‘Disputing assessments’.

Judicial review in some other jurisdictions ‘focuses on the process and the scope of the decision rather than the merits of the decision taken’.\textsuperscript{52} In Malaysia, it is clear that the courts would scrutinise decisions ‘not only for process, but also for substance’.

As discussed, exceptional circumstances would have to be demonstrated for leave to be obtained where the alternative remedy of an SCIT appeal exists. Apart from tax assessments, other administrative decisions in tax may also be amenable to judicial review. For instance, the court has held that the DGIR’s decision on a taxpayer’s advance ruling application under Section 138B ITA would be amenable to judicial review.\textsuperscript{53} Further, MoF decisions on tax exemptions under Section 127(3A), or pioneer status under the Promotion of Investment Act 1986 may also be susceptible to challenge by judicial review.

\section*{COSTS}

Cost awards by the SCIT are strictly regulated by the ITA, which stipulates that no costs order can be made except as expressly provided for.\textsuperscript{54} The SCIT may only order costs of up to 5,000 ringgit to be paid to it where the appeal is frivolous or vexatious in nature.\textsuperscript{55} The taxpayer may make representations as to why such an order ought not to be made within 21 days upon service of the deciding order. No provision exists for the recovery of costs by successful taxpayers.

At the High Court, COA and the FC,\textsuperscript{56} cost awards are discretionary in nature\textsuperscript{57} and would usually follow the event (i.e., costs would usually be awarded to the winning party). In practice, cost awards are often nominal and may not reflect the actual costs incurred by litigants. Where a consent order is to be recorded for settlement, it is common for parties to agree for no order to be made as to costs. Each party would bear their own costs.

\textsuperscript{50} Section 99(4).
\textsuperscript{51} Grounds of judgment have yet to be published by the COA.
\textsuperscript{53} IBM Malaysia Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri [2018] 1 LNS 1010.
\textsuperscript{54} Paragraph 32, Schedule 5, ITA 1967.
\textsuperscript{55} Paragraph 29, Schedule 5 ITA 1967.
\textsuperscript{56} For appeals originating from the High Court.
\textsuperscript{57} Order 59, Rule 2 ROC 2012.
VII ALTERNATIVE DISPUTE RESOLUTION

Other than litigation, the only formal method of resolving tax disputes is through dispute resolution proceedings in the 12-month review period after a notice of appeal (Form Q) is filed, but before the matter is forwarded to the SCIT for registration. Dispute resolution proceedings are conducted by the IRB’s Dispute Resolution Department (a separate department from the assessing branch that issued the assessments). In recent times, dispute resolution proceedings do not appear to have been tremendously successful, as reflected in the increasing number of pending SCIT appeals.

Taxpayers desiring certainty may apply for an advance ruling from the IRB on the application of ITA provisions to proposed arrangements to be entered into. The DGIR is legally bound by its ruling once a taxpayer has duly relied and acted upon the ruling. The High Court has recently confirmed in IBM Malaysia that an advance ruling by the IRB amounts to a decision amenable to judicial review and can be quashed if tainted with illegality.

VIII DOUBLE TAXATION TREATIES

As of 28 November 2018, Malaysia has entered into double taxation agreements (DTAs) with 74 countries. These DTAs have legal effect under the ITA. The courts have also confirmed that in the event of a conflict between DTA and ITA provisions, the former is to prevail.

In Alam Maritim, the FC held that the taxpayer is precluded from relief under the Malaysia–Singapore DTA as the disputed payments fell within Section 4A of the ITA, which has created a special class of income under which the taxpayer’s income should be taxed in Malaysia. However, this decision was recently distinguished by the High Court in Orange Rederiet Aps. The High Court agreed with the taxpayer that the Malaysia–Denmark DTA had been ratified in Malaysia subsequent to the enactment of Section 4A and must have clearly been intended by Parliament to take precedence.

IX AREAS OF FOCUS

The implementation of the current SPVD until 30 June 2019 reflects the government’s and the IRB’s recognition that maximising voluntary self-compliance is vital under a self-assessment system. However, persistently recalcitrant taxpayers can expect the full force of the IRB’s wrath through stricter enforcement and penalties after the SPVD period.

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58 Section 138B ITA 1967.
59 Section 138B(4) ITA 1967.
60 See footnote 7.
62 Section 132 ITA 1967.
65 See footnote 5.
In judicial review, it would be interesting to observe whether the IRB would persist with its publicly declared stance of objecting to all judicial review applications at the leave stage, after the Attorney General Chamber’s statement on the ‘importance of promoting judicial review as a means of developing public law’.

Internationally, Malaysia, as an associate member of the Organisation for Economic Co-operation and Development’s Inclusive Framework, has announced its commitment to implement the Base Erosion and Profit Shifting (BEPS) Action Plan. In the coming year, managed service companies especially, which have been identified for evaluation by the Forum on Harmful Tax Practices, will need to ensure that they comply with the minimum standards under the new rules.

X OUTLOOK AND CONCLUSIONS

Domestically, direct tax disputes are expected to continue to be fiercely litigated especially where the quantum disputed is significant with regard to litigation costs. Institutional and practical reforms to the SCIT are also direly needed as the number of tax appeals continues to increase to ensure that development of Malaysian tax law continues at an expeditious pace. Indirect tax disputes are expected to see less litigation at the Customs Appeal Tribunal at least in the initial stages of the implementation of the new sales and service tax regimes. Internationally, Malaysia’s commitment to international tax standards is to be lauded. It would be desirable, however, for policymakers to strike a balance between compliance with such standards and ensuring that the country remains an attractive destination for foreign investment.

Moving forward, taxpayers must continue to identify and manage their tax risks and potential tax exposures and should take advantage of the ongoing SPVD where suitable. In encounters with the IRB, obtaining legal advice at the earliest opportunity is also strongly advised to ensure that the taxpayer’s interests are best protected as it is inevitable that such interests will not be in alignment with the IRB’s own objectives.


Chapter 18

MEXICO

Luis Vázquez

I INTRODUCTION

Federal taxes include corporate income tax, individual income tax (which includes salary income and income from gifts and bequests), value added tax and excise tax. Federal duties also exist and apply mainly to authorisations or concessions granted by the federal government (e.g., telecommunications and mining). States also impose their own taxes, mainly property tax, transfer of property tax, hospitality tax and payroll tax on the employer.2

Federal tax disputes are triggered by both tax inspections and tax refund denials. Most inspections are focused on corporate income tax and value added tax, while specific industries are subject to excise tax and duty inspections (e.g., the soft-drink and mining industries, respectively).

The litigation process in Mexico is evidence-focused and very formalistic. Tax rulings issued by the Mexican federal tax authority cannot be challenged before the courts, because taxpayers are not bound by the ruling whereas the tax authority is if it is favourable to the taxpayer. Therefore, taxpayers seldom request tax rulings.

The regular length of an inspection is 18 months, but in transfer pricing cases, the term is two years. In some cases, the term may be extended for a total of 30 months, particularly when the Mexican tax authority requests information from another jurisdiction, which occasionally occurs in transfer pricing cases.

A standard process of a tax refund should last 60 business days approximately, and would include two information requests by the tax authority. However, the tax authority, at its discretion and at any time during the initial 60 business days, may order an inspection with a limited scope relating to the refund application. This inspection lasts an additional 90 business days and can be extended for another 90 business days.3 The tax authority’s head offices (i.e., those that handle cases relating to major taxpayers) usually follow the standard refund process, while the field offices (which handle regular taxpayers and newly created entities that have not met the criteria to become major taxpayers) initiate inspections regularly on all refund applications.

Tax-related court proceedings last approximately three years, including both the first instance proceedings and an appeal. Both tax assessments and refund denials follow the same court proceedings.

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2 Each of the 32 states in Mexico has its own tax-related proceedings. These are inspired by the Federal Tax Code and, thus, follow the same format. This chapter only relates to federal taxes, therefore the 32 particular tax disputes proceedings are not covered in this chapter.
3 A refund that is subject to an inspection may last up to a year.

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II COMMENCING DISPUTES

The federal tax authority can exercise its inspection powers at its discretion. The tax authority has in place risk analyses that determine the need for an inspection, although exceptionally a tax official can order a tax inspection if he or she considers it necessary.

A federal tax inspection can take several forms; the most common are an inspection at the taxpayer’s domicile, a written review or an electronic review. The tax authority’s head office performs a written review, while the field offices perform inspections at the taxpayer’s domicile. Electronic reviews are used almost exclusively when an issue has been identified and the tax authority considers that a tax deficiency clearly exists and the inspection is simply a formality.

Reaching a settlement in the case of a dispute is not explicitly regulated, although no prohibition exists and thus, settlements are in fact reached when an inspection is being performed. Before a tax assessment is determined, taxpayers can opt to begin a settlement agreement procedure before the Federal Taxpayers’ Advocate (Prodecon). Prodecon serves as a mediator and the process allows taxpayers to totally or partially settle the case, as well as to submit evidence that was not submitted during the inspection proceedings. Tax refunds cannot be settled, and thus, a refund is either totally or partially granted or not at all based on the tax authority’s findings.

A taxpayer can challenge a tax assessment or a total or partial refund denial through either an administrative appeal or an annulment claim, both of which are described in the following section.

III THE COURTS AND TRIBUNALS

i Tax Authority’s legal department

Taxpayers have the option of filing before the tax authority a written administrative appeal within a 30-business-day term as of the date the tax assessment or refund denial is notified. The administrative appeal is filed electronically, as well as the evidence.

Although the Tax Code provides that refund applications can be considered as constructively denied after three months, such a constructive ruling can be challenged through an annulment claim but not an administrative appeal.

The legal departments of the tax authority handle the administrative appeals. The head office in Mexico City has a legal department that handles cases involving major taxpayers, while each field office has a legal department that handles that field office’s cases.

The legal departments are partial to what their colleagues decided in the respective tax assessment or refund denial and, in fact, rely on their colleagues when reviewing new additional evidence submitted in an administrative appeal.

The legal department of the head office has much more technical expertise than the field offices’ legal departments. The latter rely much more on formalities and are not as experienced in complex cross-border cases.

Notwithstanding the above-mentioned drawbacks of the administrative appeal, taxpayers do file such appeals for two reasons. The first one is that taxpayers can submit additional evidence in the administrative appeal than that submitted during the inspection or refund process. In this regard, the Supreme Court of Justice issued case law where it stated that taxpayers are barred from offering evidence before the courts when such evidence has not been submitted during the inspection procedure, refund process or in the administrative appeal.
appeal. Thus, in some instances, filing an administrative appeal is necessary, even if an unfavourable outcome is expected, when the relevant evidence has not been timely submitted during the inspection or refund process.

The second reason for filing an appeal is to keep negotiations open with the tax authority, given that once a case is before the courts settlement can no longer be achieved. Thus, an administrative appeal keeps the channel of communication open to reach an amicable solution to the dispute.

While a tax assessment is challenged in an administrative appeal, taxpayers are exempt from providing security for the amount of the assessment. Providing security may be costly and thus, obtaining a partially favourable ruling at the administrative appeal may reduce the overall cost of litigation, as the cost of security would also be reduced.

The Federal Tax Code provides that in the event of a favourable ruling in an administrative appeal, the tax authority must comply within the next four months after the ruling becomes final.

In the event of a partial or total unfavourable ruling, taxpayers are entitled to file an annulment claim before the Federal Administrative Court within a 30-business-day term as of the date the resolution of the administrative appeal is notified. Although taxpayers have 30 days to file an annulment claim, taxpayers only have 10 business days to offer security after the administrative appeal is decided.

The tax authority has, in principle, three months to rule on the appeal following the filing of additional evidence. If no ruling is issued by then, a taxpayer can challenge a constructive ruling of the appeal before the Administrative Court. Such ruling is considered to have constructively affirmed the tax assessment or refund denial. If a taxpayer challenges the constructive ruling affirming a tax assessment, it is required to offer security.

In 2017, a new form of administrative appeal was introduced in the Federal Tax Code, which is called appeal on substance. The most relevant aspect of the administrative appeal on substance is that it allows taxpayers to challenge a ruling arguing that it is illegal because it is based on the taxpayer's failure to meet an unreasonable formality, to the extent that the taxpayer did not underpay taxes. In other words, the appeal on substance does away with an excessive formality and can rule an assessment as illegal, if, had such a formality not existed, no tax deficiency would exist.

The downside of the administrative appeal on substance is that taxpayers are barred from making procedural arguments (e.g., tax authority's failure to meet the inspection proceeding's deadlines or similar arguments). Thus, the administrative appeal on substance is a trade-off between waiving procedural arguments and gaining the possibility of arguing the illegality of the ruling based on an excessive formality.

As a requisite, the administrative appeal on substance is only available when the challenged ruling is the result of inspection powers. There is still some debate about whether a refund denial that results from a refund procedure where an inspection was performed can be the object of an administrative appeal on substance.

Administrative Court

Taxpayers can challenge a tax assessment or a refund denial by filing an annulment claim before the Federal Administrative Court within a 30-business-day term as of the date the ruling is notified to the taxpayer, or in the case of constructive refund denials, taxpayers can challenge such constructive ruling after the three-month term has elapsed without an explicit
ruling. Taxpayers can also challenge through an annulment claim an administrative appeal ruling, when the taxpayer elected to challenge the tax assessment or refund denial through such an appeal.

The Federal Administrative Court handles the annulment claims. The Court is divided into chambers. Each chamber has regional jurisdiction or nationwide subject-matter jurisdiction (e.g., trial on substance chamber and online trial chamber). Each chamber has three magistrates.

The Superior Chamber of the Administrative Court handles the cases that relate to high amounts or where the interpretation of international treaties is required. The general perception regarding the Superior Chamber and the Administrative Court regional chambers is that they are somewhat biased in favour of the tax authority. The Chamber in charge of the Trial on Substance is considered as the most technical and unbiased.

The proceedings before the Administrative Court last approximately 18 months, with the exception of the trial on substance chamber, which may last 10 months. Once an Administrative Court’s decision becomes final, the tax authority has four months to comply with the decision (e.g., carry out the refund).

In contrast to the administrative appeal, taxpayers must offer security when challenging before the Administrative Court a tax assessment or the ruling of an administrative appeal upholding a tax assessment. The means to offer security are:

- cash deposit;
- security interest or mortgage;
- surety bond granted by an authorised institution;
- joint and several liability assumed by a third party;
- administrative-law attachment; and
- securities or loan portfolios.

The most common means of security is a surety bond, which has an annual premium of approximately 3 per cent of the secured amount.

When a constructive ruling is challenged, either resulting from an administrative appeal or a refund application, the tax authority is required to provide the legal grounds and rationale for the ruling in the response to the claim. The taxpayer can then challenge such grounds and rationale in an amended claim filed before the Administrative Court.

The general manner in which an annulment claim is processed is in writing without any formal hearings. Alternatively, taxpayers can elect to file an annulment claim electronically where all proceedings are done online. The electronic version of a trial before the Administrative Court follows the same rules and stages as a regular trial. The electronic version of the trial can only be heard by a specific Chamber of the Administrative Court, which is located in Mexico City. This allows taxpayers to forum shop in a certain sense by filing an electronic annulment claim which, if it had been filed in a traditional manner, would have been handled by another Chamber with jurisdiction in another region of Mexico.

In 2017, a new modality of annulment claim was introduced: the trial on substance. As in the case of the administrative appeal on substance, taxpayers can elect this modality. The most relevant aspect of the trial on substance is that it allows taxpayers to challenge a ruling arguing that it is illegal because it is based on the taxpayer’s failure to meet an unreasonable formality, to the extent that the taxpayer did not underpay taxes. In other words, the trial on substance does away with an excessive formality and can rule an assessment as illegal, if, had such a formality not existed, no tax deficiency would exist.
The downside of the trial on substance is that taxpayers are barred from making procedural arguments (e.g., tax authority’s failure to meet the inspection proceeding’s deadlines or similar arguments). Thus, the administrative appeal on substance is a trade-off between waiving procedural arguments and gaining the possibility of arguing the illegality of the ruling based on an excessive formality.

As a requisite, the trial on substance is only available when the challenged ruling is the result of inspection powers and the amount in controversy has to exceed US$175,000 approximately. There is still some debate about whether a refund denial that results from a refund procedure where an inspection was performed can be the object of a trial on substance. Additionally, constructive rulings cannot be the object of a trial on substance.

An additional benefit of the trial on substance is it relieves the taxpayer of the obligation to offer security during the trial. There is some debate about whether this benefit extends to the time after the trial on substance has been decided and while the constitutional claim and, particularly, the tax authority’s appeal are processed.

In contrast to a traditional trial, the trial on substance has specific hearings that deal with determining the issues in controversy, the expert witness testimony and summation.

Against a favourable or unfavourable resolution, the tax authority or the taxpayers may, respectively, file an appeal or a constitutional claim (amparo) before a collegiate court within a 15-business-day term as of the date the decision is notified. Both the tax authority and the taxpayers can file an appeal on the incorrect grounds of the decision on law and fact.

### Collegiate courts

The constitutional claim has two purposes. The first is, from a practical standpoint, to act as an appeal and thus, review the Administrative Court’s decision from a legality standpoint (i.e., review of both law and fact). The second is to allow taxpayers to challenge the constitutionality of provisions applied either by the tax authority in the ruling challenged in the annulment claim or by the Administrative Court when deciding the case. Taxpayers must file the constitutional claim within a 15-business-day term as of the date the decision is notified before the Administrative Court, which remits the case to a collegiate court.

The tax authority is also entitled to file an appeal challenging the Federal Administrative Court within a 15-business-day term as of the date the decision is notified, and it is also decided by a collegiate court. The tax authority’s appeal must meet certain criteria and, although this was intended to restrict the tax authority’s ability to appeal, courts have more recently been lax when determining whether the criteria are met.

Additionally, taxpayers can submit an ancillary appeal once the tax authority’s appeal has been admitted by a collegiate court. This ancillary appeal allows taxpayers to rebuke the tax authority’s appeal and strengthen a favourable decision or the favourable portion of the decision.

Both the constitutional claim and the tax authority’s appeal are decided jointly by the same collegiate court. Collegiate courts are composed of three magistrates and their decision is usually issued within approximately six months of the constitutional claim or the appeal being filed. The collegiate courts are generally considered to be unbiased and more technical than the Administrative Court.

### Supreme Court of Justice

The collegiate court’s decision on the constitutional claim can be challenged by the parties through an extraordinary appeal within a 10-business-day term. This extraordinary appeal
can only refer to constitutional issues and is decided by the Supreme Court of Justice. As its name suggests, this appeal must relate to transcendent and important legal aspects in order to be admitted.

The Supreme Court of Justice has 11 judges, one of whom acts as president. The Supreme Court is divided into two Chambers, where the Second Chamber has jurisdiction over tax issues. Each chamber is composed of five judges, excluding the president.

In recent years, the Supreme Court’s analysis has become more restrictive on when an extraordinary appeal can be filed. The general perception is that the Supreme Court is biased in favour of the tax authority. Furthermore, the case law issued by the Supreme Court relating to the analysis of unconstitutionality makes a distinction for tax-related matters, allowing Congress more leeway on tax-related legislative acts.

IV PENALTIES AND REMEDIES

The Tax Code provides that taxes that are not paid in a timely manner must be updated for inflation (approximately 6 per cent annually) and a late-payment interest will accrue (1.47 per cent monthly). The late-payment interest is capped at five years (i.e., 88.20 per cent plus inflation).

Additionally, penalties apply that range from 55 to 75 per cent of the original unpaid tax and when aggravating circumstances exist, an additional 20 to 90 per cent may apply. In practice, however, the tax authority rarely applies a rate higher than the minimum of 55 per cent when issuing an assessment. Furthermore, taxpayers will not be subject to penalties if the taxpayer self-assesses without being subject to an inspection. Also, while under an inspection, a taxpayer can be eligible for a reduced penalty of 20 or 30 per cent instead of the minimum of 55 per cent.

In the case of overreporting tax losses, the tax authority can impose a penalty of 30 per cent of the overreported loss to the extent that the loss has been partially or totally utilised. If the taxpayer did not utilise the overreported tax loss and the amount is corrected by the taxpayer, no penalty will apply.

In the case of refunds, a taxpayer can be subject to a penalty of 40 per cent of the improperly paid refund.

The Tax Code further provides that taxpayers can ask for the remittance of the penalties, to the extent that the taxpayer pays the tax assessment. Additionally, taxpayers can also ask for a reduction of the late-payment interest monthly rate to 0.98 per cent, which is subject to several requisites. The Federal Tax Code grants taxpayers the possibility to pay tax deficiencies in instalments but subject to interest that ranges from 0.98 per cent to 1.47 per cent, depending on the financing period.

When entering into its first settlement agreement before Prodecon, the taxpayer is statutorily entitled to the remittance of the penalties without any further requisites.

In the case of refunds improperly denied, the taxpayer is entitled to adjust the amount for inflation and late-payment interest using the same monthly rate of 1.47 per cent. The same applies to tax assessments that are paid by the taxpayer and are ultimately reversed by the courts.
V COSTS

Aside from attorney fees, the most relevant cost of litigation is offering security. The most common means of security is a surety bond, which has an annual premium of approximately 3 per cent of the secured amount.

VI ALTERNATIVE DISPUTE RESOLUTION

i Taxpayers’ Advocate

Prodecon is a government agency independent from the tax authority. Although its main functions relate to providing assistance to taxpayers, in the case of federal tax inspections, the Prodecon can act as a neutral mediator in a settlement agreement.

A taxpayer can file a settlement procedure request at any time during the inspection to the extent that the tax authority has expressed its position, and no assessment has been issued. The settlement procedure request can refer to a single item under inspection or the entirety of the items being questioned in the inspection.

The settlement procedure is flexible and the main purpose is to facilitate an agreement between the taxpayer and the tax authority. It has no time limits, although in practice it is usually limited to 12 months.

The settlement procedure suspends the term of the tax authority to conclude the inspection and issue an assessment. The suspension applies to the entirety of the inspection regardless of the fact that the request relates to a single item or several items. Thus, it allows the taxpayer to provide evidence during the procedure and negotiate the terms of a settlement agreement while the inspection is suspended.

The tax authority is not required to accept submitting a case to the settlement procedure, but usually does. Also, the tax authority can decide to exit the settlement procedure at any time, but doing so would have to be justified.

Considering the perceived bias of the Administrative Court and the Supreme Court, taxpayers have embraced the settlement procedure as a means to avoid litigation. Thus, the public perception of the Prodecon is extremely favourable.

ii Mutual agreement procedure

The mutual agreement procedure (MAP) provided in double taxation treaties is another alternative dispute resolution available in Mexico.

The MAP takes two years approximately. Although initiated by the taxpayer, the tax authorities of each country are the involved parties.

The MAP is based on a ‘best-efforts’ principle and thus, the tax authority of each country is not required to reach an agreement. This reduces the effectiveness of the MAP and as a result taxpayers have shied away from using it.

While a MAP is under way, the administrative appeal and the term to challenge a tax assessment are suspended.

iii Arbitration

Mexico has not included arbitration clauses in its double taxation treaties. Furthermore, Mexico has not opted for arbitration as part of the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (MLI).
VII ANTI-AVOIDANCE

Mexico’s tax system includes certain special anti-avoidance rules, such as thin capitalisation rules, back-to-back rules, controlled foreign corporation rules and hybrid mismatches. However, Mexican domestic legislation does not contain a general anti-avoidance rule (GAAR).

Nevertheless, under the MLI, Mexico opted for the principal purpose test as a means to meet the minimum standard, which could be construed as a GAAR.

VIII DOUBLE TAXATION TREATIES

Currently, Mexico has signed double taxation treaties with 59 countries. Of these 59 treaties, only 54 of these countries have signed the MLI. To date, the Mexican Senate has yet to approve the MLI, although it is expected to do so.

IX AREAS OF FOCUS

i Tax refunds

The tax authority’s field offices have, as a matter of course, made value added tax refund processes extremely problematic. The amount of information requested and length of the process (in excess of a year) has affected the liquidity of certain taxpayers.

ii Non-existent transactions

The Tax Code provides a procedure to allow the tax authority to determine that a taxpayer does not have the necessary assets, employees or infrastructure to provide the services it has invoiced. An unfavourable conclusion to such a procedure results in stripping the particular taxpayer’s invoices of any validity. Thus, the taxpayer’s clients would no longer be in a position to deduct the services reflected in those invoices nor claim a credit for the corresponding value added tax.

Although the tax authority’s conclusion can be challenged, in the meantime the tax authority will informally request the taxpayer’s clients to file amended returns to revert the deduction and value added tax credit.

iii Improper transmission of tax losses

The Federal Tax Code was recently amended to grant the tax authority the possibility to presume that the transfer of tax losses is improper where certain criteria are met (mainly that the entity with the tax loss is no longer part of the same corporate group). Where the transfer of tax losses is presumed as improper, the tax losses can no longer be utilised.

X OUTLOOK AND CONCLUSIONS

When dealing with a tax dispute in Mexico, retaining counsel early is paramount to improve the chances of a favourable conclusion. Given the formalistic nature of the system, unattended or partially attended inspections or refunds can have disastrous results.
The perceived bias in the Administrative Court complicates things further. Properly advised taxpayers will likely seek a settlement directly with the tax authority or through a settlement procedure before Prodecon in order to avoid litigation or only take to litigation those items with solid bases.
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,
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.
Netherlands

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 matter 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 (VAT) 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 it 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.

On 10 October 2017, the ECOFIN Council formally adopted a Directive creating a framework for resolving all sorts of double taxation disputes within the EU. Even though this Directive is essentially based on the existing Arbitration Convention, its scope is broader than transfer pricing. The Directive aims to improve the mechanisms used for resolving disputes between Member States arising from the interpretation of double tax conventions as it requires dispute resolution mechanisms to be mandatory and binding, with clear time limits and an obligation to reach results.

Under the 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 known 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, recent legislation 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 at the 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 lean 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, on 5 June 2018 the EU Council’s Directive 2018/822 amending Directive 2011/16/EU with respect to mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements was published in the EU’s Official Journal. Any cross-border reportable arrangements where the first step of implementation is taken between the date of entry into force of the Directive (25 June 2018) and the date of application of the Directive (1 July 2020) will have to be reported by 31 August 2020 and are to be exchanged between EU Member States by 31 October 2020. This Directive, commonly referred to as ‘DAC6’ or the ‘Intermediaries Directive’ provides for mandatory disclosure
rules. Once implemented (a consultation document was to be released shortly at the time of writing) the new mandatory disclosure rules will affect 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. Once 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. This may be particularly problematic as the scope of cross-border arrangements to be reported is relatively broad and may lead to extensive reporting obligations for both intermediaries and taxpayers. Under the Directive, reporting obligations are triggered by certain ‘hallmarks’ (characteristics) covering a relatively wide range of cross-border arrangements.

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 20

NEW ZEALAND

Geoffrey Clews

INTRODUCTION

Tax investigations and disputes are common in New Zealand but tax litigation less so. This is the result of three factors:

- a self-assessment and penalty regime that makes it important for taxpayers to act reasonably in taking a tax position;
- 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
- 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.

New Zealand’s tax system is largely based on taxpayer self-assessment. A taxpayer who is required to file a tax 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 and without first having undertaken a pre-assessment disputes process, which is comprehensively regulated under the Tax

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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, in reviewing the original draft of this chapter.
2 While the precise number of investigations is not reported, they identified in 2017 discrepancies amounting to NZ$1.3 billion where taxpayers did not return correctly: IR Annual Report 2017. The figure to June 2018 was NZ$1.06 billion. Of that, some NZ$282 million was ascribed to countering aggressive tax planning: IR Annual Report 2018.
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. In the year to June 2018 the number of prosecutions was 121 and, of those, 94 dealing with tax evasion or fraud were completed: IR Annual Report 2018.
4 The most recent statistics show that in 2017 IR won 80.8 per cent of disputes that proceeded to litigation. In 2018 this increased to 89.1 per cent, reflecting a total win by IR in 41 of 46 cases: IR Annual Reports 2017 and 2018.
5 Tax refers to Income Tax and Goods and Services Tax (New Zealand’s equivalent of value added tax).
6 Normally calculated from the end of the reporting period in which the relevant return has been filed. Section 108 and 108A, TAA.
New Zealand

Administration Act 1994 (TAA). 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 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.

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. 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 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.

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. This has led in some cases to informal dispute procedures, predating the first formal exchange of notices.

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, 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) or the High Court. Rights of appeal lie from both, though there are important jurisdictional differences between the TRA and the Court.

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7 See, generally, Part IVA, TAA.
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 (SOP) phase.
13 A first level tribunal operating under its own legislation and presided over by a district court judge.
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 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. There is no formal time frame within which IR must initiate the formal disputes process. This is affected in practical terms by the statutory time bar on IR issuing a reassessment of tax. However, when that time bar is not imminent, IR sometimes tries to agree an adjustment with the taxpayer. This process can be as lengthy and costly as the formal disputes process, which must still be undertaken if an agreed adjustment is not reached.

Broadly speaking, the formal process follows four stages:

- the exchange of initial notices between IR and taxpayers;
- a conference stage;
- the exchange of statements of position (SOPs); and
- 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

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.
**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 the taxpayer has failed to file a return. 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.

The content of a NOPA is prescribed by statute and must:

- identify the tax adjustments that are proposed;
- provide a statement of facts and the law in sufficient detail to inform the opposing party of the grounds for the proposed adjustment;
- state how the law applies to the facts; and
- 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. 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.

**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.

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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.
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. Opting out is not usual, but in major disputes where the positions of the parties 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’, 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.

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. Second, 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. 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, 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 it defers to investigators’ conclusions on credibility. 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

21 Section 89N(1)(c)(viii), TAA.
22 Section 89M, TAA.
23 Section 138G, TAA.
24 Section 108 and 108A, TAA.
25 Section 108B, TAA.
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. DRU reports are usually produced in a timely way.26

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.27

### 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.28 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.29 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.30 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.31 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.

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26 All draft reports in 2018 were produced within three months of referral according to IR’s 2018 Annual Report.
28 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.
29 Protocols between IR and CL set out the relationship as of July 2009.
30 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.
31 Senior courts have warned counsel that recourse to judicial review over the available route of tax challenge may sound in a personal costs award.
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 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 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, subject to leave to appeal being granted from the Supreme Court.

The TRA is obliged to hear cases in camera, 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 and so has an independent authority 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, and although it has some latitude as to the formality with which it receives evidence, 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.

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.

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33 Section 16(4), TRA Act.
34 By Section 15, TRA Act.
35 Commissions of Inquiry Act 1908.
36 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.
37 Section 17, TRA Act.
38 Section 17(3), TRA Act, referring to the Evidence Act 2006.
The TRA is presided over by a district court judge 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.

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. 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 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 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

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39 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.

40 Section 25, TRA Act.

41 It is one of two hearing authorities under Section 138G, TAA.

42 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.
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.

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.\footnote{43} 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.\footnote{44} 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.\footnote{45}

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 is 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.

\footnote{43} Section 138P, TAA.
\footnote{44} Section 26, TRA Act.
\footnote{45} Section 26(2), (3), (5) and (6), TRA Act.
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),46 use of money interest (UOMI)47 and shortfall penalties (SFPs).48 In most cases, a reassessment is made with a new due date49 so that LPPs are not applied retrospectively, but UOMI will normally be imposed from the original due date for assessed tax. Although 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. UOMI is often a sticking point in resolving disputes. IR is seldom ready to compromise over it and will apply tax payments to interest first, so that an underlying core tax debt is not necessarily reduced.

IR must consider whether to impose an SFP in each instance of a tax shortfall.50 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.51 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.52

These penalties are then subject to potentially substantial reductions for voluntary disclosure53 and for prior good taxpayer behaviour.54 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.55

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46 Section 139B, TAA.
47 Imposed under Part 7, TAA.
48 Section 141 et seq., TAA.
49 Section 142A, TAA.
50 Section 141, TAA.
51 This can be affected by the possibility of criminal prosecution, which is ruled out if an SFP is imposed first.
52 See Sections 141A, 141B, 141C, 141D and 141E, TAA.
53 Section 141G, TAA.
54 Section 141FB, TAA.
55 Section 141EB, TAA.
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.56

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.

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.57 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.58

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.59

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.

TAX CLAIMS

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 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.

**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.60 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.61

**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.62

**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, the courts have concluded that a right of challenge is only conferred when an administrative decision translates into an assessed liability.

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.

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. 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.

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63 Section 3(1), TAA.
64 Vinelight Nominees Limited v. CIR (2005) 22 NZTC 19,298.
66 Section 138B, TAA.
In this case, if the group is a ‘consolidated group’ of companies, 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.

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.

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.

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.

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67 A wholly owned group.
69 The following commentary is drawn from IR’s published web page on binding rulings, see note 67.
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;
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\(^70\) addresses tax avoidance arrangements (i.e., arrangements having a more than incidental purpose or effect of tax avoidance) and empowers IR to

\(^{70}\) Sections BG1 and GA1, Income Tax Act 2007.
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 by reference to three major cases.

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 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 importance of making a realistic assessment of parliamentary intention was recently emphasised in one of the few tax avoidance victories of a taxpayer over IR. The High Court reminded IR that Parliament could be expected to have intended basic tax principles, such as individual liability, to apply, when IR argued for a broader economic analysis.

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.

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71 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.


New Zealand has enthusiastically supported the work of the OECD BEPS initiatives. On 6 December 2017 a bill was introduced to Parliament that, when passed, will:

- tighten further the way related-party debt is priced, to limit interest deductibility;
- eliminate tax benefits arising from hybrid and branch mismatches;
- address methods used to avoid creating a permanent establishment in New Zealand; and
- 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.

In Chatfield, 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 made a number of observations about the interpretation and application of DTTs that were not disturbed on appeal:

- 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;
- it cannot be expected that the terms of the DTTs will be expressed with the same precision as ordinary domestic tax legislation;
- 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
- 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.

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74 Taxation (Neutralising Base Erosion and Profit Shifting) Bill 2017.
76 At first instance and not disturbed on appeal.
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.77

The Chatfield case was appealed to the Court of Appeal and the case was heard in August 2018. At the time of writing, the Court of Appeal judgment had not been issued.

In Lin,78 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 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.

This case was also appealed to the Court of Appeal, which overturned the High Court decision.79 Leave to appeal the approach taken by the Court of Appeal to the interpretation of the DTT was refused by the Supreme Court.80

X AREAS OF FOCUS

IR’s current tax policy work programme81 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.82

77 Chatfield & Co Ltd v. CIR [2017] NZHC 3289.
78 Patty Tzu Chou Lin v. CIR [2017] NZHC 969.
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. 83

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 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. 84

In September 2018 the TWG issued an interim report signalling possible tax changes and seeking public consultation. Its interim observations included the possibility of, and difficulties with, a dedicated capital gains tax (not part of New Zealand’s tax system at present); tax responses to improve retirement savings and housing affordability; environmental taxes; and socially corrective taxes. It also addressed aspects of the tax disputes environment, suggesting the possibility of a taxpayer disputes service and a streamlining of some aspects of the process. The TWG is due to deliver its final report in February 2019.

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

84 See note 72.
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.
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 over 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), state 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 issues a notice of refusal to amend (NORA) to the taxpayer. The aggrieved taxpayer may within 30 days of receiving the NORA file an appeal at the TAT or other relevant court having jurisdiction over the dispute. It is noteworthy that the available administrative channels for resolution of tax disputes do not bar an aggrieved taxpayer from proceeding to the TAT or the courts, pending the exhaustion of the administrative process.

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, 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 the dispute will be forwarded to the Department of Public Prosecution for necessary actions.

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1 Etigwe Uwa and Adeyinka Aderemi are partners and Eberechi May Okoh and Munachiso Michael are senior associates at Streamowers & Köhn.
3 SNEPCO & 3 Ors. v. FIRS and Anor CA/A/208/2012, Judgment delivered on 31 August 2016.
Remedies available on tax disputes could include quashing the contested assessment, damages, cost of action, penalties, interest, fine, etc.

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, which was initially scheduled to end in March 2018, was extended for three months to June 2018. In October 2018, the federal government further launched a new Order on Voluntary Offshore Assets Regularisation Scheme (VOARS). According to the Order, eligible persons who hold offshore assets and income are expected to declare voluntarily within 12 months and pay either a one-time levy of 35 per cent or the applicable taxes plus penalties and interest.

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. 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 likely to be contentious. The writ is filed along with a statement of claim setting out the plaintiff’s claims and relief sought. Where the facts are not in contention or where a party seeks interpretation of a statute, agreement or document, an originating summons is advisable for commencing action. An action may also be commenced by originating motion or petition where expressly provided by statute.

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. Proceedings at the TAT are to be held in public, and the onus of proving its case rests on the appellant.

6 Section 15, Fifth Schedule, FIRS Act.
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.

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 the 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.

Decisions of tax authorities may be reviewed by application to court under the judicial review mechanisms. This mechanism allows a party to apply to court to review the action or decision of tribunals, lower courts or administrative authorities and decide whether the decision was rightly reached. The court, upon such review, either quashes or makes relevant orders of mandamus, certiorari or prohibition as the case may be.

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 and above for individuals and 10 million naira and above for corporate bodies;

c periodic returns filed by a taxpayer; and

d assessment or additional assessment by RTA.

Certain differences exist for commencement of disputes over different types of taxes. They include:

a 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;

b corporation tax: companies income tax (CIT) is a federal tax and all disputes relating to its payment are commenced before the TAT or FHC;

c 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;

d 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;

7 Ibid.
8 Section 19, Fifth Schedule, FIRS Act.
indirect taxes: indirect taxes in Nigeria include value added tax (VAT) and customs and excise duties. As with federal taxes, disputes are commenced at the TAT and FHC. However, where it involves individuals or partnerships, the commencement procedure for individuals and partnerships as listed above apply; 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 and whether they involve individuals, partnerships or corporations.

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.

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

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).
12 Section 2, Fifth Schedule FIRS Act.
13 Section 251(1)(b) 1999 Constitution (as amended).
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.\textsuperscript{14} In all other cases, leave of court must be obtained to appeal.\textsuperscript{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 is duly constituted if it consists of not less than five justices, provided that in cases involving the Court’s original jurisdiction\textsuperscript{16} or actions relating to the interpretation of the Constitution, the Court shall be constituted by seven justices.\textsuperscript{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 authorities as on the taxpayers.

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.\textsuperscript{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

\textsuperscript{14} Section 241 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended).
\textsuperscript{15} Section 242 of the 1999 Constitution (as amended).
\textsuperscript{16} Disputes between the Federal Government, States and National Assembly. Section 232 of the 1999 Constitution (as amended).
\textsuperscript{17} Section 234 of the 1999 Constitution (as amended).
\textsuperscript{18} Section 92 CITA.
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 Nigerian tax laws take the form of administrative penalties and civil liability\(^{21}\) such as the following.

- The RTAs are empowered to raise assessments according to the best of their judgement where returns are not filed.\(^{22}\)
- 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.\(^{23}\)
- 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.\(^{24}\)
- 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.\(^{25}\)
- 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.\(^{26}\)
- 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.

\(^{19}\) Section 94 CITA.
\(^{20}\) Sections 94–96 PITA.
\(^{22}\) Section 65(3) CITA; Section 54(3) PITA.
\(^{23}\) Section 66 CITA; Section 55 PITA.
\(^{24}\) 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.
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 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. 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. Remedies could be varying the assessment, quashing the assessment or damages.

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 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. The federal government’s VAIDS and VOARS schemes are examples of these tax amnesty programmes.

In the case of SEDCO Forex International Incorporated v. FIRS 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.

27 Section 90 CITA, Section 83 PITA.
28 Section 91 CITA, Section 84 PITA.
29 (2015) 18 TLRN 42.
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* 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* was called upon to determine whether supplied satellite-network bandwidth capacities were VATable and on whom 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.

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.

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.

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* 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* 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. 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 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 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.

The FIRS issued the Income Tax (Transfer Pricing) Regulations 2018 to replace the 2012 Transfer Pricing (TP) Regulations. The new Regulations incorporate the 2017 updates to the OECD’s TP Guidelines and some provisions contained in the African Tax Administration Forum’s Suggested Approach to drafting TP legislation.

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. 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. In 2018 various DTTs were negotiated, concluded or ratified including the Nigeria–Spain DTT, alongside DTTs with Sweden and South Korea. Also approved were

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37 With corresponding provisions in Section 17 PITA and Section 20 Capital Gains Tax Act.
DTTs between Nigeria and Singapore, Ghana and Cameroon. 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*[^40^] 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.

**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 2018 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.

In 2018 the FIRS started to write to Nigerian banks appointing them as collection agents of taxpayers considered to be in default of tax payments. The FIRS relied on Section 31 of the FIRS Act, which gives it powers to appoint a person as an agent of a taxpayer for the recovery of the tax that is payable by the taxpayer. The appointed agent will be required to pay any tax payable by the taxpayer from any money held by the agent on behalf of the taxpayer. The legality or otherwise of this action is yet to be tested in the courts.

As regards controlled foreign corporation (CFC) rules, Nigeria does not currently have any specific CFC rules. It is, however, very likely that steps are in place to enact such rules.

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.

[^40^]: (2014) 15 TLRN 76.
With the conclusion of the VAIDS scheme, the federal government recorded successes and substantial tax returns from parties who voluntarily submitted to the scheme. The government went further in 2018 to issue a Presidential Executive Order on Voluntary Offshore Assets Regularisation Scheme (VOARS), which seeks to provide an incentive for taxpayers who have defaulted in the payment of taxes in respect of their offshore assets and foreign-sourced income to voluntarily declare their offshore assets and regularise their tax affairs. VOARS provides a platform for taxpayers who have defaulted in the payment of their taxes to voluntarily declare all offshore assets and foreign-sourced income relating to the preceding 30 years of assessment and pay a one-time levy of 35 per cent on all offshore assets in lieu of payment of outstanding taxes among other benefits. The Scheme is scheduled to run for a 12-month period commencing 8 October 2018.\textsuperscript{41}

The TAT was reconstituted in 2018. Its mandate is to hear and resolve tax disputes arising from all federal tax legislation. There were 209 pending cases as at the time of inauguration in November 2018. The federal government has taken a stance that suggests it will come down heavily on citizens who do not take advantage of the various amnesty windows provided. This means the TAT and courts can expect an increased number of tax disputes to flood in.

Additionally, changes to the pioneer status incentive scheme were gazetted by the Nigerian Investment Promotion Commission (NIPC) including a new list of 27 additional pioneer industries and products. Under the pioneer status regime, tax exemptions and waivers exist for businesses granted pioneer status in Nigeria under the Industrial Development Income Tax Relief Act 2004.

\textsuperscript{41}  https://andersentax.ng/an-overview-of-the-voluntary-offshore-assets-regularization-scheme/.
Chapter 22

NORWAY

Thor Leegaard¹

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.

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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 value added tax (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. 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.

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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 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. A lawsuit must be filed within six months. The tax authorities may decide that a lawsuit cannot be filed before an appeal has been heard by the Tax Appeal Board.

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. If, on the other hand, the tax authorities have presented additional evidence, the taxpayer may be allowed to counter this new evidence. 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.

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.

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.\(^\text{11}\) It is also allowed to provide comments in other cases.\(^\text{12}\) 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.\(^\text{13}\)

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.\(^\text{14}\) 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\(^\text{15}\) 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 grey 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.\(^\text{16}\) In cases concerning less than 125,000 kroner, leave of appeal is required.\(^\text{17}\) 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.\(^\text{18}\) 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.\(^\text{19}\) 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.

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\(^\text{11}\) Section 13-6(3) TMA.
\(^\text{12}\) Section 13-6(4) TMA.
\(^\text{13}\) Section 13-6(5) TMA.
\(^\text{14}\) Section 13-7(2) TMA,
\(^\text{15}\) Prop. 38 L pkt. 19.9.3.
\(^\text{16}\) Section 29-5(1) Civil Procedures Act.
\(^\text{17}\) Section 29-13 Civil Procedures Act.
\(^\text{18}\) Section 30-4 Civil Procedures Act.
\(^\text{19}\) 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**

- **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

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\(^{20}\) 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 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. 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.

These rules also determine who is entitled to bring a case to court.

Since the Tax Appeal Board may determine in favour of the taxpayer, the Ministry of Finance has the right to sue the Board. 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

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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. Therefore, 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. 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. Costs may also partly be awarded in cases where a party has won parts of the case.

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.
Norway

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 the 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 Sæleik paragraph 47.
37 Rt 2004.957 PGS Geophysical AS paragraph 49.
38 Rt 2000.1811 Finanger.

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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 show 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 2017, leasing (mostly in relation to bareboat charters) and management fees and other services were the most significant group of cases. In addition, attribution 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 mean 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 23

POLAND

Slawomir Łuczak and Karolina Gotfryd

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 implementation of Council Directive (EU) 2016/1164 (the Anti-Tax Avoidance Directive (ATAD)). A large number of changes related to income taxes came into force on 1 January 2019, which will undoubtedly 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 to certain risks during the proceedings (especially regarding his or her company or business

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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 value added tax (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:

- micro-enterprises: two business days;
- small enterprises: 18 business days;
- medium-sized enterprises: 24 business days; and
- 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. However, it should be noted that the draft amendment to the Act on the National Fiscal Administration assumes
that a taxpayer who will correct the declaration in accordance with the result of customs and tax control and pay the tax will not be able to submit a correction later, questioning the findings of these controls.

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. It should be noted that Polish tax authorities willingly make use of the above argument and refuse to issue a tax ruling relying on potential abuse of tax law. 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).

From 2019 the tax authorities may revoke individual tax rulings obtained in the past if they were aimed at circumventing the law or they allowed optimisation measures to be taken in an artificial way or without economic justification and in consequence allowed the taxpayer to obtain a tax advantage. This means that in many cases the obtained individual tax rulings will no longer grant protection for taxpayers. Moreover, the subject of the request for interpretation cannot be the provisions to prevent tax avoidance, which relate, inter alia, to: GAAR, abuse of law in VAT, conduct of actual activity (CFC), measures limiting contractual benefits, specific anti-abuse rules (SAARs), etc.
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. 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.

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. 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.

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3 Ibidem.
4 Article 12 of the Law on the System of Administrative Courts.
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 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 complainant 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 (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

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5 Since 15 August 2015, the voivodship administrative court has right to rule in certain situations.
approximately one year 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.

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 Poland was particularly affected by the activities of organised crime groups extorting VAT in the carousel frauds, with usage of ‘blank invoices’ detected totalling 19.7 billion zlotys in 2013, 33.7 billion zlotys

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6 Information confirmed by the Warsaw Voivodship Administrative Court in a telephone conversation.
in 2014 and 81.9 billion zlotys in 2015. 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:

- falsifying invoices, issuing fabricated invoices with regard to data that might affect the amount of tax liability of the level of any refund;
- provision of false information in the invoices in order to gain tax advantages; and
- 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. A characteristic feature of administrative penalties is that their function is only prevention. Administrative penalties do not play the role of repressing 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:

- 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
- 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, 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 obliged 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).

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9 No. P 49/13.
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.

One of the key changes coming into force in 2019 is the introduction of additional tax liability related to tax avoidance, application of measures limiting contractual benefits, SAARs, incorrect withholding tax (WHT) statement or transfer pricing regulations. The tax authority, when issuing a decision applying these provisions, will determine an additional tax liability corresponding to a fraction of the tax advantage found in the proceedings (i.e., in the range of 10 to 80 per cent of the tax benefit).

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
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 for 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:

- travel expenses and other receivables of witnesses;
- expert and translator costs;
- costs of inspections; and
- 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. 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.

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.

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.

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11 Ibidem.
12 Supreme Administrative Court, 24 November 2003 (Case No. FSA 3/03).
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 from 2019 one of the significant changes to the GAAR is the removal of the negative premise of the GAAR clause when the tax benefit is less than 100,000 zlotys. It means that from 1 January 2019 tax authorities may verify and challenge any activity regardless of the expected value of the tax benefit.

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. From 2019 any action aimed at obtaining a tax benefit will be subject to GAAR unless the tax benefit is non-significant in comparison to other economic benefits resulting from the action. In addition to the above, any action undertaken for non-genuine economic reasons, other than obtaining a tax advantage that in given circumstances defeats the object or purpose of the applicable provision of the tax law, will be deemed artificial. GAAR will be no longer applicable only as a last resort when other measures (i.e., SAARs) fail. So far, GAAR 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.

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.
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

The Polish Vice Minister for Finance, Piotr Walczak, in an interview with the Polish Press Agency15 stated that in 2018, in addition to fraud in VAT, the priority of customs and tax control was the CIT tax, in which aggressive tax optimisation and transfer prices are used primarily to avoid taxation. In both cases, various types of financial instruments relating to the tax systems of several countries were used. In the area of interest in customs and tax audits were also gambling games and trade in goods with foreign countries (customs controls). In 2017, fuels, electronics, precious metals and rapeseed oil were controlled. The Vice Minister of Finance admitted that the Ministry of Finance will continue the activities that it had carried out so far, that is, first, to reduce the number of inspections of micro and small businesses. The number of inspections carried out by tax offices in 2017 decreased by 23.1 per cent compared to 2016. The Ministry of Finance mainly aims at controlling large entities – where there are potentially the largest depletions.

As for combating VAT fraud (mostly VAT carousel), the Ministry of Finance is continuing to combat this negative phenomenon by using more sophisticated tools and methodology. Thanks to this, the amount of VAT carousel is decreasing. It should be noted that the administrative courts also support the tax authorities in combating unfair taxpayers. The 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, due to a large number of changes in income taxes, the tax authorities may start using the GAAR much more broadly.

14 Supreme Administrative Court, 19 June 2009 (Case No. II FSK 276/08).
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. 2019 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 2019 are as follows.

i Income taxes

Owing to the fact that the Ministry of Finance’s aim for 2019 is to increase the collection of income taxes and tighten the tax system, as of 2019 the following main changes will be introduced into the Polish tax system:

a exit tax (the tax on transfer of assets abroad or change of tax residency of the taxpayer), not only for individuals but also for legal entities;
b a completely new mechanism of settlement of WHT in relation to payments exceeding 2 million zlotys;
c a 4 per cent additional tax for wealthy individuals – the so-called ‘solidarity tax’;
d a 5 per cent preferential PIT and CIT rate on incomes or gains from intellectual property rights resulting from research and development works (Innovation Box);
e further changes to CFC regulations;
f taxation of profits from virtual currencies (cryptocurrencies);
g tax schemes reporting (mandatory disclosure);
h limiting costs of cars in business activity; and
i deemed deduction of hypothetical interest (notional deduction – maximum of 250,000 zlotys in the tax year) on equity used for reinvestment purposes.
I INTRODUCTION

Historically, tax litigation has been a somewhat neglected field in Portugal. While the Portuguese legal framework is reasonably satisfactory in acknowledging taxpayers’ rights and providing means for their defence, the harsh reality is that tax courts face a chronic backlog of unresolved cases which they struggle to handle at an appropriate pace. More often than not, public resources are allocated to other areas of the judicial system such as criminal or civil courts, leaving tax courts struggling to keep up with the demands of a modern-day economy.

To make things worse, over the past decade significant investments have been made by the government to increase the tax authorities’ efficiency in raising revenue, notably augmenting their data management and audit capabilities. In turn, this intensified the volume of tax litigation, adding pressure to an already stressed tax court system.

Against this backdrop, some measures have been taken to address the issues faced by tax litigation in Portugal. Notoriously, in 2011 tax arbitration courts were created as an alternative dispute resolution mechanism capable of offering a final judgment within six months to one year, in contrast to the three to five years taken on average by the ordinary tax courts. To make this possible, arbitrators are selected from tax professionals, tax scholars and retired tax judges, and appeals are generally inadmissible.

On the other hand, the digital environment has finally fully reached the tax courts. Initially created in 2003, it took the best part of two decades and several improvements for the tax and administrative courts’ case management software ‘SITAF’ to be fully implemented. Finally, in 2018, its use became mandatory in all tax courts and nowadays both taxpayers and tax authorities can access their cases in real time and must present their writs by online submission. Moving from paper to a digital environment will certainly prove crucial to improve efficiency within the tax courts without compromising the quality of decisions.

Nevertheless, tax litigation is likely to continue to be on the rise as international exchange of information and the global stance against aggressive tax planning and tax avoidance fuels the tax authorities’ initiative and budgetary constraints still encourage a revenue-based
approach to their rapport with taxpayers. At the same time, taxpayers are increasingly aware of their rights and willing to assert them in court. Moreover, the issue of tax authorities’ liability for unlawful tax assessments is beginning to reach the courts in a meaningful manner.

Overall, there is a clear need to strike a balance between tax authorities’ efficiency and taxpayers’ rights protection, possibly through less adversarial approaches to the administration of taxes and tax litigation. Traditionally, tax administration tools such as mediation, settlement or horizontal monitoring have been discarded in Portugal under constitutional constraints like the principles of tax legality and equality but, slowly and steadily, things may be changing also in this regard.

In 2013, a special division was formed within the tax authorities’ structure to assist large taxpayers. The Large Taxpayers Unit successfully created a taxpayer-friendly environment directed towards large businesses and high-profile individuals in acknowledgement of the fact that most of those taxpayers focus primarily on adequate compliance with tax law and not in saving taxes at all costs.

More recently, in 2018, the government assigned an independent group of individuals with the task of drafting a report suggesting legal amendments aiming at preventing unnecessary disputes between the tax authorities and taxpayers, with the view that often their interests are not irreconcilable or conflicting and stem from misinformation or simply from the unnecessary intricacy of tax law.4

II COMMENCING DISPUTES

At the heart of any tax dispute is a disagreement between the tax authorities and a taxpayer as to how tax should apply to a given situation (i.e., how tax should be assessed). On the other hand, nowadays the vast majority of assessments result primarily from the interaction between the taxpayers and the tax authorities’ software. This entails that most disputes arise either when taxpayers wish to amend previously filed tax returns, or, above all, when the tax authorities initiate tax audit procedures and disagree with how or what the taxpayers have stated to be their tax-related affairs.

Amending tax returns

The amendment of tax returns by taxpayers is possible in the event of factual or legal errors that affect the accuracy of the original return or whenever new facts dictate a retrospective reassessment of tax.5 Moreover, in the case of self-assessed taxes such as corporate income tax and value added tax (VAT) it is mandatory whenever the amendment implies an increase of the tax assessed.6

Personal income tax returns may be amended, as a rule, within 120 days as of the payment deadline of the original tax assessment being notified to the taxpayer. By contrast, when favourable to the taxpayer, the amendment of corporate income tax returns may take place within one year as of the original filing deadline and, when unfavourable, within the general four-year statute of limitations period. Similarly, VAT assessments may be amended

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4 Ministerial Dispatch No. 4223/2018 of 17 April 2018.
5 Under Article 59(3) of the Tax Procedure and Process Code (CPPT).
6 See Article 122(1) of the Corporate Income Tax Code (CIRC) and Article 78(6) of the Value-Added Tax Code (CIVA).
within two years of the original filing when the amendment is favourable to the taxpayer and, when unfavourable, must be amended with no time limit other than the aforementioned general statute of limitations period.

Regarding legal or factual errors detrimental to taxpayers, once the deadlines for amending the corresponding returns have expired, taxpayers may only seek to alter tax assessments by initiating a formal dispute with the tax authorities, as discussed below.

The amendment of tax returns within the assessment procedure by the tax authorities is possible and is usually the result of the cross-referencing of data provided by other taxpayers or, rather less frequently, from the automatic exchange of information with foreign tax authorities. However, as a rule, the tax authorities tend to act once taxes have already been assessed, examining the conformity of such assessments within tax audit procedures. These may be initiated at any time during the statute of limitations period, which is then stayed whenever the tax audit takes place at the taxpayers’ premises or facilities (i.e., is an ‘external’ tax audit).

Tax audits must be completed within six months, a period that in certain circumstances may be extended for up to two additional three-month periods. Should the tax audit include the resort to exchange of information mechanisms with foreign tax authorities, an additional extension of 12 months is applicable.

Within the tax audit procedure, when the tax authorities reach a preliminary conclusion that an amendment detrimental to the taxpayer is due, the taxpayer is notified to present any additional information and issue an opinion on such conclusion within a set deadline ranging from 15 to 30 days. Pursuant to such hearing, the final tax audit report is issued dictating any tax assessments the tax authorities deem justifiable.

ii Disputes related to tax assessments

Once a tax assessment is issued, taxpayers may typically choose to dispute it via an administrative procedure within the tax authorities hierarchy, or go directly either to the Judicial Tax Court or to the Tax Arbitration Centre. In certain specific circumstances, however, the administrative review procedure is a precondition that needs to be met before taking the dispute to court. This is generally the case with self-assessments or withholding tax disputes, in which taxpayers can only go directly to court if the dispute does not pertain to a matter of fact and the assessment was made in accordance with assessment guidelines published by the tax authorities.

The administrative claim procedure is free of charge and may generally be filed within a 120-day period as of the assessment’s payment deadline. However, administrative claims pertaining to self-assessments or withholding tax may be filed within two years following the assessment. Administrative claims are to be decided by the tax authorities within four

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7 Tax audit procedures are governed by the General Tax Law (LGT) and by the Tax and Customs Audit Procedure Regime (RCPITA), a specific statute that outlines the tax authorities’ prerogatives and the corresponding taxpayers’ rights.

8 The general statute of limitations period is four years, foreseen in Article 45(1) LGT. There are, however, a number of specific exceptions that can extend such period up to 12 years, such as whenever the facts at stake pertain to blacklisted jurisdictions – see Article 45(7) LGT.

9 See Articles 131(3) CPPT and 132(6) CPPT.

10 See Article 70(1) CPPT.

11 See Articles 131(1) CPPT and 132(3) CPPT.
months. Upon an express or tacit dismissal\textsuperscript{12} of the administrative claim, taxpayers may choose to lodge an administrative appeal to the Ministry of Finance (within 30 days),\textsuperscript{13} to file a judicial claim before the Judicial Tax Court (within three months)\textsuperscript{14} or, when admissible, to file a tax arbitration request before the Tax Arbitration Centre (within 90 days).\textsuperscript{15} Administrative appeals should be decided within 60 days. Pursuant to such decision, the dispute may still be brought to either the Judicial Tax Court or the Tax Arbitration Centre (within the aforementioned deadlines).

Similarly, whenever a taxpayer chooses to challenge the tax assessment directly before the Judicial Tax Court, the corresponding judicial claim is to be filed within three months as of the assessment payment deadline. Alternatively, should the chosen litigation course be tax arbitration, the corresponding tax arbitration request needs to be filed within 90 days as of the assessment payment deadline.

iii Other disputes

In addition to the prevalent disputes related to tax assessments there are of course myriad actions and procedures by the tax authorities that may give rise to disputes with taxpayers. Broadly speaking, actions by the tax authorities that do not directly pertain to tax assessments may be judicially challenged by taxpayers via the general judicial administrative claim made available as a remedy against illegal action by governmental and other public entities.\textsuperscript{16} This is to be filed within three months as of the date the disputed action is notified to the taxpayer. In tax matters it applies, for instance, to cases such as the refusal or withdrawal of tax benefits or whenever taxpayers wish to challenge the outcome of binding information requests.

However, there are other disputes that take place in the tax field and do have specific procedures. Worth mentioning in this regard are actions taken by the tax authorities within tax audit procedures such as the access to banking information or the resort to presumptive taxation on the grounds of wealth signs evidenced by the taxpayer held incompatible with the corresponding personal income tax returns. In such cases, taxpayers may challenge said actions via a specific judicial appeal to be lodged within 10 days as of knowledge of the tax authorities’ intent.\textsuperscript{17} On the other hand, whenever indirect methods of taxation are applied, a special administrative procedure exists entailing an internal review procedure and a technical debate between designated experts, which is a precondition for the subsequent judicial claim.\textsuperscript{18} The taxpayer needs to request such review committee within the 30 days following the notification of the tax audit report.

Tax procedure law additionally foresees legal actions that are ancillary in nature, such as judicial order requests to access and obtain copies of the tax authorities’ records, to put an end to unlawful procedural delays or to force the tax authorities to comply with judicial decisions.

\textsuperscript{12} A tacit dismissal occurs when the deadline for a decision elapses. It grants the taxpayer the right to take the case immediately to court. Alternatively, the taxpayers may choose to wait for an express decision, which in that case remains due.

\textsuperscript{13} See Article 66(2) CPPT.

\textsuperscript{14} See Article 102(1) CPPT.

\textsuperscript{15} See Article 10(1) of the Tax Arbitration Legal Regime (RJAT).

\textsuperscript{16} The Administrative Courts’ Procedure Code (CPTA) governs the general judicial administrative claim procedure.

\textsuperscript{17} See Article 146-B(2) CPPT.

\textsuperscript{18} This special administrative procedure applicable in cases of indirect methods of taxation is governed in Articles 91 to 94 LGT.
Also available to the tax authorities are precautionary or interim measures, such as the seizure of goods or documents, and the sealing of premises to preserve evidence, the legality of which may be challenged by taxpayers within the corresponding procedures.\(^{19}\)

A final note should be made regarding tax foreclosure procedures, which are conducted by the tax authorities under judicial oversight. Upon being summoned to such a procedure, taxpayers have 30 days to lodge a judicial opposition either challenging the legality of the foreclosure procedure or arguing their illegitimacy as debtor.\(^{20}\) In addition to such judicial opposition, the legality of all other actions by the tax authorities while conducting the tax foreclosure may be challenged via a judicial claim to be lodged within 10 days of becoming aware of the action.\(^{21}\)

III THE COURTS AND TRIBUNALS

As previously mentioned, prior to the court stage taxpayers may challenge the lawfulness of tax assessments internally within the tax authorities via the administrative claim procedure. Nevertheless, administrative claims prove to have little to no effect in successfully handling taxpayers’ complaints. Indeed, especially when tax assessments result from a preceding tax audit procedure, it is very rare for the tax authorities to change their stance in administrative claim procedures. Realistically, a fair chance of success exists only regarding blatant errors of fact or law or if taxpayers can provide new documents or information that was not examined within the audit. Because of this, even if a decision is typically rendered within the four-month legal deadline, most taxpayer disputes end up in court. Likewise, the administrative appeal has similarly slim chances of success, with the added inconvenience that the 60-day deadline for a decision is a far cry from the 12 months such appeals take to be decided on average.\(^{22}\)

All things considered, the tax courts play a decisive role in handling tax disputes. These are judicial courts and therefore independent from both the government and the tax authorities. There are 16 first instance tax courts covering the entirety of the Portuguese territory. Tax cases are decided by a single judge and on average take approximately three years to be decided.\(^{23}\) They have full jurisdiction to review and annul tax assessments, both on grounds of fact and of law.\(^{24}\)

First instance court decisions may be appealed to either one of the two central administrative courts (for a review both of facts and law) or to the Supreme Administrative Court (for a review solely on matters of law). Panels of three judges rule on the appeals.\(^{25}\)

Appeals vary significantly regarding the time taken for a decision, ranging from six months to several years depending on the complexity of the case.\(^{26}\) Such appeals tend to be final given that further appeals, either to the full panel of judges of the Supreme Administrative Court or to the Constitutional Court, are very restricted.

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19 See Article 146(1) CPPT.
20 See Articles 203 CPPT and 204 CPPT.
21 See Article 276 CPPT.
22 Statistics on the volume of administrative claims and appeal and the average time taken for a decision are taken from the 2018 Government Report on the Fight against Tax Fraud and Tax Evasion, pp. 137–43.
23 See the 2017 Annual Report from the High Council of the Tax and Administrative Courts, p. 51.
24 See Section II.i.
25 See Article 280(1) CPPT.
26 For updated statistics on the duration of appeals see the Directorate-General on Justice Policy website.
Be that as it may, a second level of appeal to the Supreme Administrative Court may be based on conflicting rulings by the central administrative courts (with prior decisions from either the central administrative courts or the Supreme Administrative Court)\(^ {27}\) or by the Supreme Administrative Court (with prior decisions by the same Court).\(^ {28}\) Another possibility of appeal to the Supreme Administrative Court exists when such appeal is deemed as clearly necessary for a better application of the law or owing to the legal or social importance of the questions at hand.\(^ {29}\)

Finally, cases pertaining to the constitutionality of legal provisions may ultimately be appealed to the Constitutional Court provided that such constitutionality issue has previously been raised during the proceedings before the lower courts.\(^ {30}\)

### IV PENALTIES AND REMEDIES

Failing to pay a tax or to surrender taxes withheld entails the payment of compensatory interest at a 4 per cent yearly rate.\(^ {31}\) Whenever the taxpayer has assessed the tax amount at stake, late payment interest at a yearly rate currently set at 4.825 per cent is due instead.\(^ {32}\) Such interest is assessed together with the tax assessment and may be challenged in the same dispute.

In addition to the charge of interest, infringing tax law provisions may have criminal or administrative misdemeanour consequences. These are foreseen in a specific statute that sets out in detail not only the different types of tax infringements, but also the corresponding procedural provisions regarding how penalties should be applied and how taxpayers may defend themselves.\(^ {33}\)

Criminal penalties are punishable either with imprisonment or with pecuniary penalties. The latter are set out in a number of days of penance, to which a certain penalty amount is attributed ranging from €1 to €500 regarding convicted individuals or from €5 to €5,000 regarding corporate entities. Ancillary penalties such as interdiction of certain activities may also be applied.

Among the various types of criminal offences, emphasis should be made on the crimes of tax fraud\(^ {34}\) and of tax embezzlement,\(^ {35}\) which are the most commonly prosecuted.\(^ {36}\)

Tax fraud is punishable with up to eight years’ imprisonment (for individuals) and up to 1,920 days of penance (for corporate entities). It occurs whenever a wilful misconduct is aimed at evading the assessment, payment or passing on of tax, or at unduly obtaining tax relief, refunds or other pecuniary advantages capable of generating a decrease in tax revenue, provided that the tax amount at stake is at least €15,000, notably via:

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27 See Article 280(2) CPPT.
28 See Article 152(1b) CPTA.
29 See Article 150(1) CPTA.
30 See Article 70(1) of the Constitutional Court Procedural Law (LTC).
31 See Article 35 LGT.
32 See Article 44 LGT.
33 The General Regime on Tax Infringements (RGIT).
34 See Articles 103 RGIT and 104 RGIT.
35 See Article 105 RGIT.
36 Tax embezzlement corresponded to 79 per cent of the total tax criminal procedures initiated in 2017, while tax fraud amounted to 7 per cent (see the 2018 Government Report on the Fight against Tax Fraud and Tax Evasion, p. 167).
the concealment or misrepresentation of facts or figures that must be registered in accounting books or records, or on returns filed or provided to the tax authorities for the specific purpose of inspecting, determining, assessing or verifying taxable income; b the concealment of facts or figures that should be disclosed to the tax authorities; or c the carrying out of sham transactions, disguising the corresponding value or nature, or by interposing, omitting or replacing the corresponding intervening parties.

Tax embezzlement is punishable with up to five years’ imprisonment (for individuals) and up to 1,200 days of penance (for corporate entities). It occurs whenever tax withheld, or in any way charged to a third party, in excess of €7,500, is not surrendered by the taxpayer to the tax authorities.

Like any other crimes, the Public Prosecution Service prosecutes tax criminal offences, albeit with technical assistance provided by the tax authorities. The defence of taxpayers takes place under the general criminal procedural law.

Administrative misdemeanours are punishable with fines, applied by the tax authorities, and only apply if criminal offences do not. The most relevant misdemeanour is the failure to surrender taxes withheld, assessed or charged to a third party.37 Also relevant is the lack or inaccurate filing of tax returns or other tax-relevant documents.38

The failure to surrender taxes withheld, assessed or charged to a third party is punishable with a fine of up to 200 per cent or 400 per cent of the tax at stake (for individuals and corporate entities respectively), capped at €82,500 and €165,000 (for individuals and corporate entities respectively). The lack or inaccurate filing of tax returns or other tax-relevant documents is punishable with a fine of up to €22,750 or €45,500 of the tax at stake (for individuals and corporate entities respectively).

In addition to being able to defend themselves within the tax misdemeanour procedure prior to the application of fines, subsequently taxpayers are entitled to challenge the legality of any fines applied before the judicial tax courts.

Finally, it should be mentioned that if a dispute exists as to the tax assessment to which the tax infringement refers, as a rule, the corresponding criminal or administrative misdemeanour procedure is stayed until a final decision is reached as to the assessment’s lawfulness.

V TAX CLAIMS

i Recovering overpaid tax

Overpaid tax is typically seen as the result of an inaccurate tax assessment and, as such, it may be recovered by the taxpayer either via the filing of an amended tax return or through the normal tax dispute mechanisms discussed above.39

37 See Article 114 RGIT. The failure to surrender taxes withheld, assessed or charged to a third party corresponded to 78 per cent of the total misdemeanor procedures started in 2017 (see the 2018 Government Report on the Fight against Tax Fraud and Tax Evasion, p. 164).
38 See Article 119 RGIT.
39 See Section II.
Exceptionally, an *ex officio* review of tax assessments is possible on the grounds of an assessing error imputable to the tax authorities, of serious or blatant injustice, or of duplication of tax, within extended deadlines of up to four years as of the assessment date.\(^{40}\)

Special regimes are available to non-resident taxpayers entitled to refunds of taxes withheld at source under double tax treaties or EU directives. The deadline to request such refunds is typically two years as of the assessment date or from when the legal requirements necessary for the refund to be due are met.\(^{41}\)

Finally, regarding VAT, there is a tax refund procedure for taxpayers established in Portugal within the normal VAT current account,\(^{42}\) which generally applies when the outstanding credit resulting from deducted input VAT exceeds €250. VAT taxpayers established in other EU Member States may request the refund of VAT borne in Portugal under the rules and procedure laid down pursuant to Council Directive 2008/9/EC of 12 February 2008.\(^{43}\)

**ii Challenging administrative decisions**

Administrative decisions are subject to judicial review and must comply both with ordinary law and with constitutional principles and provisions. Hence, they may be challenged before the tax authorities themselves or the tax courts on the grounds of any illegality or unconstitutionality, including serious injustice, abuse of power, acquired right or legitimate expectation.

Nevertheless, the tax authorities tend to focus on ordinary law and decide cases accordingly. For understandable reasons such as ensuring an equal treatment of taxpayers but, most of all, to secure an adequate level of control and homogeneity between different units within the hierarchy, the tax authorities are reluctant to set aside ordinary legal provisions on the grounds of an alleged disconformity with constitutional commands. In practical terms, this is a task left to the courts.

**iii Claimants**

Tax procedural law foresees a very wide range of potential claimants. It includes taxpayers, legal substitutes, representatives, entities legally liable for the tax debt (jointly and severally or subsidiarily), and any other individual or entity that proves to have a legally protected interest in the claim.\(^{44}\)

Hence, regarding VAT and other indirect taxes such as stamp duty, claimant status includes third parties that have borne the tax at stake. Moreover, when a tax has legally been passed onto a different taxpayer, the VAT Code expressly establishes that the original VAT taxpayer alone may not challenge the corresponding assessment, so as not to create situations of unjust or unjustified enrichment.\(^{45}\)

\(^{40}\) See Article 78 LGT.

\(^{41}\) See Article 101-C of the Personal Income Tax Code (CIRS) and Article 98 CIRC, regarding individual or corporate taxpayers, respectively.

\(^{42}\) See Article 22 CIVA.

\(^{43}\) Transposed into the Portuguese legal order by Decree-Law No. 186/2009, of 12 August 2009.

\(^{44}\) See Article 9 CPPT.

\(^{45}\) See Article 97(3) CIVA.
VI  COSTS

Procedures before the tax authorities such as administrative claims and administrative appeals are free of charge. However, if the administrative claim is held to be clearly ungrounded the tax authorities may decide to apply a charge of up to 5 per cent of the disputed taxable base.46

By contrast, actions before the judicial tax courts are subject to court fees.47 These are scaled in accordance with the value of the claim, ranging on the first instance tax courts from €51 (for claims of up to €2,000) to €1,632 (for claims of up to €275,000). Claims in excess of €275,000 are subject to a final surcharge of €306 for each additional €25,000. Appeal courts’ fees are set at half the first instance tax courts’ fees.

The winning party within a judicial tax claim is entitled to claim the refund of the court fees borne from the losing party. Moreover, as compensation for legal fees, the winning party may claim an amount of up to 50 per cent of the total court fees paid. As a rule, this falls short of the actual legal costs borne, with the probable exception of very high-value claims.

Tax arbitration is also subject to fees, which are slightly higher than judicial court fees.48 These range from €306 (for claims of up to €2,000) to €4,896 (for claims of up to €275,000). Claims in excess of €275,000 are subject to a final surcharge of €306 for each additional €25,000.49

The winning party within an arbitration tax claim is refunded by the Tax Arbitration Centre the amount of fees paid.50 No amount is due as compensation for legal fees.

VII  ALTERNATIVE DISPUTE RESOLUTION

As previously mentioned, in 2011, Portugal introduced tax arbitration as a measure to tackle the significant volume of cases pending in judicial tax courts. Perfectible as it may be, it must be said that it was a resounding success. It is seen increasingly as the forum of choice if your case is relatively simple and you do not wish to wait several years for it to be decided.

The tax arbitration procedure was conceived and designed as an alternative to the judicial claim and is initiated at the taxpayer’s request before the Tax Arbitration Centre. Ad hoc tax arbitration tribunals are set up by the Centre. A single arbitrator decides cases with a value of up to €60,000, while a panel of three arbitrators decides cases in excess of such amount – such panel also exists whenever the taxpayer exercises the right to choose a specific arbitrator.51 Arbitration tribunals must decide cases by applying the law. There is no room for settlement or equity judgments.

The types of cases that may be subject to arbitration are expressly defined and include:

46 See Article 77 CPPT.
47 Court fees are levied in accordance with the Judicial Costs Regulation (RCJ), a statute that applies to all judicial court procedures, including tax courts.
48 Tax Arbitration fees are specifically set out in the Tax Arbitration Costs Regulation (RCAT).
49 Whenever the taxpayer exercises the right to choose one of the arbitrators (see Section VII) the costs are significantly higher, ranging from €6,000 (for claims up to €60,000) to €120,000 (for claims up to €10 million).
50 No refund exists when the taxpayer has exercised the right to choose one of the arbitrators.
51 Regardless of the value at stake, the taxpayer may opt to select a specific arbitrator, in which case the tax authorities will choose another and both will select a third arbitrator who will preside over the judgment. Mostly because of the related costs (see Section VI) taxpayers, apart from very specific cases in which the expertise of a specific scholar is seen as crucial, seldom elect this option.
claims upholding the illegality of additional tax assessments (including self-assessments, tax withholding and payments on account whenever preceded by an administrative claim); and

b claims upholding the illegality of decisions that set taxable income but do not directly give rise to the assessment of any tax, of decisions determining the taxable base and decisions that set asset values for tax purposes (with the exception of those that result from the application of indirect methods of taxation).

Moreover, customs duties and related indirect taxes, as well as claims relating to the classification, origin and customs value of goods, may not be subject to tax arbitration. Finally, tax disputes with a value exceeding €10 million are also excluded from tax arbitration.

The main feature of tax arbitration is its swiftness, given that cases must be decided within six months (with the possible extension of an additional equal period when the complexity of the case justifies it). This deadline is consistently complied with and is seen as the most important factor underlying a taxpayer’s choice to bring its dispute before an arbitration tribunal. Such swiftness is additionally secured by the fact that arbitration decisions tend to be final given that appeals are only admissible in very strict circumstances. Broadly speaking, a decision from an arbitration tribunal is equated for appeal purposes to a decision from a central administrative court and therefore only exceptionally may it be appealed either to the Supreme Administrative Court or to the Constitutional Court.

Apart from arbitration, other mechanisms exist that ultimately aim to prevent disputes such as binding information requests, advance clearing procedures (restricted to entities that qualify as ‘large taxpayers’), and advance pricing agreement procedures.52

VIII ANTI-AVOIDANCE

Portugal has had a general anti-abuse rule (GAAR) for nearly 20 years now.53 It was highly controversial when introduced and seen by many as a threat to the constitutional principle of legality, which was and is still seen as the backbone of the tax system. To address such concerns the actual resort to the GAAR was heavily conditioned by a set of formalities placing a special burden on the tax authorities.

Mostly because of this, for the first 10 years of its existence cases in which the Portuguese tax authorities had resorted to the GAAR were virtually unheard of. It all changed in 2011 when it was successfully applied in a high-profile case that echoed throughout the Portuguese tax industry.54 That was of course fuelled by the domestic and international stance against aggressive tax planning. In the years following such decision one witnessed a widespread resort to the GAAR by the Portuguese tax authorities, which was nevertheless somewhat restrained by the courts. Nowadays the tax authorities are still striving to strike the proper balance between applying the GAAR and accepting taxpayers’ freedom to arrange affairs in a tax-efficient manner.

It is against this backdrop that the BEPS proposals and the corresponding European Commission initiatives should be seen. In general both the tax authorities and the

52 See Article 68 LGT (Binding Information), Article 12(3) RCPITA (Advance Clearing), and Article 138 CIRC (Advance Pricing Agreements).
53 See Article 38(2) LGT.
54 Case 04255/10, decided by the South Central Administrative Court on 15 February 2011.
Portugal

government welcome such measures, in particular since they all concur to increase the tools and mechanisms at the tax authorities’ disposal. Indeed, Portugal is generally compliant with both OECD and EU legislative programmes, albeit with some delay, which is more due to poor organisation than reluctance or criticism.

IX DOUBLE TAXATION TREATIES

Double tax treaties are interpreted and applied in accordance with the Vienna Convention on the Law of Treaties of which Portugal is a contracting state. In this context, it should be mentioned that the Portuguese legal order is monist, meaning that treaty provisions need not be transposed into the domestic legal order once the corresponding treaty is signed and ratified. This entails that taxpayers may invoke treaty provisions directly and that these prevail over strictly domestic law. Tax treaty override is therefore forbidden.

Having said this, regarding the practical application of double tax treaties, domestic law does foresee specific procedural requirements destined to establish exactly how non-resident taxpayers are required to prove their entitlement to treaty benefits. This typically is done through specific standardised forms that are to be certified by foreign tax authorities to attest the corresponding tax residence and other relevant facts and circumstances such as beneficial ownership of income.

Likewise, EU law provisions prevail over domestic tax law and may be invoked directly by taxpayers.

X AREAS OF FOCUS

Significant investments made in the tax administration software and important legislative measures obliging businesses to upgrade and harmonise invoicing and accounting procedures to a point that the tax authorities may virtually access these in real time enabled in recent years a particularly efficient fight against the shadow economy.

Driven by such success, and realising the importance of information as the decisive factor to a successful administration of taxes, the tax authorities are currently shifting their attention to cross-border situations and the exchange of information with their foreign counterparts. This is likely to be a major area of focus in the near future, as the tax authorities will certainly try to make the best use of the vast exchange of information network at their disposal. In turn, this will put pressure on taxpayers and tax courts, which still tend to accept as truthful any information received from a foreign tax authority. One should not forget that these are no longer the days of information exchanged almost only by request and under careful preparation by conscious tax officials. Nowadays, most information is of

55 The Portuguese double tax treaties network currently includes 79 treaties – for an updated list of the existing treaties see the tax authority’s website.
56 See Article 101-C CIRS and Article 98 CIRC.
57 In addition to the exchange of information provided by the existing double tax treaties it is worth mentioning the Convention on Mutual Administrative Assistance in Tax Matters (developed jointly by the OECD and the Council of Europe) of which Portugal is a contracting party, and of course the EU Directives on exchange of information. Moreover, there are 15 bilateral exchange of information undertaken with jurisdictions with which no double tax treaty exists (for the corresponding list see the tax authority’s website).
course exchanged automatically and in bulk, with little to no human interference, which will inevitably augment the risk of errors and inaccuracies that may turn into a terrible ordeal for taxpayers.

XI  OUTLOOK AND CONCLUSIONS

This short analysis has shown that the Portuguese legal framework relevant to taxpayer protection, perfectible as it may be, is reasonably satisfactory. Even so, in recent years budgetary constraints and a press for quantitative efficiency have brought a considerable curbing of taxpayers’ rights, as government and tax officials concentrate above all on raising revenue. Unfortunately, this trend does not appear to be changing.

Eventually it seems inevitable that a fresh look will be taken at taxpayers’ rights, reconciling the much-needed efforts to fight tax evasion and aggressive tax planning with fundamental values such as legal certainty and proportionality, the importance of which cannot be forgotten and should not be downplayed.

Nevertheless, the major threat to taxpayers’ rights in Portugal does not come from lack of or deficient legal statutes. It pertains to the quality with which tax law is applied and to the lack of technical preparation of those dealing with it. It is more of a social than a legal problem, but if tax officials wrongfully levy taxes, tax lawyers fail to properly present their clients’ cases and tax judges decide cases simply in accordance with what they sense to be right or, even worse, take refuge in analysing form rather than merit, no legal right is really protected.
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 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

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1 Yana Proskurina is a former 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, value added tax (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 measures (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 obliged 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, only a 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:

- 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;
- failure to file tax returns as a percentage of the tax amount due that was not paid under the returns;
- failure to submit documents to the tax authorities (200 roubles per document);
- doing business without registering with the tax authorities as a percentage of the income earned from such business activity; and
- 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 from two to 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 of 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. 13AП-14558/2017 of 13 September 2017 on Case No. A56-28927/2016; Resolutions of the 17th Arbitrazh Appellate Court No. 17AП-11906/2017-AК of 23 October 2017 on Case No. A60-12916/2017, No. 17AП-14023/2017-AК of 23 October 2017 on Case No. A50-9057/2017, No. 17AП-8375/2017-AК of 23 October 2017 on Case No. A50-7683/2017, No. 17AП-13676/2017-AК 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 Resolution No. 53

In one case, 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, 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

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, 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.

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.

2 Case No. A81-2855/07.
3 Dated 30 June 2009.

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iii Challenge resale of Russian assets

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.

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, 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

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5 Case No. A40-10532/17-140-122.
6 Case No. A81-2855/07.
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, 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, 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. 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 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.

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7 Dated 30 June 2009.
9 Case No. A40-10532/17-140-122.
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 2019.

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 company that is just launching its business activity, and therefore incurs overall losses;
- a company that incurs losses as the result of a specific transaction; and
- 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:

- 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.);
- 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
- 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.

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

10  Resolution of Plenum SAC # 57 dated 30 July 2013.
11  Case No. A40-11909/12, Case No. A40-12815/15.
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.

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Chapter 26

SWITZERLAND

Jean-Blaise Eckert¹

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, they 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 may

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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 they lose. In the case where the taxpayer partially wins, they will have to pay part of the court fees. To the extent that the taxpayer wins in court, their 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 value added tax (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 announcement 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, it 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 their general duty to collaborate with tax authorities for ensuring that the taxation is complete and accurate. On request, they must provide additional information, documents, accounting documents, etc.

In the case where the taxpayer does not comply with their 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 their 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.

As of 30 September 2018, disclosures relating to assets held in jurisdictions with which Switzerland has an automatic exchange of information in place are no longer regarded as being voluntary and may not benefit from the voluntary disclosure programme anymore. Voluntary disclosures remain possible with respect to assets that are not covered by the automatic exchange of information.

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, they 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, they may file a formal complaint with the same tax authority that 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 their 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 formal 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 tax law, 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 notification 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 role 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 challenged.

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 comply 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 their 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 Swiss 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 operate 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 their own costs. The taxpayer may, however, recover from the state part of the costs in case of success in front of the court. Even in 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 their 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 issue tax rulings. In practice, however, the cantonal authorities often consult the Federal Tax Administration with regard to 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 they rely 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. Such a procedure also constitutes a minimum standard under the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (MLI), signed by Switzerland on 7 June 2017. It may be initiated to eliminate double taxation that has occurred in violation of the treaty. In this context, advance pricing agreements are a specific kind of mutual agreement procedure in the area of transfer pricing.

This type of procedure is independent from 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 a mutual agreement procedure. In order to save their 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. Furthermore, the MLI introduces more detailed arbitration provisions to existing treaties between Switzerland and countries that have also opted in for these provisions.

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 MLI in Paris, which entered into force on 1 July 2018. 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. These standards include the Principal Purpose Test (PPT), which serves to prevent treaty abuse by denying benefits under an agreement if obtaining that benefit was one of the principal purposes of an arrangement or transaction that resulted in that benefit, unless it is established that granting that benefit in these circumstances would be in accordance with the object and purpose of the relevant provisions of the agreement. The MLI is currently undergoing the standard parliamentary approval process and will enter into effect in accordance with Article 35 of the MLI.

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 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, particularly so with the recent signature of the MLI. 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 stated that the beneficial ownership criterion is an implicit requirement in all 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.

The entry into effect of the MLI will also have a significant impact on existing double taxation treaties, in particular with the introduction of the PPT as a general anti-abuse rule.

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 strict 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 intra-group 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 that 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 took place in autumn 2018.
XI OUTLOOK AND CONCLUSIONS

Following the rejection of the Corporate Tax Reform III by Swiss voters on 12 February 2017, the Federal Department of Finance has worked on a new corporate taxation proposal entitled Tax Proposal 17, and subsequently renamed Tax Reform and AHV Financing (TRAF). 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, the TRAF contains several tax measures to maintain Switzerland’s competitiveness, in particular the introduction of cantonal patent boxes and R&D tax deductions. The TRAF was accepted by Parliament on 28 September 2018, and a referendum is likely to be held on 19 May 2019. If approved by Swiss voters, the planned measures will come into force in 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 27

UNITED KINGDOM

Simon Whitehead

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 forums 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) and guidance on the use of alternative dispute resolution (ADR) in large and complex cases. The LSS sets out the framework within which HMRC seeks to resolve tax disputes through litigation or ADR. The aim behind the LSS 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

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liability on delivering a tax return. 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.

Commonly, returns must be filed within 12 months of the end of the accounting period for which the return is made. Companies must file their returns, accounts, computations and any claims for relief via HMRC’s online Corporation Tax service save for exceptional circumstances. A company may also, by notice to HMRC within 12 months of the filing date, amend its own return.

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. 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. HMRC can make only one enquiry into each tax return, unless the company has made subsequent amendments to the return. 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. 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.

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. An enquiry is completed once HMRC issues what is now termed a final closure notice.

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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.


8 Schedule 18, Paragraph 24, FA 1998.


12 Schedule 18, Paragraph 74(4), FA 1998.

13 Schedule 18, Paragraph 32(1A). Prior to the introduction of partial closure notices in November 2017, a notice completing an enquiry was simply termed a ‘closure notice’.
issue a final closure notice once it has reached a conclusion on all areas of dispute within an enquiry. The Court of Appeal has held that HMRC must carry out the following steps to validly issue a closure notice:

\[\begin{align*}
&\quad a \quad \text{decide whether to complete its enquiry;} \\
&\quad b \quad \text{establish whether amendments need to be made to the self-assessment return and, if so, what they should be; and} \\
&\quad c \quad \text{communicate the completion of the enquiry and the conclusions to the taxpayer.}
\end{align*}\]

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 new legislation allows HMRC and taxpayers to conclude discrete matters during an enquiry where more than one issue is in dispute. HMRC is able to issue a partial closure notice in agreement with a taxpayer, at its own discretion or when directed to do so by the First-Tier Tribunal on application by a taxpayer. HMRC’s policy, however, is that partial closure notices should only be issued in serious or complex cases. 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.

Closure notices, whether partial or final, only take effect once issued. Once a closure notice has been issued, HMRC cannot unilaterally withdraw it. A closure notice must state the officer’s conclusions and what, if any, amendment is required to the return under enquiry to give effect to them. A final closure notice will take account of any partial closure notices and amendments to the return already issued. Taxpayers may appeal HMRC’s conclusions and any amendments to the tax return within 30 days of being notified of the amendment.

If the taxpayer believes HMRC is unduly extending the enquiry (or certain parts of it), it can apply to the First-tier Tribunal for a direction that HMRC give a closure notice within a specified period. The Tribunal will give the direction unless it is satisfied that HMRC has reasonable grounds for not giving notice within the specified period. 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.

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14 Schedule 18, Paragraph 32(1A).
19 Schedule 18, Paragraph 32(1B), FA 1998.
23 Schedule 18, Paragraph 34(3)-(4); HMRC Enquiry Manual: EM2164.
Enquiries should not be used as a method of obtaining information as to a third party’s tax affairs. 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.

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. 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 remains in progress renders 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.

If, during an enquiry, HMRC forms the view that the amount of tax stated in the company’s self-assessment is insufficient and that, unless it is immediately increased, there is likely to be a loss of tax to the Crown, HMRC may amend the company’s self-assessment in order to make good the deficiency (a ‘jeopardy amendment’). In doing so, HMRC can seek payment from a taxpayer without having to wait until it is ready to issue a closure notice. The circumstances likely to give rise to a jeopardy amendment include where a taxpayer intends to dispose of significant assets or become non-resident or insolvent.

Once a closure notice has been issued, HMRC has no power to amend the tax return other than to enforce the conclusions stated in the notice. 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. As mentioned, 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. HMRC may issue a discovery assessment:

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.

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’. Second, either the understatement must have been

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27 Estate 4 Ltd v. HMRC [2011] UKFTT 269 (TC).
28 This process is discussed further at Section III. HMRC’s complaint process is outlined at https://www.gov.uk/complain-about-hmrc.
29 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.
33 Schedule 18, Paragraph 34, FA 1998.
34 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.
35 Schedule 18, Paragraph 41, FA 1998. See also Section 29(1), TMA 1970.
36 Schedule 18, Paragraph 45, FA 1998. See also Section 29(2) TMA 1970.
careless or deliberate, or HMRC could not reasonably have been expected to be aware of the understatement based on the information made available to it by the taxpayer at the relevant time. Similarly, if HMRC discovers that a return for an accounting period incorrectly states 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.

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. 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, the taxpayer must produce the information within such time, by such means and in such format as provided for in the notice. 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.

Unless the issue of the notice to provide information has received prior approval from the Tribunal, there is a right of appeal against it. However, this appeal does not extend to

37 Schedule 18, Paragraph 43, FA 1998. See also Section 29(4) TMA 1970.
38 Schedule 18, Paragraph 44(1), FA 1998. See also Section 29(5) TMA 1970.
40 Schedule 18, Paragraphs 34(3)-34(4) and 48, FA 1998.
41 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.
42 Schedule 36, Paragraph 7, FA 2008.
43 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.
any information or documents that form part of a taxpayer’s statutory records.46 An appeal must be made to HMRC, in writing and specifying the grounds of appeal, within 30 days of receipt of the notice.47 If a taxpayer fails to make an appeal within the normal time limit, an appeal can still be made if HMRC agrees48 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 value added tax (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’49 to provide ‘relevant data’.50 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;51 for this reason, a data-holder notice must not be used to obtain information about the data-holder’s own tax position.52 The data requested may be general data, or data specific to a particular person or matter including personal data.53 The type of information must be specified in the notice.

46 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.


48 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.

49 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, settlers, 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.

50 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, specify 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.


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.54

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.55

iii  Other direct taxes

Virtually identical rules apply for other self-assessed taxes.56

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.57 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.58 HMRC may also issue a default surcharge59 where a registered person has not filed their VAT return on time, or an inaccuracy penalty60 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

55 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).
56 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.
57 Section 25, VAT Act (VATA) 1994.
58 Section 73 VATA 1994.
60 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 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, 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). 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.

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.

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61 Section 80, VATA 1994.
63 HMRC’s guidance on non-statutory clearance is at https://www.gov.uk/non-statutory-clearance-service-guidance. HMRC have published several checklists (Annexes A–E) setting out the information that needs to be provided in the clearance application (at https://www.gov.uk/government/publications/non-statutory-clearance-service-guidance-annexes).
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, 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. If HMRC offers a review, the taxpayer then has 30 days to accept HMRC’s offer or, if they do not wish to accept the offer of a review, to notify the appeal to the tribunal. 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. The taxpayer then has 30 days to notify the appeal to the tax tribunal once the 30 days have passed. 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.

ii  Complaints

HMRC published ‘Your Charter’ in February 2013. This was updated in January 2016 and currently outlines seven rights that taxpayers can expect from HMRC. These are the rights to expect HMRC to:

a  respect you and treat you as honest;
b  provide a helpful, efficient and effective service;
c  be professional and act with integrity;
d  protect your information and respect your privacy;
e  accept that someone else can represent you;
f  deal with complaints quickly and fairly; and

g  tackle those who bend or break rules.

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. The taxpayer should submit as much information as possible in order for HMRC to investigate the complaint.

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64 Section 49A, TMA 1970.
65 Revenue & Customs Brief 10/09.
66 Section 49C, TMA 1970.
67 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).
68 Section 49E(6), TMA 1970.
69 Section 49G, TMA 1970.
70 Section 49G, TMA 1970.
71 Sections 49C and 49F, TMA 1970.
72 Available at https://www.gov.uk/government/publications/your-charter/your-charter.
73 Information about how to complain to HMRC is available at https://www.gov.uk/complain-about-hmrc.
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,74 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. 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 application for judicial review in the High Court.76 Cases in the High Court should not take

74 Section 15, Tribunals, Courts and Enforcement Act (TCEA) 2007.
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\(^77\) and to pay tax.\(^78\) 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.\(^79\) 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,\(^80\) failure to give notice of chargeability to tax or unauthorised issue of VAT invoices.\(^81\) 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’.\(^82\) 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.

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.\(^83\) This power applies to tax periods commencing on or after 1 April 2010 and to offences committed

\(^77\) Section 106, FA 2009; Schedule 55, FA 2009, as amended by Section 163 FA 2016.
\(^78\) Section 107, FA 2009; Schedule 56, FA 2009, as amended by Section 163 FA 2016.
\(^79\) Schedules 55 and 56, FA 2009.
\(^80\) Schedule 24, FA 2007, as amended by Section 163 FA 2016.
\(^81\) Schedule 41, FA 2008, as amended by Section 163 FA 2016.
\(^82\) Schedule 24, FA 2007, as amended.
\(^83\) 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; failure to notify liability to tax or the unauthorised issue of a VAT invoice. See HMRC’s guidance at https://www.gov.uk/government/publications/publishing-details-of-deliberate-tax-defaulters-pddd.
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.84

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.85 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.86

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,87 UK law provides for other means by which an overpayment of tax can be recovered.

First, the High Court retains an inherent jurisdiction to hear claims in damages and restitution unless implicitly or explicitly excluded by statute.88 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

87 Schedule 18, Paragraph 15(4), FA 1998 for companies and Section 9ZA (2), TMA 1970 for individuals.
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. 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 and costs are usually recoverable by the successful party, whereas that is not generally the case for the statutory tribunal regimes.

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. 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. 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 can be liable to make a repayment of overpaid tax, the Supreme Court has held, in relation to the predecessor provisions, 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 disappplied in an EU law context, or the conclusion of the courts that those previous provisions were implicitly exclusive. However, where the provisions of Paragraph 51A do not apply, the ability to bring a High Court restitution claim will remain.

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

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90 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 in most circumstances be on a simple interest basis but under Section 35A of the Senior Courts Act 1984, which seeks to reflect the commercial cost to the claimant and which is therefore likely to be higher; Littlewoods Retail Ltd v. Revenue and Customs Commissioners [2017] UKSC 70; Prudential Assurance Co Ltd v. HMRC [2018] UKSC 39.
91 See Section VI.
92 Schedule 1AB, TMA 1970.
93 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.
94 Schedule 18, Paragraph 51(6), FA 1998.
95 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).
96 Monro v. Revenue and Customs Comrs.
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.\(^9\)

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 \(\text{Littlewoods}\).\(^9\) 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 respect of 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\(^1\) and in 2007\(^2\) 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 incompatible with EU law and unlawful by the CJEU\(^3\) and Supreme Court.\(^4\) In 2013 further retrospective legislation amended the Court rules to protect only HMRC from orders for interim relief.\(^5\)

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 per annum paid by defaulting judgment debtors to bank base plus 2 per cent per annum simple (currently 2.75 per cent per annum) just for HMRC.\(^6\) 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.\(^7\) 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

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\(^1\) Regulation 165A, VAT Regulations 1995.

\(^9\) \text{Littlewoods Retail Ltd v. Revenue and Customs Commissioners} [2017] UKSC 70.


\(^1\) Section 107 Finance Act 2007.

\(^2\) Case C-362/12 Test Claimants in the FII Group Litigation.


\(^4\) Section 234 Finance Act 2013, applied recently in \text{Jazztel Plc v. Commissioners for Her Majesty’s Revenue and Customs} [2018] EWHC 1830 (Ch) in the context of the \text{Stamp Taxes Group Litigation}.

\(^5\) Section 52 Finance (No. 2) Act 2015.

\(^6\) Section 38 Finance (No. 2) Act 2015.

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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). The lawfulness of these provisions was upheld by the First-Tier Tribunal in July 2017 following a challenge by taxpayers subject to the charge. The Upper Tribunal heard an appeal from this decision in July 2018, however then decided to stay the case (prior to giving its decision) pending developments in other proceedings. While this 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. 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. 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. 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.

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. 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. 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. 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’. By contrast, in Skywell, the First-tier Tribunal found that there was no such change in circumstances to justify the substitution of parties.

Before the Court of Appeal in the FII case, 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. Following the CJEU decision in Danfoss, 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. Attempts in the UK to argue that applying that principle, the end payer of a VAT charge could use common law remedies in restitution to recover the overpaid VAT directly from HMRC were unsuccessful at the level of the Supreme Court.

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, unreasonable or negligent act or omission of any legal or other representative; or if a party acts unreasonably in bringing, defending or conducting the proceedings. 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. Tribunals have held that a party (or their representative) acted unreasonably where they:

a failed to comply with tribunal directions;

116 Skywell, Paragraph 19.
118 Case C-94/10 Danfoss and Sauer Danfoss, judgment of 20 October 2011.
120 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’.
121 Rule 10(1)(b), FTR.
The Tribunal has the general power to order costs in cases that are categorised as ‘complex’, 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.

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’). 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.

**VII ALTERNATIVE DISPUTE RESOLUTION**

Historically, ADR has not played a part in resolving tax disputes. However, HMRC has now 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

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128 Tor View Self Storage Limited v. The Commissioners for Her Majesty’s Revenue and Customs [2015] UKFTT 0564 (TC).
129 Rule 10(1)(c)(i), FTR.
130 Rule 10(1)(c)(ii), FTR.
131 The Rees practice applies to both direct and indirect taxes. See HMRC, ‘ARTG8670 – First-tier and Upper Tribunals: The tribunal hearing: Requests for HMRC to waive costs or fund customer’s costs where there is a further appeal – Rees Practice’ at https://www.gov.uk/hmrc-internal-manuals/appeals-reviews-and-tribunals-guidance/artg8670.
results of these pilot projects, 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.

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.

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.

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.

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.

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, diverted profits tax and apprenticeship levy. 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.\textsuperscript{137} 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).\textsuperscript{138} 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.\textsuperscript{139} If counteraction is used, consequential adjustments can be claimed to provide relief to the taxpayer to ensure there is not excessive taxation.\textsuperscript{140} 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.\textsuperscript{141} 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.\textsuperscript{142}

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,\textsuperscript{143} 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 that are later found to be counteracted, then the penalty, 60 per cent of the counteracted value, will apply.\textsuperscript{144} 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 \textit{Ramsay} principle,\textsuperscript{145} which introduced the principle of 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. \textit{Ramsay} led to some uncertainty in the courts’ approach to abuse (see \textit{BMF}\textsuperscript{146} and \textit{SPI}).\textsuperscript{147}

A recent decision, in \textit{UBS AG},\textsuperscript{148} 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.

\textsuperscript{137} Section 207, FA 2013.
\textsuperscript{138} Section 207(2), FA 2013.
\textsuperscript{139} Section 209, FA 2013 as amended by Section 156, FA 2016.
\textsuperscript{140} Section 210, FA 2013 as amended by Section 157, FA 2016.
\textsuperscript{141} Section 209, FA 2013 as amended by Section 156, FA 2016.
\textsuperscript{142} Schedule 43, FA 2013 as amended by Section 157, FA 2016.
\textsuperscript{143} HMRC’s ‘Penalties for the General Anti-Abuse Rule’, Policy Paper, 9 December 2015.
\textsuperscript{144} Section 158, FA 2016.
\textsuperscript{145} \textit{Ramsay (WT) Ltd v. IRC [1982] AC 300.}
\textsuperscript{146} \textit{Barclays Mercantile Business Finance Ltd v. Mawson (Inspector of Taxes) [2004] UKHL 51, [2005] 1 AC 684.}
\textsuperscript{147} \textit{IRC v. Scottish Provident Institution [2004] UKHL 52, [2005] 1 AII ER 325.}
\textsuperscript{148} \textit{UBS AG v. Revenue and Customs Commissioners [2016] UKSC 13, [2016] 1 WLR 1005.}
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),\(^{149}\) interest deductibility (Action 4),\(^{150}\) intellectual property (Action 5),\(^{151}\) transfer pricing (Actions 8–10)\(^{152}\) and country-by-country reporting (Action 13).\(^{153}\) 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 is awaited.

On 7 June 2017, the UK signed the OECD’s Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS (MLI). The UK then deposited its instrument of ratification and final list of reservations and notifications on 29 June 2018. The MLI entered into force in the UK on 1 October 2018, and will begin to have effect in the UK for UK tax treaties in 2019 (the date will vary depending on the specific UK tax). The MLI will introduce changes to various articles of UK tax treaties that follow the OECD Model Convention, add at least one new article (Article 29 (Entitlement to Benefits)), and insert a preamble to clarify that the purpose of UK tax treaties is to avoid double taxation without creating opportunities for non-taxation or reduced taxation through tax evasion or avoidance.

The UK has chosen to apply Part VI (Arbitration) of the MLI. In the absence of resolution by mutual agreement between the tax authorities, taxpayers will be entitled to request that their case be submitted to arbitration. In relation to disclosure of aggressive tax planning (Action 12), the UK considers that it already had disclosure rules and that these are kept under review. There are, however, proposals to strengthen tax avoidance disclosure regimes regarding VAT and inheritance tax.

### 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 the ultimate resolution of the dispute.\(^{154}\)

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.\(^{155}\) 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

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149 This was enacted in the Finance Act 2016 with effect for payments from 1 January 2017.
150 This was enacted in the Finance Act 2017.
151 This was enacted in the Finance Act 2017 with effect from 1 July 2016.
152 This was enacted in the Finance Act 2016 and has effect for all accounting periods beginning on or after 1 April 2016 for corporation tax purposes.
153 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.
155 Section 219(2), FA 2014.
near identical.\textsuperscript{156} The return or claim must\textsuperscript{157} 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:

- HMRC has given the taxpayer a follower notice in relation to the same return, claim or appeal;
- 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
- 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.\textsuperscript{158}

The APN or PPN must specify the amount of the payment.\textsuperscript{159} 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.\textsuperscript{160} This also applies where an appeal is ongoing. If the taxpayer fails to make the payment by the relevant date, HMRC may issue penalties, beginning at 5 per cent of the amount in question.\textsuperscript{161} 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.\textsuperscript{162}

It is reported that, since 2018, HMRC has issued over 80,000 APNs (although it has retracted some 6,000). The notices, since their introduction, have received significant criticism and have been the subject of a number of legal challenges in recent years. In December 2017, the Court of Appeal robustly dismissed several such challenges.\textsuperscript{163} From a procedural standpoint, the High Court has held that taxpayers who are issued with APNs should generally exhaust their right to make representations under Section 222 FA 2014 before seeking to challenge the notice by way of judicial review.\textsuperscript{164}

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.\textsuperscript{165} 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.

\begin{footnotesize}
\begin{enumerate}
\item[156] Schedule 36, FA 2014.
\item[157] Section 219 (3), FA 2014.
\item[158] Section 219(4), FA 2014.
\item[159] Section 220, FA 2014.
\item[160] 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 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.
\item[161] Section 226, FA 2014.
\item[162] Sword Services Ltd v. Revenue and Customs Commissioners [2016] 4 WLR 113, [2016] STI 1799.
\item[165] Section 204, FA 2014.
\end{enumerate}
\end{footnotesize}
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.\textsuperscript{166} The taxpayer may amend the return (and notify HMRC) or object to the FN within 90 days by written representation.\textsuperscript{167} 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.\textsuperscript{168}

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.\textsuperscript{169}

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 courts in interpreting the terms of double taxation treaties.\textsuperscript{170} The commentary to the OECD conventions can be relied upon to interpret the terms of treaties that follow the OECD Model.\textsuperscript{171}

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

\textsuperscript{166} Section 206, FA 2014.
\textsuperscript{167} Sections 207-208, FA 2014.
\textsuperscript{168} Section 208(2), FA 2014 and Section 211, FA 2014.
\textsuperscript{169} Lord Diplock in \textit{Salomon v. Customs & Excise} [1967] 2 QB 116 at 143.
provision within those Parts. 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 or to advance corporation tax (ACT).

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, 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.

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. 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.

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

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172 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.


175 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.

176 *Boake Allen (HL).*

177 *Boake Allen.*

178 *Commissioners for Her Majesty’s Revenue and Customs v. FCE Bank plc; The Felixstowe Dock and Railway Company Limited.*
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.\footnote{The Felixstowe Dock and Railway Company Limited.}

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.\footnote{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, 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.\footnote{[1977] 2 WLR 107.}

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 20 years.\footnote{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; Hoecht AG v. IRC [2001] ECR I-1727; case C-446/03 Marks & Spencer Plc v. Hailey (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-524/06 Test Claimants in the Thin Group Litigation [2007] ECR I-02107; 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.}

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 disapproved as unlawful, or whether they should be judicially moulded to achieve a conforming interpretation.\(^{184}\) 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 \textit{Ghaidan v. Mendoza},\(^{185}\) \textit{Pickstone v. Freemans}\(^{186}\) and \textit{Lister v. Forth Dry Dock}\(^{187}\) 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 \textit{IDT} \(^{188}\) \textit{Vodafone II}\(^{189}\) and the Court of Appeal’s first judgment in \textit{FII} \(^{190}\)). According to Lady Justice Arden in \textit{IDT}:

\begin{quote}
\textit{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.}\(^{191}\)
\end{quote}

Further, when analysing the application of the \textit{Marleasing} principle in \textit{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.'\(^{192}\)

Thus, in \textit{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 \textit{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 \textit{Cadbury Schweppes}. In \textit{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 \textit{IDT} this defeated the taxpayer’s claim entirely, and in \textit{Vodafone II} and \textit{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 \textit{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.

\(^{185}\) \textit{[2004] UK HL 30, [2004] 3 All ER 411}.
\(^{186}\) \textit{[1989] AC 66}.
\(^{187}\) \textit{[1989] 1 All ER 1334, 1991, AC 546}.
\(^{190}\) \textit{Test Claimants in the FII Group Litigation} [2010] EWCA Civ 103.
\(^{191}\) \textit{HMRC v. IDT Card Services Ireland Ltd}, Paragraph 89.
\(^{192}\) \textit{Test Claimants in the FII Group Litigation} [2010] EWCA Civ 103, Paragraph 260.

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ii Specific rules relating to VAT

Current UK VAT thresholds

<table>
<thead>
<tr>
<th>Registration</th>
<th>Threshold</th>
</tr>
</thead>
<tbody>
<tr>
<td>Registration for taxable supplies</td>
<td>Taxable turnover of £85,000 in the previous 12 months</td>
</tr>
<tr>
<td>De-registration VAT</td>
<td>Taxable turnover of £83,000 or less in the previous 12 months</td>
</tr>
<tr>
<td>Registration for distance selling</td>
<td>Value of distance sales to UK customer exceeds £70,000 (if distance sales include excise goods, then registration is required regardless of the value)</td>
</tr>
<tr>
<td>Registration for acquisitions from other EU countries</td>
<td>Goods acquired exceed £85,000</td>
</tr>
<tr>
<td>Payment on account threshold</td>
<td>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</td>
</tr>
<tr>
<td>Intrastat thresholds</td>
<td>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 £175</td>
</tr>
<tr>
<td>Error reporting threshold</td>
<td>£10,000 or 1 per cent of the total sales for the period (excluding VAT) subject to an upper limit of £50,000</td>
</tr>
</tbody>
</table>

 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. Errors below this threshold can be corrected by adjustment in the current VAT return.

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.

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194 HMRC guidance is found at ‘Correct errors on your VAT Returns’ at https://www.gov.uk/vat-corrections.
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 continue.

This political focus on HMRC to counter tax avoidance and increase recoveries has produced extensive new powers. As discussed above, over the past few 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 2017, the Court of Appeal upheld HMRC’s exercise of this power and, as things stand, it appears that HMRC 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. 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 that 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 that 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 that 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. 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. 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. The CJEU gave its decision in favour of the taxpayer in October 2017. Transfer pricing is another area in which the European Commission has continued to be particularly active.

The availability of compound interest in direct tax claims against HMRC appears to have now been finally determined in HMRC’s favour following the Supreme Court’s decision in Prudential this year. The Supreme Court, overturning the House of Lords’ decision in

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197 Case C-362/12 Test Claimants in the FII Group Litigation, judgment of 12 December 2013.
198 Mercedes-Benz Financial Services UK Ltd v. Revenue and Customs Commissioners [2015] EWCA Civ 1211; case C-164/16 Revenue and Customs Commissioners v. Mercedes-Benz Financial Services UK.
199 See the European Commission’s website at ec.europa.eu/taxation_customs/taxation/company_tax/transfer_pricing/index_en.htm.
Sempra Metals,\textsuperscript{201} held that Prudential was not entitled to compound interest in respect of any of its claims for overpaid corporation tax or ACT. As mentioned 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.\textsuperscript{202}

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\textsuperscript{203} 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. Should these challenges succeed, a number of remedies that are arguably no longer available to claimants in tax matters will once again become available.

\section*{XI OUTLOOK AND CONCLUSIONS}

2018 has been a busy year in the fields of direct and indirect tax, both in the domestic and European context. 2019 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. 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

\textsuperscript{201} Sempra Metals Ltd v. HM Commissioners of Inland Revenue [2007] UKHL 34, [2008] 1 AC 561.
\textsuperscript{202} Littlewoods Retail Ltd v. Revenue and Customs Commissioners [2017] UKSC 70.
\textsuperscript{203} Investment Trust Companies (in liquidation) v. Commissioners for HMRC [2017] UKSC 29.
been considered by the courts in the past year while others remain to be determined or are subject 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.
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Subsequently, Axel Cordewener obtained a Master of Laws at the University of Leuven (Belgium) and served as a research assistant at the Institute of Tax Law of the University of Bonn where he completed a PhD on EU law in 2001. Parallel to this, he completed his ‘Referendariat’ (two-year practical legal training) in September 2001.

In 2002, Axel Cordewener joined the Bonn office of Flick Gocke Schaumburg as a lawyer. He became an associate partner in 2006 and of counsel in 2007 when he took up a part-time teaching position as professor at the University of Leuven. Between 2012 and 2014, he was a member of the legal service of the European Commission.

Axel Cordewener specialises in EU and international tax law. He has extensive litigation experience both before the German tax courts, including the Federal Tax Court, and the European Courts in Luxembourg.

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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
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David received his bachelor’s degree in fiscal administration from the University of Indonesia. He holds an advance diploma in international taxation from the UK Chartered Institute of Taxation. 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 advisers and the French branch of the International Fiscal Association.

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Maura is a tax partner in the taxation department of Mason Hayes & Curran. She is a lawyer and a chartered tax adviser. Maura has significant 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.

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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.

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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 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.

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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 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.

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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 Common Foreign and Security Policy 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.
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,
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Karolina Gotfryd graduated a law degree with honours from Warsaw University Law School.
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numerous tax law seminars and summer tax schools at Jagiellonian University in Cracow,
and at Vienna University of Economics and Business. She participated in the EUCOTAX
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area of research was ‘SAAR – in a post-BEPS world’. She was a finalist in the ‘Eye on tax’
competition 2015, organised by EY. She gained experience in legal practice at international
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JOHN GULLIVER
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For more than 25 years, John has advised Fortune 500, FTSE 100 and other major
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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
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John was educated at the University of London (LLB (hons)), is an associate of the
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Fabio J Guzmán Ariza is the managing partner of the Guzmán Ariza law firm. He is a
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MICHAEL HENDRICKS
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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.

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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 a 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.

NIAMH KEOGH
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Niamh is a tax partner in the taxation department of Mason Hayes & Curran. She is a lawyer and a chartered tax adviser. Niamh has broad experience in advising a wide range of clients across all tax heads. She has particular experience in advising on securitisations, structured
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Niamh is a member of the tax committee of the Irish Funds Industry Association and the Irish Debt Securities Association.

PAUL KRAAN
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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 multilateral 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 Dutch Association of Tax Advisers 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.

S SARAVANA KUMAR
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S Saravana Kumar is a partner with the firm’s tax, SST and customs practice and regularly represents taxpayers on various direct and indirect tax disputes. An adjunct professor with Universiti Tenaga Nasional (UNITEN), he also chairs the Taxation Section of LAWASIA. Saravana is ranked as one of Asia’s leading lawyers in The Legal 500 and Chambers Asia, and was recently named one of the 40 top lawyers under 40 years old in Asia by Asian Legal Business. His publications include Singapore Tax Cases Digest (CCH), CCH GST Case Summaries, The Law of Goods and Services Tax in Malaysia (CCH), Halsbury’s Laws of Malaysia (Revenue Law) (LexisNexis), and Hishamudin Yunus: Celebrating Judicial Independence, which he also edited.

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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.
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Slawomir Łuczak graduated with a law degree from University of Poznan. He joined SK&S in 1998 and became 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 also advises on tax issues in relation to restructuring projects and consolidation. He is a member of the International Fiscal Association, Association Européenne d’Etudes Juridiques et Fiscales and Regional Council of Attorneys in Warsaw.

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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.

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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 a general and national reporter at several of its annual congresses.

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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.

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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 2018 and by International Tax Review.
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D P Naban is a senior partner of the firm. He heads the firm’s tax, sales and service tax and customs practice and deals with all aspects of tax law including income tax, sales and services tax, stamp duty, customs duty, and anti-dumping duty. He is a member of the Chartered Tax Institute of Malaysia. Mr Naban has co-authored a number of publications on tax, namely *Malaysia Singapore Tax Cases Digest* (CCH), *CCH GST Case Summaries, The Law of Goods and Services Tax in Malaysia* (CCH), and *Halsbury’s Laws of Malaysia (Revenue Law)* (LexisNexis). He is a highly acclaimed lawyer as ranked by *Chambers Asia* and *The Legal 500*, and is empanelled as an Arbitrator with the Asian International Arbitration Centre and the Bangalore International Mediation, Arbitration and Conciliation Centre.

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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.

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Diogo Ortigão Ramos is a partner and head of Cuatrecasas’ tax practice in Portugal. He focuses his practice on EU, national and international taxation, particularly regarding M&A, buyouts, corporate restructuring, financial transactions, real estate investment structuring and transactions, and tax and customs litigation.

He is a member of the Portuguese Bar Association (since 1989), the Portuguese Tax Association, the International Fiscal Association, the Portuguese Association of Tax Consultants, the International Bar Association and the American Bar Association, and has been acknowledged by the Portuguese Bar as a specialist tax lawyer.

Diogo is a member of the European Tax Law Group, Tax Associates Meeting and of the Europe VAT Group, the members of which are renowned European law firms, leaders in their respective jurisdictions. He is the Portuguese representative of the Foreign Lawyers Forum of the American Bar Association.

Diogo obtained his law degree from Lusíada University (1989) and postgraduate degree in taxation from ISG – Business & Economics School (1995).

YANA PROSKURINA

Yana Proskurina is a former 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 and Partners and Pravo.Ru.

Yana was also recommended as a professional in tax practice by Tax Controversy Leaders 2015 and by International Tax Review.

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Adrián Rodríguez is a partner and co-chair of the tax practice of Colombian law firm Lewin & Wills. In addition to Colombia, Mr Rodríguez is licensed to practise 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 Rodríguez 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. Among other matters, Mr Rodríguez has experience in: 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 Rodríguez also advises high net worth families and individuals in a variety of international and domestic tax, international investments, and legal issues.

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Associate Chris Toh Pei Roo’s practice consists primarily of income tax disputes. Chris read law at the University of Leeds, holds the St Philips Chambers Prize for Commercial Dispute Resolution for his performance on the BPTC and completed his LLM in international commercial law from University College London.

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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.

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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.

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Pedro Vidal Matos is a partner at Cuatrecasas. He focuses his practice on tax litigation, both administrative and judicial. He has been a member of the Portuguese Bar Association since 2002, and is a member of the Portuguese Tax Association and of the International Fiscal Association. He is a lecturer at the postgraduate programme in taxation at the Portuguese Catholic University.

Pedro obtained his law degree from Nova University of Lisbon (2002), completed a postgraduate degree in company law from the University of Coimbra (2004), a postgraduate degree in taxation, from ISG – Business & Economics School (2005), a postgraduate degree in administrative and tax justice from University of Coimbra (2007), a master’s in public
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JOUNI WECKSTRÖM

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Jouni Weckström a 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

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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 United Kingdom 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 United Kingdom, 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 FIH Group Litigation; and the ROSIIP Group Litigation.

Simon regularly contributes articles to specialist tax publications such as Taxation, Tax Journal and International Tax Review.
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Kornelia Wittmann is a partner at bpv Hügel. Kornelia is co-head of the firm’s tax law practice group. Kornelia has a double degree in economics and law. Additionally, she holds an LLM in international tax law. Kornelia is dually qualified as attorney at law and as an Austrian and Hungarian tax adviser. Before joining bpv Hügel she worked at PwC for several years. Kornelia has also been regarded in numerous national and international rankings and is a regular speaker at seminars and conferences. Her main areas of practice are tax litigation including fiscal criminal law, corporate, international and M&A tax law. Further, Kornelia provides advice in national and international accounting law and in banking supervisory law.

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Nicolas D Wolski, LLM, is an attorney at law (Frankfurt Bar) and a German tax adviser. He graduated from the Universities of Marburg, Münster and Vienna. Before joining bpv Hügel Nicolas worked at Freshfields Bruckhaus Deringer, Graf von Westphalen and most recently as European counsel with the Frankfurt office of Willkie Farr & Gallagher. Nicolas Wolski focuses on tax advice in M&A transactions. He has extensive experience in the private equity industry. He further specialises in international reorganisations and financing. Nicolas has an outstanding track record in advising banks, corporates and private equity houses on tax aspects of syndicated loan agreements.

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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 and 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.

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