

# Tax Controversy

*Contributing editor*  
Richard Jeens



2017

GETTING THE  
DEAL THROUGH

GETTING THE  
DEAL THROUGH 

# Tax Controversy 2017

*Contributing editor*  
**Richard Jeens**  
**Slaughter and May**

Publisher  
Gideon Robertson  
gideon.roberton@lbresearch.com

Subscriptions  
Sophie Pallier  
subscriptions@gettingthedealthrough.com

Senior business development managers  
Alan Lee  
alan.lee@gettingthedealthrough.com

Adam Sargent  
adam.sargent@gettingthedealthrough.com

Dan White  
dan.white@gettingthedealthrough.com



Published by  
Law Business Research Ltd  
87 Lancaster Road  
London, W11 1QQ, UK  
Tel: +44 20 3708 4199  
Fax: +44 20 7229 6910

© Law Business Research Ltd 2016  
No photocopying without a CLA licence.  
First published 2013  
Fourth edition  
ISSN 2053-8944

The information provided in this publication is general and may not apply in a specific situation. Legal advice should always be sought before taking any legal action based on the information provided. This information is not intended to create, nor does receipt of it constitute, a lawyer-client relationship. The publishers and authors accept no responsibility for any acts or omissions contained herein. The information provided was verified between August and September 2016. Be advised that this is a developing area.

Printed and distributed by  
Encompass Print Solutions  
Tel: 0844 2480 112



## CONTENTS

<b>Global overview</b>	<b>5</b>	<b>Mexico</b>	<b>54</b>
Richard Jeens Slaughter and May		Christian Solís Martínez and Jorge Arturo Rodríguez Ruiz SMPS Legal	
<b>Austria</b>	<b>6</b>	<b>Netherlands</b>	<b>61</b>
Walter Loukota and Christian Wimpissinger Binder Grösswang attorneys at law		Frank Pötgens, Ingrid Mensing and Mats Cornelisse De Brauw Blackstone Westbroek NV	
<b>Brazil</b>	<b>12</b>	<b>Nigeria</b>	<b>66</b>
Ana Paula Schincariol Lui Barreto, Gabriela Silva de Lemos, Marcel Alcades Theodoro and Alessandra Gomensoro Mattos Filho, Veiga Filho, Marrey Jr e Quiroga Advogados		Muhammad Dele Belgore (SAN) and Lateef Omoyemi Akangbe Sofunde, Osakwe, Ogundipe & Belgore	
<b>Colombia</b>	<b>17</b>	<b>Norway</b>	<b>71</b>
Gustavo Pardo, Stephanie Ramirez, Catherine Herrera Gustavo Pardo y Asociados SAS		Ola Mæle, Sindre Kleive and Lise Onarheim KPMG Law Advokatfirma AS	
<b>France</b>	<b>22</b>	<b>Panama</b>	<b>77</b>
Yves Rutschmann Bredin Prat		Ramón Anzola, Maricarmen Plata and Andrés Escobar Anzola Robles & Asociados	
<b>Greece</b>	<b>27</b>	<b>Portugal</b>	<b>83</b>
Sophia K Grigoriadou, John M Papadakis and John A Gkotsis Dryllerakis and Associates		Diogo Ortigão Ramos, Pedro Vidal Matos, Sónia Fernandes Martins and Fernando Lança Martins Cuatrecasas, Gonçalves Pereira	
<b>Ireland</b>	<b>32</b>	<b>Switzerland</b>	<b>88</b>
Joe Duffy and Greg Lockhart Matheson		Ruth Bloch-Riemer Bär & Karrer AG	
<b>Italy</b>	<b>37</b>	<b>United Kingdom</b>	<b>93</b>
Massimo Antonini, Raul-Angelo Papotti and Paolo Piantavigna Chiomenti Studio Legale		Dominic Robertson, Richard Jeens and Charles Osborne Slaughter and May	
<b>Japan</b>	<b>43</b>	<b>United States</b>	<b>98</b>
Eiichiro Nakatani and Kai Isoyama Anderson Mōri & Tomotsune		J Walker Johnson, Robert J Kovacev and Carina C Federico Steptoe & Johnson LLP	
<b>Luxembourg</b>	<b>48</b>		
Christine Ntumba Dentons Luxembourg			

# Preface

## Tax Controversy 2017

Fourth edition

**Getting the Deal Through** is delighted to publish the fourth edition of *Tax Controversy*, which is available in print, as an e-book and online at [www.gettingthedealthrough.com](http://www.gettingthedealthrough.com).

**Getting the Deal Through** provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique **Getting the Deal Through** format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes Greece, Ireland, Mexico, Portugal and Switzerland and a new Global overview.

**Getting the Deal Through** titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at [www.gettingthedealthrough.com](http://www.gettingthedealthrough.com).

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

**Getting the Deal Through** gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editor, Richard Jeens of Slaughter and May, for his assistance with this volume. We also extend special thanks to Jean A Pawlow of McDermott Will & Emery LLP, contributing editor for the previous editions, who contributed the original format from which the current questionnaire has been derived, and who helped to shape the publication to date.

GETTING THE   
DEAL THROUGH 

London  
September 2016

# Global overview

Richard Jeens

Slaughter and May

As summarised in the chapters that follow, the legal frameworks and practices for managing and resolving tax controversies vary from country to country and present different challenges for tax authorities, taxpayers and their respective advisers as each looks to secure the best outcome from any particular tax dispute. However, stepping back, three overarching themes (and challenges) stand out.

## **Paying the 'right' amount: an ongoing spotlight on tax issues**

The tax affairs of companies and high profile (or rich) individuals remain very much in the public spotlight. In particular, fuelled by new rounds of leaked information, the boundaries between tax planning, tax avoidance and tax evasion have become the subject of significant political and popular debate.

For instance, the 'Panama papers' have provided an enormous trove of information for regulators, tax authorities and journalists, much of which has been used – at times selectively – to bolster the public perception of (and consequent hostility to) perceived tax avoidance. Likewise, the publicity around the tax affairs of particular individuals, such as the Green family in the UK or the Wyly brothers in the US, may sell newspapers but does not necessarily help identify what taxpayers' legal obligations really are (as opposed to what the public deems the 'right' amount). Tax authorities and taxpayers will therefore need to work harder to resolve tax controversies so that they are not only legally sound but can also stand up to external scrutiny, whether from politicians, investors or the media.

## **Pressure on tax authorities: a national and international response**

This public and political attention has increased the pressure on tax authorities across the world to do more (and be seen to do more) to make sure taxpayers pay the 'right' amount.

At the national level, this has often resulted in governments giving tax authorities an increasing arsenal of tools. Often these are presented as necessary to tackle tax avoidance, but increasingly, they form part of the landscape for handling more mainstream tax controversies. For example, in the UK, for tax disputes with alleged tax avoidance, taxpayers can now be required to pay all the disputed tax (plus potentially significant penalties) upfront rather than wait to see if the courts will eventually rule against them. Likewise, in Germany and other European countries, tax authorities increasingly use powers of arrest or unannounced 'dawn raids' in the context of civil disputes as well as criminal cases or deploy 'anti-abuse' arguments to question the economic substance of previously unchallenged structures or deals.

At the international level, the increasing exchange of information between tax authorities and other regulators means that resolving significant tax controversies will rarely be possible without proper regard for the international dimensions. This is consistent with legislative developments in many jurisdictions, such as anti-hybrid rules, and some of the core themes in the OECD BEPS project – a good answer in one jurisdiction that leaves an odd (or unacceptable) outcome in another is unlikely to withstand scrutiny or form a lasting basis for settling a tax controversy, particularly given the ever-present risk of effective double taxation. The ongoing EU investigations into whether tax arrangements agreed with particular EU tax authorities amounted to unlawful 'state aid' – with the Apple dispute attracting transatlantic attention – are also indicative of the need to be mindful of the broader regulatory and political landscape when handling tax controversies.

In that regard, one of the potentially most significant developments in tax controversies in the medium term will be the extent to which tax (and tax evasion) moves from being a taxpayer-tax authority issue to being part of the broader, more extraterritorial criminal and compliance landscape. In

the UK, for instance, 2017 is expected to see a new criminal offence of failure to prevent the facilitation of tax evasion. Like existing bribery/corrupt practices offences in the UK and other jurisdictions, this will effectively criminalise corporations that do not have adequate procedures in place to prevent their employees and associates facilitating tax evasion by third parties (even if there is no involvement or benefit for the corporation itself). If this trend continues, tax controversies, whether their own or ones they become associated with, will remain a risk area for almost all multinational organisations.

While taxpayers may feel under pressure, some sympathy must also be felt for tax authorities themselves. Often under-resourced – in the US, in line with staffing reductions, the number of tax audits conducted by the IRS fell by over 20 per cent between 2010 and 2015 – the febrile political atmosphere in many countries and pressure exerted globally to 'reform' means tax authorities remain exposed to challenges both from taxpayers and politicians. For example, tax authorities working to agree the implementation of the OECD BEPS project on a basis that gives legal certainty and commercial predictability for taxpayers in their particular jurisdiction may be criticised by politicians if that is seen to be 'soft' on tax avoidance. And that is not to mention the challenges to the sort of structural tax reform in the US that might reduce the incentives for US companies to use controversial offshore structures.

## **Reputational and relationship challenges**

The third key theme that emerges is that successfully resolving tax controversies involves much more than just winning the legal arguments. Taxpayers and their advisers must manage the reputational challenges associated with resolving tax disputes and do so in a way that is sensitive to the different audiences and stakeholders involved. By way of example, a transfer pricing case that turns on the value contributed by different business units in different jurisdictions frequently opens questions of the relative worth or contribution of individuals or operations. Not only is that a challenge in terms of managing employees but few taxpayers welcome the political or public reaction (and potential brand damage) to revealing details of how the price a consumer pays for a particular product is really calculated. Similarly, the increasing recruitment of taxpayers as information providers for tax authorities, such as through horizontal monitoring in the Netherlands or reporting of employee tax identification numbers in Japan, may make day-to-day tax operations more controversial.

Tax controversies may also be framed by other developments, such as obligations on large organisations to publish their tax strategy, the country-by-country reporting proposals in the EU or the need to balance investor pressure to maintain a competitive effective tax rate while not having any damaging tax controversy disclosures in the annual report. Given the interconnected web of contracts and counterparties that often underpin global business relations, there is also the importance for taxpayers of being clear who bears the risk of the outcome of any particular tax controversy – and being able to resolve these contractual issues in a neutral and sophisticated judicial forum can be a major advantage to both sides.

## **Ongoing challenges**

Tax controversy is therefore set to remain a challenging area. There remains real value in being aware of the tax framework and recent developments in different jurisdictions – and having a sophisticated range of contacts in these jurisdictions so as to know who to turn to when looking to avoid any particular tax controversy or to resolve a dispute when, all too frequently, it does arise.

# Austria

Walter Loukota and Christian Wimpissinger  
Binder Grösswang attorneys at law

## Overview

### 1 What is the relevant legislation relating to tax administration and controversies? Other than legislation, are there other binding rules for taxpayers and the tax authority?

Austrian tax law – as with Austrian law in general – is comprehensively codified (the same is basically true for civil law; nevertheless, decisions of the courts, especially the highest courts, play a major role in civil law as well as in tax law). Court decisions are important, as the courts interpret the codified law (especially in the field of civil law), but such decisions do not constitute law or establish general principles that have the same authority as the law (ie, there is no common law system). The Federal Fiscal Code constitutes the relevant legislation relating to the tax administration. All the common rules and procedural regulations applying to all taxes are laid down in this act. The code provides rules for the determination of facts in order to determine the tax base, tax assessment, collection and enforcement of taxes, out-of-court as well as court remedies, right of appeals and appellations procedure before the tax courts, fines and penalties. Specific taxes are governed by single tax acts, for example, the Income Tax Act, Corporate Income Tax Act or Value Added Tax Act. There are numerous other taxes and levies such as real estate transfer tax, real estate tax, payroll tax, etc. The Reorganisations Tax Act provides – under specific conditions – for the tax neutrality of various reorganisations of corporations and other companies.

Austrian tax law is enforced by the tax administration (see question 2).

Tax treaties and other international conventions qualify as a part of the applicable legislation, provided they have been implemented by the Austrian legislative power. Another source of directly applicable law is EU regulations (in the field of taxes and levies there are only a few regulations, such as the Customs Code). In addition, a number of EU directives regarding taxation matters exist that have to be transferred into domestic law by the Austrian legislative power.

There are numerous administrative guidelines (sometimes also translated as ‘regulations’) issued by the Austrian Federal Ministry of Finance. These guidelines provide explanations and interpretations of Austrian tax law and are supposed to guarantee a uniform application of tax law by the tax administration. The guidelines are formally binding for (federal) tax authorities, but not for taxpayers and tax courts. However, a taxpayer relying on these guidelines can expect a remedy under the principle of equity as set forth in the Federal Fiscal Code.

### 2 What is the relevant tax authority and how is it organised?

Austrian tax administration is divided among the federal government, nine federal states and the municipalities. Most taxes (federal taxes, such as income tax, corporate income tax, value added tax, real estate transfer tax, etc) are collected and assessed by the federal government (most of them – such as income tax, corporate income tax, value added tax – are ‘joint’ taxes, ie, the revenue is divided among the federal body, the single states and the municipalities); in contrast, the single states and municipalities have independent taxing rights, which, however, play only a minor role (ie, real estate tax and payroll tax at community level).

The Austrian Federal Ministry of Finance, as part of the federal government, is the head of the federal tax administration; it presides over the local (federal) tax offices.

If a taxpayer finds his or her rights violated by a tax assessment from his or her local tax office (in the form of a decree), he or she is entitled to

file an appeal against such assessment (decree). The appeal is dealt with by a tax court, which can either be a local administrative court for state or municipality taxes, or the Federal Tax Court for federal taxes such as income tax, corporate income tax, value added tax, etc. Against a court’s decision, an appeal is admissible to the Austrian Administrative Court or, if constitutional rights are violated, to the Constitutional Court.

## Enforcement

### 3 How does the tax authority verify compliance with the tax laws and ensure timely payment of taxes? What is the typical procedure for the tax authority to review a tax return and how long does the review last?

Usually, tax declarations are subject to a plausibility check before a tax assessment is made (ie, before the tax assessment is issued). If the review takes place as part of a tax audit, specific rules apply. The following explanations only deal with the review before a tax assessment.

Any inconsistencies are subject to further reviews. Also, any deviations from the tax authorities’ opinion, which have to be indicated in the tax returns, will lead to review in detail. As well as any inconsistencies and deviations, the intensity of the review process depends on the type and amount of income. Each year tax authorities especially focus the review on certain aspects. However, a certain number of tax returns are randomly chosen for a comprehensive review. The duration of a review depends on the intensity of the review process. It can take up to several months or even longer until a tax return is assessed.

In general, taxpayers with a high turnover or income are subject to audits that take place in the office of the taxpayer. The frequency of tax audits depends on the business size. Large businesses are audited on a permanent basis (ie, all assessment periods are subject to audit).

Finally, it should be mentioned that most tax returns are filed electronically; the underlying electronic system – which, inter alia, also allows the taxpayer to file an electronic appeal against a tax assessment – is called FinanzOnline. In case of an electronically filed tax return, the tax assessment may well be issued without any review (ie, the assessment is issued automatically), but a review can take part afterwards (ie, as part of a tax audit, or in the form of additional questions to the tax return).

If the payment of taxes is not made on time a late payment fine arises that amounts to 2 per cent. After three months this figure increases by a further per cent.

### 4 Are different types of taxpayers subjected to different reporting requirements? Can they be subjected to different types of review?

The official forms used for tax returns require different kinds of information for individuals, partnerships, corporations and other legal entities. Generally speaking, corporations and partnerships have to provide more information, including a financial statement (if they are obliged to prepare one; see below).

Account-keeping and recording obligations according to the Austrian Commercial Code (and other laws) also apply for tax law purposes. Under the Commercial Code individuals, corporations and companies operating a business are required to prepare financial statements annually: corporations such as a private limited corporations (GmbH) and public stock corporations (AG) are subject to these obligations irrespective of their size, whereas individuals and other companies (ie, partnerships)

are only obliged to prepare a financial statement if their turnover exceeds €700,000 in two subsequent years. The extent of providing financial information in a financial statement, however, depends on the size of the business. Smaller businesses are exempt from certain requirements.

There are a number of additional record and account-keeping obligations for commercial law or tax law reasons, for example, keeping a wage account for every employee for the purposes of (withholding) wage taxes and payroll taxes, or obligations of record-keeping for VAT purposes, and so on.

The obligation to prepare a financial statement directly influences the reporting requirements for tax law purposes, since the financial statement – as well as an audit report – has to be attached to the tax return.

#### **5 What types of information may the tax authority request from taxpayers? Can the tax authority interview the taxpayer or the taxpayer's employees? If so, are there any restrictions?**

All kinds of written evidence can be requested by tax authorities, either before the tax assessment or – which is more likely – in the course of a tax audit. Taxpayers are obliged to provide tax authorities with all the information needed to ascertain facts that are relevant for taxation. This includes business books, accounts and records, financial information (from financial statements) and copies of invoices or transaction documents. In a tax audit the taxpayer is obliged to fully cooperate with the tax authorities. In particular, the taxpayer has to provide information, submit perusal and examination records, accounts, business documents and other deeds, provide the explanations needed to understand the records, and support the tax authority in checking data stored electronically. If the taxpayer is not able to provide information, or if the information is not sufficient, the external auditor may request information from other persons as witnesses.

It is also admissible to interrogate the taxpayer's employees. There are no restrictions except business secrets (see question 7).

#### **6 What actions may the agencies take if the taxpayer does not provide the required information?**

Tax authorities can enforce a taxpayer's duty to cooperate in the course of a taxation procedure as well as his or her duty to submit a tax return by means of coercion (ie, a coercive fine). Tax authorities have to first threaten and then impose a penalty payment of up to €5,000 for the single penalty. Any other direct enforcement is not admissible in a fiscal procedure. However, tax authorities can directly enforce an action by, for example, searching the taxpayer's home or business or in the course of a criminal procedure.

In addition, submission of tax returns can be enforced with a late-filing penalty that may not exceed 10 per cent of the assessed tax.

If a taxpayer does not file a tax return or if he or she, for whatever reason, does not provide sufficient information for tax assessment or sufficient information in the course of a tax audit, tax authorities are also entitled to assess taxes based on estimation.

#### **7 How may taxpayers protect commercial information, including business secrets or professional advice, from disclosure?**

Generally, commercial information and business secrets are not protected vis-à-vis the tax authorities; they themselves have to treat any information obtained from taxpayers as strictly confidential and private. Information and documents held by attorneys or tax advisers enjoy particular protection where such information and documentation may not even have to be handed over to the authorities. However, once the documentation and information is also held by the taxpayers, such protection is no longer applicable.

A witness may refer to business secrecy in order not to reveal certain information to the tax authorities. However, the taxpayer himself or herself does not benefit from business secrecy, which means that he or she has to reveal all business-related information to the tax authorities. On the other hand, all information obtained by tax officials is protected by tax secrecy (see below).

Legal professionals, however, have the right to refuse testimony regarding information of which they gained knowledge in their capacity as the representative.

As well as business secrecy, Austrian law stipulates the protection of bank secrecy (section 38 of the Banking Act). Due to bank secrecy, banks and other financial institutions must not reveal any information regarding their relations with the customer (ie, information about bank deposits, bank accounts and any other information). However, exceptions to bank

secrecy apply if a criminal procedure has been commenced, or if the authority requesting information is a foreign (ie, non-Austrian) authority asking for information about a foreign national.

Tax officials have to comply with tax secrecy, which is guaranteed under the Federal Fiscal Code. In general, tax officials must not disclose any information, including commercial information and business secrets. Breach of tax secrecy is penalised with a fine or up to three years' imprisonment. However, if a tax criminal procedure has been started the authority may be obliged to inform other authorities or criminal prosecutors. Additionally, banking secrecy was waived outside of criminal procedures for residents as well. Due to an amendment of the Banking Act, banking secrecy was extensively abolished by including many exemptions. The obligation for confidentiality no longer applies – in line with EU directives – inter alia in connection with the automatic exchange of information, the request for information and the reporting obligation.

#### **8 What limitation period applies to the review of tax returns?**

A tax assessment and its cancellation or amendment is no longer admissible once the statute of limitation for a tax assessment has expired. In general, the statute of limitation for a tax assessment is five years; it is de facto extended to six years due to a special rule applying to assessed taxes only (ie, income tax, corporate income tax, value added tax, etc). For withholding taxes or taxes self-assessed by the taxpayer, only a five-year statute of limitation applies. If taxes have been (intentionally) evaded, it is a 10-year period. If tax authorities perform an official act (ie, reminding the taxpayer to file the return, requesting additional information etc), the six-year period is extended for another year. However, after a period of 10 years an assessment is not admissible (this is known as the absolute period for assessment). For taxes such as income tax, corporate income tax or value added tax where a tax return has to be submitted, the statute of limitation for a tax assessment begins upon the end of the relevant calendar year (ie, 31 December).

#### **9 Describe any alternative dispute resolution (ADR) or settlement options available.**

An agreement on taxes (ie, a contract, settlement or agreement) is in general not admissible.

However, the Federal Fiscal Code provides for an agreement, once a procedure before a tax court has been commenced. However, such agreement is merely on facts and circumstances of the case; legal issues or the application of certain laws cannot be subject to such agreement.

A binding ruling regarding the application of law on specific future facts is also admissible, but it is restricted to certain tax matters (such as transfer pricing, tax-neutral reorganisations and group taxation). Such ruling is subject to a fee.

Finally, there are mutual agreement procedures in accordance with double taxation treaties.

#### **10 How may the tax authority collect overdue tax payments following a tax review?**

Tax authorities can enforce overdue tax payments. Enforcement is possible against moveable assets, receivables and other property rights (except immovable assets) with a decree from the tax office. Movables in the possession of the debtor are seized and realised by auction. Monetary claims are attached by attachment order, in particular a written prohibition to a third-party debtor against making payments to the judgment debtor. For immovable assets such as real estate, the tax office requires court assistance (ie, the issuance of a tax office decree would not be admissible).

#### **11 In what circumstances may the tax authority impose penalties?**

A late-filing penalty of up to 10 per cent can be imposed on anyone failing to meet the obligation to submit a tax return in time (see question 6). A late-payment penalty has to be set against a taxpayer in case a tax has not been paid by the end of the due date. Such late-payment penalty is 2 per cent of the taxes due.

#### **12 How are penalties calculated?**

The amount of the late-filing penalty is at the discretion of the tax authorities, but it may not exceed 10 per cent of the assessed tax. Owing to usual practice, the penalty is 1 per cent for every month elapsing after the due date. The late-payment penalty is always 2 per cent of the amount of the

due tax (see question 11), irrespective of the period of time having elapsed since the due date.

### 13 What defences are available if penalties are imposed?

A late-filing penalty as well as a late-payment penalty is an administrative act (ie, in form of a decree) against which an appeal is admissible. The tax authority that imposed the penalty will re-examine the matter and will decide on the appeal in form of a preliminary decision. The preliminary decision can be challenged before a tax court.

### 14 In what circumstances may the tax authority collect interest and how is it calculated?

Interest accrues in the following events:

- If a tax assessment leads to an additional payment (ie, the tax assessed is higher than the taxpayer's advance payments, which are in turn based on tax assessments from former years), interest accrues to the advantage of tax authorities. If on the other hand the tax assessment leads to a refund (ie, the tax assessed is lower than the taxpayer's advance payments), interest accrues to the advantage of the taxpayer. The period of interest accrual begins on the 1 October of the year subsequent to the calendar year in which the relevant tax has been triggered and ends after 48 months (ie, interest accrues for a maximum period of two years). The interest rate is 2 per cent over the base interest rate.
- If the taxpayer applies for a full or partly deferral of tax payments that are due under the conditions that payment would result in considerable hardship for him or her and the enforcement of the claim would not appear to be endangered by the deferment, interest accrues for the period of deferral. The interest rate is 4.5 per cent over the base interest rate.
- If the taxpayer submits an appeal to the tax court, as in this case it is entitled to apply for a suspension, the competent tax office has to grant such suspension if the appeal does not, from a reasonable perspective, appear to be unsuccessful and the taxpayer's behaviour does not seem to endanger the collection of the tax liability at stake. If the objection before the tax court is finally unsuccessful, interest is charged on the due amount for the period of suspension. The interest rate is 2 per cent over the base interest rate.
- If the taxpayer submits a complaint to the tax court and decides to pay the amount of due tax although he or she is appealing against the tax assessment, he or she can – upon application – claim interest in the event that the amount of due tax is reduced due to the appeal. The interest rate is 2 per cent over the base interest rate.

### 15 Are there criminal consequences that can arise as a result of a tax review? Are these different for different types of taxpayers?

It is a tax crime in Austria to provide tax authorities with incorrect or incomplete particulars concerning substantial matters for taxation or to fail to inform the tax authorities of substantial facts. A penalty of up to two years' imprisonment or a monetary fine (amounting to 200 per cent of the evaded tax) can be imposed; in particularly serious cases, the penalty can be imprisonment between one and 10 years. If the taxpayer or a person in charge of the affairs of a taxpayer commits one of the above-mentioned acts through gross negligence, it is considered to be a tax offence that can be punished with a monetary fine of up to 100 per cent of the amount of the evaded tax.

The Financial Crime Act applies to individuals and, according to the Association Responsibility Act, under certain conditions (a decision maker or an employee commits the act for the benefit of the legal entity or duties that affect the legal entity are violated) to legal entities. The daily rates shall be based on the Association Responsibility Act; the fine can amount to 150 per cent of the impended fine that is applicable to individuals.

### 16 What is the recent enforcement record of the authorities?

Currently, there are no data available.

## Third parties and other authorities

### 17 Can a tax authority involve or investigate third parties as part of the authority's review of a taxpayer's return?

Yes, under Austrian procedural tax law, the authorities have broad powers to ask third parties to provide information that might be decisive for their investigations into someone else's tax matters. Generally, such third parties may not reject a request for information, except they can bring forward a particular interest (eg, privilege, endangered business secrets, a particular confidentiality).

Persons other than the taxpayer can be in the role of a formal witness in a fiscal procedure. As a general rule, a witness shall be interrogated only if a clarification of the matter by the taxpayer did not or is not likely to show any results.

Due to bank secrecy (see question 7), tax authorities are not allowed to request banking information (about deposits, accounts or other transactions) from banks or other financial institutions.

Finally, it should be remarked that if in the course of a third party's tax audit authorities obtain information about the taxpayer (ie, about business relationships), they are allowed to evaluate this information and notify the tax office competent for the respective taxpayer's assessment.

### 18 Does the tax authority cooperate with other authorities within the country? Does the tax authority cooperate with the tax authorities in other countries?

Domestic Austrian tax authorities shall fully exchange information with each other. Other authorities and public offices are obliged to inform tax authorities of facts relevant for taxation purposes.

Austria also has to comply with international exchange of information requirements as set forth in the EU Directive 011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation (that has been transformed into domestic law) and in double taxation conventions. Most double taxation conventions stipulate an obligation to exchange information that is foreseeably relevant either to the correct application of a tax convention or for the purposes of the administration and enforcement of domestic tax law. It should be noted that the above-mentioned internal legal requirements to exchange information overrule even Austrian bank secrecy (see question 7), which means that non-resident bank customers in practice do not benefit from bank secrecy.

## Special procedures

### 19 Do any special procedures apply in cases of financial or other hardship, for example when a taxpayer is bankrupt?

The taxpayer may apply for a full or partial deferral of tax payments that are already due under the conditions that payment would result in considerable hardship for him or her and the enforcement of the claim would not appear to be endangered by the deferment. Interest accrues during deferment. Tax authorities may also defer collection in full or in part of due tax claims if their collection would be unreasonable; under similar conditions, the debt may be released. Debt may also be released due to the principle of equity.

### 20 Are there any voluntary disclosure or amnesty programmes?

The Fiscal Criminal Tax Law has a provision providing the taxpayer with the possibility of a voluntary disclosure procedure regarding tax crimes (ie, both tax evasion and understatement of tax through gross negligence). If the taxpayer goes through this disclosure procedure and voluntarily reveals all facts and circumstances of his or her crime, he or she must not be punished: the perpetrator of a tax crime will not be subject to punishment if he or she amends the incorrect particulars. An exemption from punishment will not apply when the act has already been fully or partially detected.

## Rights of taxpayers

### 21 What rules are in place to protect taxpayers?

The Federal Fiscal Code grants a right to be heard – in writing or orally – before an administrative act (a decree) is issued. This particularly applies if there is a significant divergence from the facts declared in the tax return to the disadvantage of the taxpayer. There is also the right to appeal against decisions. Personal and business information is subject to tax secrecy, which is guaranteed under the Federal Fiscal Code (see question 7).



Tax authorities are obliged to check the relevant facts also in favour of the taxpayer, which is the one of the most important principles set forth in the Federal Fiscal Code.

Beside the above-mentioned principles set forth by law, no guidelines or code of conduct exist.

## **22 How can taxpayers obtain information from the tax authority? What information can taxpayers request?**

The Federal Fiscal Code does expressly grant the right to access the records of tax authorities. If access is denied, the taxpayer cannot directly appeal against this decision but against the tax assessment due to a violation of his or her rights.

Taxpayers can also turn to tax authorities for any legal information; authorities are even obliged to assist the taxpayer – provided that he or she is not supported by a professional counsel (ie, tax adviser or attorney at law) – to take legal or other actions (ie, in filing his or her tax return).

## **23 Is the tax authority subject to non-judicial oversight?**

Local federal tax offices are subject to supervision by the Federal Ministry of Finance; tax offices in the single state as well as community agencies competent for tax matters are supervised by the specific state's government. The supervisory bodies may direct a local tax official also in regard to an individual case. However, in practice they usually refrain from doing so. A taxpayer's ombudsman exists as part of the Federal Ministry of Finance.

## **Court actions**

### **24 Which courts have jurisdiction to hear tax disputes?**

An appeal against the tax office's decree is admissible to a tax court; such court is a specialised independent institution separate from tax authorities (similar to a civil or criminal court). The function of a tax court can either be performed by a local administrative court for state or community taxes (that is also competent for administrative matters), or the Federal Tax Court for federal taxes (being exclusively competent for federal taxes only) such as income tax, corporate income tax, value added tax. As a consequence of the appeal, the tax office is obliged to decide in the form of a preliminary decision. Only after this decision can the tax court be made competent (if the taxpayer submits an appeal against the preliminary decision). Against a tax court's decision, a further appeal (revision) is, in what are known as 'fundamental questions', admissible to the Administrative Court, or, if constitutional rights are violated, to the Constitutional Court; see also question 2. Thus, the tax courts pass judgments in the first instance; only in this first instance the facts of the case are established and heard. There is no appeal on the facts once the taxpayer decides to bring an appeal to the Administrative Court.

### **25 How can tax disputes be brought before the courts?**

In an action before the tax court an appeal has to be filed in writing or declared for record within one month of notice of the local tax office's tax assessment. This one-month period can, upon the taxpayer's application, be (repeatedly) prolonged by the tax office for 'good reasons'. The person addressed in the tax assessment (ie, the taxpayer) qualifies as the appellant. In the appeal, the appellant and the contested tax assessment have to be named. A copy of the tax assessment is not required to be enclosed. The appellant is required to explain what is requested (to what extent or in what regard the decree shall be modified, amended or whether it shall be annihilated). Finally, the taxpayer is required to expose the reasoning. The facts and circumstances of the case as well as the means of evidence – from the taxpayer's perspective – are not expressly required to be explained in the appeal, but it is very much recommended that they are described.

Even though the final destination of the appeal is the tax court, it has to be addressed to the tax office that issued the contested tax assessment; this is explained by the tax office's obligation to issue a preliminary decision on the reasons of the appeal. However, certain exceptions to this obligation apply, especially if both the taxpayer as appellant and the tax office come to the agreement that such preliminary decision is not necessary; usually that is the case if the points taken up by the taxpayer's complaint have already been discussed in a tax audit.

There is no minimum threshold amount for an appeal. An appeal against a tax office's tax assessment can be based on errors of law and procedure.

As a second instance of the court proceedings, the Administrative Court decides (see question 34 for further details; see also questions 24 and

2). An appeal against the tax court's verdict, the technical term of the law is revision, has to be submitted within a period of six weeks (this period is not subject to any prolongation). The revision must be addressed to the tax court that issued the contested verdict; the first instance judges whether the revision complies with procedural requirements (ie, the six-week period). There is no minimum threshold amount for a revision. A revision against a tax court's verdict can also be based on errors of law and procedure; however, since the second instance does not rejudge the facts and circumstances of the case, certain restrictions apply for errors of procedure. Finally, it should be noted that any revision to the Administrative Court is restricted to 'fundamental questions' only.

### **26 Can tax claims affecting multiple tax returns or taxpayers be brought together?**

Generally, no, since several tax claims can only be combined to one common litigation if the underlying tax assessment is contested by several complainants respectively and if several complaints are filed against the assessment.

### **27 Must the taxpayer pay the amounts in dispute into court before bringing a claim?**

An action against a tax assessment generally does not have the effect of blocking the execution of the disputed tax assessment; the amount of tax in dispute has to be paid, even if an appeal is filed.

However, the tax authorities may, upon the taxpayer's application, suspend execution in whole or in part if an appeal is filed: the tax office whose assessment is contested shall grant such suspension if the appeal does not, from a reasonable perspective, appear to be unsuccessful; and the taxpayer's behaviour does not seem to endanger the collection of the tax claim. If the objection before the tax court is finally unsuccessful, interest is charged on the amount due for the period the payment of the tax was suspended (see question 14). It should be remarked that, on the other hand, if the taxpayer submits a complaint to the tax court and decides to pay the amount of due tax, he or she can – upon application – claim interest in the event that the amount of due tax is reduced due to the appeal. The interest rate is 2 per cent over the 'base interest rate' (see question 14).

Court fees (a fixed rate of currently €240) have to be paid only if the taxpayer files a revision against a tax court's judgment that is addressed to the Administrative Court (see questions 25 and 34).

### **28 To what extent can the costs of a dispute be recovered?**

The costs of the dispute before the tax courts cannot be recovered. In case of a complaint against a tax court's judgment, the claimant obtains a partial refund provided that the revision is finally successful. The claimant obtains a lump-sum payment currently amounting to €1,106,40 irrespective of the actual costs of the appeal, plus a refund of the court fees.

### **29 Are there any restrictions on or rules relating to third-party funding or insurance for the costs of a tax dispute, including bringing a tax claim to court?**

Generally, no such limitations apply in Austria. Within the corporate group the capital maintenance rules provide a barrier for having subsidiaries finance a tax litigation of a parent company.

### **30 Who is the decision maker in the court? Is a jury trial available to hear tax disputes?**

As a general rule, a single judge decides. Upon application of the taxpayer (or upon request of the competent judge, whose request is admissible in a restricted number of events) a panel of judges (a 'senate') becomes competent. The senate of judges consists of two professional and two lay judges.

There are no jury trials in the field of taxation in the Austrian judiciary. The decisions of the Administrative Court (see questions 25 and 37) are made by a panel of five professional judges. In matters of administrative criminal matters and in certain 'uncomplicated' or procedural matters, however, a panel of three judges decides.

### **31 What are the usual time frames for tax trials?**

A tax court is required to make its decision within a period of six months after the complaint; after this period, the taxpayer is entitled to file a complaint against the court's inactivity. As a consequence of such complaint, the court is granted a period of another three months to make its decision. Although the above-mentioned possibility of a complaint against

a tax court's inactivity exists (that taxpayers are in practice reluctant to use), courts usually take more time for their decisions. Depending on the court and the subject matter of the case, a tax trial may take approximately between six and 30 months. An appeal before the Administrative Court may take from nine to 36 months.

### 32 Describe the discovery process for a tax trial.

Tax trials are determined by the principle of official investigation (ie, the court investigates the facts ex officio). Nevertheless, the facts shall be included in the taxpayer's complaint as well as in the tax office's briefs. In preparation of the trial the court also consults the files of the tax office. If facts are in question, the court takes evidence. Although the parties (the taxpayer and the tax office) may request to seek out evidence by specific means (eg, by testimony of a witness) it is at the discretion of the court to choose the most appropriate means of evidence.

### 33 What testimony is permitted in a tax trial?

Means of evidence in a tax trial inter alia include documentary evidence and testimony of witnesses. The parties of the trial (the taxpayer and the tax office) must also be heard. In practice, the taxpayer's testimony is of great importance, although he or she does not have the formal position of a witness. As a general rule, it is at the discretion of the court to choose the most appropriate means of evidence.

In order to ensure a fair trial, the Financial Crime Act provides oral translation assistance during criminal trials for people who do not understand the language of the proceedings; the Federal Fiscal Code on the contrary provides interpreters solely for deaf and hard of hearing parties.

### 34 Who can represent taxpayers in a tax trial? Who represents the tax authority?

In the first instance (ie, before the tax court) a taxpayer may represent himself or herself. If the taxpayer chooses to be represented, he or she has to be represented by an attorney at law, a (registered) tax adviser or a certified public accountant. In the second instance (ie, before the Administrative Court) the taxpayer has to be represented by an attorney, a (registered) tax adviser or a certified public accountant. Only in the second instance is legal aid from public funds available if a taxpayer cannot afford legal representation.

Tax offices are represented by qualified members. It is not common for tax authorities to be represented by attorneys at law or other professional counsellors.

### 35 Are tax trial proceedings public?

If a hearing in a tax trial takes place, it is held in public, independent of the decision being made by a single judge or a senate (see question 30). A hearing must take place upon application of the taxpayer (that has to be included either in the complaint or in the appeal against the preliminary decision (see question 24)), or upon request of the (single) judge, or – if a senate is competent to decide – upon request of the presiding judge or the senate's decision.

However, the public may be excluded upon the taxpayer's application or – under certain restrictions – upon the tax office's request.

### 36 Who has the burden of proof in a tax trial?

Tax trials are determined by the principle of official investigation (ie, the court investigates the facts ex officio; see also question 32). Nonetheless, the taxpayer has an obligation to cooperate with the tax authorities. Both judicature and trial practice show that – if facts cannot be asserted by the court under this principle – each party of the trial (ie, the taxpayer and the tax office) has to prove its allegations. The tax authority must prove all facts and circumstances to justify a tax claim, and the taxpayer must prove all facts and circumstances to justify the non-existence of a claim.

### 37 Describe the case management process for a tax trial.

After receiving the complaint, the authority that issued the contested assessment may decide by preliminary appeal decision or bring the action before the administrative court within three months. In the event that the competent authority decided by preliminary appeal, the taxpayer has the right to a court decision by filing a request of remittance within one month. The administrative court has to conduct the necessary investigation proceedings and can reject the complaint as unfounded or allow the complaint that leads to the annulment of the tax assessment. The state of the proceedings is reversed to the position that existed before the contested assessment was made.

### 38 Can a court decision be appealed? If so, on what basis?

A revision against the tax court's decision (the instrument of appeal against a tax court decision, see above) has to be submitted within a period of six weeks (this period is, however, not subject to any prolongation; see question 25). The revision must be addressed to the first instance (ie, the tax court that issued the contested verdict). The first instance rules on whether the revision complies with procedural requirements (ie, the six-week period, res iudicata or other requirements). There is no minimum threshold amount for a revision (see question 25). A revision against a tax court's decision can also be ruled upon errors of law and procedure; however, since the second instance does not re-judge the facts and circumstances of the case, certain restrictions apply for errors of procedure.

The revision is decided upon by the Administrative Court having its seat in Vienna. This court is competent not only for matters of taxation, but for any public law appeal as a second (and last) instance in Austria. Decisions are made by a panel of five judges (in matters of administrative criminal matters and in certain 'uncomplicated' or procedural matters, however, a panel of three judges decides).

It should be pointed out that any appeal to the Administrative Court is restricted to fundamental questions only (ie, if the legal matter is of fundamental significance), which basically means that such revision is only admissible in order to secure the uniformity of the application of the law. The first instance in tax law matters (ie, the tax court) decides whether the revision to the Administrative Court is admissible (such decision must be included in the court's main decision). If the tax court denies admission, a revision to the Administrative Court is nevertheless admissible – within the same period of six weeks – but requires additional reasoning in order to demonstrate that fundamental questions are raised by the complaint. In this event, the revision is deemed to be 'extraordinary'.

# BINDER GRÖSSWANG

Walter Loukota  
Christian Wimpissinger

loukota@bindergroesswang.at  
wimpissinger@bindergroesswang.at

Sterngasse 13  
1010 Vienna  
Austria

Tel: +43 1 534 80 / 270 / 277  
Fax: +43 1 534 80 8  
www.bindergroesswang.at

If the Administrative Court considers a law unconstitutional, it has to refer the legal question to the Constitutional Court. The Administrative Court is furthermore obliged to refer a legal question to the European Court of Justice if the relevant provision of Austrian law needs to be interpreted under EU law.

If a taxpayer is of the opinion that a decision of a tax court violates its constitutional rights, it may also directly address the Constitutional Court. A constitutional complaint can only be based on the violation of constitutional law and must be filed in writing or declared for record within six weeks' notice of the relevant court's decision. In its request to the Constitutional Court the taxpayer can request that the Constitutional Court transfers the case to the Administrative Court for an examination of non-constitutional rights, if no violation of constitutional rights is found by the Constitutional Court (called 'successive revision').

# Brazil

Ana Paula Schincariol Lui Barreto, Gabriela Silva de Lemos, Marcel Alcades Theodoro and Alessandra Gomensoro

Mattos Filho, Veiga Filho, Marrey Jr e Quiroga Advogados

## Overview

### 1 What is the relevant legislation relating to tax administration and controversies? Other than legislation, are there other binding rules for taxpayers and the tax authority?

The Brazilian tax system is established by the Federal Constitution, which describes, in a very detailed manner all collectable types of tax and the related federative entities entitled to collect it. In Brazil, the Federal Constitution afforded a very detailed treatment to tax issues, determining the general aspects of taxable events and limits to the imposition of taxes.

The Brazilian tax code (Law No. 5,172/1996) establishes general tax rules (concerning aspects such as the definition of taxes, obligations, assessment, tax credits and statute of limitations). In addition, each type of tax may be outlined in specific laws, which consist in a statute responsible for instituting taxes and governing all their aspects.

The tax system is guided by the strict legality principle, meaning that no other rule may contravene legal provisions settled in laws. Furthermore, as the Brazilian Constitution provides for tax issues in details, such constitutional provisions must be strictly observed.

Competent authorities enact statutes (such as decrees, normative rulings, resolutions and ordinances) that, in theory, serve the only purpose of detailing and providing more practical rules related to what has been established in the Constitution and in the pertinent laws. However, it is far from uncommon that such statutes end up creating rights and obligations not provided for in any laws or in the Federal Constitution, thereby exceeding their purpose and contributing to a litigation scenario in tax matters.

In addition, it is possible that other rules may arise in a more specific and practical manner, such as: (i) once the taxpayer requests the government to issue an opinion on the correct interpretation of a certain rule regarding a particular case, it becomes obliged to act accordingly to what the government replies; and (ii) once higher courts rule in a certain case, its ruling binds upon other members of the judiciary branch (this is a consequence of rulings in the means of repetitive and general repercussion appeals).

Regarding international treaties signed by Brazil, they are incorporated to the domestic legal system by means of decrees. Once they become rules enforceable by the legal authorities, taxpayers shall also comply with them.

As for litigation tax matters, there are different levels of discussion that are administrative and judicial. Such matters shall be discussed under the terms of the procedure rules provided in Brazil by the Brazilian Code of Civil Procedure. As a result of a reform in the Brazilian procedural system, a new Code of Civil Procedure was recently enacted (Law No. 13,105/2015), which expressly consists in the general law governing all procedures before administrative and judicial courts. In spite of this fact, special laws are enacted in order to rule specific procedures that may take place in administrative and judicial level of litigation. The Brazilian Code of Civil Procedure should be applied on a subsidiary and supplementary manner.

Tax foreclosures lawsuits are governed by a specific law (Law No. 6,830/1980) and the procedure at the administrative level is ruled by Decree No. 70,235/1972 and by Law No. 9,784/1999).

### 2 What is the relevant tax authority and how is it organised?

Each federative entity (federal government, states and municipalities) have their own legislative structure for purposes of administrating and collecting taxes.

At federal level, taxes are enforced and inspected by the Brazilian Federal Revenue Service, a body subordinated to the Ministry of Finance, part of the Executive Branch.

The Brazilian Federal Revenue Service is divided into sub-secretariats that are responsible for collection and assistance, taxing and litigation, auditing and inspection, customs and international relations, and management of this public body. In addition, there are decentralised units for the audit and inspection of taxes and customs aspects.

## Enforcement

### 3 How does the tax authority verify compliance with the tax laws and ensure timely payment of taxes? What is the typical procedure for the tax authority to review a tax return and how long does the review last?

The law provides several tax reporting obligations for the taxpayer, and in most cases the taxpayer is liable for determining and paying the taxes to which it is subject. Currently, authorities at the Brazilian Federal Revenue Service have at their disposition a cutting-edge technology to enforce the law and inspect taxpayers, especially considering that most of the tax reporting obligations are delivered and analysed in an exclusively digital environment.

To formalise the beginning of an inspection, authorities at the Brazilian Federal Revenue Office should issue an 'Instrument of Distribution for Tax Proceedings' (*Termo de Distribuição de Procedimento Fiscal*), in which the issuing authority can question the taxpayer, request documents and conduct in loco inspections or diligences. Tax proceedings may last between 60 and 120 days, and this period can be extended by the issuing authority as many times as it deems necessary.

Particularly as regards inspection of individuals, which are subject to income tax, the procedure carried out by the Brazilian Federal Revenue Office consists in analysing the information filled in and delivered electronically by the taxpayer (DIRPF).

If authorities at the Brazilian Federal Revenue Office identify any inconsistencies in the provided information, the taxpayer shall be notified who, at the office's discretion, can either: (i) rectify the provided information and, if applicable, pay any unpaid tax; or (ii) submit documents evidencing the accuracy of the information provided in the tax reporting obligations.

### 4 Are different types of taxpayers subjected to different reporting requirements? Can they be subjected to different types of review?

According to Brazilian legislation, taxpayers may be considered either enterprises or individuals.

As a general rule, enterprises are subject to one of the following taxation regimes: *Simples Nacional*, Actual Profit Regime (*Lucro Real*) or Presumed Profit Regime (*Lucro Presumido*).

*Simples Nacional* is a taxation regime that may be adopted by small businesses with an annual gross revenue of up to 3.6 million reais and consists in applying a single rate to its monthly revenue for all the taxable performed activities.

Regarding the Actual Profit Regime, for purposes of calculating the income tax (IRPJ) and Social Contribution over the Net Profit (CSLL), the taxable amount corresponds to the net profit of the period determined

from its accounting information, after introducing certain adjustments, such as additions and exclusions, as provided in the law.

Regarding the Presumed Profit Regime, it may be adopted by taxpayers who are not legally required to adopt the Actual Profit Regime, reporting an annual gross revenue of up to 78 million reais. Under such a regime, the taxable amount is obtained by the application of a prior fixed percentage to its revenue, regardless of the expenses recorded in its accounting.

Enterprises, in what concerns Income Tax and Social Contribution over the Net Profit, should fill in and electronically delivery to the Federal Revenue Service a tax reporting obligation (EFC) that consists in a document in which all transactions affecting the taxable base of such taxes are reported, as well as the relevant amounts due and payable to the federal government.

In addition, enterprises are required to fill in and electronically delivery to the Federal Revenue Service, the EFD-Contribuições. It is another type of tax reporting obligation under which taxpayers provide information regarding determination of the social contribution.

If their activities are of commercial or industrial nature, enterprises should record and electronically delivery their tax books in order to comply with the tax reporting obligation known as EFD-ICMS/IPI.

Individuals, in their turn, are subject, among other taxes related to specific transactions and business, to income tax, which is determined by means of a tax report prepared and electronically delivered to the Federal Revenue Service. Such tax report can be delivered in one of the two taxation models available (simplified and complete mode), that the taxpayer chooses taking into account the option resulting in the lowest tax burden.

#### **5 What types of information may the tax authority request from taxpayers? Can the tax authority interview the taxpayer or the taxpayer's employees? If so, are there any restrictions?**

Generally, a taxpayer shall present all the tax reporting obligations provided in legislation. The tax authority may request and examine goods, books, files, documents and other papers in order to verify the compliance with the tax legislation. Furthermore, it may also address written questions regarding the transactions and facts under analysis as well as enquire the taxpayer, taxpayer's representatives or their employees.

However, it is common for tax authorities to require the presentation of other information apart from the official documents and tax reporting obligations provided in legislation. Regardless of this, taxpayers are not obliged to present or disclose any information or document if a law does not require so.

#### **6 What actions may the agencies take if the taxpayer does not provide the required?**

In the event that the taxpayer does not provide the requested clarification or fails to submit any files or documents requested by the tax authorities, the law determines that once unable to determine the due and payable amount, tax authorities may arbitrate such amounts based upon pre-determined criteria, as well as increase any relevant fines.

Tax authorities can also impose penalties for obstructing the tax audit procedure.

#### **7 How may taxpayers protect commercial information, including business secrets or professional advice, from disclosure?**

Information exchanged with the tax authorities are protected by the privacy of tax related information (article 198 of the Brazilian Tax Code) and cannot be disclosed to third parties. There are judicial precedents ruling that information provided solely to the tax authorities is subject to such privacy. Therefore, once tax authorities require documents and information from taxpayers as provided by law, they cannot refuse to provide it based on confidentiality.

Attorneys and clients are not obliged to disclose messages, information or documents exchanged within the scope of an attorney-client relationship, as they are deemed as confidential by the Code of Ethics and Discipline of the Brazilian Bar Association (OAB).

#### **8 What limitation period applies to the review of tax returns?**

In accordance with Brazilian laws, any challenge by the tax authorities regarding the procedures adopted by the taxpayer shall be made within a term of five years counted from the occurrence of the relevant taxable events. Therefore, in the event that the tax authorities intend to verify

whether the taxation adopted by the taxpayer and informed through its tax reporting obligations are in accordance with the legislation or not, it should proceed with the service of notices and request for information or clarification always within a five-year term.

#### **9 Describe any alternative dispute resolution (ADR) or settlement options available?**

Regarding tax matters, Brazilian laws do not allow alternative solutions for settlement of disputes. Discussion on the lawfulness of tax collection may occur at administrative level or before judicial courts. If the taxpayer does not obtain a favourable decision at administrative level, it may resort to judicial courts. Discussion at administrative level may also occur by means of the filing of appeals by taxpayers and by the tax authorities. The main difference between discussing matters at administrative or judicial level lies in the need to present collateral at judicial level.

#### **10 How may the tax authority collect overdue tax payments following a tax review?**

Payment of taxes, even overdue ones, may always be made by the taxpayer, duly added by a fine (at 20 per cent) and interest on late payments calculated at the SELIC rate (official interest rate calculated by the Brazilian central bank), at federal level. In the event of lack of payment by the taxpayer, tax authorities may seek appropriate court redress and file a tax foreclosure lawsuit. In the context of this lawsuit, tax authorities may claim the presentation of warranties by the taxpayer in order to assure the payment of the debt under discussion such as assets, rights and even a portion of the company's income.

At the administrative level, in specific situations, tax authorities proceed with a measure intending to monitor the assets owned by the taxpayer in order to follow up its capability to pay the debts under discussion (*arrolamento de bens*).

#### **11 In what circumstances may the tax authority impose penalties?**

Penalties are imposed by tax authorities in cases of official assessment for collection of tax claims. Penalty percentages may be increased in the event of evasion, fraud and wilful misconduct, or in the event taxpayer obstructs the tax audit procedure (the initial percentage at federal level is of 75 per cent, and may reach 225 per cent).

#### **12 How are penalties calculated?**

Penalty percentages are applied based on the amount of taxes allegedly due and payable, as determined by the tax authorities. Tax authorities may also apply penalties for the noncompliance of tax reporting obligations even in the event all the taxes were duly paid.

#### **13 What defences are available if penalties are imposed?**

A taxpayer has the right to challenge penalties both in administrative and judicial levels. As a rule, the administrative level comprises three instances for taxpayer's defence (defence, voluntary appeal and special appeal). Defence is judged by an administrative body formed by tax authorities and appeals are analysed and judged by the administrative court called Conselho Administrativo de Recursos Fiscais (CARF). At CARF-level, trials take place in judgement chambers formed by judges appointed by tax authorities and by taxpayers. At state and local administrative levels, there is also a due process of law, and appeals may be filed by both parties.

#### **14 In what circumstances may the tax authority collect interest and how is it calculated?**

Interest is due whenever taxes are collected arrears. At federal level, interest is calculated by means of the application of SELIC.

#### **15 Are there criminal consequences that can arise as a result of a tax review? Are these different for different types of taxpayers?**

In the event of verification and evidence of fraudulent acts, wilful misconduct or simulation perpetrated by the taxpayer, fines are increased up to 150 per cent (at federal level). Once the practice of such acts is verified and the increased fine is applied, the tax claim shall be formalised for criminal purposes, and criminal measures shall be suspended until the final outcome of the administrative proceeding. If the administrative proceeding

has a favourable outcome to the taxpayer, the criminal suit shall not move forward. Alternatively, in general, if the tax debt is not paid, the case record is forwarded to the Federal Prosecution Office.

#### **16 What is the recent enforcement record of the authorities?**

In 2015, pursuant to information obtained from the Brazilian Federal Revenue Service's website, an amount of 125.6 billion reais was the subject matter of tax deficiency notices and 277,369 tax claims were filed. The focus of tax surveillance proceedings were large taxpayers, which represent 0.01 per cent of the taxpayers in Brazil and 61 per cent of the tax revenue.

#### **Third parties and other authorities**

#### **17 Can a tax authority involve or investigate third parties as part of the authority's review of a taxpayer's returns?**

The Brazilian Tax Code imposes on third parties the obligation to provide information as support to the tax authorities and lists the persons required to deliver to the administrative authority information in their possession, namely:

- government employees;
- financial institutions;
- asset managers;
- brokers, auctioneers and official forwarding agents;
- executors;
- trustees, commission merchants and liquidators; and
- any other entities or persons designated by the law on account of their activity.

It should be noted, however, that the obligation provided for in this provision does not embrace providing information regarding facts that the informing person or entity is bound to keeping under confidentiality by virtue of position, office, duty, ministry, activity or profession.

On the other hand, any unjustified refusal by a taxpayer or a third party to cooperate with the tax authorities may qualify as an obstruction to an inspection or audit, entailing the application of a fine by the tax authority.

#### **18 Does the tax authority cooperate with other authorities within the country? Does the tax authority cooperate with the tax authorities in other countries?**

Article 198 of the Brazilian Tax Code imposes on the tax authorities the duty to observe the privacy of tax related information, preventing them from disclosing any tax information of taxpayers.

It should be noted, however, that privacy of tax-related information is not absolute, and the transfer of protected information is allowed under exceptional circumstances provided for in the law.

Item I of paragraph 1 of article 198 of the Brazilian Tax Code authorises the tax administrations to furnish information protected by privacy of tax related information to comply with a requisition made by a court authority in the interest of justice.

Article 199 of the Brazilian Tax Code also deals with the privacy of tax-related information duty in a flexible manner when allowing the sharing of tax information between entities of the federal government, that is conditional to an authorising legal or contractual provision.

At international level, the Brazilian government is an active participant in tax cooperation actions intended to fight abusive practices of evasion, elision and money laundering, by means of the Brazilian Federal Revenue Office and the Ministry of Foreign Affairs, known as the Itamaraty Palace. Those actions include the Global Forum of Transparency and Exchange of Tax Information (FG) and the project designed to fight the tax base erosion and transfer of profits (BEPS).

Brazil's adherence to the FG, signed in 2011, will allow the country to comply with the G20's collective commitment to carry on, up until 2018, the automatic exchange of tax information with the more than 130 signatories of the convention.

Likewise, Brazil is strengthening the tax cooperation on a bilateral sphere. Currently, Brazil has 32 agreements to avoid double taxation in place. All such agreements include mechanisms for the exchange of tax information.

#### **Special procedures**

#### **19 Do any special procedures apply in cases of financial or other hardship, for example when a taxpayer is bankrupt?**

Companies under court-supervised reorganisation may request admittance to the instalment payment programme instituted by Law No. 13,043/2014, which is a special instalment-payment system of the federal government to taxpayers in that situation.

Instalment payment of the court-supervised reorganisation embraces solely debits registered as overdue federal tax liability and, to adhere to the programme, it is necessary to include all debits of the taxpayer in the instalment payment facility. The debit may be divided into 84 monthly and consecutive instalments where it is not necessary to present collateral.

#### **20 Are there any voluntary disclosure or amnesty programmes?**

Federal, state and local governments often institute amnesty programmes, which facilitate the settlement of taxpayers' debts.

Such programmes provide for the possibility of on-demand or instalment payments, with significant reductions of interest and fines.

In addition to amnesty programmes, the Brazilian Federal Revenue Service also provides for the possibility of a simplified instalment-payment facility, which is an ordinary instalment-payment facility allowing payment of the debt in 60 monthly instalments. Instalment-payments are non-collateral dependent and can be made online.

#### **Rights of taxpayers**

#### **21 What rules are in place to protect taxpayers?**

The main rules protecting taxpayers' rights are set forth in the Brazilian Federal Constitution. Tax authorities must observe such rules, as they correspond to limitations to the authority to tax of the states, municipalities and the federal government.

Furthermore, government activities, likewise the collection of taxes, are generally bound by the law. This means that, in such cases, tax auditors shall act as expressly provided for and within the limits of the law, under threat of having their actions held unlawful by the internal affairs department of government entities (administrative disciplinary control) and also the judicial courts.

Taxpayers are also granted the right to challenge the legality of tax assessments at both administrative and judicial levels.

#### **22 How can taxpayers obtain information from the tax authority?**

In Brazil, any audit procedure begins with the presentation of a formal request, which contains the identification of the tax auditor and information about the audit procedure. Taxpayers can confirm the accuracy of such information with the tax administration electronically or at the tax authority's office.

Furthermore, the Brazilian Federal Constitution grants taxpayers the right to have access to information of their interest, held by public authorities.

In the event that access to any such information is denied or otherwise hindered by the government entities, taxpayers may enforce the exercise of such right before courts.

#### **23 Is the tax authority subject to non-judicial oversight?**

Tax authorities are subject to internal oversight within the administrative government body, as they shall act in strict compliance with the law. In that regard, tax assessments and audit procedures are subject to a quality and legality control carried out internally at the government body.

On the other hand, taxpayers are granted the right to challenge any tax assessments issued against them, both at the administrative and judicial levels.

Disputes involving tax assessments at the administrative level may be subject to different procedures, depending on the government entity. At the federal level, taxpayers are granted with two levels of appeal within the administrative tax courts.

#### **Court actions**

#### **24 Which courts have jurisdiction to hear tax disputes?**

The Brazilian judiciary branch structure deliberates over three instances: the first and second instances and the higher courts.

At first instance, lawsuits are judged by a single judge, and this decision may be subject to appeal that will be judged by the competent court formed by a collective of appellate judges.

In turn, the decision made by the collective may still be submitted to the review of higher courts, also formed of collective bodies, each of which has a specific jurisdiction to analyse violations to constitutional provisions (Supreme Court (STF)) or to federal laws (Superior Court of Justice (STJ)).

For the analysis of tax matters, the first and second instances of the judiciary branch have one federal structure divided into five regions that are competent to analyse federal taxes, and one state structure for each state of the federation with jurisdiction to examine issues related to state and local taxes.

## 25 How can tax disputes be brought before the courts?

Court disputes in Brazil can be brought for preventive purposes (to avoid a deemed undue collection from occurring), for a repressive purpose (to avoid a collection already in force), or for purposes of recovering unduly paid tax amounts.

Court lawsuits may be begun for violations against constitutional or legal provisions, or in factual situations, they are liable to support the taxpayer's rights.

To file a lawsuit, the taxpayer must be represented by an attorney-at-law, who will file an initial pleading describing the factual situation, the right to be protected and the request or claim of the plaintiff. Such initial pleading should be accompanied with documentation supporting the taxpayer's rights (depending on the type of action, there is an allotted time to stop producing evidence) and evidence of procedural cost payment.

Lawsuits may be filed by the taxpayers and one cannot file a lawsuit aiming at protecting a third party's right in one's own name. There are exceptional situations, however, admitting the filing of class action suits (that may be filed by certain entities expressly provided for in the law, such as senior representative associations) that may have erga omnes effectiveness.

The law does not impose a minimum or maximum limit of value to be discussed in court.

## 26 Can tax claims affecting multiple tax returns or taxpayers be brought together?

In repeated situations affecting several taxpayers in an equal manner, and dependent on an issue exclusively of law, either with respect to the tax or to accessory obligations, it is possible to file lawsuits consolidating several taxpayers in a joinder of plaintiffs, with due regard to the principle of reasonableness of the number of parties.

There are also situations allowing the filing of class action suits with erga omnes effects, which may be brought by specific individuals or entities.

## 27 Must the taxpayer pay the amounts in dispute into court before bringing a claim?

Discussion of taxes before the courts does not require their early payment or a court deposit of the relevant amount.

Convenience of early payment and/or of the court deposit should be analysed against the concrete situation of the taxpayer and/or the requirement.

## 28 To what extent can the costs of a dispute be recovered?

Procedural costs should be borne by the plaintiff and/or by the appellant, provided that, the winning party may ultimately claim from the losing party the return of the court expenses incurred in (not including in such recovery attorney's fees agreed upon directly by the taxpayer).

In addition to recovery of procedural costs, as a general rule subject to certain exceptions, the losing party should be ordered to pay a loss of suit percentage fixed by the judge pursuant to legal criteria, allocated to the winning party's attorney-at-law.

## 29 Are there any restrictions on or rules relating to third-party funding or insurance for the costs of a tax dispute, including bringing a tax claim to court?

In general, to be granted a suspension of enforceability of tax claim, allowing the taxpayer to remain in good standing before tax authorities and avoiding any collection acts, it is necessary to make a court deposit,

or obtain a court decision expressly suspending the enforceability of the collection.

A court deposit may be made at any time, but it must be made in the name of the taxpayer, even if the financial resources for such purpose are provided by a third party.

On the other hand, the law provides for alternative collateral for the tax claim enforced against the taxpayer (particularly in tax foreclosures). In such situations, it is possible to present a bank surety letter, a guarantee insurance letter or other personal or real estate property owned by the taxpayer or by third parties.

## 30 Who is the decision maker in the court? Is a jury trial available to hear tax disputes?

At first instance, lawsuits are judged by a single judge, and this decision may be subject to appeal to be judged by the competent court formed by a collegiate of appellate judges.

In turn, the decision delivered by the collective may still be submitted to the review of higher courts (STJ and STF), and also by collective bodies (justices).

In Brazil, there is no jury trial available to hear tax disputes.

## 31 What are the usual time frames for tax trials?

There is no straightforward time frame for tax trials, but the best estimate for a suit that does not involve producing evidence, but rather, only issues of law, is six to eight years, while suits involving factual issues may take between eight and 12 years to be finally decided.

## 32 Describe the discovery process for a tax trial.

In lawsuits dealing with tax issues, other than writ of mandamus that do not admit evidentiary deferment, there is an evidentiary fact-finding phase occurring after the adequate constitution of the suit, that is, after the submission of the defendant's answer and of the plaintiff's reply.

At such a fact-finding stage, the parties may substantiate the facts leading to their right by means of documents or technical examination produced by an expert appointed by the judge. Although there is no prohibition to the production of testimonial evidence, it is neither usual nor efficient in tax issues.

In general, producing evidence is incumbent on the lawsuit's plaintiff, who should preserve all documents supporting his/her/its right to be submitted to the judge or to the court-appointed expert.

## 33 What testimony is permitted in a tax trial?

The Brazilian legal system admits as evidence in tax proceedings the testimony of the party or testimonial evidence.

However, considering that the scope of facts in a tax proceeding currently embraces technical or accounting issues, the solving of which requires specific technical knowledge, the production of expert evidence is more common in such proceedings.

## 34 Who can represent taxpayers in a tax trial? Who represents the tax authority?

At judicial jurisdiction, the defence of a taxpayer must be conducted by an attorney-at-law duly registered at the OAB. Representation of the tax authority is made by government attorneys (*procuradores*), who are lawyers approved in competitive selective examinations conducted by the municipalities, the states and the federal government.

In the event that the taxpayer cannot afford to pay an attorney, Law No. 1,060/50 provides for the grant of free judicial assistance. However, court precedents do not have a uniform understanding as to the grant of such benefit to legal entities.

At administrative jurisdiction, it is not mandatory that the taxpayer's defence be conducted by an attorney-at-law; the taxpayer may conduct his/her own defence. Defence of tax authorities at federal level is made by the tax auditors at first instance and by the government attorneys at second instance.

## 35 Are tax trial proceedings public?

Pursuant to the provisions of the *caput* of article 37 of the Federal Constitution of 1988 and of article 189 of the New Brazilian Code of Civil Procedure, all procedural acts are, as a general rule, of a public nature, that is, anyone may have access to the case record and to the judgments.

However, in the event that a certain matter is ordered to be prosecuted as a closed proceeding, access to the case record and to judgment sessions is only permitted to the interested parties.

In tax matters, closed proceedings may be ordered whenever the taxpayer attaches to the case record strategic information, confidential documents, or when there is suspected fraud under a pending criminal investigation, among others.

At administrative jurisdiction, access to case records is only allowed to the interested parties. However, judgments are opened to the public.

### 36 Who has the burden of proof in a tax trial?

As a general rule, in the Brazilian legal system the burden of proof lies with whoever asserts the claim, according to the provisions of article 373 of the New Code of Civil Procedure.

In tax law, for an administrative act to generate a presumption of validity and thereby reversing the burden of proof against the taxpayer, it must be well founded.

However, in the event of any administrative act unduly founded, the taxpayer is not required to produce negative evidence, or any evidence of impossible production, it being enough to demonstrate that occurrence of the taxable event was unduly substantiated by the administration.

On the other hand, in the event that the nature of the claim is legitimate, it shall be exclusively incumbent upon the taxpayer to produce evidence that their conduct did not violate the law. Thus, the burden of proof is reversed.

### 37 Describe the case management process for a tax trial.

From the moment the taxpayer receives the proceeding notice, the term within which to file their defence and to request evidence production begins. If granted by the judge, the parties may start the producing the requested evidence. Moving on, the case is remitted to the judge under advice to deliver a first instance decision.

If any party disagrees with the first instance decision, it is possible to file an appeal to be judged at second instance by the judging board composed of appellate judges and no longer by a single judge. At this time, the parties are allowed to present oral arguments.

From the decision to be delivered at the second instance, it is still possible to appeal to higher courts. To file an appeal to the STJ, it is necessary to substantiate precedent dissension and violation to infra-constitutional laws, while to file an appeal to the STF, it is necessary to substantiate a violation to the Federal Constitution or to treaties, as well as the general repercussion of the disputed matter. Oral arguments are permitted.

### 38 Can a court decision be appealed? If so, on what basis?

In the Brazilian legal system, if a party does not agree with a decision delivered at first instance by a single judge, it is possible to file an appeal to be judged at second instance by a board formed by three appellate judges.

From the second instance decision, it is still possible to file a special appeal to the STJ and an extraordinary appeal to the STF, conditioned on evidence of compliance with all legal requirements for the filing of both appeals.

At judicial courts, in accordance with the provisions of paragraph 5 of article 1,003 of the New Brazilian Code of Civil Procedure, all appeal terms were standardised to 15 days, with the exception of a motion for clarification, the term for which remains five days and aims at reforming the decision delivered with any ambiguity, contradiction, omission or material error.

**MATTOS FILHO** > Mattos Filho, Veiga Filho,  
Marrey Jr e Quiroga Advogados

Ana Paula Schincariol Lui Barreto  
Gabriela Silva de Lemos  
Marcel Alcades Theodoro  
Alessandra Gomensoro

anaplui@mattosfilho.com.br  
glemos@mattosfilho.com.br  
malcades@mattosfilho.com.br  
agomensoro@mattosfilho.com.br

Al. Joaquim Eugênio de Lima 447  
São Paulo-SP  
01403-001  
Brazil

Tel: +55 11 3147 7600  
www.mattosfilho.com.br



# Colombia

Gustavo Pardo, Stephanie Ramirez, Catherine Herrera

Gustavo Pardo y Asociados SAS

## Overview

### 1 What is the relevant legislation relating to tax administration and controversies? Other than legislation, are there other binding rules for taxpayers and the tax authority?

The National Tax Code (Decree No. 624 of 1989) is the principal legislation that governs the national taxation of individuals, corporations, branches, permanent establishments and other entities. It covers income and capital gains taxes, equity tax (wealth tax), VAT, excise tax, payroll taxes, and procedure and controversy at the administrative level. For procedure and controversy, Law No. 1437 of 2011 and the General Code of Process (Law No. 1564 of 2012) must be considered. The Special Administrative Unit for the Management of Taxes and Customs (DIAN) is the agency that enforces national tax law.

The DIAN publishes resolutions concerning official tax guidance. Article 193 of Law No. 1607 of 2012 provides for the right for consultation regarding specific situations applicable to a taxpayer. Under article 264 of Law No. 223 of 1995 taxpayer conduct taken in line with a written official opinion that is in effect, may not be challenge by the DIAN and must be support by judges.

Colombia does not have an extensive network of tax treaties with other countries. It has one with Bolivia, Ecuador and Peru, which does not follow the OECD model, and treaties with Spain, Chile, Switzerland, Canada, Mexico, Korea, India, Portugal and Czech Republic, which follow OECD guidance that determines how residents of those countries are taxed by Colombia. Other treaties are currently under negotiation. Further treaties will come into force in future years (with France, among others).

### 2 What is the relevant tax authority and how is it organised?

The DIAN is headed by the General Director who is appointed by the President. Four offices (legal, IT services, economic studies and disciplinary investigations), two secretariats (the General Secretariat and the Institutional Development Secretariat) and three directorates (Customs, Tax and Customs Police, and Taxes) report to the Central Directorate. The Taxes Directorate has four subdivisions (tax collection, collection, tax oversight and management, and customer service).

## Enforcement

### 3 How does the tax authority verify compliance with the tax laws and ensure timely payment of taxes? What is the typical procedure for the tax authority to review a tax return and how long does the review last?

The DIAN sets up general audit programmes according to relevant situations, such as requesting refunds of credit balances, settlement or offset of tax losses (net operating losses), and revision of certain tax incentives. It also sets up industry-specific audit programmes (eg, mining, oil and gas, financial institutions, tax stability beneficiaries and special income tax regime).

In developing such audit programmes, it visits taxpayers and requests information from them, which it then compares against the information, reported on magnetic media means by other taxpayers. If there are any discrepancies either in the reported information or in the treatment it considers appropriate, the DIAN invites the taxpayer to review the situation and evaluate the amendment of its tax return. The invitation to amend is not mandatory but that moment is very important in the

procedure because it indicates that the period in which the taxpayer can make amendments in his or her favour is nearing an end. Following this is the 'proposed assessment' period, from which point onwards the taxpayer may only make amendment proposed by the DIAN, all of which must be in favour of the treasury.

If taxpayers discover an error in the filed return before the DIAN proposes an assessment they may file an amendment return. After receiving a notice of proposed assessment (*Requerimiento Especial*), the taxpayer may only make amendments proposed by the DIAN.

Generally, a tax audit does not take more than two months. However, in cases of increased economic relevance or concerning large amounts it may take more time, but it rarely takes more than six months, except in cases of income tax returns with settlement or tax loss compensation, when it can take even longer.

Usually, a tax audit only covers one type of tax (eg, VAT), despite the fact that the rules allow for two types of tax to be audited at once. Concerning income tax, audits must cover just one taxable year, whereas for VAT and withholding taxes several taxable periods can be covered at the same audit.

### 4 Are different types of taxpayers subjected to different reporting requirements? Can they be subjected to different types of review?

Individuals with revenues lower than US\$16,000 are not obliged to file an annual income tax return if they meet other requirements. If their revenue is lower than US\$208,000 they are not obliged to file information on magnetic media means. Corporations and other entities are obliged to file both income tax returns and information on magnetic media in any case, even if they did not receive any income for the year. Individuals, corporations and other entities with no residence in Colombia are not obliged to file income tax returns in Colombia, if all their revenues from Colombian sources were subject to the highest rate of withholding at source.

Nevertheless, from 2015, foreigners with no tax residence in Colombia are obliged to file a wealth tax return for 2015, 2016 and 2017 (and 2018 in the case of individuals), based on the equity owned in Colombia at 1 January 2015 if that equity is above US\$415,000. The taxable basis is the gross equity less the debts, both of them determined according to the rules under Title II of Book I of the Tax Code. Most double taxation treaties protect residents in the other country from being subject to wealth tax, but in the absence of a tax treaty the nature of the wealth owned in Colombia must be analysed to assess whether, in addition of the obligation to file a wealth tax return, some tax is due.

There are some differences in regards to information on electronic media means being report by financial institutions, stock exchanges and brokers, among others.

Subject to their compliance with other requirements, individuals with low equity are not obliged to file VAT returns. Other individuals are obliged to file annual VAT returns (if their income is less than US\$170,000), quarterly VAT returns (income between US\$170,000 and US\$1 million) or bimonthly VAT returns (income greater than US\$1 million), according to their income level from the previous year.

The more complex tax audits are those involving large amounts, transfer pricing, goodwill amortisation, financial instruments, losses (net operating losses) and tax refunds, and those initiated by information provided by third parties. Different types of audit arise in practice for large taxpayers given the time that the audit team can devote to the review and, for some

industries, the experience of the DIAN auditors may make the situation more or less complex for the taxpayer.

**5 What types of information may the tax authority request from taxpayers? Can the tax authority interview the taxpayer or the taxpayer's employees? If so, are there any restrictions?**

The DIAN's powers to request information are broad. Although much of the information may already have been delivered to the DIAN by the taxpayer or other payers, if the DIAN requests information again, this request should be complied with to avoid penalties for failure to provide all or some of the information requested.

Besides accounting books and supporting documentation, the DIAN can ask for financial information, copies of documents, contracts, agreements, public registrations, etc.

Audits start with a request for information, which can be difficult to comply with within the usual 15-day time frame. Taxpayers may make a request for more time, which is often granted, except when the deadline of a legal term is approaching.

It is uncommon for the DIAN to ask for an interview with the taxpayer, as the taxpayer concerns themselves with the revision of information and documents. It is, however, common for the taxpayer to ask for an interview with the DIAN's auditors and its bosses in order to explain individual situations, as well as to present any employee declarations as testimony.

However, as there is a principle according to which nobody is obliged to declare against him or herself, it is uncommon for a taxpayer's employees to present testimony to the DIAN. Taxpayers often use written declarations from third parties (eg, financial institutions) to certify the date of any particular loan agreement.

**6 What actions may the agencies take if the taxpayer does not provide the required?**

Should a taxpayer fail to submit any requested information in the proper way, or submit it after the deadline, the DIAN may charge a penalty of up to US\$ 170,000, or 5 per cent of the amount related to the requested information. If the information is insufficient, the penalty charged can be up to 0.5 per cent of amount of the information requested or, if the information has no value, up to 0.5 per cent of revenue or, in absence thereof, up to 0.5 per cent of equity. In addition, the DIAN can disregard costs, exempt income, deductions, tax credits, liabilities and withholding taxes when the information is related to those items if the requested information is not forthcoming. In effect, the DIAN seeks to transfer the evidence burden onto the taxpayer, under a mechanism that could be unlawful, by disregarding costs or deductions, so the taxpayer must fully prove any sum claimed.

The penalty for failure to provide requested information in the due form and on time can be reduced to 10 per cent of the penalty if the taxpayer provides the information before the penalty is notified. It can be reduced to 20 per cent if the taxpayer provides the information within the two months following the time the penalty is notified. In addition, the DIAN may ask third parties, and even shareholders, banks, clients or suppliers of the taxpayer, for the information it requires.

**7 How may taxpayers protect commercial information, including business secrets or professional advice, from disclosure?**

The general information to be submitted to the DIAN regarding both taxable bases and the determination of settled taxes in tax returns, as well as the information related to tax audits, is confidential. Sometimes such information is no longer confidential if it is requested by a competent authority in the course of criminal procedures or money-laundering investigations. Likewise, such information can be shared by the DIAN with other authorities in order to verify the settlement of local taxes and payroll taxes, and for statistical purposes.

The privilege of confidential information protects information entrusted by the client to his or her lawyer for the purpose of obtaining legal advice, in line with article 34 of Law No. 1123 of 2007. Lawyers and accountants are not obliged to declare the facts entrusted to them or known by them owing to their profession.

**8 What limitation period applies to the review of tax returns?**

The general statute of limitation is two years from the deadline to file the returns. If filed out of time, the two-year term begins from the time the return is filed. If there is a credit balance in the return, the two-year period

starts from the moment the refund of the balance is requested. In the case of settlement or compensation of net operating losses, the statute of limitation is five years from the time the return was filed.

**9 Describe any alternative dispute resolution (ADR) or settlement options available.**

The current rules do not contain ADR or settlement options, although there are some initiatives that are expected to be established in the near future.

In recent years some reforms introduced settlement options (transactions, conciliations and easy payments) that were temporarily available in previous years, where paying the full amount due, the total or partial penalty payments and interests can be avoided. The Constitutional Court declared most of these options constitutional, which implied that those who made use of the respective settlement options settled the cases by paying a portion of the amounts in question, and so receiving amnesty for the remaining liability. The last of these options are provided in articles 55, 56 and 57 of Law No. 1739 of 2014.

In practice it is customary, especially at the audit stage, for a taxpayer to request formal meetings with auditors and their superiors to explain its particular situation, a mechanism that can elucidate the taxpayer's case and arguments. However, this does not constitute a settlement option in the formal sense.

**10 How may the tax authority collect overdue tax payments following a tax review?**

The DIAN can collect overdue tax payments when the administrative action establishing the overdue nature of tax payments has become a final judgment, which occurs when the appeal for reconsideration has been resolved. At this point the DIAN can start the process of collecting the sums established therein by issuing a payment order, although the admission of a lawsuit before the judges or courts adjourns its enforcement action until the final decision is pronounced by the tax courts.

Prior to or at the same time as the payment order, the DIAN can confiscate any good of a debtor that has been determined as his or her property.

**11 In what circumstances may the tax authority impose penalties?**

Penalties can be imposed for late filing of returns, failing to submit information or submitting it in a form other than that requested, requesting amendments to reduce the tax due or increase the credit balance without the right to do so and the correction of returns. There are also penalties related to transfer pricing, complementary documentation and transfer pricing returns, among others.

The most common penalties are the result of amendment and inaccuracy. When a taxpayer voluntarily corrects its return before the DIAN gives notice of proposed assessment penalties, the penalties are 10 per cent or 20 per cent of the amount due, depending on when the taxpayer increases the amount.

If the tax due is not voluntarily increased by the taxpayer following the DIAN's request, the penalty starts at 40 per cent and can be increased to 80 per cent or 160 per cent depending on when the increased amount of tax due is settled and paid.

Another common penalty occurs because of information not provided, filed late or with errors (see question 6). Penalties due to errors in information are only applicable if the errors lead to damage affecting the DIAN's revision; otherwise such penalties may not be applicable.

**12 How are penalties calculated?**

It depends on the type of penalty. The penalties for amending a return and an incorrect filing are calculated based on the larger tax liability or the lesser credit balance, proposed by the DIAN.

The penalty for failing to provide information or submitting it with mistakes (up to 5 per cent) is calculated over the total amount of the information not provided or declared inaccurately or late.

**13 What defences are available if penalties are imposed?**

Appeal (reconsideration) against penalties is available by challenging the facts the authority has relied on. There are no other grounds allowing the penalties to be avoided, such as showing ordinary business care and prudence in determining tax obligations was exercised or having retained a competent tax professional, provided that adviser with relevant facts and relied on the adviser in good faith.

There are two exceptional cases in which a request can be made for penalties not to be imposed if, in the case of a penalty being imposed due to the provision of inaccurate information, it can be demonstrated that the inaccuracies did not affect in bad faith the tax due; or that the DIAN's review contained an assessment error or misapplied the applicable law. In practice, when the foregoing circumstances are proved a judge could revoke the penalties, although the number of cases in which a judge revoked the inaccuracy penalty in a final decision have diminished in recent years.

#### **14 In what circumstances may the tax authority collect interest and how is it calculated?**

Interest accrues on late payments assessed by the taxpayer itself and taxes or higher taxes officially determined by the DIAN. Interest accrues daily at the highest possible rate authorised in financial markets for consumer credit (approximately 30 per cent annually, on average). Interest stops accruing after two years following the lawsuit being admitted by the tax judge and restarts after the final decision is made. The interest is not compounded.

There is no interest on penalties, but they will increase in line with inflation after the next 1 January following the year in which the administrative stage with the DIAN finished.

#### **15 Are there criminal consequences that can arise as a result of a tax review? Are these different for different types of taxpayers?**

According to the Criminal Code (article 402 of Law No. 599 of 2000), failing to pay VAT and withholding tax at source will lead to penal consequences within two months after the due date. The penalty will be between three and six years' imprisonment. In addition, fines for breaching the penal law equivalent to twice the amount due would be applicable.

The above-mentioned penalties are applicable to individuals within an organisation who are responsible for making tax payments.

#### **16 What is the recent enforcement record of the authorities?**

The available public information shows that the amount of tax collected by the DIAN increased by 41.2 per cent from 2011 to 2012, and 99.73 per cent from 2012 to 2013. There is no public information available for following years. It is important to mention that the total amount of tax assessments is lower than 1 per cent of the amount of taxes collected.

### **Third parties and other authorities**

#### **17 Can a tax authority involve or investigate third parties as part of the authority's review of a taxpayer's return?**

The DIAN can contact third parties for documents and interviews when information is not provided by the taxpayer. Third parties can be interviewed in exceptional cases. The DIAN is obliged to inform the taxpayer when it contacts a third party and to disclose the information collected if it decides to use it in order to support its arguments. There are no penalties related to this procedure, other than the one previously mentioned for information not provided (see question 6).

Some of the most complex reviews are those initiated by accusations from third parties.

#### **18 Does the tax authority cooperate with other authorities within the country? Does the tax authority cooperate with the tax authorities in other countries?**

At the domestic level, the DIAN can share information with other authorities for the purposes of verifying the settlement of local and payroll taxes, and for statistical purposes. It can also provide information for criminal procedures or money-laundering investigations.

The eight agreements signed by Colombia under the OECD model (with Spain, Chile, Switzerland, Canada, Mexico, Korea, India and the Czech Republic) foresee the possibility of exchanging information for tax investigation purposes. In addition to these agreements, Law No. 1661 of 2013 contains the Convention on Mutual Administrative Assistance in Tax Purposes agreed with EU and OECD members. Likewise, Law No. 1666 of 2013 contains the agreement with the US concerning exchanging information for tax purposes. Colombia has also subscribed to tax information exchange agreements with Curaçao and Barbados and other countries to avoid being included in the Colombian tax haven list. There is uncertainty

about the scope of the cooperation agreement with Panama announced for June 2016, which is still uncertain at August 2016.

### **Special procedures**

#### **19 Do any special procedures apply in cases of financial or other hardship, for example when a taxpayer is bankrupt?**

Any taxpayer may enter into a payment agreement with the DIAN in order to pay taxes that are due, over a term of no more than five years, provided that satisfactory payment guarantees are provided. In practice, the DIAN enters into payment agreements for terms of between one and three years. During this term, interest in arrears accrues on the principal balance.

Subject to some requirements and restrictions, the term of the payment agreement can be longer when the taxpayer has reached an agreement to restructure its liabilities with financial entities.

#### **20 Are there any voluntary disclosure or amnesty programmes?**

There is no permanent regulation of voluntary disclosure or amnesty programmes; however, from time to time Congress offers amnesty programmes for tax owed, penalties and interest payments. The last amnesty applicable to all taxpayers finished in September 2015. A new amnesty, applicable only to taxpayers in the agriculture sector, ended in July 2015.

Article 239(1) of the Tax Code provides for a kind of general amnesty to include omitted assets or to exclude non-existent liabilities as net taxable income at the general tax rate (25 per cent), with no penalties if the taxpayer provides it voluntarily. For 2015, 2016 and 2017 articles 35 to 41 of Law No. 1739 of 2014 provide for the same general amnesty but at a reduced tax rate of 10, 15 or 13 per cent respectively, without penalties.

In addition, article 57 of Law No. 1739 of 2014 provides for a special payment condition for taxpayers who had been charged arrears from 2012 or earlier, who will be eligible for a reduction in interest and penalties up to 60 per cent. The deadline for this amnesty was 23 October 2015.

### **Rights of taxpayers**

#### **21 What rules are in place to protect taxpayers?**

Several rules provide protection to taxpayers. Specifically, article 193 of Law No. 1607 of 2012 establishes the Taxpayer Bill of Rights, which provides that taxpayers have the right, among other things, to fair and respectful treatment, to be represented, to present consultations and receive replies, to confidentiality, and to review and appeal against administrative acts.

#### **22 How can taxpayers obtain information from the tax authority? What information can taxpayers request?**

The DIAN provides general information online at [www.dian.gov.co](http://www.dian.gov.co). Among other things, this information refers to deadlines, frequently asked questions, regulations and official tax guidance.

Taxpayers can request specific information that is in their individual interest by exercising their petition right in relation to their particular situation or case. These requests can refer to tax account statements, specific investigations and partial or complete copies of files related to reviews or investigations into the respective taxpayer.

Article 193 of Law No. 1607 of 2012 provides the right of consultation for specific issues applicable to particular taxpayers.

#### **23 Is the tax authority subject to non-judicial oversight?**

As is the case with other public administration bodies, the Office of the Comptroller General oversees the management of monitoring the DIAN's results, while the Office of the Inspector General oversees the conduct of the DIAN's officers. The Office of the Inspector General can be engaged upon petition of a sole taxpayer.

The Taxpayer and Customs User Ombudsman is part of the DIAN and, among other functions, it must, at the request of taxpayers, track any review process initiated by the DIAN in order to ensure it complies with due process and that the actions of the various bodies of the DIAN are within the framework of the constitutional principles of equity and transparency governing the exercise of public functions.

In addition, for those cases where the amount is greater than US\$118,000, the taxpayer may request that the reconsideration appeal be resolved by a specialist technical committee, comprising the attorney rapporteur and reviser of the decision, the Finance and Public Credit Minister, the DIAN's director and the head of the DIAN's legal office (or delegates of these last three).

### Update and trends

The current government is working on a general tax bill of the national tax system, which could be effective from January 2017.

Currently, there is no written draft of the tax bill. All that is known at the time of writing is that the commission of experts named by the government for the purposes of reviewing the national tax system and some regional tax issues has presented its analysis, and that the tax bill will be filed by mid-October 2016.

### Court actions

#### 24 Which courts have jurisdiction to hear tax disputes?

Jurisdiction corresponds to the administrative judges in the first instance, if the amount does not exceed US\$25,000; otherwise it corresponds to the courts. For the second instance, the jurisdiction corresponds to either the courts or Council of State.

#### 25 How can tax disputes be brought before the courts?

In the process of return reviews where the taxpayer increases the settled tax, the DIAN will take three steps: the proposed assessment, the official assessment and the resolution in which the appeal for reconsideration is decided. A tax dispute can be brought before a tax judge through a lawsuit filed within four months following the notification of resolution that decides the appeal (this is the most common scenario). On the other hand, the taxpayer can decide not to appeal the official assessment but go directly to the courts, provided that the answer filed in response to the proposed assessment (*Requerimiento Especial*) was timely and appropriate. This lawsuit should be filed within four months following the notification of the official assessment.

There is no minimum amount for bringing a case before the courts; if the amount is low, there is no double instance.

A dispute before a judge should be brought through a lawyer with power of attorney.

#### 26 Can tax claims affecting multiple tax returns or taxpayers be brought together?

Tax claims cannot be brought by multiple taxpayers because the requirements from the tax authorities are specifically for each individual (taxpayer).

#### 27 Must the taxpayer pay the amounts in dispute into court before bringing a claim?

For a case to be brought before a judge, it is not necessary for the amounts in dispute to be paid, although the DIAN can initiate the collection process before the judges permit the lawsuit. If the collection process has begun, and if seizure or attachment of goods was ordered, such measures must be lifted as a consequence of the lawsuit being permitted.

The costs of a dispute should be paid by each of the parties (ie, as a rule, they are not recoverable). It is usual for taxpayers to claim costs against the DIAN when they deem that the dispute did not have a sound basis. This type of claim is usually not upheld by the judiciary.

#### 28 To what extent can the costs of a dispute be recovered?

Fees and other costs related to the defence must be paid by taxpayers themselves and cannot be recovered. Those expenses would be deductible for income tax purposes.

#### 29 Are there any restrictions on or rules relating to third-party funding or insurance for the costs of a tax dispute, including bringing a tax claim to court?

There are no rules relating to third-party funding or insurance for the costs of a tax dispute, including bringing a tax claim to court.

#### 30 Who is the decision maker in the court? Is a jury trial available to hear tax disputes?

According to article 308 of Law No. 1437 of 2011, any trial started after 2 July 2012 shall be decided by a judge in oral hearings; namely, three hearings in the first instance (initially, of evidence, allegations and trial) and one hearing of allegations; and a trial in the second instance, where the judge can request that the allegations be presented in writing.

When an administrative judge has jurisdiction, he or she is the decision maker. When a court or the Council of State has jurisdiction, the hearing of allegations and trial must be addressed by the number of judges making up the quorum required for the decision to be made.

#### 31 What are the usual time frames for tax trials?

For trials that started before 2 July 2012, the statistics from the Colombian Institute of Tax Law show that more than 30 per cent of trials take between four and five years to reach final judgment; only 6 per cent take less time, and the remaining 64 per cent taking more time. For trials that began after 2 July 2012, it is expected that the time frame will be significantly reduced, nevertheless, the facts show that up to August 2016, in general, time frames remain the same as before.

#### 32 Describe the discovery process for a tax trial.

Evidence must be requested when the lawsuit is issued or at other specific points during the trial (ie, evidence delivered and requested during the trial must be available to all parties in good time). Subsequently, evidence ordered in the initial hearing will be adduced in the evidence hearing.

All evidence is permitted, provided that it is relevant to the case. The most common types of evidence include documents, reports, expert opinions and testimonies.

#### 33 What testimony is permitted in a tax trial?

Third parties and experts can testify, as well as the taxpayer. When a witness lives in a place other than that where the judge or court is located, he or she may be ordered to attend the trial or be authorised to make his or her statement by technical means. Experts may testify when it comes to special scientific or technical knowledge. In the system in force since 2 July 2012, in hearings, a judge can question the parties' attorneys in order to shed light on the facts and arguments related to the trial.

Foreign evidence, testimonies included, originated in Spanish are accepted as evidence, following apostille procedure or, for countries not part of the Haya Convention, the official procedure before the Ministry of Foreign Affairs. When originated in other languages, translations must be made by official translators authorised by the Ministry of Foreign Affairs.

#### 34 Who can represent taxpayers in a tax trial? Who represents the tax authority?

A taxpayer must be represented in a trial by an attorney. The same is valid for the DIAN, which appoints lawyers from its external representation staff. If a taxpayer cannot afford legal representation they can claim 'poverty protection', in which case fees are set by the judge at the expense of the counterparty, and the covered taxpayer does not have to pay any ordinary expenses inherent to the trial. Although poverty protection was established for the benefit of individuals, some edicts by the Council of State have exceptionally recognised its applicability to corporations and other entities.

#### 35 Are tax trial proceedings public?

The current regulations anticipate that third parties can attend the first hearing; however, this does not mean that the other hearings of the trial must be considered private. Nevertheless, in practice they are private, as they are not attended by third parties.

#### 36 Who has the burden of proof in a tax trial?

The burden of proof corresponds to the party that wishes to prove a particular fact or right. It is common for the burden of proof to correspond to the taxpayer, and for the DIAN to transfer the burden of proof to the taxpayer when it fully rejects one benefit or deduction, in which case the taxpayer must prove the right claimed.

Article 745 of the Tax Code contains a special norm according to which the gaps in evidence at the time of the decision of an official assessment or the appeal decision must be resolved in favour of the taxpayer. This only covers gaps in evidence during the administrative discussion stage; however, if a gap in evidence was noted at this stage, the judge or court has the power to recognise such gap in the decision.

**37 Describe the case management process for a tax trial.**

During the trial hearing and the hearing of allegations, each party has up to 20 minutes to present its arguments before the judge and the counterparty. The rules do not anticipate any other briefing processes.

**38 Can a court decision be appealed? If so, on what basis?**

A judgment issued in the first instance by both administrative judges and the courts can be subject to an appeal within 10 days of the notification. In accordance with the terms foreseen in the new law, appeals should be resolved within six months.

Generally, judgments in the second instance cannot be appealed. However, in exceptional cases they can be subject to special amendments such as: (i) extraordinary appeal of review, for some grounds expressly foreseen by the law dealing with the existence of new evidence or fraudulent acts made related to the process; and (ii) extraordinary appeal when the decision is against a unification decision made by the Council of State.



**Gustavo Pardo**  
**Stephanie Ramirez**  
**Catherine Herrera**

**g.pardo@gpya.co**  
**s.ramirez@gpya.co**  
**c.herrera@gpya.co**

Carrera 15 # 88 - 64, Office 501  
Torre Zimma  
Bogotá  
Colombia

Tel: +57 1236 0674  
Mobile: +57 318 338 4198  
[www.gustavopardoyasociados.com](http://www.gustavopardoyasociados.com)

# France

Yves Rutschmann

Bredin Prat

---

## Overview

### 1 What is the relevant legislation relating to tax administration and controversies? Other than legislation, are there other binding rules for taxpayers and the tax authority?

The relevant legislation is tax law, which is codified in the French Tax Code (FTC) that sets out the statutory rules applicable to the determination and filing of taxes, and the French Tax Procedure Code (FTPC), which sets out the rules governing tax recovery procedures and tax controversies.

Tax law is enacted by parliament (mainly through yearly finance acts) and must comply with:

- the French Constitution;
- international treaties duly ratified or approved by Parliament and in force;
- the treaty on the functioning of the EU;
- the European Convention on Human Rights; and
- European directives issued by the EU.

Once the law is enacted, the French government and the French Tax Authorities (FTA) are in charge of stipulating the terms and conditions of the application of such rules, under the control of the courts.

For that purpose, the FTA regularly issues comments on provisions of law that are compiled in the French tax guidelines published on the Public Finances' official bulletin website ([bofip.impots.gouv.fr](http://bofip.impots.gouv.fr)). Such guidelines may neither supplement nor detract from the law and are binding on the FTA. For information purposes, the FTA has also published (and regularly updates) a list of abusive practices.

Upon the request of a taxpayer, the FTA can also issue formal rulings on the assessment of a given situation with respect to a tax rule. Such rulings are binding on the FTA and, once published, may be invoked by third parties subject to certain conditions.

### 2 What is the relevant tax authority and how is it organised?

The FTA is a part of the General Directorate of Public Finances (DGFIP) and is subject to the authority of the Ministry of Budget. The FTA is responsible for drafting laws to be enacted by parliament, drafting the regulations and guidelines with respect to tax matters and ensuring control of the tax basis, the monitoring of tax audits and the recovery of taxes. Finally, the DGFIP represents the Ministry of Budget for international negotiations in tax matters and assesses the requests for rulings.

The DGFIP is composed of general and specialised services located in Paris (some of these services have a national competence and handle tax matters relating to, in particular: (i) large entities with an annual turnover that exceeds €400 million; (ii) wealthy individuals; (iii) non-resident entities and individuals; and (iv) tax fraud) and of local services throughout French territory.

---

## Enforcement

### 3 How does the tax authority verify compliance with the tax laws and ensure timely payment of taxes? What is the typical procedure for the tax authority to review a tax return and how long does the review last?

Tax is usually self-assessed by taxpayers who have to file tax returns. The FTA periodically checks such tax returns, registered deeds or related

documentation. For this purpose, the FTA may request justification or an explanation from taxpayers or third parties.

If such preliminary control is not satisfactory, such a review may trigger some adjustments, or may lead to the conduct of a tax audit.

The duration of tax audits conducted on individuals is limited to one year (with a possible extension to two years in certain cases) and the duration of tax audits on business entities is not generally limited (except for business entities whose annual turnover does not exceed certain thresholds and for which an audit may not last more than three months).

An audit may either result in the issuing of a notice stating that such audit is closed with no reassessment, or in the issuing of a tax reassessment notice.

Under certain specific circumstances, the FTA may also be allowed, upon authorisation of a judge, to carry out raids at the taxpayer's premises and to seize material and documents.

---

### 4 Are different types of taxpayers subjected to different reporting requirements? Can they be subjected to different types of review?

Business entities are required to file income tax returns in respect of each fiscal year, as well as additional returns in respect of all types of tax (local taxes, VAT, etc) and specific documentation. In particular, entities with a turnover or asset gross value equal to or higher than €400 million in a fiscal year, or that have an affiliate that has reached this threshold, are required to prepare transfer pricing documentation, which must be provided to the FTA during a tax audit within 30 days upon first request, and a simplified transfer pricing documentation, which must be provided within six months from the filing of the tax return. For fiscal years beginning on or after 1 January 2016 (and pursuant to BEPS recommendations), business entities meeting certain criteria must also submit an annual country-by-country transfer pricing report in a dematerialised form.

Individuals are also required to file an income tax return, with respect to the household taxable income of a given calendar year. Filing shall generally be made online and the FTA is currently investigating the implementation of taxation at source for certain income categories. Individuals with a net wealth greater than €2.57 million are also required to file a specific wealth tax return.

Under the French trust reporting rules, trustees are subject to annual and event-based reporting requirements in France in the event that: (i) either the trustee, the settlor or one of the beneficiaries of the trust, is a French tax resident; or (ii) if any of the assets or rights placed in the trust are located in France.

---

### 5 What types of information may the tax authority request from taxpayers? Can the tax authority interview the taxpayer or the taxpayer's employees? If so, are there any restrictions?

Business entities are generally required to provide copies of any document supporting the tax returns filed. Such documents include accounting documentation, business books and records, bank statements, transaction documents and invoices. They are also required to submit to the FTA a soft copy of all their accounting records in the form of an accounting entry file. Additionally, certain large business entities are required to report, as appropriate, their cost accounting and consolidated statements and business entities subject to the transfer pricing requirements shall provide, upon request, their transfer pricing documentation (see question 4),

including a copy of the rulings obtained from foreign tax authorities by their related parties.

An individual taxpayer will generally be required to provide the FTA with any document supporting the tax returns filed and, in particular, bank account documentation or justification regarding assets, debts or tax deductions or credits.

The FTA may request information from persons who are not bound by the obligation to provide such information, such as a taxpayer's employees, but the latter are not legally required to respond.

## 6 What actions may the agencies take if the taxpayer does not provide the required information?

If the taxpayer does not provide the required information or if the tax audit cannot take place due to the taxpayer's behaviour (ie, opposition to a tax audit), the FTA is entitled, under certain conditions, to proceed to a discretionary adjustment of the taxpayer's taxes and to claim for penalties (up to 100 per cent of the adjusted taxes), as well as late payment interest. Opposition to a tax audit may also incur criminal sanctions (see question 15).

Upon authorisation of the relevant court and for specific cases of fraud, the FTA is entitled to proceed to raids (see question 3) through which they may access certain other documents and information.

## 7 How may taxpayers protect commercial information, including business secrets or professional advice, from disclosure?

Taxpayers cannot invoke professional secrecy to refuse to disclose information requested by the FTA. Correspondence between attorneys and their clients is, however, protected by the legal professional privilege, in respect of which there is no exception and does not have to be disclosed to the FTA.

FTA officers are legally subject to professional secrecy with regards to information collected in the course of their duties. A violation of this obligation constitutes a punishable criminal offence. However, this rule allows for exceptions to the benefit of other French administrative and judicial authorities, as well as foreign competent authorities on the basis of an exchange of information agreement. Nevertheless, French law prohibits the FTA, in certain circumstances, from providing information that would disclose any business, industrial or professional secret to foreign tax authorities.

## 8 What limitation period applies to the review of tax returns?

As a general rule, the statute of limitations expires on the sixth year following the year during which the event triggering taxation occurred. However, a reduced three-year statute of limitations applies to most taxes, such as corporate and individual income tax, turnover taxes, certain local taxes, transfer taxes and wealth tax. For transfer taxes and wealth tax, however, a taxpayer cannot benefit from the reduced statute of limitations in the event that he or she failed to file a tax return or to register a deed and where further FTA investigations are necessary.

The statute of limitations may be further extended, such as in the event that: (i) a criminal complaint is filed (up to two additional years); (ii) a request for information from foreign tax authorities is made (up to three additional years); or (iii) the taxpayer is involved in fraud or with respect to hidden activity (up to 10 years).

Finally, irrespective of the above mentioned statute of limitations, the FTA is entitled to audit fiscal years during which tax losses carried forward were generated, even if such fiscal years are statute bared, to the extent such tax losses are offset against taxable income generated during fiscal years that are not statute bared.

## 9 Describe any alternative dispute resolution (ADR) or settlement options available?

On being issued a reassessment notice by the FTA an administrative review phase takes place, during which the taxpayer interacts with the FTA.

First, the taxpayer either acquiesces to the adjustment or raises arguments in writing to the relevant tax inspector within 30 days of receiving the reassessment notice (this may be extended in certain circumstances). In the latter case, the taxpayer is informed in writing by the FTA whether they agree with the taxpayer's arguments and, if not, is provided with the reason why. The FTA may respond with a new basis for its position.

Following this exchange of written comments, the taxpayer is entitled to meet the tax inspector's direct manager to discuss the legal arguments and factual circumstances. If the disagreement persists, the taxpayer may ask for a meeting with the tax inspector's general supervisor.

Under certain conditions, factual aspects of the case may also be submitted to an independent tax commission (either local or national) that will hear both the taxpayer and the FTA. However, its decision is not binding on the parties and does not reverse the burden of proof. Additional commissions may also be convened in specific circumstances (eg, in case of abuse of law, specific commission can be convened upon request of the FTA or the taxpayer, and its decision reverses the burden of proof).

During this administrative phase, no payment can be claimed from the taxpayer. If the FTA confirms the proposed reassessment, at the end of such phase, a tax collection notice is issued that may be challenged by the taxpayer by introducing a contentious claim (see question 25).

The taxpayer may also introduce a claim for equitable relief with respect to taxes due (except for VAT) or penalties and the late payment interest.

## 10 How may the tax authority collect overdue tax payments following a tax review?

In the event that the taxpayer does not pay the taxes following a formal notice sent by the FTA and depending on the stage of the procedure, the FTA may take protective or executory measures in respect of the taxpayer's assets. For example, the FTA can seize tangible properties, real estate or receivables held on third parties, such as employers (subject to a minimum amount required for subsistence).

The statute of limitations for the recovery of taxes is generally four years after the date on which the tax collection notice is issued (extended to six years under certain circumstances). Such statute of limitations may be suspended in cases of taxpayer-requested payment deferral (see question 25). It may also be interrupted by certain events, such as a formal notice to pay, precautionary measures or certain legal proceedings.

## 11 In what circumstances may the tax authority impose penalties?

Penalties are generally imposed if tax returns are inaccurate or incomplete, have not been filed or have been filed late, or if taxes have not been paid or paid late.

Penalties may also be imposed in certain other circumstances such as failure to comply with invoice requirements or reporting obligations.

In addition to such penalties (that are similar to sanctions), late payment interest is also generally due (see question 14).

## 12 How are penalties calculated?

Penalties are calculated as follows:

Type of penalty	Method of calculation
Penalties for inaccurate or incomplete tax returns	Penalties are assessed on the adjusted tax at the rate of: <ul style="list-style-type: none"> <li>• 10% if the error or omission is not deliberate and relates to personal income tax returns.</li> <li>• 40% if the error or omission is deliberate or constitutes an abuse of law in which the taxpayer is not the main instigator or the principal beneficiary of said abuse; and</li> <li>• up to 80% if the error or omission is either fraudulent or constitutes an abuse of law in which the taxpayer is the main instigator or principal beneficiary of said abuse.</li> </ul>
Type of penalty	Method of calculation
Penalties for failure to file tax returns on time	Penalties are assessed on the adjusted tax at the rate of: <ul style="list-style-type: none"> <li>• 10% if the filing is done before a formal notice is issued or before the expiry of a one-month period following a formal notice by the FTA;</li> <li>• 40% if it is done after that period; and</li> <li>• 80% if the taxpayer carries out an undisclosed activity.</li> </ul>
Penalties for failure to pay taxes when due	Penalties are assessed at the rate of 5% or 10%, depending on the taxes involved.

Other penalties are assessed at fixed amounts (eg, fines for failure to provide documents required by the FTA), or at proportional rates on amounts required to be declared or reported on specific statements.

### 13 What defences are available if penalties are imposed?

The FTA must provide written justification for the penalties imposed and characterise, as appropriate, the omission or error.

Taxpayers are entitled to request the cancellation of penalties that are either not justified or insufficiently justified. In certain cases, a reduction of the penalties may automatically be granted as long as certain conditions are met. Discretionary reduction might also be contemplated in certain circumstances.

### 14 In what circumstances may the tax authority collect interest and how is it calculated?

The FTA is entitled to collect late payment interest where the payment of taxes has been improperly deferred, or tax returns have not been properly or timely filed. Late payment interest is, however, not due in certain specific cases (eg, when penalties are substituted to the avoided tax (such as in the case of hidden distributions)).

By way of exception, late payment interest may not be due, subject to certain conditions, where a taxpayer has made an explicit statement in the tax return or where legal tolerance may be applied (ie, if the amount of tax reassessed does not exceed: (i) one-twentieth for income tax; or (ii) one-tenth for transfer tax and wealth tax of the declared tax base).

Late payment interest is assessed at the rate of 0.4 per cent per month, on the amount of tax reassessed, and generally starts accruing as from the month following the month in which the relevant tax should have been paid (for personal income tax, on 1 July of the year following the year pursuant to which the taxation is set) and ends on the last day of the month of notification of the reassessment notice.

### 15 Are there criminal consequences that can arise as a result of a tax review? Are these different for different types of taxpayers?

Opposition to tax audit may, in addition to discretionary reassessment, be criminally sanctioned by a fine, and, in the event of a repeated offence, by a prison sentence issued by the criminal court.

A taxpayer may be held criminally responsible for tax fraud if he or she has intentionally and fraudulently avoided, or tried to avoid, any tax liability. Prosecution for tax fraud is launched on the FTA's initiative, subject to prior consent of an independent tax commission responsible for criminal tax matters.

### 16 What is the recent enforcement record of the authorities?

According to their enforcement survey of 2015, reassessed taxes and associated penalties were estimated to be €21.2 billion. More than approximately 1.3 million audits have been carried out and tax audits resulted in the recovery of €12.2 billion (as compared to €10.4 billion in 2014). Three million contentious claims were filed in 2015 and an equivalent number of claims were dealt with in 2015. The number of court proceedings in 2015 (over 24,000) is equivalent to the number of court proceedings in 2014. About 1,000 criminal claims for tax fraud were filed by the FTA in 2015.

## Third parties and other authorities

### 17 Can a tax authority involve or investigate third parties as part of the authority's review of a taxpayer's returns?

The FTA is entitled to request information on taxpayers from third parties, provided that such third party falls within the categories enumerated in the FTPC. In that case, the third party is required to respond to the FTA's request and is subject to a fine if it fails to do so. Additionally, certain private entities, such as financial institutions, are required to disclose information to the FTA on their own initiative.

The FTA is not obliged to inform the taxpayer of a third-party investigation process. However, if the FTA relies on information and documents obtained through such investigations for the tax reassessment, it must inform the taxpayer of the content and origin of such documents or information.

### 18 Does the tax authority cooperate with other authorities within the country? Does the tax authority cooperate with the tax authorities in other countries?

The FTA cooperates with both French and foreign tax and non-tax authorities. Such cooperation may be either on demand or automatic (eg, social security authorities and judicial authorities are required to automatically transfer certain information annually).

With regard to cooperation with foreign authorities, the FTA can rely on provisions of double tax treaties, as well as on the provisions of EU Directive 2011/16/EU (as amended by EU Directive 2014/107/EU) and of the protocol to the OECD convention. Such provisions enable the FTA to request information in order to control the tax basis of French resident individuals and entities, and request assistance in the recovery of taxes.

France has signed an intergovernmental agreement regarding FATCA with the US, pursuant to which French financial institutions are required to report information about their US clients' accounts to the French government, which, in turn, will exchange that information with the US tax authorities. A reciprocity clause obliges the US tax authorities to transmit certain information about French residents holding US accounts. France is currently supporting the adoption of a similar agreement at EU-level.

## Special procedures

### 19 Do any special procedures apply in cases of financial or other hardship, for example when a taxpayer is bankrupt?

Taxpayers facing financial hardship may ask the FTA, under certain conditions, for payment deferral of the taxes due or, under exceptional circumstances, a write-off of all or part of the taxes.

Aside from such procedure (that applies on a case-by-case basis), there is no special recovery procedure in such cases. The FTA benefits from a preferential right over non-real estate assets and may obtain a mortgage over taxpayers' real estate assets. French tax law also provides for joint liability that enables the FTA to recover amounts due from third parties under specific circumstances (eg, from directors who are responsible for fraud or repeated serious failures to fulfil tax obligations, which render the recovery of taxes and penalties due by the legal entity impossible).

Specific rules relating to the assessment of taxes may also apply to entities that are in financial hardship.

### 20 Are there any voluntary disclosure or amnesty programmes?

The main voluntary disclosure programme organised by the French government relates to individuals deciding to regularise undisclosed foreign assets in order to benefit from reduced penalties by way of a settlement with the FTA.

In the course of an audit, taxpayers may regularise any unintentional mistake or inaccuracy made in their tax returns (provided that such tax returns relate to taxes concerned with the audit). If relevant, such taxpayers may benefit from reduced late payment interest.

Finally, no amnesty programme has been introduced in France, but taxpayers may request the FTA's leniency by introducing a claim for equitable relief.

## Rights of taxpayers

### 21 What rules are in place to protect taxpayers?

French tax law provides for certain rights and guarantees for taxpayers both before and after an audit.

When initiating the audit, the FTA must provide the taxpayer with a tax audit notice that explicitly states that the taxpayer has the right to be advised by a counsel and outlines the scope of the review. Failure to mention such information generally results in the procedure being void.

A reminder of the procedure and rights of the taxpayer to ask, for example, for formal meetings or commissions (see question 9), is also made at each step of the procedure.

Additionally, a taxpayer bill of rights, which outlines the main applicable rules in case of a tax audit, must be provided to the taxpayer prior to said audit.

Once the tax audit is over, the FTA has to provide the taxpayer with the outcome of the verification and, as appropriate, with the amount of the adjustments and penalties applied. The taxpayer has the right to ask for a report. The FTA cannot proceed to a new verification for the same time period and for the same tax (other than in certain limited specific situations).



## 22 How can taxpayers obtain information from the tax authority? What information can taxpayers request?

The FTA must inform the taxpayers of the content and the origin of any information and documents obtained from third parties in respect of which it relies in order to justify the reassessments. The FTA must transmit to the taxpayer, upon request and before the collection of the taxes, such documents, or a summary of their contents.

Furthermore, when the FTA implements raids, it has to provide an inventory of all documents seized by the agents and return them within a certain time.

## 23 Is the tax authority subject to non-judicial oversight?

During the tax audit, the taxpayer may submit his or her case to various commissions composed of judges, practitioners, experts, etc (see question 9). The FTA is also required to request the prior consent of the commission in charge of criminal tax matters before launching a prosecution for tax fraud (see question 15).

For complex cases, a national expert committee (composed of tax professionals who do not belong to the FTA) may be consulted by the FTA on legal aspects.

Under certain conditions, taxpayers may also request the intervention of the departmental tax conciliator or the tax ombudsman, in order to find solutions to conflicts between the FTA and taxpayers in the event of a taxpayer complaint with regard to the way his or her request was dealt with by them.

## Court actions

### 24 Which courts have jurisdiction to hear tax disputes?

Tax disputes are held before administrative courts and civil courts depending on the type of taxes involved. Each procedure generally involves three levels of jurisdiction: lower court, court of appeal and supreme court.

	Administrative courts	Civil courts
<b>Field of competence</b>	<ul style="list-style-type: none"> <li>• Income taxes</li> <li>• Local taxes</li> <li>• Other direct taxes</li> <li>• VAT</li> </ul>	<ul style="list-style-type: none"> <li>• Transfer taxes</li> <li>• Indirect taxes other than VAT</li> <li>• Wealth tax</li> </ul>

Specific questions (relating to the compliance of tax provision with the French Constitution) may be submitted by courts, upon a taxpayer's request, to the Constitutional Council. Access to the Council can be requested at each level of jurisdiction, and requires that the three following conditions are met:

- the provision that is challenged applies to the litigation or proceedings involved, or is the basis of such proceedings;
- such provision has not previously been found to be constitutional by the Constitutional Council; and
- the issue raised is a new one or is of a serious nature.

Preliminary rulings may also be sought by courts from the Court of Justice of the European Union regarding:

- the interpretation of the EU treaties,
- the validity and interpretation of acts of the institutions or other EU bodies.

### 25 How can tax disputes be brought before the courts?

Any taxpayer may bring a tax dispute before courts, subject to a prior claim before the FTA. A contentious claim of this nature must generally be introduced before the FTA before 31 December of the second year following the year during which the tax collection occurred, the tax collection notice was issued, the tax was paid, or the event triggering the contentious claim occurred.

The FTA is not obliged to answer within a specific time-frame. However, in the absence of an answer within a six-month period as from the date of the contentious claim (that may be extended by an extra three months if requested by the FTA), such claim is deemed to be rejected.

The taxpayer can object to the FTA decision by bringing the issue before the court within a two-month period beginning from receipt of the letter informing the taxpayer of the refusal (or at any time after the end of the six-month period in the event of an implicit refusal).

## Update and trends

In recent years, the FTA has increasingly performed tax raids on large national and international groups for suspected fraud. Such visits take place within the context of a global policy by the FTA aimed at tracking tax fraud schemes.

The constitutionality of tax and criminal proceedings taking place simultaneously, giving rise to concurrent penalties for the same facts, is currently under debate. Rulings have already redefined the extent to which such overlapping is authorised.

With respect to taxpayers' rights, priority preliminary rulings on the issue of constitutionality have opened new contentious opportunities with respect to tax matters. Recourse to this procedure has increased since 2008, which has resulted in substantial modifications of tax law.

There is no minimum threshold amount for claims.

### 26 Can tax claims affecting multiple tax returns or taxpayers be brought together?

Whenever several contentious claims are brought separately before the judge but are similar in nature, the judge may decide to bring these contentious claims together as one case. If such contentious claims are issued by two different taxpayers, the judge must inform them of his or her intention to consolidate the claims, and they may refuse this consolidation. The taxpayer may also ask for contentious claims relating to similar taxes to be dealt with as one case.

Contentious claims with respect to several taxes may be separated by the FTA through several contentious claim refusals if the proceedings are different. In that case, each refusal shall be brought before the courts separately.

### 27 Must the taxpayer pay the amounts in dispute into court before bringing a claim?

A taxpayer who receives a tax collection notice is obliged to pay the whole amount of the adjusted taxes and then introduce a contentious claim (see question 25). However, he or she may request payment deferral, provided that he or she provides guarantees to the FTA (cash payment to a special treasury current account, pledge, etc). If the taxpayer either does not provide guarantees or provides unsatisfactory guarantees, the payment is still deferred, but the FTA may implement protective measures. Specific rules of procedure apply in such cases that allow the taxpayer to contest any decision of the FTA in relation with the guarantees, usually through emergency proceedings.

The deferral is effective until the decision of the lower court, or the end of the period during which the taxpayer could go before the court.

If the lower court decision is in favour of the FTA, the taxpayer has to pay the taxes immediately (including penalties and late payment interest), as well as:

- as regards a sum due with respect to personal income tax and wealth tax, a 10 per cent penalty and interest at a rate of 0.4 per cent per month calculated from the first day of the thirteenth month following the month during which the payment was due, pursuant to the tax collection notice; and
- as regards a sum due with respect to other taxes, a 5 per cent penalty and interest at a rate of 0.4 per cent per month calculated from the first day of the month following the month during which the payment was due.

If the decision is in favour of the taxpayer, the latter is automatically eligible to default interest on the amount of tax he or she had already paid, and is reimbursed for the fees related to the provision of guarantees.

### 28 To what extent can the costs of a dispute be recovered?

When the decision is favourable to the taxpayer, certain costs (such as costs for producing documents, registration fees (if any), costs relating to expertise) are automatically reimbursed.

Other costs are borne by the losing party (for example, legal fees), to the extent requested by the other party and subject to the judge's decision (usually the amount charged on the defeated party may not exceed €5,000).

**29 Are there any restrictions on or rules relating to third-party funding or insurance for the costs of a tax dispute, including bringing a tax claim to court?**

According to the National Internal Regulations, a lawyer may only charge fees to his or her client, or one of his or her representatives. A third party can guarantee a taxpayer (individuals and companies) in the event of a request for a payment deferral.

In some instances, and under certain circumstances, third parties may buy potential tax receivables held by taxpayers over the FTA and offer to assist in a claim for reimbursement and bear the related costs, in exchange for part of the gain obtained.

**30 Who is the decision maker in the court? Is a jury trial available to hear tax disputes?**

The number of judges in a court depends on the level of jurisdiction. At each level, such numbers may vary, especially depending on the gravity or importance of the case.

**For administrative courts**

Level of jurisdiction	Lower administrative court	Administrative court of appeal	Supreme Administrative Court
Number of judges	One to three	Three to five	Three to 17 – varies from case to case

**For civil courts**

Level of jurisdiction	Lower civil court	Civil court of appeal	Supreme Civil Court
Number of judges	Three	Three	Three to 19 – varies from case to case

Specific rules apply for emergency proceedings. There is no jury for tax matters.

**31 What are the usual time frames for tax trials?**

The usual time frame for tax trials varies substantially depending on the level of jurisdiction and the situation. There are no mandatory time frames. In practice and on average, trials before lower courts and courts of appeal can take between one year and two-and-a-half years, and trials before Supreme Courts can take one to two years.

**32 Describe the discovery process for a tax trial.**

There is no discovery process for a tax trial.

**33 What testimony is permitted in a tax trial?**

Tax trials are based on a written procedure under which the judge examines the factual circumstances and legal arguments described by each party in their briefs. Parties may make oral observations during the hearing. In

addition, the judge may ask for expertise, although such procedure is rarely used by judges in practice.

**34 Who can represent taxpayers in a tax trial? Who represents the tax authority?**

Legal representation of taxpayers is mandatory, except for the lower administrative court and generally the civil court (for tax cases).

The FTA may be represented by its own agents, even if in practice the FTA appoints lawyers in some instances. In rulings before the Supreme Civil Court, the FTA shall be represented by a lawyer. In France, a specific category of lawyers represents parties before Supreme Courts.

Taxpayers who cannot afford legal representations may request, upon filing an application with the relevant justification, legal aid to finance in whole or part legal fees and expenses.

**35 Are tax trial proceedings public?**

Tax trials proceedings are public.

**36 Who has the burden of proof in a tax trial?**

The burden of proof generally lies with the FTA, except in certain specific situations in which such burden of proof lies with the taxpayer, such as where: (i) the FTA has adjusted the taxpayer’s taxes unilaterally (in the course of discretionary reassessments); (ii) the commission in charge of abuse-of-law matters has agreed with the FTA; (iii) the taxpayer did not answer to a reassessment notice; or (iv) the FTA has proved the existence and amount of a profit shift abroad (transfer pricing issues).

**37 Describe the case management process for a tax trial.**

Under French tax law, during the trial, exchange of briefs is organised by the court, with the court acting as an intermediary. Each party only addresses their briefs to the court and the court communicates the brief to the other party giving a time limit to reply.

Once briefs have been exchanged, the court issues an order for the conclusion of proceedings. Briefs that are produced after the order are generally not examined by the court, except for notes in support of pleadings, which may be addressed to the president of the formation of the court.

**38 Can a court decision be appealed? If so, on what basis?**

Whenever the taxpayer or the FTA do not agree with the decision of lower courts, they may bring an appeal before the competent court of appeal and ultimately before the competent Supreme Court.

Appeal before	Procedure
The administrative or civil court of appeal	The taxpayer is given a two-month period to file the appeal, against a four-month period in practice for the FTA, beginning at the date of notification of the lower court decision.
The Supreme Administrative or Civil Court	The taxpayer is given a two-month period to file the appeal, beginning at the date of notification of the court of appeal decision.

B R E D I N P R A T

---

**Yves Rutschmann**

53 quai d’Orsay  
75007 Paris  
France

**yvesrutschmann@bredinprat.com**

Tel: +33 1 4435 3535  
Fax: +33 1 4289 1073  
www.bredinprat.fr

# Greece

Sophia K Grigoriadou, John M Papadakis and John A Gkotsis

Dryllerakis and Associates

## Overview

### 1 What is the relevant legislation relating to tax administration and controversies? Other than legislation, are there other binding rules for taxpayers and the tax authority?

The applicable legislation relating specifically to tax administration is the Code of Tax Procedure (L 4174/2013), which regulates, amongst other matters, the process of tax audits and controversies up to the stage of recourse to Greek courts, and the Code of Administrative Procedure, which is in general applicable on the relations of citizens and any public law entity.

Moreover, the General Secretariat of Public Revenues issues circulars that are binding on the tax authority, for the interpretation and implementation of the tax legislation.

Greece has signed bilateral treaties for the avoidance of double taxation with a long list of countries.

### 2 What is the relevant tax authority and how is it organised?

Every tax authority lies within the jurisdiction of the General Secretariat of Public Revenues, which is a state-controlled branch of the Greek Ministry of Finance. The General Secretariat of Public Revenues shall become an independent authority as of 2017, free from state control and monitoring. The secretariat shall be governed by the administrative council, a governor and a European Commission expert. The European Commission will appoint two officials in the council.

The competent tax office is determined by the registered seat of the company or the residence of the taxpayer. The three major cities (Athens, Piraeus and Thessaloniki) have separate tax offices for Societes Anonymes. For individuals who have their residence abroad, the competent tax office is determined by the residence of their tax representative. For non-Greek tax residents with an obligation to be registered in Greece, the Tax Office of non-Greek Residents (residents abroad) is competent.

For large enterprises and for individuals of a certain wealth, the audit competence lies within specific audit centres seated in Athens.

## Enforcement

### 3 How does the tax authority verify compliance with the tax laws and ensure timely payment of taxes? What is the typical procedure for the tax authority to review a tax return and how long does the review last?

Normally, in case of submission of a tax return, tax is assessed without a further action by the tax authorities, simultaneously with the submission of the tax return or in brief period of time in case of annual income taxation returns. However, following a tax audit, tax authorities may issue a corrective tax assessment act, provided that it justifiably emerges from the audit that the previously submitted tax return was inaccurate or mistaken.

In case the taxpayer does not file a tax return despite his or her respective obligation, an estimated tax assessment act may be issued unless the taxpayer files a late tax return.

In extremely urgent cases, such as when there are indications that the taxpayer intends to leave the country, thus jeopardising the collection of taxes due, especially through the transfer of assets, tax authorities may issue a preventative tax assessment act prior to the lapse of the date for submission of the respective tax return. In such a case, the taxpayer either pays in a lump sum the tax indicated on the preventative tax assessment or secures its payment by providing a guarantee or by accepting of a lien

of property in favour of the tax administration for the total amount of the tax liability.

### 4 Are different types of taxpayers subjected to different reporting requirements? Can they be subjected to different types of review?

Different types of taxpayers are subject to different reporting requirements. Employees and pensioners are subject to limited reporting and basically to the annual income tax return. Such individuals are usually subject to an audit if an unjustified increase of their assets is found (usually following an audit on their bank accounts). Individuals of a certain wealth are audited by a special audit centre.

Business (either individuals or entities) are subject to increased reporting standards, which involve maintaining accounting books on the basis of the simplified or double-entry accounting principle. Although efforts have been made to reduce the required reporting, Greece is still a country of complicated and intensive requirements. Businesses are also subject to a variety of tax reviews (regular audit, partial audit (for a certain tax item), audit for VAT refund, audit for the issuance of fictitious invoices etc).

### 5 What types of information may the tax authority request from taxpayers? Can the tax authority interview the taxpayer or the taxpayer's employees? If so, are there any restrictions?

Upon written request of the tax authorities, the taxpayer is obliged to provide copies of its books and records or any other related document for the determination of the tax liability of the taxpayer, including customers and suppliers' lists, as well as any other information within five business days from the notification of the request. An obligation of certain third parties (eg, banks, undertakings for the collective investment in transferable securities (UCITs), notaries etc) to provide within a deadline of 10 days to the tax authorities all the required information they possess in relation to the taxpayer, with the exception of information and documents is provided as well. In case of data and information in a foreign language, an official translation of them in Greek shall be submitted.

Interviews of the taxpayer or the taxpayer's employees are not provided in Greek tax legislation, however, it may not be excluded, especially in cases of an ongoing criminal investigation.

### 6 What actions may the agencies take if the taxpayer does not provide the required?

No reaction to requests of the tax administration for the provision of required information constitutes a procedural infringement and a penalty is imposed to the taxpayer. Moreover, if the information not provided refers to the business books and records kept and issued by the taxpayer, tax authorities may use indirect methods in order to determine the taxable income by calculating taxpayer's gross income and outflows on the basis of generally accepted principles and techniques of auditing.

### 7 How may taxpayers protect commercial information, including business secrets or professional advice, from disclosure?

Data concerning third parties in their transactions with taxpayers are not covered by the professional secrecy and therefore an obligation of providing such data exists. However, in the case of professional secrecy, the lifting

of professional secrecy is provided following the written permission of the competent prosecutor for the granting of data covered by such secrecy.

What is more, it should be noted that the employees of tax administration are obliged to keep confidential all the data and information of the taxpayer, which came to their knowledge in the frame of the exercise of their duties. Pursuant to a recent amendment in tax legislation, in case of outstanding debts of more than €150,000, the name of the taxpayer is published.

### 8 What limitation period applies to the review of tax returns?

As of 1 January 2014 the act of tax assessment can be issued within five years from the end of the tax year and may be extended under certain conditions. For tax evasion cases, the act of tax assessment can be issued within 20 years from the end of the tax year. However, since tax evasion includes the inaccurate submission of a tax return aimed at tax avoidance, the 20-year statute of limitation shall be considered as the general rule.

### 9 Describe any alternative dispute resolution (ADR) or settlement options available

As of 1 January 2014, an administrative appeal is provided as an extra-judicial mandatory remedy for challenging any act or omission of the tax authority (administrative appeal is a precondition for the admissibility of the judicial appeal lodged before the competent administrative court). Thus, prior to any judicial review, a re-examination of the disputed act or omission is conducted by a special administrative authority particularly formed for this purpose, the Dispute Resolution Directorate (DRD) (see question 25).

### 10 How may the tax authority collect overdue tax payments following a tax review?

In case of non-payment of amounts indicated in the tax assessment act, the tax administration should send to the taxpayer a payment notice prior to proceeding to any enforcement action. In case of non-payment of the amount due within 30 days from the notification of the payment notice, tax authorities may proceed (without a judicial decision) to the imposition of a seizure of movable assets, real estate, property rights, claims and, in general, all of the debtor's assets. On the basis of the above conditions, tax authorities may also proceed to taking the appropriate interim measures.

It shall be noted that the non-payment of the tax due is a criminal offence.

### 11 In what circumstances may the tax authority impose penalties?

The tax authority may impose penalties in cases of infringements of the Greek tax legislation. Said penalties are distinguished between penalties for procedural infringements and penalties for infringements found following an audit by the tax authority.

Procedural infringements include (indicatively):

- non-submission or late submission of a statement of informative character or a tax return or a withholding tax return;
- non-compliance with a request of the tax administration for the provision of information or data;
- non-cooperation during a tax audit;
- non-notification to the tax administration of the appointment of a tax representative;
- non-registration before the tax registry; and
- non-compliance with an obligation regarding the keeping of books and issuance of records according to Greek accounting standards, etc.

Infringements found following an audit by the tax authority include (indicatively):

- filing of an inaccurate tax return;
- non-filing of a tax return;
- non-payment of VAT;
- non-issuance of a tax record for a transaction subject to VAT;
- issuance of false tax records;
- issuance and receipt of fictitious tax records; and
- falsification of tax records, etc.

Special penalties for infringements of transfer pricing legislation are provided as well.

### 12 How are penalties calculated?

Penalties for procedural infringements are fixed and depend on the simplified or complex accounting status of the taxpayers, that is, different penalties are imposed to taxpayers who are not liable to maintaining accounting books and those liable to maintaining accounting books on the basis of simplified or double-entry accounting principle. Repetition of any infringement within five years results in the imposition of a double penalty, whereas a quadruple penalty is imposed in case of a second repetition.

Penalties for infringements found following an audit by the tax authority depend on the amount of discrepancy and are calculated as a percentage of the value of the infringement whether it concerns the fictitiousness, forgery and concealment of the taxable income or whether it concerns the non-payment of taxes or the fraudulent refund of them.

Penalties for infringements of transfer pricing legislation are calculated as a percentage on the declared gross profits.

### 13 What defences are available if penalties are imposed?

The taxpayer may raise all arguments on formality of the act of assessment of penalties or on the merits, including defence based on force majeure, which is difficult to prove and is accepted in extreme cases. Reliance on attorney or accountant is not accepted as force majeure.

### 14 In what circumstances may the tax authority collect interest and how is it calculated?

In cases of a late payment or non-payment of any amount of tax (the latter being found following a tax review), the taxpayer is obliged to pay interest for the time period from the end of the legal deadline until the date of payment of the tax. The determination of the interest rate is a decision made by the Deputy Minister of Finance. At this point in time, the interest rate is set at 8.76 per cent per annum. However, until 31 December 2017, interest is calculated on a monthly basis at a rate of 0.73 per cent.

### 15 Are there criminal consequences that can arise as a result of a tax review? Are these different for different types of taxpayers?

Legal provisions governing criminal tax evasion have been incorporated in the Greek Code of Tax Procedures, pursuant to which tax evasion is considered to be committed by persons who:

- intentionally avoid the payment of taxes (eg, income tax, uniform tax on the acquisition of ownership, special real estate tax, VAT, turnover tax, premium tax, withholding and imputable taxes, fees or contributions, shipping tax etc) by not paying or paying incorrectly or reimbursing or setting off or deducting or withholding taxes; and
- intentionally issue false or fictitious tax records as well as receipt fictitious tax records or alter such records, irrespective of whether they evade paying taxes or not.

Under the Greek penal system, legal entities do not bear criminal liability. For this reason, individuals who are engaged with the effective management, administration and representation of a legal entity (either by holding specific executive positions or by exercising de facto management duties) are considered instead as perpetrators or accomplices of the tax evasion crime.

### 16 What is the recent enforcement record of the authorities?

Uncollected taxes due are expected to reach about €90 billion by the end of 2016. The General Secretariat of Public Revenues is said to have collected €1.6 billion in the first semester of 2016 from new and old debt.

### Third parties and other authorities

#### 17 Can a tax authority involve or investigate third parties as part of the authority's review of a taxpayer's returns?

The tax authority has the right to request any kind of information from third parties such as other public entities (authorities, organisations or companies owned by the state), judicial or prosecution authorities or other third parties such as financial institutions, investment funds, chambers of commerce, notaries, registrars, heads of land registry offices, economic or social or professional associations or organisations. The right is restricted in cases of pending criminal cases or investigations where the granting of a relevant permission by the court or the prosecutor is required in order to request the information.

Third parties bound by professional confidentiality may provide information related to their economic transactions with the taxpayer. However, for the rest of the information covered by the confidentiality obligation, the tax authority shall request permission by the competent prosecutor on proving that the taxpayer is suspected of tax evasion and invoking the reasons for which it wishes to obtain said information by the third party.

A fine ranging from €100 to €500 may be imposed in case third parties refuse to provide the above mentioned information to the tax authority.

A draft law currently pending for voting will increase the fines.

### **18 Does the tax authority cooperate with other authorities within the? Does the tax authority cooperate with the tax authorities in other countries?**

The tax authority may cooperate with every authority within the country.

As to tax authorities in other countries, Greece has adopted EU Directive 2011/16/EU on administrative cooperation in the field of taxation, by which every member state authority may request information from other member states.

Greece has also signed and applies the Convention on Mutual Administrative Assistance in Tax Matters, which was developed jointly by the Council of Europe and the OECD and promotes the international cooperation in the assessment and collection of taxes.

Furthermore, Greece has adopted the Automatic Exchange of Information tax standard, developed by the OECD, under which jurisdictions obtain financial information from their financial institutions and automatically exchange that information with other jurisdictions on an annual basis. The Automatic Exchange of Information tax standard will begin coming into effect in 2017.

### **Special procedures**

#### **19 Do any special procedures apply in cases of financial or other hardship, for example when a taxpayer is bankrupt?**

If a taxpayer is declared bankrupt, the Greek state enjoys a priority right after claims of secured creditors for claims of VAT including any kind of surcharges thereof and it ranks fifth after other priority creditors.

Concerning the declared bankrupt, if the Greek state has announced its claims within the bankruptcy procedure, he may request a settlement to be granted by the Minister of Finance. If the debt exceeds the amount of €600,000 the State Legal Council may accept the settlement that may involve either:

- the payment of the total amount of debt along with the partial or total release from late payment surcharges, tax surcharges and fines;
- the payment of the basic debt and the late payment surcharges in monthly installments (up to 90); or
- a combination of the previous two.

#### **20 Are there any voluntary disclosure or amnesty programmes?**

Greek tax legislation currently foresees no specific voluntary disclosure procedure, although supplementary income tax returns are allowed for reporting non-disclosed or understated income and/or wealth.

However, in Spring 2016, the Ministry of Finance published a draft bill on the voluntary disclosure of undeclared taxable income for public consultation, pursuant to which a voluntary disclosure programme was being introduced with appropriate sanctions, incentives and verification procedures, consistent with international best practice, and without amnesty provisions.

### **Rights of taxpayers**

#### **21 What rules are in place to protect taxpayers?**

The aforementioned Code of Tax Procedure and Code of Administrative Procedure protect taxpayers, as well as general principles of the Greek Constitution.

#### **22 How can taxpayers obtain information from the tax? What information can taxpayers request?**

The taxpayers may file a petition to the tax authority in order to receive copies of any public or private document within 20 days provided that they prove a legitimate interest. In practice, the period of reaction on behalf of the authorities may be longer and the legitimate interest may not be accepted. If the document is related to the private or family life of a third party, protected by confidentiality under a special provision, or if it is

crucial to a police, judicial or administrative investigation, the tax authority may deny said petition.

### **23 Is the tax authority subject to non-judicial oversight?**

Every tax authority is subject to the control and monitoring of the General Secretariat for Public Revenues (see question 2).

Before the taxpayer initiates pre-court or court actions against an act or omission by the tax authority (see question 24) he may file a complaint to the Greek Consumer's Adviser, an independent authority that intervenes in cases involving public bodies including tax authorities. Upon examination of the complaint, the consumer adviser shall attempt to contact the tax authority and resolve the issue.

### **Court actions**

#### **24 Which courts have jurisdiction to hear tax disputes?**

Tax disputes fall within the jurisdiction of administrative courts, on two levels: the Administrative Court of First Instance and the Administrative Court of Appeals.

Tax disputes up to €150,000 and tax disputes arising from enforcement of tax claims by the tax authority (eg, seizures etc) fall under the competency of the single-member Administrative Court of First Instance.

Non-monetary tax disputes lie within the competency of the three-member Administrative Court of First Instance.

If the tax dispute is valued at €150,000 or more, the three-member Administrative Court of Appeals has exclusive jurisdiction as a first and final instance.

Decisions issued by the Administrative Courts of First Instance may be appealed by any of the parties.

The territorial jurisdiction is determined by the seat of the tax authority that issued the contested act (or omission).

Final decisions issued by the Administrative Court of Appeals valued more than €40,000 are subject to a petition for cassation before the Supreme Administrative Court (Conseil d'Etat) on limited exclusively legal grounds and if no prior jurisprudence of the Administrative Supreme Court exists or if the decision of the Administrative Court of Appeal contradicts prior jurisprudence of the Administrative Supreme Court or other Supreme Court or irrevocable decision of an administrative court.

Greek law has introduced the 'pilot trial', a process by which any legal matter of an appeal before the administrative courts may be examined first by the Supreme Administrative Court directly upon the filing of a petition by the interested party provided that the matter is of great importance and it affects many taxpayers. Moreover, an administrative court itself may issue a preliminary decision, initiating a pilot trial before the Supreme Administrative Court. The final decision by the Supreme Administrative Court is binding on the court that initiated the pilot trial and any party that was involved in the pilot trial and constitutes jurisprudence on the legal matter in the way described in the previous paragraph.

#### **25 How can tax disputes be brought before the courts?**

Tax disputes are brought before administrative courts by recourse against any act or omission of the tax authority (including assessment of taxes and fines, denial of refunds to the taxpayer etc). A recourse may be brought by any taxpayer who has a legitimate interest affected by the contested act or omission, on any legal or factual grounds and without any threshold.

Recourse may also be brought independently by individuals or entities who are jointly liable for tax obligations of legal persons or entities. Tax disputes may not be brought before the courts by the tax authority.

The Code of Tax Procedure requires that before recourse to administrative courts, an administrative appeal before the DRD of the Ministry of Finance is filed as mandatory. The administrative recourse may be submitted to the DRD within 30 days of the date of the notification of the final corrective assessment act or other tax dispute, or 60 days for taxpayers residing abroad. The DRD must issue a decision within 120 days from the filing of the administrative appeal, otherwise the appeal is considered tacitly rejected.

The taxpayer has the right to judicially challenge such rejection by submitting an appeal to the administrative courts within 30 days of the date of the notification of the decision issued by the DRD, or the expiry of the 120-day period if no decision was issued by the DRD. In any case, he is obliged to pay upon filing, a court fee amounting to 2 per cent of the tax in dispute up to an amount of €1,000. Another court fee of €3,000 up to

### Update and trends

One of many important concerns has been the process before the Dispute Resolution Department (DRD) that is intended to be a way of resolving tax disputes before reaching Greek courts, thus bringing resolution in a faster way and releasing Greek courts from the burden of thousands of cases. Until recently, the DRD was unfortunate in letting most response deadlines expire without issuing a decision, thus creating a process that simply added cost and time to the whole resolution. Recently, under the pressure of negative publicity, the DRD has started issuing decisions. These decisions are also now publicly available enabling taxpayers to invoke them as precedents.

Another concern is that the submission of an appeal suspends only 50 per cent of the assessment, provided that at least the remaining 50 per cent is paid meaning that taxpayers who cannot pay the 50 per cent do not enjoy the suspension.

€10,000 is payable for the hearing of the appeal at first instance. A draft law currently pending is expected to amend the aforementioned amounts.

Relief sought is limited to total or partial annulment or modification of the contested act, including an obligation to refund of any amounts unduly paid to or due by the tax authority, with interest. In case of contestation of an omission by the tax authority, the taxpayer may request from the court to determine the amount of the taxpayer's claim.

### 26 Can tax claims affecting multiple tax returns or taxpayers be brought together?

In principle, each contested act or omission by the tax authority is subject to a separate appeal. However, coherent act(s) may be contested in one appeal, especially in cases of tax audits covering multiple taxations and fiscal years. In any case, the admissibility of the appeal is judged separately for each contested act (eg, deadline, court fee etc). In cases where multiple persons or entities are jointly liable for payment of any amount of tax, an appeal may be brought together or separately for all or any of them. 'Collective' appeals by taxpayers are not permitted under Greek law.

### 27 Must the taxpayer pay the amounts in dispute into court before bringing a claim?

Payment of the amounts in dispute is not a prerequisite for the filing or hearing of an administrative appeal before the DRD or an appeal at first instance (except for the court fee mentioned in question 26).

The submission of an administrative appeal or an appeal suspends the payment of 50 per cent of the amount in dispute, provided that the remaining 50 per cent is paid. In any case, the taxpayer may seek suspension of the whole amount in dispute by the DRD or (more commonly) by the court, by proving inability to pay entailing irreparable damage in case of enforcement of the claim by the tax authority. In practice, suspension is difficult to be obtained and requires the disclosure of the global income and assets of the taxpayer and his family members or, in case of legal entities, of jointly liable individuals, main shareholders and affiliated entities.

In case of an appeal before the administrative court of appeals against a decision of the administrative court of first instance, the payment of 50 per cent of the amount determined by the court of first instance until the date of hearing before the court of appeals is a prerequisite for the appeal to be heard. A draft law currently pending is expected to amend the aforementioned percentages.

### 28 To what extent can the costs of a dispute be recovered?

Costs of a tax dispute may be sought by both the taxpayer and the tax authority. These only include costs connected to the proceedings before the court, in all instances. In practice, Greek courts only grant rather small amounts as costs (a few hundred euros to a few thousand for the Supreme Court). Court fees paid are refunded in full or in part in case of acceptance of the appeal.

### 29 Are there any restrictions on or rules relating to third-party funding or insurance for the costs of a tax dispute, including bringing a tax claim to court?

Greek law has no restrictions or rules relating to third-party funding or insurance for the costs of any dispute.

### 30 Who is the decision maker in the court? Is a jury trial available to hear tax disputes?

The decision is rendered by the court as a whole (whether single-member or three-member formation of the court) and all judges have an equal vote, including the president or presiding judge. In the Supreme Administrative Court, the divisions consist of five judges, or seven in cases of higher importance. Cases of major importance may be brought before the Plenary Session.

There is no public attorney or prosecutor in administrative courts; however, in multi-member formations, one judge (with a vote) acts as the reporting judge. No jury trial is available in administrative courts.

### 31 What are the usual time frames for tax trials?

Time frames in Greek administrative courts are notoriously long, but the situation is gradually improving (especially before the courts of appeal). An appeal before the Administrative Court of First Instance of Athens may be heard within three to five years from filing, and a decision is issued within six to 12 months from the hearing. Time frames before administrative courts in other cities are shorter. However, tax disputes involving amounts exceeding €150,000 are brought directly before the Administrative Court of Appeals and heard within six to 12 months from the hearing. A decision is usually rendered within six to months from the hearing. Time frames before the Supreme Administrative Court range from one to three years, according to the importance of the case.

### 32 Describe the discovery process for a tax trial.

In tax trials (and trials before administrative courts in general), the discovery process is basically in writing. All evidence must be filed by the taxpayer at the court at least one day before the hearing date. The tax authority is obliged to file an administrative file including all relevant documents, including its position 15 days before the hearing.

Any party may organise sworn affidavits by witnesses before a notary or a judge of the civil court of first instance, for which the other party should be notified at least 10 days in advance. Technical or economic reports, or expert or legal opinions are freely permitted and in rare cases a testimony before the court is permitted, which is normally very brief.

Any party may submit a memorandum elaborating on its pleadings within three days from the hearing and within another three days (from said deadline) the other party may submit a memorandum responding to the pleadings.

The court may issue a preliminary ruling ordering the performance of a re-audit or audit by the tax authority or expert opinions to be provided.

### 33 What testimony is permitted in a tax trial?

Tax trials usually do not involve testimonies other than sworn statements (affidavits). In any case, the taxpayer is not accepted as a witness. Persons most commonly providing sworn statements or testimonies in tax trials are accountants, employees of the taxpayer, counterparties in various transactions etc. Experts or persons providing technical reports or legal opinions are also permitted to testify. All written evidence must be translated in Greek. Sworn statements or testimonies by non-Greek speakers are carried out with the assistance of a translator.

### 34 Who can represent taxpayers in a tax trial? Who represents the tax authority?

In tax trials with amounts in dispute exceeding €600, taxpayers must be represented by an attorney at law. The tax authority is represented either by its director or by members of the State Legal Council, a special body of lawyers representing the Greek state before all courts.

### 35 Are tax trial proceedings public?

All trial hearings before Greek administrative courts are public, but as explained, the procedure is basically in paper.

### 36 Who has the burden of proof in a tax trial?

In principle, in trials before the administrative courts, each party bears the burden of proof of its own pleadings. However, in Greek tax law the tax authority has the burden to prove all elements that are necessary for a tax assessment, which constitute the reasoning of such tax assessment (usually in the form of a tax audit report). As a result, a tax assessment or audit may be annulled on the grounds of lack of reasoning. As an exception

to this rule, Greek tax legislation often introduces presumptions for the indirect proof of existence of taxable matter; in these cases, the burden of proof is reversed. Also, according to recent case law, in some extreme cases (eg, of tax evasion) the court may decide an ad hoc allocation of the burden of proof, subject to judiciary review by the Supreme Administrative Court.

In any case, if the court does not have enough evidence it may issue a preliminary ruling ordering a re-audit or supplementary audit with a limited scope, which is carried out by the tax authority.

### 37 Describe the case management process for a tax trial.

In preparation for a tax trial all evidence shall be collected and translated and usually sworn statements are prepared. In certain cases, where additional legal grounds to the initial appeal exist, they can be submitted to the court 15 days before the hearing and notified to the other side and they become part of the appeal. Proxies or authorisation documents on behalf of the client shall be submitted to the court at least one day before

the hearing. The arguments of the appeal, the evidence and the counter arguments against the Greek state's position are analysed in the legal memorandum submitted within three days from the hearing; and in the following three days, the legal memorandum of the Greek state (if any has been submitted) can be rebutted.

### 38 Can a court decision be appealed? If so, on what basis?

Each party may file an appeal against a decision of the Administrative Court of First Instance within 60 days from the notification of the decision. As a prerequisite for the filing of the appeal is payment of 50 per cent of the tax levied (see question 27). The appeal may include any legal or factual ground.

Against decisions of the Administrative Court of Appeals, a petition for cassation may be filed within 60 days from the notification of the decision or 90 days if the taxpayer resides abroad.



DRYLLERAKIS & ASSOCIATES

**Sophia K Grigoriadou**  
**John M Papadakis**  
**John A Gkotsis**

**sg@dryllerakis.gr**  
**jp@dryllerakis.gr**  
**jg@dryllerakis.gr**

5 Chatzigianni Mexi Street  
 Athens  
 GR 115 28  
 Greece

Tel: +30 211 000 3456  
 Fax: +30 211 000 5200  
 www.dryllerakis.gr

# Ireland

Joe Duffy and Greg Lockhart

Matheson

---

## Overview

### 1 What is the relevant legislation relating to tax administration and controversies? Other than legislation, are there other binding rules for taxpayers and the tax authority?

The relevant legislation regarding direct taxes is principally the Taxes Consolidation Act (TCA) 1997. This Act includes provisions relating to income tax, corporation tax and capital gains tax. In respect of value added tax (VAT), the relevant legislation is principally the Value-Added Tax Consolidation Act 2010. The relevant legislation regarding stamp duty is the Stamp Duty Consolidation Act 1999, with respect to capital acquisitions tax it is the Capital Acquisitions Tax Consolidation Act 2003 and for customs, the Customs Act 2015 that implements EU customs rules. Both direct and indirect taxes are administered by the Office of the Revenue Commissioners (Revenue). Decisions of Revenue can be appealed to the recently established Tax Appeals Commission (TAC).

In the practical sense, there are many other factors that are relevant to the interpretation and administration of tax legislation, which include:

- decisions of the courts: as Ireland is a common-law system, previous court decisions are binding on taxpayers, unless overruled by subsequent legislation or by a higher court;
- the Irish Constitution;
- the international dimension, for example, the laws of the ECHR or EU treaties, directives and regulations; together with obligations arising from Ireland's OECD membership and cooperation with the BEPS project;
- double taxation treaties between Ireland and other jurisdictions;
- Revenue guidance as to Revenue's administration of the law, for example, Revenue eBriefs and codes of practice; and
- Revenue internal guidance manuals that are issued to employees of Revenue to be followed in the course of their duties of administration of the Irish tax system and which are available to the public as a result of the Freedom of Information Act 2014.

### 2 What is the relevant tax authority and how is it organised?

The Revenue is responsible for administration of the government's tax policies. Revenue was established by Government Order in 1923 and there are currently 110 Revenue offices countrywide. The board comprises three commissioners, one of whom is the chairman and all of whom carry the rank of secretary general. The chairman is also the Accounting Officer for Revenue. Its core function is the assessment and collection of taxes and duties. It derives its mandate from its statutory obligations and from the government as a result of EU membership. Within Revenue there are 16 divisions:

- four regional divisions;
- the Large Cases Division;
- the Investigations and Prosecutions Division;
- four Revenue Legislation Service Divisions;
- the Planning Division;
- the Corporate Services and AGs Division;
- the Corporate Affairs and Customs Division;
- the Revenue Solicitor's Division;
- the Information, Communications Technology and Logistics Division; and
- the Collector General's Division.

The work that Revenue undertakes includes assessing, collecting and managing taxes and duties that account for the majority of Exchequer revenue, administering a customs regime for the control of imports and exports and the collection of duties and levies on behalf of the EU, as well as working with other state agencies in cross-departmental initiatives.

---

## Enforcement

### 3 How does the tax authority verify compliance with the tax laws and ensure timely payment of taxes? What is the typical procedure for the tax authority to review a tax return and how long does the review last?

In Ireland, businesses and individuals are required to self-assess their tax liability and file a return with Revenue. They assess their tax liability over a certain period known as the chargeable period. A self-assessment is required to be made in, and as part of the return, stating the amount of income, profits or gains, or chargeable gains arising to the taxpayer for the period, together with an assessment of the amount of tax chargeable to and payable by the taxpayer. The self-assessment must also identify if there is a surcharge applicable for a late return. In the event that the indicative calculation is incorrect, any additional tax due must be paid one month after the amendment of the self-assessment. Interest is chargeable on any tax underpaid or paid late (ie, not on or before the due date). Companies pay corporation tax in a payment or payments of preliminary tax for the chargeable period and then complete and file a return. Following receipt of the return, Revenue may make an assessment of the company for the relevant tax.

There are a number of different forms of intervention that Revenue may undertake to ensure that tax liability has been self-assessed correctly and that the tax laws have been complied with. Revenue has a multifaceted approach to tackling non-compliance and may carry out a number of activities. Revenue may undertake a non-audit compliance intervention, which does not have the same level of formality of an audit or investigation, and may be in the form of an unannounced visit, a request for a business to undertake a self-review of tax liability, or a pursuit of returns from non-filers. Revenue may also undertake a formal audit, which is an examination of a taxpayer's tax return, declaration of liability, statement of liability or compliance with tax and duty legislation. A Revenue audit may be undertaken by a single Revenue auditor or a team of auditors depending on the complexity of the audit. Lastly, Revenue can undertake a formal investigation of a taxpayer's affairs where it believes that serious tax evasion may have occurred. Such an investigation may result in criminal prosecution.

Revenue assessments can be raised within four years of the end of the chargeable period for which the return is filed. Revenue may make an assessment if it is not satisfied with a particular return filed having received information in that regard, or where a Revenue officer has reason to believe that a return does not contain a full and true disclosure of all material facts. Revenue must give notice of assessment to the chargeable person. This should include time allowed for an appeal. It must identify separate liability to different taxes if applicable.



#### 4 Are different types of taxpayers subjected to different reporting requirements? Can they be subjected to different types of review?

In Ireland, the taxpayer reporting requirements vary depending on whether the taxpayer is employed or self-employed. The taxation system for individuals employed by an employer is the 'Pay As You Earn' (PAYE) system and employees have their taxes deducted at source through payroll by their employer. Self-employed individuals are required to submit their own individual return on a self-assessment basis, in the same manner as a company submits a corporation tax return. Generally, the same processes of review are applied to all taxpayers. However, as Revenue adopts a risk-based approach to audits, certain categories of taxpayers would be considered lower-risk than others, for example, taxpayers who pay tax through the PAYE system. Furthermore, there are differing levels of engagement between taxpayers and Revenue; for example, companies in the Large Cases Division typically operate in a system of cooperative compliance and would have closer contact with Revenue officials on a more regular basis.

#### 5 What types of information may the tax authority request from taxpayers? Can the tax authority interview the taxpayer or the taxpayer's employees? If so, are there any restrictions?

Revenue officers may make such enquiries or take such actions within their powers as they consider necessary to ascertain whether a person is chargeable to tax and to assess the amount of income, profits or gains and the entitlement of the person to any allowance, deduction or relief. A Revenue officer may enter any business premises where that officer has reason to believe that there has been activity relating to chargeable tax, there are any records relating to such activity, or any property is or has been located. Such an officer may request a person who has information relating to such tax liability to provide information and explanations relating to the liability, and to produce any relevant records or property. They can also search the premises for any such records or property if they feel they have not been produced.

There is a limit as to what the officers can obtain; they cannot require anything within the ambit of legal privilege, or professional advice given in a confidential nature to a client. The officer also needs a warrant to enter any premises that is a private residence.

#### 6 What actions may the agencies take if the taxpayer does not provide the required information?

If a Revenue officer has reason to believe that a person is withholding records or property relating to tax, the officer is entitled to search the premises in question for such records or property. A person who does not comply with an officer for this purpose is liable for a penalty of €4,000.

If, during an audit intervention, a taxpayer refuses to facilitate the audit or to produce the requested information, it will be regarded as obstructing the audit process. If Revenue cannot obtain cooperation after a reasonable period, it will advise the taxpayer that such obstruction is a criminal offence. There may also be situations in which it may be necessary for Revenue to take immediate action to secure information.

Revenue may also serve notice on a financial institution and other third parties to make books, records or other documents available for inspection, if they contain information relating to a tax liability of a taxpayer, even if the taxpayer is not known to the officer but is identifiable by other means. The officer authorised by Revenue must have reasonable grounds to believe that the financial institution or other third party is likely to have information relating to this liability. Revenue may also avail itself of a provision in the legislation that allows for an application to be made to the High Court for an order requiring information from financial institutions or third parties.

Where a taxpayer fails to submit a return on time, Revenue may charge interest on any tax that is paid late and a surcharge will apply to the tax liability in question. The surcharge is treated as part of the liability to tax. The principal risk of not engaging constructively with Revenue is triggering a Revenue assessment of a taxpayer's tax liability.

#### 7 How may taxpayers protect commercial information, including business secrets or professional advice, from disclosure?

No powers of search or request of Revenue should be construed as requiring a person to disclose any information that would be covered by legal

professional privilege, or that would constitute professional advice of a confidential nature given to a client. Legal advice privilege applies to confidential communications between a solicitor and client and litigation privilege applies in the context of advice given regarding litigation. Legal advice privilege applies only to lawyers. However, as noted above, the TCA protects professional advice given to a taxpayer if given in a confidential nature. An authorised officer of Revenue or a taxpayer who refuses to produce a document on the basis of privilege can apply to the District Court for a determination as to whether a document is privileged legal material.

#### 8 What limitation period applies to the review of tax returns?

Where a chargeable person has delivered a return containing a full and true disclosure of all material information for a chargeable period in which the return is filed, Revenue may not make an assessment or an amendment to an assessment after the end of four years commencing at the end of the chargeable period in which the return is filed.

Unless and until a full and true return has been filed, the four-year time limit does not begin to run. A Revenue assessment on a person other than a chargeable person cannot be made any later than four years after the chargeable period to which the assessment relates.

#### 9 Describe any alternative dispute resolution (ADR) or settlement options available?

While there is no formal ADR programme in place, Revenue's Complaint and Review Procedure is the process by which customer service issues between taxpayers and Revenue can be resolved. There are a number of stages to such proceedings. First, a taxpayer makes a formal complaint to the office where their case is managed. If dissatisfied with the result, a taxpayer can seek review by the manager for the local office, or in certain circumstances, from the divisional or regional office. If still dissatisfied, a taxpayer can seek independent review by an internal or external reviewer.

The TAC is the body responsible for hearing appeals in relation to an assessment made by Revenue. The TAC is under an obligation to be flexible in its proceedings. Appeal commissioners must endeavour, to the best of their ability, to ensure a flexible approach in relation to procedural matters and the avoidance of undue formality. Appeal commissioners must also provide the parties the opportunity to settle their dispute by agreement. It is understood that, particularly with regard to cases that were under appeal prior to the formation of the new TAC and are governed by transitional rules, that Revenue will take a pragmatic and commercial view in seeking to negotiate a settlement with taxpayers relating to the alleged liability. Generally, the *Code of Practice for Revenue Audit and Compliance Intervention* states that the use of appropriate monetary settlement is consistent with the efficient management of the tax system and it has an important role in Revenue's compliance programmes.

#### 10 How may the tax authority collect overdue tax payments following a tax review?

Revenue may take a number of enforcement actions in the collection of overdue tax payments. The most frequently used enforcement action is recovery by sheriff. Revenue uses the services of a number of sheriffs to deal with the majority of cases to do with overdue tax payments. Attachment is an exemplary enforcement option that can be used where conventional enforcement by sheriff has failed. Revenue also contracts with a number of solicitor firms for the purpose of pursuing payment through a court action. In certain circumstances, tax can also be collected through payroll.

#### 11 In what circumstances may the tax authority impose penalties?

Revenue may impose a number of fixed penalties for non-compliance. Where a person has been required by notice given under or for the purposes of certain provisions relating to corporation tax to furnish any information or particulars and he or she fails to comply with this notice, he or she will be liable to a penalty of €3,000. If the failure continues after judgment has been given there is an additional penalty of €10 per day. If the taxpayer is a company, the penalty is €4,000 and €60 per day. Furnishing incorrect information or particulars gives rise to a penalty of €3,000 or €4,000 for a company. Furthermore, Revenue may impose tax-gear penalties for specific defaults. In a case where a penalty arises, the amount of the penalty is generally computed by Revenue, agreed with the taxpayer and paid. If the taxpayer does not agree with the computation it is a matter for a court to determine whether the taxpayer is liable.

## 12 How are penalties calculated?

The calculation depends on a classification of the default into categories, that is, whether the action that gave rise to the liability was careless or deliberate behaviour and whether it was with or without significant consequences. The level of disclosure made by a taxpayer is also considered. Qualifying disclosure is defined as disclosure of complete information in relation to, and full particulars of, all matters occasioning a liability to tax that gives rise to a penalty. The penalty amount differs depending on whether the disclosure was the first, second or third disclosure made by the taxpayer in that category. Higher penalty rates arise when there is deliberate behaviour and with no qualifying disclosure. Cooperation with Revenue also affects the rate where there has been no disclosure. The penalty also varies depending on whether the qualifying disclosure was prompted or unprompted. A full table detailing the rates of penalties in each scenario as outlined here is set out in the *Revenue Code of Practice for Revenue Audit and Other Compliance Interventions* at 5.6.2.

## 13 What defences are available if penalties are imposed?

Taxpayers are responsible for the filing and payment of their own taxes, even where filed on their behalf by a professional adviser. The TCA applies to self-assessments made by another person acting under the taxpayer's authority as if it was made by the taxpayer. As the penalty calculation rules take into account the extent to which the taxpayer behaviour was careless or deliberate and the level of cooperation, the taxpayer who was unaware of non-compliance through carelessness and later cooperates with Revenue in assessment of the correct liability would likely incur a lesser penalty.

## 14 In what circumstances may the tax authority collect interest and how is it calculated?

Interest may be charged on late payments of tax in a number of sections in the TCA. In addition, where as a result of a Revenue intervention it is clear that the taxpayer has not made a full and correct return and that an undercharge to tax or duty arises, interest charges arise under the relevant interest provisions in the TCA. Interest is treated as an increase in tax due for the accounting period in question. The rate of interest is determined by the relevant section in the TCA.

## 15 Are there criminal consequences that can arise as a result of a tax review? Are these different for different types of taxpayers?

Criminal prosecution may result from a Revenue investigation and those convicted are liable to a fine or imprisonment or both. A Revenue investigation is an examination of a taxpayer's affairs where Revenue has reason to believe, after an examination of the relevant information, that a serious tax or duty evasion, or other offence, such as fraud, smuggling or trade without an excise licence, may have been committed.

A taxpayer commits a criminal offence under the TCA if he or she knowingly or wilfully files an incorrect tax return, or if he or she knowingly or wilfully aids, abets, assists, incites or induces another to file such a return. The Director of Public Prosecutions makes decisions as to whether a case should be prosecuted.

## 16 What is the recent enforcement record of the authorities?

The enforcement record of Revenue is good and public opinion in Ireland is strongly against tax avoidance schemes.

## Third parties and other authorities

### 17 Can a tax authority involve or investigate third parties as part of the authority's review of a taxpayer's returns?

Revenue may request certain information from a bank or financial institution or other third party in relation to a taxpayer's affairs. As outlined in question 6, there is a provision in the TCA for an application for a court order directing a bank, financial institution or third party to furnish such information to Revenue. Taxpayer's rights regarding the privacy and security of their personal data are protected by the Data Protection Acts 1988 to 2003.

### 18 Does the tax authority cooperate with other authorities within the country?

In practice, Revenue works with a number of other authorities within Ireland in carrying out its functions, including An Garda Síochána (the

Irish police force), the National Employment Rights Authority and the Department of Social Protection.

Revenue cooperates with multiple foreign tax authorities. Ireland has entered into a number of double taxation treaties with other jurisdictions. In addition to Ireland's treaty network, Ireland has entered into tax information exchange agreements (TIEAs) with many other jurisdictions, under which Revenue cooperates with foreign authorities in the exchange of tax information. Ireland's TIEAs tend to follow the OECD model for TIEAs. Ireland has also signed up to the Multilateral Convention on Mutual Administrative Assistance in Tax Matters, which provides for information exchange to combat cross-border tax avoidance and evasion. Revenue has information exchange obligations arising from Ireland's membership of the EU and the OECD, both of which involve automatic exchange of information relating to cross-border tax rulings and advance pricing agreements (APAs).

## Special procedures

### 19 Do any special procedures apply in cases of financial or other hardship, for example when a taxpayer is bankrupt?

In the past, Revenue has been sympathetic to occasional cash flow difficulties, but has been keen to stress that the legal obligations for payment apply equally to all taxpayers. The Office of the Collector-General is charged with the responsibility of ensuring the collection of the majority of business and personal taxes. Where a taxpayer falls behind on tax payments, Revenue will seek engage with the taxpayer to address the issue. Where meaningful engagement is not forthcoming, Revenue may take other actions such as charging interest or commencement of an enforcement action.

### 20 Are there any voluntary disclosure or amnesty programmes?

Historically, Revenue has had a number of amnesty programmes but none exist at present.

## Rights of taxpayers

### 21 What rules are in place to protect taxpayers?

Revenue is subject to the Data Protection Acts 1988 and 2003. These Acts confer rights on individuals with regard to their personal data and responsibilities on entities that use and process such data. Revenue treats all personal information received as confidential, and can only disclose such information to third parties under certain conditions. Revenue is also subject to the oversight of the TAC and the High Court in the discharge of its functions.

Under the Customer Service Charter that is part of Revenue's Complaints and Review Procedure, taxpayers can expect to be treated with courtesy and consistency, and can expect to be given the necessary information and assistance required to help them understand their tax obligations. A presumption of honesty also exists with respect to a taxpayer's dealings with Revenue.

### 22 How can taxpayers obtain information from the tax authority? What information can taxpayers request?

Under the Data Protection Acts 1988 and 2003, Revenue must, on request from a taxpayer, provide that taxpayer with a copy of personal information that Revenue holds on them. Such information must also only be held by Revenue for as long as is necessary to carry out its functions in relation to such information. The taxpayer, who is the data subject, can request a copy of all information relating to them by way of a data protection access request in writing to the Data Controller in Revenue.

Under the Freedom of Information Act 2014, any person can request access to information held by Revenue, as Revenue is a public body, provided it is not personal information or information that, if disclosed, would compromise law enforcement, security, or finances of the State.

### 23 Is the tax authority subject to non-judicial oversight?

Revenue is accountable to the Government of Ireland, which is responsible for the appointment of new Revenue commissioners. Decisions of Revenue can be appealed to the TAC as outlined in the following questions.

---

**Court actions**


---

**24 Which courts have jurisdiction to hear tax disputes?**

In Ireland the High Court, Court of Appeal and the Supreme Court have appeal jurisdiction to hear appeals on a point of law from determinations of the TAC. A taxpayer who wishes to make an appeal against a decision or assessment made by Revenue must submit a written notice of appeal to the TAC, which is the newly-established independent statutory body whose main task is hearing, determining and disposing of appeals against assessments and decisions of Revenue concerning taxes and duties in accordance with relevant legislation. The legislation concerned is the Finance (Tax Appeals) Act, 2015 and the TCA 1997. The TAC currently comprises two appeal commissioners appointed by the Minister of Finance, who have a renewable fixed term of seven years in office, together with staff who support the appeal commissioners in their duties. In addition, where certain actions of the Revenue do not give rise to a direct right of appeal before the TAC, the High Court may have jurisdiction in a judicial review procedure.

**25 How can tax disputes be brought before the courts?**

The taxpayer must submit a written notice of appeal to the TAC. It is intended that later in 2016, it will be possible for taxpayers to make their appeals electronically through the TAC website. In the meantime, taxpayers must submit notice in writing either by email or post. The taxpayer must include in the notice of appeal all of the information relating to the issue including the name and address of the appellant, the taxpayer's personal public service (PPS) number or tax reference number, information on the matter under appeal and the grounds for appeal, together with any other matters stipulated by the appeal commissioners. A taxpayer will have 30 days to appeal a decision or assessment made by Revenue. There is no minimum threshold value of an appeal stated in the rules of procedure.

As soon as practicable after receipt of the notice of appeal, the TAC will send a copy of the notice of appeal and any supporting documentation to Revenue. Revenue will be advised that any objection to the acceptance of the appeal on the grounds of validity of the appeal must be communicated to the TAC by notice in writing, stating their reason for the objection, no later than 30 days after the date on which the copy of the notice of appeal has been sent to them. In order to be a valid appeal, it must be made in relation to an appealable matter and all conditions must be satisfied as required by the provisions of the acts relating to the appeal concerned.

Where no notice of objection has been received from Revenue within 30 days or alternatively, where a notice of objection has been received from Revenue and the appellant has been afforded the opportunity to respond in writing to that notice of objection, the commission will decide whether or not the appeal should be accepted. A decision on whether or not an appeal should be accepted may be made by a member or members of staff of the commission or by a commissioner. A decision not to accept an appeal will only be made where the member or members of staff of the TAC or the appeal commissioner is satisfied that the appeal is not a valid appeal, the appeal is without substance or foundation or the appeal is a late appeal and the requirements for acceptance of a late appeal have not been satisfied.

**26 Can tax claims affecting multiple tax returns or taxpayers be brought together?**

Where multiple appeals regarding the same matter are brought by different taxpayers, Revenue may apply to have the cases effectively joined on application to have all cases except one stayed for the duration of the hearing of the single appeal case and can then apply the determination to each appeal case on the same matter.

**27 Must the taxpayer pay the amounts in dispute into court before bringing a claim?**

Having lodged an appeal against a Revenue assessment, a taxpayer will have paid the tax that the taxpayer believes is due for the relevant accounting period as a pre-condition of the appeal. There is no requirement to pay the disputed tax in order to appeal. On the determination of the appeal, if there is any additional tax due as a result of the determination it will then become payable. Where a chargeable person has an additional liability to tax on the determination of an appeal, that additional amount of tax is generally deemed due and payable on the same date as the tax charged by the assessment that was under appeal.

If the tax paid was 90 per cent of the total tax after the determination of the appeal, then it shall be due and payable one month from the date of the determination of the appeal.

**28 To what extent can the costs of a dispute be recovered?**

Each party is responsible for its own costs for a TAC hearing.

**29 Are there any restrictions on or rules relating to third-party funding or insurance for the costs of a tax dispute, including bringing a tax claim to court?**

There are no specific restrictions of this nature stated in the rules of procedure of the TAC. However, such provisions are not permitted by a general rule of litigation in Ireland.

**30 Who is the decision maker in the court? Is a jury trial available to hear tax disputes?**

The appeal commissioners decide on the issues under appeal and issue determinations. At present there are two appeal commissioners; both of whom have, prior to appointment, acted as practising barristers. Where the appeal commissioners think it appropriate, they may adjudicate on a matter without a hearing on consent of the parties. Appeal commissioners may have regard to a previous appeal that raised common or related issues. There is no provision for a jury trial in the TAC. Appeals on a point of law will be adjudicated before the High Court, Court of Appeal and the Supreme Court without a jury. A jury will only be relevant in a criminal prosecution of a tax case.

**31 What are the usual time frames for tax trials?**

There is no specified guideline in terms of the time typically taken to complete an appeal. However, the case management powers of the TAC are aimed at concluding appeals as expeditiously as possible. Appeal commissioners have the power to direct that a case management meeting be held to help progress a case. An initial case management meeting will normally be held following the receipt of the statement of case. Further case management conferences may be held if necessary with the aim of securing the completion of the proceedings in a fair and expeditious manner.

**32 Describe the discovery process for a tax trial.**

There is no set formal discovery process stated in the TAC rules of procedure. Applications for discovery may be made before the TAC at any time up to the hearing of the matter.

**33 What testimony is permitted in a tax trial?**

The appeal commissioners may summon any person who they think able to give evidence regarding an assessment made on another person to appear before them to be examined, and may examine such person under oath. The clerk, agent, servant or other person confidentially employed in the affairs of a person chargeable can also be examined in the same manner, and subject to the same restrictions, as in the case of a taxpayer who presents himself or herself to be examined orally. A person who, after being summoned, neglects or refuses to appear before an appeal commissioner at the time and place appointed for that purpose, appears but refuses to be sworn or subscribe the oath or refuses to answer any lawful question will be liable to a penalty. In general, the taxpayer may decide to, but will not be compelled to give evidence.

**34 Who can represent taxpayers in a tax trial? Who represents the tax authority?**

The taxpayer can submit its own appeal to the TAC or it can be submitted on its behalf by a legal representative. The commission will hear any barrister or solicitor, or any person who is a member of a number of professional bodies set out in the TCA (the Irish Auditing and Accounting Supervisory Authority or an accountancy body that comes within its supervisory remit, the Irish Taxation Institute and the Law Society of Ireland), who appears on behalf of a party. Notwithstanding that a person does not fall within these categories, the commission may hear such person if they are satisfied it is appropriate to do so. Appeal commissioners are required to manage and conduct proceedings in a way that will meet the reasonable expectations of members of the public with regard to the avoidance of undue formality and a flexible approach being adopted in respect of procedural matters.

**Update and trends**

There has been a significant increase in disputes regarding perceived tax avoidance before the TAC and the courts. This trend is likely to continue.

There is no provision at present for legal aid specifically in the tax appeals system.

Where a taxpayer is being prosecuted for tax evasion due to deliberately misinforming Revenue of the true facts of their business affairs or where there has been wilful non-compliance with legislation, legal representation might be available due to the criminal nature of the proceedings.

**35 Are tax trial proceedings public?**

The taxpayer can opt for an appeal hearing to be heard in camera, but the default position is that every hearing will be held in public unless specifically requested otherwise, either at the statement of case stage, or within 14 days of receiving notice of the time and place of the hearing. Appeal commissioners may also direct that an appeal or part of an appeal be held in camera if deemed necessary. Determinations are published within 90 days of the decision with the name and any personal details of the taxpayer redacted.

**36 Who has the burden of proof in a tax trial?**

The burden of proof in civil cases generally is on the balance of probabilities. In tax cases the burden of proof depends on the particular section in the legislation that is subject to the dispute, however, generally, the burden rests with the taxpayer.

**37 Describe the case management process for a tax trial.**

The Finance (Tax Appeals) Act 2015 includes a number of provisions aimed at assisting the expeditious and fair completion of proceedings, including the right for appeal commissioners to direct that a meeting, known as a case management conference, be held to progress a case. Where such a

conference is arranged, appeal commissioners will fix a date and time for an initial case management conference following the receipt of the statement of case and this will be notified to the parties not less than 14 days prior to the time and date of the hearing. They may hold such further case management conferences as appear necessary or desirable with the aim of securing the completion of the proceedings in a fair and expeditious manner. The appeal commissioners will request the parties to the appeal to notify them in writing not later than seven days before the date fixed for a conference of any application for directions that the party intends to make, including a brief statement of the grounds on which the party will argue that such directions are necessary and appropriate for the fair and efficient disposal of the appeal. A party that notifies the commissioners of an intention to apply for a direction or directions shall at the same time furnish the other party with a copy of such notification and shall confirm in writing to the commission that this has been done.

The directions that can be made include a direction to join parties to an appeal, to stay the proceedings for a fixed period, to direct that the parties submit a statement of agreed facts, a book of core documents, or a book of authorities, as well as a statement of evidence to be furnished during the appeal. Appeal commissioners may also direct that any experts giving expert evidence of a scientific or technical nature be called to meet in advance of the hearing and prepare an agreed statement on the areas that the experts are in agreement and the areas in which they differ.

**38 Can a court decision be appealed? If so, on what basis?**

While decisions of the appeal commissioners are final and conclusive on the facts of the case, a party to an appeal process who is dissatisfied with a determination of the appeal commissioners as being erroneous on a point of law only may by notice in writing require the appeal commissioners to state and sign a case stated for the opinion of the High Court. Written notice must be given and copied to any other party to the appeal, no later than 21 days from the date on which the determination has been notified to the parties. It must specify the particular respect in which the determination is alleged to be erroneous in law. This may in turn be appealed to the Court of Appeal and the Supreme Court. An appeal route that previously lay to the Circuit Court for a full rehearing is being discontinued.



**Joe Duffy**  
**Greg Lockhart**

**joseph.duffy@matheson.com**  
**greg.lockhart@matheson.com**

70 Sir John Rogerson's Quay  
Dublin 2  
Ireland

Tel: +353 1 232 2000  
Fax: +353 1 232 3333  
www.matheson.com

# Italy

Massimo Antonini, Raul-Angelo Papotti and Paolo Piantavigna

Chiomenti Studio Legale

## Overview

### 1 What is the relevant legislation relating to tax administration and controversies? Other than legislation, are there other binding rules for taxpayers and the tax authority?

Italian tax law is based solely upon written sources at both national and EU levels. Among various written sources of law, the Italian Constitution is considered a primary source of law. It sets forth the rules that are directly applicable as well as the basic rules governing the approval of laws (including tax laws).

EU tax law is also applicable in Italy. Italian judges apply the law in compliance with EU law and European Court of Justice case law.

Also tax treaties, as long as they are implemented by the Italian Parliament, are applicable.

It should be noted that EU law and tax treaties set forth, in general terms, only substantive tax rules whereas tax proceedings are governed by national rules and the Civil Procedure Code.

Among the others, the following supplementary legislative sources of tax law are noteworthy: Presidential Decree No. 600/1973 on assessment procedures, Legislative Decree No. 472/1997 on the imposition of tax penalties and Law No. 241/1990 on administrative proceedings in general.

Specific rules on tax litigation are provided by Decree No. 546/1992. According to article 1(2), tax courts shall apply the specific provisions of such a decree and, to the extent compatible, the rules of the Civil Procedure Code. Also worthy of mention is Legislative Decree No. 545/1992, setting forth the basic rules governing the tax jurisdiction in Italy.

Circular letters by the Italian tax authorities are not binding for the taxpayers. Taxpayers can also disregard individual pronouncements issued by the tax authorities, even if this would most likely give rise to a tax assessment. Conversely, replies by the Revenue Agency to the rulings regarding specific taxpayers on their own actual case are binding on the tax authority itself.

### 2 What is the relevant tax authority and how is it organised?

The Revenue Agency is the public authority in charge of the enforcement of all taxes (excluding customs and excise duties, and some other minor levies), competent to issue notices of assessment.

From 1 December 2012 it incorporated the Real Estate and Land Registry Agency.

The Revenue Agency is divided into territorial offices, namely:

- regional directorates, based in the head town of each region, responsible for the management, tax assessment, tax litigation and supervision of local offices; and
- provincial directorates, based in the main town of each province, structured with one or more local offices, namely an audit office (divided into areas of up to three, according to the different types of taxpayers and different activities performed) and a legal office (that deals with litigation).

In some cases, other entities may take part in the administration of taxes; in particular, municipalities are responsible for the administration of the municipal tax on real estate properties.

Also worthy of mention is the Tax Police, which assists public prosecutors and plays an important role in verifying the correct compliance with tax laws.

## Enforcement

### 3 How does the tax authority verify compliance with the tax laws and ensure timely payment of taxes? What is the typical procedure for the tax authority to review a tax return and how long does the review last?

Italy implements a self-reporting tax system that requires taxpayers to file an income tax return estimating the amount of taxes payable for the tax period.

The Revenue Agency verifies the fulfilment of tax obligations and whether a tax return is correct through the following main procedure (applicable to both income and indirect taxes):

- An initial check (on errors in the determination of the taxable income or in the calculation of the tax due or regarding tax deductions and tax credits) is carried out automatically on all tax returns, before the submission of the tax return regarding the subsequent fiscal year.
- A second 'formal' check (on the consistency of the tax return with the documentation kept by taxpayers, including material from the tax registers' database) is carried out on samples of tax returns by the end of the second year following the year in which the tax return was submitted.
- A third phase (substantive audit) is intended to rectify the individual incomes declared and to identify subjects who, although being obliged to submit the tax return, have not done so. This audit is based on all information and documents available to the Revenue Agency or acquired through access, inspections and verifications. If this audit is conducted at the taxpayer's place of business, tax auditors can stay for no longer than 60 working days (30 days in an ordinary term plus 30 days' extension). The officers must be authorised by way of special authorisation that is issued by the head of the tax office of their jurisdiction. Access to locations that are also used as a dwelling by the taxpayer must be authorised by the Public Prosecutor. At the end of their audit, the tax auditors must draw up the final tax report. This report may result in a notice of assessment indicating the amount of taxes to be paid. In the case of non-compliance with the procedural guarantees laid down for the protection of the taxpayer during the audit, the information illegally acquired cannot be used to determine the taxpayer's liability.

### 4 Are different types of taxpayers subjected to different reporting requirements? Can they be subjected to different types of review?

All taxpayers state their income through an income tax return. The tax return must be submitted by all individuals who registered an income the previous year (entrepreneurs and those practising a craft or profession must submit it even if they did not receive any income), by using the forms provided every year by the Revenue Agency.

The forms vary depending on whether the tax return concerns individuals, partnerships or corporations.

For individuals, the form to be used can be the standard tax return form or - if the declarant reports only employment or pension income - the '730' form (the simplified form). Using the 730 form has considerable advantages, since it is easier to complete and does not require calculations; moreover, the taxpayer obtains the reimbursement of any tax that may have been overcharged, directly with his or her pay slip or in the pension instalment for July.

Individuals who possess business income and income deriving from the practice of crafts and professions must submit by 30 September of each year the tax return using the Modello Unico form, which includes the annual declaration of VAT taxpayers and the Italian Regional Tax on Productive Activities (Irap) declaration.

#### 5 What types of information may the tax authority request from taxpayers? Can the tax authority interview the taxpayer or the taxpayer's employees? If so, are there any restrictions?

The powers of the tax offices are exerted on the taxpayers through accesses, inspections and verifications, or mainly in the offices themselves, with requests for information and documents to the taxpayer and to third parties.

In particular, through summons or questionnaires, the Revenue Agency can ask taxpayers for data, information and possible documents necessary for verification, to be completed, signed and returned, within an established deadline, usually no less than 15 days.

Through questionnaires for statistics-based tax assessment, the Revenue Agency gathers data concerning each economic activity. They do not represent a base for tax assessment for the taxpayer who completes them.

Interviews with the taxpayer or the taxpayer's employees are often carried out during tax audits at the taxpayer's place of business, with the limitations illustrated at question 3.

Even if there is no legal obligation to respond, pursuant to article 10 of the Taxpayer's Bill of Rights, taxpayers must collaborate with the tax authority and act in good faith.

Moreover, the Revenue Agency can examine all corporate books and accounting records that must be kept by all subjects with an economic business relevant for tax purposes, apart from specifically provided cases of exemption.

Corporate taxpayers are also expected to have compulsory registers provided by tax laws and the Italian Civil Code. They must be kept until the deadlines for the verifications relating to the corresponding tax period have expired, even after the deadline established by article 2220 of the Italian Civil Code (ie, 10 years after the last entry) or other tax laws.

Pursuant to the Italian Taxpayer's Bill of Rights, a taxpayer may not be requested to provide additional documents already at the disposal of the Revenue Agency.

#### 6 What actions may the agencies take if the taxpayer does not provide the required information?

If taxpayers do not provide the Revenue Agency with the requested information:

- a penalty of between €258 and €2,065 is applicable;
- deeds, documents, accounting books and records that have not been filed on specific request of the tax officers cannot be used by taxpayers in their favour in potential tax litigation. Taxpayers can overcome this presumption only by proving that they had no responsibility in failing to provide these documents; and
- the Revenue Agency can assess the taxpayer's position by assumptions on the basis of their profits or turnover.

#### 7 How may taxpayers protect commercial information, including business secrets or professional advice, from disclosure?

The Revenue Agency's audit must be carried out confidentially and without undermining the potential business secrets of the taxpayer.

Especially in audits on large corporations, the control activity must not be invasive to the taxpayer's daily business in terms of time and media exposure.

Pursuant to article 200 of the Criminal Procedure Code, lawyers and advisers cannot be obliged to disclose their taxpayers' situations, except in the case of a criminal offence.

#### 8 What limitation period applies to the review of tax returns?

Pursuant to article 43 of Presidential Decree No. 600 of 29 September 1973, the assessment notices for income purposes shall be notified, under penalty of forfeiture, by 31 December of the fifth year following the year in which the relevant tax return was filed

In cases of failure to file a tax return or in the event of filing of a void tax return, the tax assessment notice may be served until 31 December of

the seventh year following the year in which the tax return should have been filed.

#### 9 Describe any alternative dispute resolution (ADR) or settlement options available?

There are several procedures under Italian tax law that define claims before an appeal is filed with the tax courts. These procedures help to mitigate the time and costs invested in a potential tax dispute and, in certain cases, allow for a reduction of tax penalties.

The key features of these procedures are analysed below.

##### Early payment

If taxpayers pay the total amount of the assessed taxes (with relative interest) within 60 days from the service of a notice of assessment, they are entitled to a reduction of penalties of up to one-sixth of the minimum applicable penalty.

##### Voluntary disclosure

Voluntary disclosure allows for the correction of omissions or irregularities in the submission of the tax returns or the payment of taxes. Voluntary disclosure entails a reduction of the penalties applicable and is admitted until the deadlines provided by the law. In order to benefit from voluntary disclosure, the violations must not already have been detected. There must also be no visits, inspections, audits or other assessment activities already in progress.

##### Self-defence

The Revenue Agency has the power to correct its own errors without the need for a judicial decision. The unlawful deed may be independently annulled by the tax authority or at the taxpayer's request. However, the submission of the request does not suspend the term for filing an appeal before the tax court. The annulment can be carried out even if the judgment is pending or if the deed has already become final due to the expiry of the deadline for the filing of an appeal.

##### Tax settlement

Tax settlement procedures allow the taxpayer to settle a notice of assessment before filing a tax appeal. The tax settlement procedure may be activated either by the taxpayer or by the tax authority. Taxpayers must file their written proposal of tax settlement within 60 days of the notification of the notice of assessment. The notification of the proposal interrupts the term for the filing of the tax claim for 90 days. The tax authority then summons the taxpayer to discuss the proposal within 15 days of the notification of the request. If the parties reach an agreement, the contents of the agreement are set out in a written deed, which is signed by both parties. The tax settlement is not subject to appeal and cannot be modified by the tax office. This results in a reduction of penalties of up to one-third. If an agreement is not reached, the taxpayer may file an appeal with the tax court.

##### Judicial settlement

Judicial settlement allows the parties to the tax proceedings to settle the dispute before a decision is issued by the tax court. It may be activated by the taxpayer, the tax office or the judge. This procedure applies to all disputes and may take place before or during the public hearing (of first or second instance). If a settlement is reached, the agreement between the parties is reported in the minutes of the hearing. If a settlement is reached beforehand, the agreement is communicated to the judge who must declare the proceedings closed. If the agreement is considered inadmissible by the judge, they must schedule the hearing date and the proceedings will continue as usual.

In a judicial settlement, the amount of tax is set out in order to close the dispute. The taxpayer obtains a reduction of up to 40 per cent of the tax in the penalties due under the agreement, in case of settlement before the provincial tax court, or up to 50 per cent in settlement cases before the regional tax court.

##### Conciliation

For tax assessments issued by the Revenue Agency claiming less than €20,000, taxpayers who intend to appeal must submit an application for conciliation. The request will be filed with the tax office that has issued the tax assessment. The application must contain a reasoned proposal with the recalculation of the amount of the claim. If the tax office decides not to accept the claim for a full annulment of the assessment, it will provide

the taxpayer with a proposal concerning its reasoning of the controversial issues. The application is treated like a formal tax claim. If, within 90 days from the presentation of the application, the Revenue Agency does not accept the claim, the application produces the effect of presenting a formal tax claim. If the Revenue Agency rejects the conciliation request at an earlier date, the aforementioned effects start from the taxpayer's receipt of rejection.

#### **Mutual agreement procedure**

In double taxation cases, taxpayers can start a procedure to designate government representatives of the competent authorities to work together to resolve international tax disputes (MAP), if it is allowed by the relevant bilateral tax treaty.

If the dispute concerns a related party resident in another EU member state, taxpayers may activate a MAP procedure according to the EU Arbitration Convention.

In both cases, the pending tax litigation is suspended.

#### **10 How may the tax authority collect overdue tax payments following a tax review?**

Overdue tax collection is entrusted to a company (Equitalia SPA), which has territorial jurisdiction sub-divided between three subsidiaries (Equitalia Nord, Equitalia Centro and Equitalia Sud).

Further to the service of a notice of assessment, the taxpayer is requested to pay by the next 60 days the assessed taxes, interest and penalties, irrespective of the filing of an appeal before the tax court.

If the taxpayer fails to pay, the Revenue Agency is entitled to take interim measures aimed at preserving the tax credit, such as the registration of a mortgage on real estate property of the taxpayer and the 'administrative block' of moveable registered assets (eg, cars). Should this be the case, the Revenue Agency must notify a specific payment demand 30 or 20 days before the mortgage or the block, respectively.

Moreover, 270 days after the service of the notice of assessment, Equitalia can enforce collection procedures, such as the divestiture of moveable assets (eg, bank accounts) and the seizure of real estate and moveable property.

#### **11 In what circumstances may the tax authority impose penalties?**

The Revenue Agency imposes monetary penalties whether:

- the taxpayer has engaged in the conduct sanctioned by tax law; or
- the taxpayer's conduct is characterised by guilt.

Additional penalties may be imposed on taxpayers to limit the exercise of a business activity, prevent participating in public tenders and suspend licenses, concessions or authorisations necessary for specific businesses or activities.

#### **12 How are penalties calculated?**

Main penalties imply the payment of a sum of money; either a fixed sum or a percentage (related to the avoided or evaded tax). For example:

- penalties for failure to file a tax return: if a taxpayer is required to file an income tax return and fails to do so, the penalty may range from 120 to 240 per cent of the amount of unpaid tax (in any case, a minimum penalty of €250 is applicable);
- penalties for failure to file a correct tax return: the penalty may range from 90 to 180 per cent of the additional tax liability assessed (the penalty applies even if undue deductions or tax credits are exposed in the tax return); and
- penalties for failure to pay taxes on time: if a taxpayer is required to pay an amount shown on his or her tax return but fails to pay such amount within the applicable deadline, a penalty equal to 30 per cent of the amount of unpaid tax will be applied.

If the taxpayer, even at different times, commits a number of violations that, in their progression, prejudice or tend to prejudice the determination of the taxable income or of taxes, a juridical accumulative penalty is applicable. Accordingly, the Revenue Agency imposes the penalty that should be imposed for the most serious violation, increased by a quarter to half. If the violations refer to various taxes, the basic penalty is first increased by a fifth. If they concern different tax periods, the basic penalty is first increased by half or triple.

The 'material' accumulative penalty, which is a simple sum of the applicable sanctions, is applicable, if it is less than the juridical accumulative penalty.

#### **13 What defences are available if penalties are imposed?**

Apart from filing an appeal before a tax court, taxpayers can submit to the Revenue Agency a brief within 60 days of the notification of the deed of imposition of the penalties, in order to justify their behaviour.

For example, taxpayers can prove that the violation is not punishable since it is determined by objective uncertainty about the scope and interpretation of the applicable tax rule.

The tax office has one year to annul or confirm the deed. In the second instance, the confirmed penalty may be challenged before a tax court.

In addition, taxpayers can define the penalties by paying an amount of penalties reduced to one third. The payment must be made before the expiry of the term for filing the tax appeal. The settlement concerns only the financial penalties and the taxpayer can decide to file an appeal with regard to the assessed taxes. However, in the event of a favourable decision with regard to the taxes assessed, the taxpayer cannot request any refund of the settled penalties already paid.

#### **14 In what circumstances may the tax authority collect interest and how is it calculated?**

Interest on arrears are automatically calculated as a consequence of tax assessments and are equal to:

- 5 per cent per year, from the day following the one in which the payment should have been made until the notification of the notice of payment; and
- the interest rate fixed yearly by the Ministry of Economy and Finance, from the notification of the notice of payment until the date of the effective payment.

Taxpayers applying for an instalment plan should pay interests equal to 6 per cent per year on the amount due.

#### **15 Are there criminal consequences that can arise as a result of a tax review? Are these different for different types of taxpayers?**

The Revenue Agency or the Tax Police that carried out the tax audit may notify the judicial authority that they have material that may constitute a criminal offence. The judicial authority then decides whether or not to conduct the criminal investigation and prosecute the taxpayer.

The criminal procedure applicable to tax crimes is the same applicable to other criminal offences. It is based on the assignment of the burden of proof to the Public Prosecutor who must prove that the crime has been committed. For most tax offences, the Public Prosecutor must also prove the taxpayer's guilt. Accordingly, business entities cannot be prosecuted.

The most important criminal offences are:

- False tax return. If on the basis of an allegedly false tax return it turns out that, in a given fiscal year, the unpaid tax is greater than €150,000 and the amount of undeclared taxable income is higher than 10 per cent of the total positive items reported in the tax return or, in any event, higher than €3 million, the criminal penalty would consist of imprisonment for a term ranging from one to three years.
- Fraudulent tax return. If a fraudulent tax return is filed by issuing an invoice for non-existent transactions, the criminal penalty would consist of imprisonment for a term ranging from one year and six months to six years.
- Fraudulent transfer of assets to impede collection of taxes. If the taxpayer commits fraudulent acts with regard to their own or others' assets, in order to avoid payment or the collection of taxes for a total amount exceeding €50,000, the applicable punishment is imprisonment for a term ranging from six months to four years. If the amount of taxes, penalties and interest exceeds €200,000, the applicable punishment is imprisonment for a term ranging from one year to six years.

#### **16 What is the recent enforcement record of the authorities?**

According to the report issued in July 2016 by the Ministry of Economy and Finance, the Revenue Agency is totally or partially successful in tax litigation in 69.4 per cent of cases.

---

### Third parties and other authorities

#### 17 Can a tax authority involve or investigate third parties as part of the authority's review of a taxpayer's returns?

The Revenue Agency can request financial information from banks concerning the personal accounts of the taxpayer.

It can also request information and documents from contractual counterparties and make cross-checks with third parties.

#### 18 Does the tax authority cooperate with other authorities within the country? Does the tax authority cooperate with the tax authorities in other countries?

Apart from the Public Prosecutor, the Revenue Agency rarely cooperates with other domestic authorities.

Despite Italy entering into bilateral agreements for the exchange of information with many countries, cooperation with foreign tax authorities has been rare.

Albeit technically the cooperation with other domestic institutions (such as the employment and social security agency INPS) or foreign tax authorities is technically possible, the Italian tax authorities have been shown to be quite non-proactive.

---

### Special procedures

#### 19 Do any special procedures apply in cases of financial or other hardship, for example when a taxpayer is bankrupt?

Taxpayers who are in temporary situations of objective difficulties, namely that are unable to pay a registered debt as indicated in the notice of payment, can apply to the collection office to obtain a rescheduling of the debt.

Application must be submitted on paper, along with appropriate documentation indicating the temporary situation of objective difficulties. The extension may be granted up to a maximum of 120 monthly instalments (10 years). The minimum amount of instalment, without exception, is €100.

Another way to reschedule a tax debt is through tax settlement, which is applicable during insolvency proceedings.

#### 20 Are there any voluntary disclosure or amnesty programmes?

At present, the Italian government is evaluating the second phase of the voluntary disclosure programme (that ceased in November 2015), to enable Italian taxpayers to regularise non-declaration of capital held offshore.

---

### Rights of taxpayers

#### 21 What rules are in place to protect taxpayers?

The Taxpayer's Bill of Rights has been introduced into the Italian system by Law No. 212/2000.

This law, integrated by a number of executive regulations, on the one hand establishes general principles that the legislator must respect when he or she intends to introduce tax rules, such as the prohibition of analogy, the non-retrospective effects of tax rules, the simplicity of tax rules and the prohibition of introducing new taxes by means of a law-decree. On the other hand, the law recognises the taxpayer's rights to be clearly informed by the Revenue Agency, to receive tax deeds adequately motivated, to compensate his or her debts and credits, to access to ruling and to be assisted by an ombudsman.

It is worth noting that the Taxpayer's Bill of Rights is an ordinary law, with no specific or stronger powers compared to other subsequent ordinary laws.

#### 22 How can taxpayers obtain information from the tax authority? What information can taxpayers request?

Taxpayers have no right of access to documents formed and held by the Revenue Agency before being served with a notice of assessment.

However, taxpayers can file an application for a ruling in order to receive a reply by the Revenue Agency regarding their own actual cases concerning:

- the application of statutory provisions of objectively unclear interpretations;
- the valuation and fulfilment of the requirements necessary to qualify for specific tax regimes;
- the application of the abuse-of-law rule; or
- the disapplication of specific anti-avoidance rules.

The applicant must submit a tax ruling request before the deadline for the submission of the tax return or for the fulfilment of any other tax obligations connected to the object of the tax ruling request. The Revenue Agency must reply within 120 days of the request (90 days in the case of the first type of ruling). However, where further information is required, the Revenue Agency may request additional documentation and the answer may be delivered within 60 days from its receipt.

Where the Revenue Agency does not reply within this term, the interpretation provided by the taxpayer is considered accepted. The reply must be motivated and the interpretation provided is binding on the Revenue Agency only vis-à-vis the applicant.

#### 23 Is the tax authority subject to non-judicial oversight?

The Revenue Agency has full autonomy in regulation, administration, treasury, organisation, accounts and finance within the limits set by a convention agreed every year with the Ministry of Economy and Finance, which sets the strategic aims and carries out constant monitoring of its activities.

Due to its public nature, the Revenue Agency is subject to control by the State General Accounting Office and the Court of Auditors.

---

### Court actions

#### 24 Which courts have jurisdiction to hear tax disputes?

As a general rule, the tax courts have jurisdiction over all tax disputes. Tax proceedings are aimed at verifying the procedural legality of the tax assessment and the substantive legality of the tax obligation. Disputes concerning enforcement are excluded from the jurisdiction of the tax courts. The civil courts have jurisdiction over enforcement disputes and claims for damages against the Revenue Agency. The only enforcement matters that are heard before the tax courts are disputes concerning the executive right for the collection of taxes.

The tax courts are:

- the provincial tax commission (first instance) of the territory where the tax office issuing the challenged deed is located;
- the regional tax commission (second instance), which can overrule judgments issued by the provincial tax courts located in the relevant region; and
- the Supreme Court of Cassation (third and final instance), which rules on decisions issued by the regional tax commissions, but only on legal grounds.

#### 25 How can tax disputes be brought before the courts?

Article 19 of Legislative Decree No. 546/1992 provides a list of challengeable deeds. These include:

- notices of assessment;
- deeds providing for the application of financial penalties;
- notices of payments;
- registrations of mortgages on real estate assets;
- deeds related to cadastral qualifications;
- denials of tax refunds, penalties and interests not due; and
- the denial or revocation of benefits.

In this respect, it should be noted that the tax authority cannot base its defence on grounds that are different from those indicated in the challenged deed.

Litigation is initiated by filing a tax claim, which must contain:

- an indication of the tax court to which the appeal is submitted;
- the identification of the taxpayer and their legal representative;
- the taxpayer's residence or registered office or domicile;
- an indication of the tax authority against which the appeal is filed; and
- the subject matter of the appeal, and the grounds of the appeal.

In particular, the subject matter of the appeal consists of two elements: *petitum* (the claim filed with the tax court) and *causa petendi* (the grounds in support of the claim).

The claim must be served on the tax authority that issued the challengeable deed and filed with the tax court. The notification of the appeal may occur in three ways: through the postal service, by hand or through a public official.

The claim must be served within 60 days of the service of the deed being appealed. The taxpayer must, within 30 days from the service of the tax claim, file it with the tax court along with supporting documentation.



After a claim has been filed, the tax court verifies that the contribution due for participation in judicial proceedings has been paid. Contributions are only paid once and there is no cost for the subsequent filing of briefs and documents. The contribution amount depends upon the value at stake in the dispute. The maximum amount of the contribution is €1,500.

Taxpayers must file a registration note, allowing the tax court to assign a docket number to the appeal. In the absence of such note, the proceedings are not initiated.

There is no minimum threshold amount for appealing. However, for tax assessments issued by the Revenue Agency claiming less than €20,000, taxpayers who intend to appeal must submit an application for conciliation (see question 9).

### **26 Can tax claims affecting multiple tax returns or taxpayers be brought together?**

On the basis of the case law of the Supreme Court of Cassation, it is possible to file one single appeal regarding multiple tax assessments or different persons, only if the challenged obligation to pay taxes is the same.

### **27 Must the taxpayer pay the amounts in dispute into court before bringing a claim?**

The filing of the appeal does not, per se, suspend the collection.

If the taxpayer files a tax claim with the tax court, the tax authority can request the payment of one-third of the assessed tax plus interest (but no penalties), while the litigation is pending before the first instance court.

If the first instance judgment is positive for the taxpayer, he or she has the right to be reimbursed of the interim payment.

In the opposite scenario, pending the litigation before the regional tax court, the taxpayer is requested to pay up to two-thirds of the taxes assessed and related interest and penalties.

Further to the negative judgment of the regional tax court, all the remaining amount due must be paid.

In order to avoid such interim payments, the taxpayer can ask the courts of first or second instance (even further to the appeal before the Supreme Court of Cassation) to delay the assessment enforcement. The tax court will order a suspension where the payment may cause a serious damage to the taxpayer (*periculum in mora*) and the claim seems well-grounded (*fumus boni iuris*).

### **28 To what extent can the costs of a dispute be recovered?**

In tax proceedings, the court shall require the unsuccessful part to bear the costs of litigation.

Under article 91(2) of the Civil Procedure Code, the costs of litigation can be allocated equally if both parties lose the lawsuit or the judge finds it appropriate to do so.

### **29 Are there any restrictions on or rules relating to third-party funding or insurance for the costs of a tax dispute, including bringing a tax claim to court?**

No.

### **30 Who is the decision maker in the court? Is a jury trial available to hear tax disputes?**

The provincial and regional tax courts are made up of a panel of three judges.

Tax issues are ruled by the Fifth Chamber of the Supreme Court, which is made up of a panel of five judges.

There is no jury trial in tax disputes.

### **31 What are the usual time frames for tax trials?**

From the filing of the appeal before the provincial tax court to the relevant judgement: approximately one year.

From the filing of the appeal before the regional tax court to the relevant judgement: approximately one year.

From the filing of the appeal before the Supreme Court to the relevant judgement: approximately five years (longer time frames are usually experienced).

### **32 Describe the discovery process for a tax trial.**

Tax litigation relies heavily on documentary evidence and judges must base their decisions on the evidence submitted by the parties.

The parties may produce documents to support their grounds, arguments and requests. Documents may be filed with the court until a date not later than 20 days before the hearing or 10 days for memoranda and briefs.

The evaluation of such documents shall be carried out pursuant to the general rules on the evaluation of the proofs, that is, in the judge's careful and diligent judicial discretion. The judge may order the parties to produce additional documents if they are necessary for the resolution of the dispute.

Like criminal and administrative proceedings, illegally obtained evidence cannot be considered by judges in tax litigation. For example, documents acquired during an inspection that was conducted without the Public Prosecutor's authorisation are inadmissible at trial.

### **33 What testimony is permitted in a tax trial?**

Confessions and witness testimony are not admissible in a tax trial.

It should be noted that witness testimony excludes third parties' recorded statements in the Tax Police's minutes or the tax authority's audit reports. Such indirect evidence can be used in judicial decisions so long as they are not the sole basis for the decision. Consistent case law has repeatedly taken this position.

Tax courts have the power to access and request information relating to the facts submitted by the parties. For complex matters, the tax courts may request technical advice from the tax authorities, or public administrations. Similarly, the tax judge may request access to inspections, data, information and technical reports from public administrations advice.

### **34 Who can represent taxpayers in a tax trial? Who represents the tax authority?**

In tax proceedings, the taxpayer must appoint a professional legal counsel who is authorised to represent clients in proceedings before the tax courts.

The taxpayer may appear without legal representation if they are persons entitled to assistance before the tax courts or if the amount in dispute is less than €3,000.

The Revenue Agency is represented in the proceedings by its own officers. Conversely, Equitalia is represented by external tax lawyers.

### **35 Are tax trial proceedings public?**

Even if tax proceedings in Italy are held without the presence of the parties or their legal counsel, the parties may request to be allowed to illustrate their arguments orally. In particular, each party may file a request for public hearing, to be served upon the other party and filed with the tax court 10 days before the hearing date.

### **36 Who has the burden of proof in a tax trial?**

Generally, the burden of proof in tax litigation rests with the tax authority issuing the tax assessment.

However, where a specific presumption is mandated by law, or when the evidence is much closer to the taxpayer (eg, deductibility of costs), the burden of proof is on the taxpayer.

### **37 Describe the case management process for a tax trial.**

The briefing process is as follows:

- within 60 days from the notification of the notice of assessment, the claim must be filed;
- within 30 days from the notification of the claim, taxpayers must file the claim and submit the documentation before the tax court;
- within 60 days from the notification of the claim, the Revenue Agency must file its reply and produce the documentation before the tax court (the tax authority may also appear directly before the tax court during the public hearing);
- if requested, the hearing for the suspension of the notice of assessment is scheduled by the tax court;
- if requested, the public hearing is scheduled by the tax court;
- by 20 days before the date of the hearing, parties can file other documents;
- by 10 days before the date of the hearing, parties can file replies; and
- after the hearing, the tax court issues its decision (there is no deadline).

### **38 Can a court decision be appealed? If so, on what basis?**

The appeal before the regional tax courts must be filed within 60 days of receiving notification of the provincial tax court's decision. If there is no

### Update and trends

The recent main changes in tax legislation have been introduced by the Legislative Decree No. 156 (tax litigation reform), 157 (Revenue Agency reform), 158 (tax crimes reform), 159 (tax collection reform), 160 (reorganisation of tax advantages) of 24 September 2015 and No. 128 of 5 August 2015 (provisions on legal certainty in the relations between tax authorities and the taxpayer).

The main areas of focus are:

- reorganisation of the Revenue Agency, aimed at making tax inspections less invasive; avoiding duplication of requirements; and reducing the inconvenience to taxpayers caused by the duration of tax inspections;
- simplification of tax obligations: a new criterion has been introduced in order to reschedule delayed or missed payments;
- enhancing a transparent and cooperative relationship between taxpayers and tax administration and increasing internal tax control (eg, in the case of tax settlement, tax payments can be made within four years – instead of the previous three years – in a minimum of eight and a maximum of 16 instalments);

- review of the tax criminal penalty system according to the predetermination and proportionality criteria (eg, a general reduction of the penalties in the case of violations that are considered to be less serious and an increase of penalties in fraudulent cases); and
- mediation has been strengthened and new provisions have been introduced in order to allow taxpayers to remedy tax violations before a tax assessment is issued (with an important reduction of the applicable penalties). The ruling procedure has been improved and the response times have been reduced (see question 22).

Concerning the review of collection rules is the hypothesis of a restyled Equitalia, which could be transformed into a sort of ‘house of the taxpayers’, is gaining grounds.

A recent parliamentary proposal aims to increase the functionality, productivity and effectiveness of tax courts (eg, selecting judges after a public competition and creating single-judge provincial tax courts).

notification of the decision, the appeal before the regional tax courts may be filed within six months from the filing of the decision.

There are several requirements for appeals before the regional tax court. These include: a summary of the proceedings, the subject matter of the appeal and the specific grounds for appeal. Like the appeal before the provincial tax court, the appeal before the regional tax court must contain both a *petitum* and a *causa petendi*.

The appellant may not propose requests that have not been submitted in the proceedings of first instance. An exception to this rule applies where the appellant requests a restatement of the taxes or penalties. The deductions and the documents acquired in the process before the provincial tax court are automatically submitted to the regional tax court for review. Issues and objections that are not raised in the proceedings of second instance are automatically waived.

The regional tax court’s decision may be appealed before the Supreme Court, solely on legal grounds.

An appeal before the Supreme Court may be proposed on the following grounds:

- jurisdiction;
- violations of rules regarding territorial jurisdiction;
- violation and misapplication of rules of law;
- invalidity of the decision or of the proceedings; and
- a lack of examination on a decisive fact of the dispute.

The appeal before the Supreme Court must be filed within 60 days of the notification of the regional tax court’s decision. If there is no notice, the appeal may be filed with the Supreme Court within six months of the filing of the regional tax court’s decision.

# CHIOMENTI

STUDIO LEGALE

**Massimo Antonini**  
**Raul-Angelo Papotti**  
**Paolo Piantavigna**

**massimo.antonini@chiomenti.net**  
**raulangelo.papotti@chiomenti.net**  
**paolo.piantavigna@chiomenti.net**

Via Giuseppe Verdi 2  
20121 Milan  
Italy

Tel: +39 02 7215 71  
Fax: +39 02 7215 7224  
www.chiomenti.net

# Japan

Eiichiro Nakatani and Kai Isoyama

Anderson Mōri & Tomotsune

## Overview

### 1 What is the relevant legislation relating to tax administration and controversies? Other than legislation, are there other binding rules for taxpayers and the tax authority?

#### Legislation

Articles 30 and 84 of the Japanese Constitution require that all taxes be imposed by acts of the Diet. The legislation that is relevant to the procedural aspects of taxes in Japan includes:

- the National Tax General Rule Act (Act No. 66 of 1962), which deals mainly with matters generally related to national taxes, such as time limits for the tax authority to issue tax assessments, penalties for failure to file tax returns and rules on tax audits;
- the National Tax Collection Act (Act No. 147 of 1959), which stipulates the procedures for collection of national taxes; and
- the National Tax Violation Control Act (Act No. 67 of 1900), which sets out the criminal procedures related to evasion of national taxes.

Some pieces of legislation that mainly deal with substantive aspects of national taxes also provide procedural rules related to national taxes, such as the Income Tax Act (Act No. 33 of 1965), the Corporation Tax Act (Act No. 34 of 1965), the Inheritance Tax Act (Act No. 73 of 1950), the Consumption Tax Act (Act No. 108 of 1988) and the Act on Special Measures Concerning Taxation (Act No. 26 of 1957).

#### Other legally binding rules

##### Tax treaties

Tax treaties that have been concluded by the cabinet and approved by the Diet are given full force in Japan. As a member of the Organisation for Economic Co-operation and Development (OECD), Japan adopts provisions that are in line with the OECD Model Tax Convention when concluding treaties with other countries. As of 1 July 2016, Japan has concluded 66 tax treaties that are applicable to 97 jurisdictions and designed to avoid double taxation, prevent tax evasion and foster the exchange of information and assistance in collection of taxes.

##### Cabinet orders and ministerial ordinances

The cabinet can, within the powers granted to it under the relevant acts, enact cabinet orders to implement the acts. Similarly, ministers can, within the powers granted to them under the acts or cabinet orders, enact ministerial ordinances to implement acts and cabinet orders.

#### Legally unbinding but practically respected rules

##### Administrative circular

The Commissioner of the National Tax Agency (NTA) issues circulars, which are directives to officials of the NTA and its subordinate bureaus to provide a uniform interpretation and application of tax laws. However, circulars are merely interpretations by the tax authority and are not binding as a source of law.

##### Court precedents

The courts' interpretations of tax laws are not binding as a source of law. The interpretations of the courts, especially those of the Supreme Court, are generally respected in practice as an authority to support one's position.

### 2 What is the relevant tax authority and how is it organised?

The NTA, which is an extra-ministerial bureau of the Ministry of Finance, is the primary governmental agency with respect to national taxes. The NTA has a three-tier organisational structure: the head office; 11 regional taxation bureaus and Okinawa Regional Taxation Office; and over 500 tax offices. Local governments, their subordinate prefectural tax offices, city offices and town and village offices handle matters regarding local taxes.

## Enforcement

### 3 How does the tax authority verify compliance with the tax laws and ensure timely payment of taxes? What is the typical procedure for the tax authority to review a tax return and how long does the review last?

The tax authority verifies compliance by reviewing filed tax returns and conducting field examinations, which are audits conducted at the site of the taxpayers. While reviews are generally handled by tax offices, corporations with over ¥100 million in capital and foreign corporations are subject to review by regional taxation bureaus.

If a review reveals failure to file tax returns or underreporting of tax amount, the taxpayer is usually contacted by a tax officer and instructed to file a return stating the correct tax amount and paying the unpaid tax (with a penalty, if applicable). In other cases, taxpayers are subject to field examinations that are conducted at their site. The 2011 amendment to the National Tax General Rule Act requires, in principle, the tax authority to give the taxpayer notification before the tax officer's visit to the taxpayer's site. A field examination can last from a few days to more than a year depending on various factors, such as the scale of the business operated by the examined taxpayer. A field examination generally involves studying the books and accounting records and inventories, and interviewing the employees of the taxpayer. These interviews are conducted under the power to access the relevant book-records and other materials and to ask questions (see question 5). In field examinations of business entities or individuals operating businesses, the examiners investigate all income tax concurrently, including tax that should have been withheld, corporation tax and consumption tax. At the end of a field examination the tax authority issues a disposition to impose the tax that the taxpayer should have reported in the returns for the previous years, or a document that no disposition is imposed on the taxpayer.

### 4 Are different types of taxpayers subjected to different reporting requirements? Can they be subjected to different types of review?

The reporting requirements for all taxpayers are generally the same. However, upon approval of the head of the relevant tax office, taxpayers can file 'blue returns' for income tax and corporation tax. A taxpayer who has received approval to file a blue return is granted certain privileges, such as a deduction of ¥100,000 or ¥650,000 from the amount of income. At the same time, individual taxpayers who file blue returns are obliged to attach their balance sheet, income statement and other documents containing sufficient details to calculate their income to the returns. In contrast, individual taxpayers who file white returns (ie, tax returns that are not blue returns) are only required to submit documents explaining their gross income and deductible expenses.

There is no substantial difference between reviews of blue returns and white returns. Note that approval to file a blue return places an obligation,

which is stricter than that imposed on white-return taxpayers, on the taxpayer to keep book records of its transactions in the manner specified by the relevant ministerial ordinances. The tax authority can request the records from the blue-return taxpayers in tax audits. In this sense, taxpayers filing blue returns have more obligations at a review than those filing white returns.

**5 What types of information may the tax authority request from taxpayers? Can the tax authority interview the taxpayer or the taxpayer's employees? If so, are there any restrictions?**

The National Tax General Rule Act provides that the tax authority may ask the taxpayer and certain persons specified by the Act (eg, persons to whom the taxpayer is or was obligated to pay money) to submit or present the relevant book-records and other materials, which generally include business books and records, financial information and copies of transaction documents. The tax authority is likely to interpret the phrase 'book-records and other materials' as authorising the auditors to access a wide range of information. However, the power to request information from taxpayers is restricted by the requirement of necessity (see question 7).

The Act empowers the tax authority to ask questions to the taxpayer and the persons specified by the Act. Under this rule, the tax authority can interview the taxpayer and its employees. As with the power to access book-records and other materials, the power to ask questions is also subject to the requirement of necessity.

**6 What actions may the agencies take if the taxpayer does not provide the required information?**

The agencies are prohibited from intruding on any private premises or auditing any materials without the consent of the taxpayer. However, a taxpayer is punishable by imprisonment of up to one year or a fine of up to ¥500,000 if the taxpayer fails to provide an answer, provides a false answer or obstructs an audit. If the matter concerns tax evasion, which is subject to criminal punishments, the agencies can obtain a court approval to access private premises or materials without the taxpayer's consent.

**7 How may taxpayers protect commercial information, including business secrets or professional advice, from disclosure?**

Japanese law does not explicitly protect commercial information or professional advice against tax audits. But the tax agencies are subject to two requirements under the National Tax General Rule Act in their conduct of tax audits: the agencies are allowed to ask taxpayers questions or audit materials only if it is objectively necessary; and taxpayers are criminally punishable only if there are no reasonable grounds to refuse the agencies' request for materials or copies of the materials. These two requirements of necessity and lack of reasonable grounds function, to a certain extent, as protection of commercial information and professional advice. It is an open question as to whether a duty of confidentiality provides professionals, such as accountants or attorneys, with reasonable grounds to refuse the agencies' requests, although a few judicial decisions seem to deny the existence of reasonable grounds.

**8 What limitation period applies to the review of tax returns?**

The National Tax General Rule Act provides that the statute of limitation on assessment is five years from the statutory due date of tax return. This general rule does not apply to certain cases, such as cases of tax evasion (seven years) and situations to increase or decrease the amount of net loss (nine years). The Act further exempts cases where certain events occur after the statutes of limitation under the general rule have expired. For example, if a tax had been reported based on a transaction that brought about an income, and the income was later returned due to invalidity of the transaction, the limitation is three years from the day that the income was returned.

**9 Describe any alternative dispute resolution (ADR) or settlement options available.**

There are three methods for a taxpayer to seek resolution of a tax dispute with the government: filing a request for reinvestigation; requesting administrative review; and filing a lawsuit. The first two are systems of administrative appeal and the last is a judicial appeal system. Besides these options, there are no other systems to resolve tax disputes with the government. Japanese tax laws do not allow the government to settle

with taxpayers. However, there are some cases of de facto settlement, in which the government cancels a disposition in exchange for the taxpayer's concession of a related claim.

A request for reinvestigation is generally filed with the administrative agency that has made the disputed disposition. For example, a request for reinvestigation of a disposition of the head of a tax office is filed with him or her. It must be filed within three months from the date of receipt of the notice of disposition under the 2014 amendment to the National Tax General Rule Act, which is applicable to the dispositions issued on or after 1 April 2016. Execution of a disposition is not suspended by the filing of a request. If the request is upheld, the disposition is cancelled; otherwise it will continue to be valid.

Generally, a request for administrative review can be filed with the President of the National Tax Tribunal by a taxpayer who is not satisfied with the decision received concerning a request for reinvestigation within one month after the decision issuance date, or who has not received any decision concerning a request for reinvestigation within three months from filing the request. There are also specific cases in which a taxpayer may file a request for administrative review without having filed a request for reinvestigation, such as where the concerned disposition is issued by the head of a regional taxation bureau. The 2014 amendment to the National Tax General Rule Act expanded these specific cases to grant taxpayers the option to choose between filing a request for reinvestigation first or filing a request for administrative review without having filed a request for reinvestigation.

See question 25 for details on the judicial appeal system.

**10 How may the tax authority collect overdue tax payments following a tax review?**

The general process to collect defaulted tax involves the tax authority first sending a collection letter to the taxpayer within 50 days from the original due date. If a payment is not made despite the demand letter, a disposition for non-payment will be instituted. The tax authority will then initiate a procedure to collect the defaulted tax if full payment of the tax due is not made within 10 days after the notice. Without the need for a court permit, the tax authority is allowed to seize the defaulting taxpayer's assets (including claims to a third party, such as a claim for funds in a bank account), convert the assets into money and seize the proceeds derived from the sales of assets. Such money raised is then used to pay the defaulted tax and any remaining amount is returned to the taxpayer or distributed to other creditors of the taxpayer.

**11 In what circumstances may the tax authority impose penalties?**

If a taxpayer underreports its payable tax amount, fails to file a tax return by the due date or fails to pay withholding tax by the due date, the tax authority will impose additional tax on the taxpayer as a penalty. In the case of tax evasion, additional aggravated tax will be imposed instead of the general additional taxes. Furthermore, a taxpayer who has violated tax laws may be subject to imprisonment of not more than 10 years, a fine of not more than the amount of tax evasion, or both.

**12 How are penalties calculated?**

The additional tax for underreporting is 10 per cent of the difference between the unreported and reported taxes (the 'Difference') plus 5 per cent of the difference between the Difference and the larger of ¥500,000 or the reported tax.

In the case of a failure to file a tax return, the additional tax is 15 per cent of the unreported tax plus 5 per cent of the difference between the unreported tax and ¥500,000. The additional tax for a failure to pay withholding tax is 10 per cent of the unpaid amount (see question 20 for the case where a taxpayer files a tax return with the correct tax amount after filing an earlier erroneous tax return without having predicted a disposition by the tax authority prior to the first filing.) For tax evasion, the rate of additional tax as a penalty is increased to 35 per cent (in the case of under-reporting tax or not paying withholding tax), or 40 per cent (in the case of non-filing).

**13 What defences are available if penalties are imposed?**

Penalties are not imposed if there are reasonable grounds for the taxpayer's non-compliance with the laws. For example, if a certain interpretation of the laws has been customarily established in practice and the interpretation

is later found by the court to be a misinterpretation, a taxpayer may be regarded as having reasonable grounds for underreporting the tax amount due to the misinterpretation. However, mere misunderstanding of the laws or reliance on professional advice (eg, legal or accounting advice) does not constitute reasonable grounds.

#### **14 In what circumstances may the tax authority collect interest and how is it calculated?**

Additional tax is payable on unpaid taxes as interest. The rate of additional tax on unpaid taxes is: 7.3 per cent per annum for the period up to the due date or the period up to the day on which two months have elapsed from the day following the due date; and 14.6 per cent thereafter until the date payment is completed.

Under the current rule, the 7.3 per cent and 14.6 per cent are reduced respectively to: 1 per cent plus a certain rate calculated based on the average rate of banks' new short-term loans; and 7.3 per cent.

Interest tax is also payable on postponement of tax payment, tax payment in kind (to be made after the initial due date), or postponement of due date of tax return. In principle, the amount of interest tax shall be calculated by using rates similar to those used for the calculation of additional tax.

#### **15 Are there criminal consequences that can arise as a result of a tax review? Are these different for different types of taxpayers?**

Two types of criminal consequences can arise from a tax review. The first is criminal punishment for obstructing a tax audit. As mentioned in question 6, a taxpayer who has failed to provide an answer, provided a false answer or obstructed an audit is punishable by imprisonment of up to one year or a fine of up to ¥500,000.

The second is criminal punishment for tax evasion. If a tax review reveals potential tax evasion, the NTA is authorised to carry out coercive investigation that is similar to the criminal investigation process. The NTA will report tax evasion that it discovers from such an investigation to the public prosecutors for criminal prosecution. As mentioned in question 11, a person who is prosecuted and convicted for tax evasion is punishable by imprisonment and/or a fine. The length of imprisonment and amount of fine depends on the type of tax and conduct, but imprisonment is no longer than 10 years and the fine is not more than the amount of tax evasion.

The above does not vary depending on the type of taxpayers.

#### **16 What is the recent enforcement record of the authorities?**

The NTA announced that, in operation year 2014, the number of field examinations that it conducted at the sites of individual and corporate taxpayers are, respectively, approximately 68,000 (while 21.39 million individual tax returns were filed) and 95,000 (while 2.79 million corporate tax returns were filed). These field examinations revealed unreported income of ¥500.8 billion in individual income tax and ¥823.2 billion in corporation tax. These figures do not include examinations that involved simply contacting and giving instructions to taxpayers. In addition, the tax authorities conduct examinations of other taxes, such as consumption tax, inheritance tax, gift tax and withholding income tax.

#### **Third parties and other authorities**

#### **17 Can a tax authority involve or investigate third parties as part of the authority's review of a taxpayer's returns?**

As mentioned in question 5, the tax authority may ask not only the taxpayer but also certain persons specified by the National Tax General Rule Act (eg, persons to whom the taxpayer is or was obligated to pay money) for relevant materials and ask them questions. By exercising this power, the tax authority can involve third parties. Even though taxpayers or third parties do not have any specific rights with respect to involvement of third parties, the two requirements of tax audits as mentioned in question 7 (ie, necessity and lack of reasonable grounds) apply to tax audits involving third parties. The punishment mentioned in question 6 is applicable to third parties, which means that a third party who has failed to provide an answer, provided a false answer or obstructed an audit is punishable by imprisonment of up to one year or a fine of up to ¥500,000.

#### **18 Does the tax authority cooperate with other authorities within the country? Does the tax authority cooperate with the tax authorities in other countries?**

There is no law generally authorising the tax authority to cooperate, or share information that it obtained through its operations, with other authorities in Japan. However, there are some acts that explicitly empower the tax authority to do so in specific cases (eg, the Public Assistance Act (Act No. 144 of 1950)). At the same time, it has been strongly argued that the tax authority should not share such information with other authorities due to the duty of confidentiality of all national public officers. The Supreme Court has not issued a clear position on this matter and therefore, Japanese law on this issue remains unclear.

On the other hand, there are relatively clear rules on the cooperation of the Japanese tax authority with authorities of other countries. Under tax treaties as mentioned in question 1, the NTA exchanges information with foreign tax authorities and collects data and information relating to taxpayers, including foreign corporations. In addition, the NTA cooperates with foreign authorities to resolve international double taxation issues.

#### **Special procedures**

#### **19 Do any special procedures apply in cases of financial or other hardship, for example when a taxpayer is bankrupt?**

There is no single general rule aimed at dealing with taxpayers' hardship. However, some legislation provides rules that are applicable to specific cases of hardship. For example, there is legislation that provides for postponement of the due dates of taxes if certain conditions are satisfied.

Furthermore, the tax authority may suspend collection of taxes from taxpayers in certain kinds of hardship, such as a disaster, an illness or the closing of the taxpayer's business.

In addition to the postponement of due dates and suspension of collection, certain properties are prohibited from being seized to ensure that taxpayers have a minimum standard of living. Therefore, necessities such as clothes, bedding, furniture and also a portion of taxpayers' salaries cannot be seized for national taxes.

#### **20 Are there any voluntary disclosure or amnesty programmes?**

Additional tax as a penalty is not imposed on a taxpayer who files a tax return to amend a previously filed tax return in which the tax amount was underreported, as long as the taxpayer did not predict a disposition by the tax authority prior to the first erroneous filing. The rate of the additional tax is reduced to 5 per cent per annum if a tax return is overdue but it was not predicted that the tax authority would issue a disposition. Similarly, the rate of the additional tax on withholding income tax is reduced to 5 per cent per annum if the taxpayer pays the unpaid withholding tax amount without such a prediction.

#### **Rights of taxpayers**

#### **21 What rules are in place to protect taxpayers?**

As mentioned in question 1, the Japanese Constitution requires that all taxes be imposed by acts of the Diet. The 2011 amendment to the National Tax General Rule Act requires the tax authority to give the taxpayer advance notification of the time, place, and purpose of the audit, relevant taxes, relevant years, books and materials to be investigated, and other items specified by the relevant cabinet order, such as the names of the officers.

#### **22 How can taxpayers obtain information from the tax authority? What information can taxpayers request?**

Taxpayers can obtain information from the tax authority under the Act on Access to Information Held by Administrative Organs (Act No. 42 of 1999). It sets out the right of taxpayers to access information held by the government by filing a claim to the head of the relevant administrative organisation, unless the requested information falls under any of the exempted categories specified by the Act, such as information that, if disclosed, will endanger the government's accurate understanding of the facts pertaining to tax collection.

#### **23 Is the tax authority subject to non-judicial oversight?**

Tax authorities are supervised by their superior agencies. For example, a tax office is supervised by the regional taxation bureau that has jurisdiction over the relevant region. However, there is no procedure for a taxpayer to request oversight by a superior agency. Dispositions of tax authorities can

### Update and trends

Under the Act on the Use of Numbers to Identify a Specific Individual in the Administrative Procedure (Act No. 27 of 2013) and three related acts, the Social Security and Tax Number System (the Japanese government calls it 'My Number System') came into effect on 1 January 2016. One of the purposes of the system is to accurately and promptly track information on taxpayers' income and thereby achieve fairness in social security and taxation. In advance of the enforcement of the system, the government started to assign an identification number to each person from 5 October 2015.

Following the system becoming effective on 1 January 2016, private business operators are required to specify the identification numbers of employees and other relevant persons on various documents relating to taxes and social security. The documents where the identification numbers are required include payment certificates of employment income and dividend income, certificates of withholding income tax, returns for deduction for dependants and notification documents pertinent to social insurance and employees' pension insurance.

be subject to administrative appeal if requested by taxpayers, as summarised in question 9.

### Court actions

#### 24 Which courts have jurisdiction to hear tax disputes?

There are no specialised courts for tax-related matters in Japan. Cases relating to tax matters are decided by ordinary courts. The rules under the Administrative Case Litigation Act (Act No. 139 of 1962) stipulate that more than one court can be specified as the forum of jurisdiction in many cases, and they are designed to include the Tokyo District Court as a forum in all cases in which the national government is the defendant. Therefore, taxpayers can select the Tokyo District Court as the first instance forum for all cases involving national taxes.

#### 25 How can tax disputes be brought before the courts?

The grounds to bring a dispute before the courts vary depending on the type of the claim that the taxpayer or plaintiff intends to bring. The most common is a request to cancel the disposition imposed on the taxpayer, as follows.

The grounds to bring such a claim are the illegality of the disposition (see question 36 for details on burden of proof).

Prior to filing a claim with the court to cancel the disposition, the taxpayer is required to have undergone the administrative procedures, which are requesting a reinvestigation on administrative review. In particular, a taxpayer may file a lawsuit only if: (i) it files a complaint with the court within six months from the date of notice of the National Tax Tribunal's dismissal of the request for administrative review; or (ii) the agency with which the taxpayer has filed a request for reinvestigation or the Tribunal fails to give a decision within three months of the taxpayer filing a request for administrative review (see question 9 regarding the necessary administrative procedures and the 2014 amendment to the National Tax General Rule Act).

In general, a person with a legal interest in the cancellation of the disposition has standing to bring the claim. In most cases, the taxpayer, including a successor of the taxpayer, to whom the disposition was issued, has standing.

There is no minimum threshold amount to bring a claim to the courts.

A disposition will be cancelled if the taxpayer or plaintiff's request for cancellation is upheld in a final and binding court decision. In such a case, the government or defendant will usually refund any tax that the taxpayer has paid based on the cancelled disposition after the decision of the court becomes final. However, if the government does not do so voluntarily, the taxpayer has to file a separate claim for a refund.

#### 26 Can tax claims affecting multiple tax returns or taxpayers be brought together?

Taxpayers can bring to court tax claims affecting multiple tax returns or taxpayers. However, this is subject to the requirement of relevance, which is detailed in statute.

#### 27 Must the taxpayer pay the amounts in dispute into court before bringing a claim?

A disposition is valid until it is cancelled by an authority, including a court. This means that the taxpayer must pay the amount imposed by the disposition even while it is being disputed in court. If the taxpayer does not pay the imposed amount, the tax authority may collect the amount through the measures described in question 10.

#### 28 To what extent can the costs of a dispute be recovered?

The court usually awards to the losing party the costs that arose from the administrative matters of the case, including the court fees to file the claim. Administrative costs can therefore be recovered if the taxpayer or plaintiff is successful. Not all actual costs borne by the taxpayer are recoverable, which means a successful taxpayer cannot recover from the government or defendant any attorneys' fees.

#### 29 Are there any restrictions on or rules relating to third-party funding or insurance for the costs of a tax dispute, including bringing a tax claim to court?

There is no restriction on, or rule relating to, third-party funding or insurance for the costs of a tax dispute.

#### 30 Who is the decision maker in the court? Is a jury trial available to hear tax disputes?

Tax litigation is heard and decided by a panel of judges in ordinary courts. With regard to criminal cases, while there is a judicial system known as *Saiban-in Seido*, under which citizens and judges form a panel that decides a case, this system is not applicable to tax litigation.

#### 31 What are the usual time frames for tax trials?

The Supreme Court published that, for administrative cases (including tax cases), the average period in 2014 for: (i) a first-instance decision was 14.7 months; (ii) an appeal court decision was 5.9 months; and (iii) a Supreme Court decision was 4.8 or 5.4 months (depending on the form of appeal). The time frame for tax trials varies from case to case depending on various factors. However, it tends to take longer if the issues in the case are complicated and the disputed amount is large. For example, a recent case that involved corporate restructuring, in which approximately ¥30 billion was disputed, took around three years between filing and the Tokyo District Court issuing first-instance decision, and around eight months between the first-instance decision and the appeal court decision of the Tokyo High Court. In that case, the Supreme Court delivered its decision 14 months after the appeal against the decision of the Tokyo High Court.

#### 32 Describe the discovery process for a tax trial.

The discovery system is not available in Japan. However, the Civil Procedure Code imposes broad obligations on possessors of documents to submit documents to the court if the court issues a document production order upon a request from another party. Under this obligation, a party (in tax litigation, the taxpayer or plaintiff and the government or defendant) that possesses the relevant documents must submit the documents to the court unless the documents fall under one of the exceptions under the Code. Exceptions include documents concerning a secret related to a public officer's duties, which, if submitted, is likely to harm public interest or substantially hinder the person's performance of public duties.

#### 33 What testimony is permitted in a tax trial?

Tax litigation generally adopts a cross-examination system. Under the system, a person examined before the court is asked questions by the party who has requested the examination, the other party and the judge (in this order). Any person, including the taxpayer or experts, can be examined if the court finds, upon application by either the plaintiff or the defendant, that the person's statement is relevant to the case. There are only clerical differences between examination of a party to the case and examination of a third party.

Under Article 138 of the Civil Procedure Regulation (Supreme Court Regulation No. 5 of 1996), a party filing evidence prepared in a language other than Japanese must attach translation thereof to the evidence.

**34 Who can represent taxpayers in a tax trial? Who represents the tax authority?**

As in all litigation on civil and administrative matters, taxpayers can represent themselves in tax litigation. Taxpayers can also be represented by qualified attorneys. A certified public tax accountant can attend hearings and make allegations to the court as an assistant of the taxpayer and the attorney. The tax authority is represented by government officers.

**35 Are tax trial proceedings public?**

Court proceedings in tax cases are generally held at hearings, which are open to the public. However, the court can choose to adopt non-public procedures such as preparatory proceedings. Although case records are generally available to the public, only parties to a case and third parties with legal interests in the case can obtain copies of the records. Further, the court can restrict the disclosure of the records if the records contain a party's material private life secret or a trade secret.

**36 Who has the burden of proof in a tax trial?**

In general, the government or defendant has the burden of proof of legality of the disposition at issue. In theory, this requires the government to prove the existence of the facts that form the basis of the tax and the tax amount. In practice, however, a taxpayer or plaintiff cannot be successful in cancelling a disposition unless it presents detailed facts and evidence to support the allegation that the disposition is illegal.

Further, there are exceptions to the general rule that the government or defendant bears the burden of proof. For example, the defence of reasonable grounds (mentioned in question 13), which relieves a taxpayer or plaintiff from the additional penalty tax, is available only to taxpayers who

successfully prove the existence of such reasonable grounds. Further, in certain statutorily provided situations, the government is allowed to estimate the taxpayer's income based on general information of the taxpayer, such as changes in the amount of the taxpayer's assets or debts.

**37 Describe the case management process for a tax trial.**

The process varies on a case-by-case basis, but the usual process is as follows:

- the taxpayer or plaintiff files a complaint to the court with jurisdiction;
- the first hearing date is scheduled to be held one and a half months or more from the filing date;
- several hearings are held before examination and issuance of the court's decision;
- testimony is heard from testifiers or the taxpayer, or both (if necessary);
- during the intervals between the hearings the parties submit briefs and evidence to the court;
- the court decides on the case; and
- the losing party may file an appeal.

**38 Can a court decision be appealed? If so, on what basis?**

As in other cases, a three-tiered judicial system is applicable to tax cases. Under the system, if a taxpayer is dissatisfied with the judgment of the first instance court, the taxpayer may appeal to one of the High Courts of Japan within two weeks from the date the judgment is delivered to the losing party. If the decision of the High Court is unsatisfactory, subject to certain requirements, an appeal may be made to the Supreme Court of Japan within two weeks from the delivery of the judgment.

# ANDERSON MŌRI & TOMOTSUNE

Eiichiro Nakatani  
Kai Isoyama

eiichiro.nakatani@amt-law.com  
kai.iso-yama@amt-law.com

Akasaka K-Tower, 2-7  
Motoakasaka 1-chome  
Minato-ku, Tokyo 107-0051  
Japan

Tel: +81 3 6888 1039 / 5871  
Fax: +81 3 6888 3039 / 6871  
www.amt-law.com/en/

# Luxembourg

Christine Ntumba

Dentons Luxembourg

---

## Overview

### 1 What is the relevant legislation relating to tax administration and controversies? Other than legislation, are there other binding rules for taxpayers and the tax authority?

The relevant legislation is the Luxembourg Tax Law (LTL), which is compiled in seven volumes and provides common rules for determining the taxable basis and the applicable procedural regulations.

The rules governing tax compliance procedures, tax recovery and tax controversies are not compiled in one single volume. Tax compliance relating to direct tax matters is governed by provisions inspired by Germany, whereas indirect taxes, namely registration duties as well as value added tax (VAT) have their own tax proceedings.

The LTL is enacted by Luxembourg's parliament and is enforced by the LTA and Luxembourg courts.

The LTA must apply the LTL in accordance with the provisions of other binding rules deriving from:

- the Constitution;
- double tax treaties signed by Luxembourg that are currently in force;
- EU directives that have been duly implemented into Luxembourg legislation;
- the European Convention on Human Rights; and
- the Treaty on the Functioning of the European Union.

Additionally, the LTA generally issues circulars and administrative notes that ensure a uniform interpretation of the LTL. Such circulars and guidelines are published on the LTA website and also have a legally binding effect for the LTA and taxpayers.

Moreover, taxpayers may apply for advance tax clearances on the application of certain provisions of the tax law or on the application of transfer pricing principles to their personal situation. Such rulings and advance pricing agreements (APA), which must be addressed in writing to the competent tax service, are binding for the LTA if approved.

Finally, the LTA and tax courts generally and extensively refer to German case law.

### 2 What is the relevant tax authority and how is it organised?

The LTA is headed by the Ministry of Finance.

The administration in charge of direct tax matters is organised on a four-tier structure:

#### I Direction

- director;
- division of legislation;
- division of economic matters;
- division of litigation;
- division of international relationships;
- division of exchange of information;
- inspectorate responsible for taxation services;
- inspectorate responsible for tax collection services;
- division of IT;
- division of valuations of immovable properties;
- division of general matters;
- division of legal matters;
- division responsible for withholding tax on interest and exchange of information;
- division responsible for withholding tax on remunerations; and

- division responsible for tax audits.

#### II Taxation services

- service responsible for the calculation of income tax on individuals;
- service responsible for the calculation of income tax on Corporations;
- service responsible for the calculation of withholding tax on remunerations;
- service responsible for the valuation of immovable properties; and
- service responsible for the calculation of withholding tax on interest.

#### III Tax audit service

#### IV Tax collection service

The administration in charge of indirect taxes is organised as follows:

#### I Direction

- director;
- division 1 – general matters;
- division 2 – VAT and taxes on insurance;
- division 3 – other taxes on legal movement of goods; and
- division 4 – domains.

#### II Taxation services

- service responsible for VAT and taxes on insurance;
- service responsible for registration duties and collection of taxes;
- service responsible for mortgages;
- inspectorate; and
- anti-fraud service.

---

## Enforcement

### 3 How does the tax authority verify compliance with the tax laws and ensure timely payment of taxes? What is the typical procedure for the tax authority to review a tax return and how long does the review last?

The LTA has the power to perform tax audits on the basis of documents and on-the-spot audits for all taxpayers.

In practice, particularly in the case of audits of corporate income tax returns, the LTA will generally issue provisional tax assessments that are solely based on the filed tax returns, without carrying out any prior review of the latter. At a later stage and within the legal statute of limitations, the LTA may review the provisional tax assessments further to the tax return's verification.

Tax returns related to personal income tax or to indirect tax are directly subject to a final tax assessment after the competent tax inspector has verified the tax return. Such tax assessment must be issued within the legal statute of limitations.

The tax inspector must follow a certain order when conducting his or her investigations. First, he or she must request additional information on the facts and numbers reported in the tax returns. Second, if the requested information is deemed insufficient, he or she may require copies of the related legal documents. Third, he or she may require from the taxpayer an explanation as to why a certain tax treatment is applied in the tax return.

The tax inspector will only be allowed to require additional information from third parties if the information obtained from the above steps is deemed insufficient and the taxpayer does not provide useful explanations. Upon request from the tax inspector, the taxpayer (or the third party)



is legally obliged to provide all clarifications and documents required as long as such information is relevant to review the tax return.

Exceptionally, if the off-site check is inconclusive, the inspector may conduct an on-site tax audit, which generally takes place at the residence or at the professional address of the taxpayer. Based on the 2015 annual report of the LTA, 44 on-site tax return reviews were performed leading to an additional collection of taxes amounting to more than €2 million.

The duration of the review varies and can take up to several months depending on several elements (eg, the level of detail provided in the tax return, the size of the business, the cooperation of the taxpayer in providing the required information, etc).

#### **4 Are different types of taxpayers subjected to different reporting requirements? Can they be subjected to different types of review?**

Taxpayers are either business entities or individuals. The rules that apply to the review of their tax returns are generally similar; however, some differences exist and are mainly related to the determination of their taxable basis and the applicable tax rate, as described below.

Contrary to the tax rate applicable to businesses, which is fixed and the same for all types of business taxpayers, the tax rates applicable to individuals are progressive and take into account the taxpayer's personal situation such as marital status, the minimum essential income, etc.

The official deadlines for filing personal income tax returns, corporate income tax returns and VAT returns are set on different dates.

Personal income tax returns can be electronically filed. VAT returns must be electronically filed. Corporate income tax returns are currently filed either electronically or by post. Electronic filing should become mandatory in 2017. Other tax returns are currently filed by post.

The taxable basis of business taxpayers of a certain size, who are required to prepare annual financial statements, is based on their accounting results after adjustments for tax purposes. Duly approved financial statements are part of the tax return and must be enclosed therein. Individuals are taxed on their income after deduction of certain expenses specifically determined by the LTL.

In practice, tax audits on individuals are generally shorter and less complicated unless the individual carries out an undisclosed activity or is suspected of tax fraud.

#### **5 What types of information may the tax authority request from taxpayers? Can the tax authority interview the taxpayer or the taxpayer's employees? If so, are there any restrictions?**

The LTA is entitled to request any information that is deemed necessary to review the tax return.

The information requested includes copies of contracts, legal documents supporting entries included in financial statements, copies of the transfer pricing report supporting a remuneration earned by the taxpayer, general ledger, invoices, bank statements, receipts, copies of tax returns filed abroad by a foreign subsidiary or by a foreign branch held by the taxpayer, copies of residence certificates confirming the fiscal residency of a related party, etc.

Tax returns are mainly reviewed by referring to the required documentation; however, the LTA may interview a taxpayer or the representative of a business taxpayer. Both are allowed to be assisted by their counsel.

If the LTA does not receive adequate answers from the taxpayer, they may request information from third parties at the taxpayer's cost.

#### **6 What actions may the agencies take if the taxpayer does not provide the required information?**

The LTA may force the taxpayer to cooperate by sending document requests, summons or imposing a financial penalty. They may also issue an estimated tax assessment as a last resort.

#### **7 How may taxpayers protect commercial information, including business secrets or professional advice, from disclosure?**

As taxpayers are obliged to cooperate with the LTA and to provide them with all relevant information related to their tax affairs (including information related to third parties), the LTA are legally subject to professional secrecy (ie, they are not allowed to disclose any information received, including commercial and business secrets). Breach of professional secrecy by a tax inspector may entail criminal charges against the LTA.

However, the LTA may be obliged to inform other public authorities or criminal prosecutors (eg, within the context of a criminal proceeding).

#### **8 What limitation period applies to the review of tax returns?**

The statute of limitations expires on 31 December of the fifth year following the fiscal year concerned (eg, the prescription period for taxes of the 2010 fiscal year ends on 31 December 2015).

The limitation does not apply when it comes to confirming the amount of tax losses carried forward (ie, the tax inspector can review these tax losses at any time, when they are needed to effectively offset taxable income).

In some cases, the statute of limitations can either be interrupted (eg, upon renunciation by the taxpayer) or be extended from five years to 10 years (eg, if the tax returns are not filed or are incomplete).

#### **9 Describe any alternative dispute resolution (ADR) or settlement options available.**

In order to avoid having the LTA challenge the filing of a tax return, taxpayers may either file a ruling with the LTA to agree upfront on the tax treatment applicable to their specific case or file an advance pricing agreement with the LTA to agree on the applicable arm's-length margin for transfer pricing purposes.

Upon agreement, the ruling or the advance pricing agreement is not transferable ipso facto to other cases and is binding for the LTA for five fiscal years (unless one of the key characteristics of the transaction is modified in the meantime). However, the decision of the LTA will no longer be enforceable if the legal provision or the administrative practice on which it was based is modified.

An appeal mechanism is also available within the tax administration (see question 25).

#### **10 How may the tax authority collect overdue tax payments following a tax review?**

Following a tax review, the tax inspector will issue a tax assessment confirming the amount of tax due. This amount is payable within one month from the date of notification to the taxpayer.

Under certain conditions, the taxpayer may apply to pay in instalments or to postpone payment.

If the taxpayer does not pay within one month and has not concluded any payment arrangement with the LTA, the latter will initially issue an order to pay within five working days followed by a second order sent via a bailiff if the first order does not produce the expected results. In the absence of payment following both orders, the LTA will issue a summons to pay within a certain period by which they will inform the taxpayer of their intention to pursue the payment of the outstanding tax (and related interest) by any legal means. Such legal means include seizure and realisation of a taxpayer's moveable assets, receivables, immovable assets and seizure of amounts owed to the taxpayer by third parties (eg, an employer, a notary or banks).

For corporate taxpayers, the LTA may also request the court to declare a company bankrupt for default in payment. In this case, the bankruptcy trustee may realise the assets of the taxpayer in order to satisfy the payment obligations.

#### **11 In what circumstances may the tax authority impose penalties?**

The LTA may impose penalties if tax returns are not filed or not filed on time and if the tax is not paid on time.

#### **12 How are penalties calculated?**

The LTA may charge:

- additional tax (eg, 10 per cent of tax due);
- a fixed fine (that may range from €1,250 to €25,000); or
- a variable fine (ie, the fine's amount increases with respect to the period the tax return remains unfiled).

If the taxpayer refuses to file a tax return, the LTA may issue a tax assessment based on their estimate of the tax due.

#### **13 What defences are available if penalties are imposed?**

If the delay in filing a tax return is due to force majeure, the taxpayer can send a letter to the LTA explaining the objective reasons that prevented its

timely filing. If the arguments of the taxpayer are accepted, the fine will be cancelled.

Moreover, where penalties are calculated on the amount of assessed tax, any reduction of such tax will result in cancellation of the excessive penalty.

#### 14 In what circumstances may the tax authority collect interest and how is it calculated?

The LTA may charge interest for late payment of tax due. Interest for late payment is assessed at 0.6 per cent per month starting after the expiration of the month in which the relevant tax should have been paid.

In case of payment in instalments, interest for late payment is assessed at 0.1 to 0.2 per cent per month.

#### 15 Are there criminal consequences that can arise as a result of a tax review? Are these different for different types of taxpayers?

If, as a result of a tax review, the LTA discovers that substantial amounts were not declared on purpose by way of intentional false declarations or accounting misrepresentation (eg, if the accounts are falsified resulting in the omission of substantial taxable amounts or in deduction of substantial expenses, or if the supporting legal documents are missing or have been falsified), they may suspect and file a criminal case for tax fraud (or an attempt to commit tax fraud). The penalty related to the latter could be imprisonment or a monetary fine up to 10 times the amount of tax due. These consequences apply for all types of taxpayers (business entities, individuals and directors).

#### 16 What is the recent enforcement record of the authorities?

Based on the 2015 annual report of the LTA, the percentage of claims increased by 18 per cent in 2015, whereas the percentage of disputes solved through the administrative procedures decreased.

#### Overview of the past six years

Year	Claims filed with the LTA	Claims solved upon decision of the LTA	Claims filed with the Administrative Tribunal	
			Without decision from the LTA	After decision of the LTA
2010	778	596	13	106
2011	875	429	21	51
2012	957	556	15	66
2013	1083	665	20	84
2014	1124	783	19	83
2015	1316	742	26	95

#### Third parties and other authorities

#### 17 Are third parties involved in the authority's review of tax returns and what rights do taxpayers have with respect to their involvement?

The LTA is entitled to request information on a taxpayer from third parties, if the justifications provided by the taxpayer are insufficient to review the tax return. In principle, only documents and information that are relevant to review the tax return can be requested from third parties by the LTA. Additionally, the right of the LTA to request information may be limited by professional confidentiality applicable to certain third parties (eg, employees of the central service of statistics or STATEC).

As for banks, Luxembourg has entered a world of total fiscal transparency. Since 1 January 2015 banks have started to automatically communicate interest income received by non-residents of EU member states to the related tax authorities. As stated under OECD agreements, the main scope of the application of automatic exchange will be to extend it to other income. The exchange of information will include dividends and capital gains earned directly or indirectly in 2016, as well as bank account balances. In addition, the exchange will no longer be limited to EU countries but will apply internationally.

#### 18 Does the tax authority cooperate with other authorities within the country? Does the tax authority cooperate with the tax authorities in other countries?

Tax authorities can exchange information with any other local authority. Some information is automatically disclosed to the LTA (eg, income from employment as declared for social security).

Since 1 January 2015 Luxembourg has automatically exchanged information with EU member state tax authorities based on the Law of 21 June 2005 (implementing EU Directive No. 2003/48/CE) as regards interest paid to individual residents in another EU country and based on the Law of 23 December 2005.

Luxembourg has transposed article 8 of EU Directive No. 2011/16/EU of 15 February 2011 on administrative cooperation in tax matters in its domestic law.

Since 29 March 2013, Luxembourg law has introduced mandatory and automatic exchange of information on the following types of income: wages, pensions and directors' fees.

Luxembourg has also entered into a Foreign Account Tax Compliance Act (FATCA) agreement with the US according to which Luxembourg's financial institutions are required to provide the LTA with information regarding the accounts held by US citizens and US tax residents. The information will be forwarded to the US tax authorities (Law of 24 July 2015).

Based on the law on automatic exchange of information (published on 24 December 2015) and entered into force on 1 January 2016 that implements EU Council Directive No. 2014/107/EU amending Directive No. 2011/16/EU and introducing the OECD's common reporting standard (CRS), Luxembourg reporting financial institutions must exchange information not only on US persons (for FATCA purposes), but also on certain individuals and certain entities resident in EU member states or in certain third countries.

The recent law dated 23 July 2016 (amending and supplementing the Law of 29 March 2013) extends measures related to mandatory automatic exchange of information to explicitly include cross-border rulings and APA issued by the LTA. Therefore, cross-border rulings and APA issued, amended or renewed after 31 December 2016 (as well as existing cross-border rulings and APA issued, amended or renewed in the period commencing five years before 1 January 2017) will automatically be exchanged with other EU member state tax authorities and with the European Commission.

Most double tax treaties are also a legal source of exchange of information between countries, based on the provisions of administrative assistance included therein.

Another source of exchange of information on VAT is EU regulation No. 218/92/EEC of 27 January 1992 modified by regulation No. 1798/2003/EC of the EU Council of 7 October 2003.

#### Special procedures

#### 19 Do any special procedures apply in cases of financial or other hardship, for example when a taxpayer is bankrupt?

In case of financial or other hardship, the LTA may authorise payment in instalments on the taxpayer's request. Interest for late payment may in this case be adapted to the financial situation of the taxpayer.

The LTA may also postpone in full or in part the payment of tax if its immediate payment will irremediably compromise the financial situation of the taxpayer and provided that the financial difficulties are not due to the taxpayer's negligence. In this case, the LTA will generally require sufficient guarantees to protect their interest.

The LTA or the judge may also fully or partially waive the tax debt and related penalties if the collection of such amounts is unreasonably inequitable for the taxpayer. Based on the LTA's 2015 annual report, 344 requests were filed in this respect in that year; of which 233 have received a decision from the head of the tax administration.

#### 20 Are there any voluntary disclosure or amnesty programmes?

As from 1 January 2016 and for a limited period of two years, Luxembourg introduced a voluntary disclosure programme for individuals and corporate entities allowing them to declare any income that was not declared since 2006, provided that such income falls within the following categories of offences: voluntary or involuntary tax fraud or tax scam (the programme does not apply if the income falls within the scope of anti-money laundering or anti-terrorism regulations, in this case the offence will be reported to the Public Prosecutor for a sentence). The sanctions in case of disclosure

are limited to the payment of taxes due, with an additional 10 per cent increase if the corrective tax returns are filed in 2016 (whereas if they are filed in 2017 an additional 20 per cent increase shall apply).

## Rights of taxpayers

### 21 What rules are in place to protect taxpayers?

The LTL provides for certain rules in order to protect taxpayers.

For instance, the LTA is obliged to inform taxpayers that they intend to deviate from tax returns. Taxpayers must have the opportunity to defend the position taken in their tax returns before the LTA issues its tax bulletin.

Upon communication of the tax bulletin, the taxpayer can file a claim against it within three months as from the date of notification.

The LTA must apply the principles of objectivity and proportionality when reviewing the tax returns.

### 22 How can taxpayers obtain information from the tax authority? What information can taxpayers request?

The LTL provides that the taxpayer is entitled to receive all information and documents that have led to the determination of their taxable basis, except for documents that may affect the tax situation of a third party, which must remain protected by fiscal secrecy. The information can either be automatically sent to the taxpayer or at the taxpayer's request.

### 23 Is the tax authority subject to non-judicial oversight?

The Law of 22 August 2003 organises the tasks of a mediator who is placed under the supervision of parliament. Any taxpayer (ie, an individual or a company via its legal representatives) who believes that, on the occasion of a personal conflict with the LTA, the latter did not act according to their mission as a public institution, or contravened conventions, laws or regulations, may bring the matter to the attention of the mediator either by way of a written or oral statement.

The mediator analyses the claims formulated by the taxpayer, investigates and proposes recommendations to the tax service concerned if the mediator concludes that the complaint is admissible.

Upon execution of the recommendations, the LTA must inform the mediator. If the LTA does not apply the recommendations, the mediator is entitled to publish the recommendations.

If a complaint is rejected, the mediator must inform the taxpayer by post and justify his or her decision.

Based on the LTA's 2015 annual report, 28 claims were filed via the mediator in that year.

## Court actions

### 24 Which courts have jurisdiction to hear tax disputes?

In principle, the courts that are competent for disputes related to direct tax (eg, personal tax, corporate income tax, municipal business tax, net wealth tax) are administrative courts. There is no specific court structure for tax disputes.

Claims are initially heard by the Administrative Tribunal, which is therefore the tribunal of first instance.

An appeal against the decision of the Administrative Tribunal will be heard by the Administrative Court, which is the court of appeal. Such appeal may be based on an error in the application of the law or of a procedure.

Disputes related to indirect tax (eg, VAT, subscription tax) are heard by civil courts.

### 25 How can tax disputes be brought before the courts?

In general, as regards direct taxes, there are two stages for filing a tax appeal. The taxpayer is obliged to file a formal claim with the LTA prior to filing a claim with the judge (ie, the claim to the court will not be valid in the absence of a prerequisite claim to the LTA).

The formal claim to the LTA must be filed within three months of the notification of the tax assessment; it must be sent to the head of the tax service that has issued the disputed tax bulletin. The inspector-in-chief will automatically review the overall tax position of the taxpayer (and not only the disputed points) and is expected to provide his or her decision within three months.

Based on the LTA's 2015 annual report, 1,316 claims were filed in that year, of which 742 have received a decision from the LTA's head.

## Update and trends

On 26 July 2016, the government presented to parliament a draft bill of Law No. 7020, which provides for several provisions aiming at strengthening measures against tax fraud and money laundering. The bill distinguishes three types of tax fraud (simple tax fraud, aggravated tax fraud, and tax swindle) and proposes to introduce tax swindle and the aggravated tax fraud under the list of primary offences in the criminal code.

According to the bill, a tax fraud is considered as aggravated if the tax unpaid exceeds a certain amount (or a certain percentage) and is punishable by a sentence of imprisonment of up to three years combined with a cash penalty (a minimum of €25,000 and a maximum of six times the amount of unpaid taxes).

Tax swindle is an offence that requires, in addition to the aggravated tax fraud elements, a systematic use of fraudulent schemes designed to misrepresent the facts to the LTA and must relate to very substantial amounts. Tax swindle is punishable by a maximum of five-years imprisonment and a fine (a minimum of €25,000 and a maximum of 10 times the amount of unpaid taxes).

As regards judicial assistance in international criminal matters, the bill provides that the Luxembourg State Attorney General can refuse to provide assistance to the requesting foreign authorities in case the request for assistance is exclusively related to tax criminal offences by virtue of Luxembourg law. No appeal may be lodged against the decision of the Luxembourg State Attorney General in this respect.

If the bill is voted, these measures will apply to criminal tax offences committed as from 1 January 2017.

If the LTA's decision is not (completely) satisfactory, the taxpayer can bring the dispute to the Administrative Tribunal within three months as from the notification of the decision of the LTA.

Six months after the filing of a formal claim, and if the LTA did not reply, the taxpayer is allowed to bring the dispute to the Administrative Tribunal at any time after the expiration of the above six months. Based on the LTA's 2015 annual report, 121 claims were filed with the Administrative Tribunal in that year, of which 26 did not receive a LTA decision.

As mentioned above, an appeal against the judgment of the Administrative Tribunal can be lodged with the Administrative Court. Exceptionally, upon request, claims against administrative fines imposed by the LTA based on the laws on international exchange of information can be directly brought by the taxpayer to the Administrative Tribunal.

With respect to indirect taxes, filing a formal claim with the LTA is not a prerequisite (ie, the taxpayer is allowed to file a claim with the court and another claim with the LTA simultaneously, alternatively or consecutively).

In both cases the filing of a claim with the LTA does not preclude the payment of the contested tax.

### 26 Can tax claims affecting multiple tax returns or taxpayers be brought together?

Tax claims affecting multiple tax returns of the same taxpayer can be brought to the court either by the taxpayer or by the LTA.

Luxembourg law does not contain provisions related to class actions. However, joint actions are allowed if all the claimants have an interest pertaining to the same claim.

### 27 Must the taxpayer pay the amounts in dispute into court before bringing a claim?

If the taxpayer does not agree with the tax determined by the LTA, he or she must nevertheless pay the amounts due within the established deadline and then file a claim with the LTA. If the LTA's decision is unsatisfactory, he or she may file a complaint with the Administrative Tribunal. However, the trial does not suspend the taxpayer's obligation to pay the disputed tax. The LTA may continue to pursue payment of tax even if the trial is pending.

Under certain circumstances, the payment of tax may be suspended upon the taxpayer's request provided that, based on the arguments presented by the taxpayer, the judge deems that the taxpayer's chances of winning the case against the LTA are significantly high and that it is possible to prove that the immediate payment of tax will result in the taxpayer's unreasonable and irremediable financial distress.

If, at the closing of the trial, the decision of the judge is unfavourable to the taxpayer, the tax and interest for late payment will be retroactively due (ie, including for the period when the payment of tax was suspended).

**28 To what extent can the costs of a dispute be recovered?**

The costs of the legal procedure are generally borne by the party that has lost the case, (ie, the judge will oblige the taxpayer to pay the costs for legal proceedings if the decision was favourable to the LTA and vice versa). The judge may allocate a portion of fees to each party if his or her decision is only partly favourable to each of them.

In principle, each party must pay the cost for hiring a representative (eg, a lawyer).

**29 Are there any restrictions on or rules relating to third-party funding or insurance for the costs of a tax dispute, including bringing a tax claim to court?**

Third party litigation funding and insurance legal protection for the cost of a tax dispute are not prohibited.

**30 Who is the decision maker in the court? Is a jury trial available to hear tax disputes?**

In general, the decisions of the fiscal court are made by a panel of three judges. There are no jury trials to hear tax disputes.

**31 What are the usual time frames for tax trials?**

Tax trial decisions may take between six and 24 months to be delivered depending on the complexity of the case. An appeal may take up to 24 additional months approximately.

**32 Describe the discovery process for a tax trial.**

Tax trials are generally based on factual elements and arguments described by each party in the briefs. Evidence to support their respective opinions are also generally directly provided by either the taxpayer or the LTA to the judge.

Other means (eg, testimony by an expert) may be used at the discretion of the judge. The judge will generally pronounce his or her judgment on the basis of facts, arguments and evidence produced during the trial.

**33 What testimony is permitted in a tax trial?**

Any type of evidence is in principle acceptable including testimony by the taxpayer or by a court-appointed expert. The choice of the most appropriate means of evidence lies with the judge. In straightforward cases, only written evidence (eg, paperwork, accounts, invoices, contracts) is generally used. Documents used as evidence must be translated either in French, German or Luxembourgish.

**34 Who can represent taxpayers in a tax trial? Who represents the tax authority?**

In the proceedings before the tribunal of first instance, taxpayers are allowed to either represent themselves or to appoint a representative provided that the latter performs a regulated profession (an attorney, a certified accountant or a certified auditor).

In proceedings before the court of appeal, taxpayers must be represented by an attorney.

The LTA is represented by the government's representative.

**35 Are tax trial proceedings public?**

In general, tax trial proceedings are pleaded in public. The parties or their representatives are allowed to orally present their arguments. The representative of the government must further give his or her conclusions, which are publicly read before the judges' deliberation. Deliberations are not held in public and the documents pertaining to the case are not available to the public, although the final decision of the tribunal can be further read in a public hearing.

**36 Who has the burden of proof in a tax trial?**

The guiding principles governing the burden of proof in tax matters are not fundamentally different from those applicable in general; each party must prove the facts being presented.

Indeed, the general rule is that the LTA has the burden of proving facts that trigger or that increase the taxable basis, whereas the taxpayer has the burden of proving facts that reduce or that cancel tax liability. In other words, the burden of proof of taxable income belongs to the LTA, while that relating to deductible expenses is to be made by the taxpayer.

However, the situation is different in the field of criminal tax law where the burden of proof remains in all cases in the hands of the LTA.

It should be noted that, within the context of a review of a tax return and if the LTA is doubtful about the accuracy of the facts and figures declared by the taxpayer, they are entitled to require additional information and the law provides that the taxpayer must mandatorily justify any points that seem doubtful to the LTA.

It is up to the LTA to prove that the procedure applied to the taxpayer has respected all the legal requirements (eg, the LTA must prove that they have diligently requested the tax return before issuing an ex officio tax assessment).

**37 Describe the case management process for a tax trial.**

The taxpayer must file a duly-justified written complaint with the Administrative Tribunal within three months following the notification of the decision of the LTA. The tribunal will immediately send a copy of the complaint to the LTA, which is thus deemed to be duly notified.

Upon receipt of a copy of the claim, the LTA will send a copy of the taxpayer's file to the Administrative Tribunal in order for the taxpayer to have access to all information contained in his or her tax file.

The representative of the LTA must lodge its defence in writing within three months.

After the tribunal has received the written defence of the defendant, a copy will be sent to the taxpayer, who may reply in writing to the defence within one month.

A copy of the plaintiff's brief will be sent to the representative of the defendant, who in turn has an opportunity to reply within one month.

Briefs that are produced after the expiry of the time limit required by the tribunal are generally not analysed by the judge.

In some cases, the judge can exceptionally extend the time limits for the above exchanges of briefs upon duly justified written request.



**Christine Ntumba**

**christine.ntumba@dentons.com**

Atrium Vitrum Building  
33 rue du Puits Romain  
Bertrange  
8070  
Luxembourg

Tel: +352 46 83 83  
Fax: +352 46 84 84  
www.dentons.com

---

**38 Can a court decision be appealed? If so, on what basis?**

Any judgment of the Administrative Tribunal (in its capacity of tribunal of first instance) may be appealed to the Administrative Court. The appeal can be based either on the facts or on errors of law and of procedure.

The appeal must be filed within 40 days following the communication of the decision of the tribunal of first instance. Such delay cannot be extended. The taxpayer must be represented by a lawyer when appealing against the judgment of the tribunal of first instance. The LTA must be represented either by a representative of the government or by a lawyer. The decision-making powers of the Administrative Court are similar to those of the Administrative Tribunal.

The decision of the Administrative Court is final (ie, it may not be challenged before a court of cassation).

# Mexico

Christian Solís Martínez and Jorge Arturo Rodríguez Ruiz

SMPS Legal

---

## Overview

### 1 What is the relevant legislation relating to tax administration and controversies? Other than legislation, are there other binding rules for taxpayers and the tax authority?

The regulatory framework of the relationship between taxpayers and the federal tax authorities is mainly provided by the Federal Tax Code (each state has its own set of rules).

The Tax Administration Service (TAS) certain cases it can delegate part of its authority to federal entities. The scope of the authority that can be exercised by the TAS is established by the Tax Administration Service Law and its regulations.

On the other hand, regarding tax controversies, the Federal Administrative Litigation Law provides the legal framework whereby the taxpayers can challenge illegal resolutions issued by the tax authorities before the tax court.

Besides the federal laws, the executive branch is entitled to issue a set of regulations for each federal tax law, as well as an additional body of rules titled Miscellaneous Tax Resolutions, which is frequently updated during the year.

Finally, Mexico has an extensive network of tax treaties to avoid double taxation and to exchange information with other countries.

### 2 What is the relevant tax authority and how is it organised?

In general, the TAS is the Mexican authority in charge of enforcing federal tax laws (see question 1).

The TAS is headed by the TAS chief. Below that, the TAS is divided in to the following general departments:

- collection;
- tax audit;
- customs;
- audit procedures involving foreign trade operations;
- relevant taxpayers (that has specific collection, audit and legal sub-departments);
- operations involving oil and gas;
- taxpayers' services;
- legal;
- planning;
- resources and services;
- examination; and
- communications and information technology.

Each department has several sub-departments. Besides the general departments, the TAS has several decentralised local departments distributed in the whole national territory.

---

## Enforcement

### 3 How does the tax authority verify compliance with the tax laws and ensure timely payment of taxes? What is the typical procedure for the tax authority to review a tax return and how long does the review last?

The Federal Tax Code establishes different types of procedures to determine if a taxpayer is complying with the tax laws. The most commonly used are:

- automatic system reports generated as a result of differences between the tax returns and the information held by the federal tax authorities;
- audit procedures performed in the taxpayer's domicile;
- audit procedures performed in the tax authorities' office – in this case, the taxpayer receives an information request from the tax authorities and has a deadline to file the corresponding information;
- audit of the taxpayer's financial statements issued by a certified public accountant – for several years, having financial statements certified was an obligation for certain types of taxpayers and had the benefit that they were presumed to be true. Therefore, a special audit procedure that initiated with the public accountant that signed the financial statements was created; and
- electronic audits – for several years now the tax authorities have been improving their electronic systems and have been pressuring taxpayers to migrate to an electronic invoicing and accounting system.

As part of those efforts, taxpayers are required to upload to the tax authorities' portal part of their accounting information on a monthly basis. Such information is processed and, in certain cases, might result in preliminary tax assessments that will be notified to taxpayers through their electronic mailing systems. The tax authorities will be focusing much of their efforts to this new type of audit in the foreseeable future.

However, audit procedures initiated in the taxpayer's domicile or in the tax authorities' office are by far the most common procedures used to verify if the taxpayers are complying with tax laws. Albeit, in the following years, we expect to see a significant increase in electronic audits.

Typically, a tax audit starts with the notification of an official letter containing the list of taxes that are to be reviewed and over which period. Usually, tax authorities have a 12-month period to review the documentation provided by the taxpayers and issue an official letter including the observations that could result in a tax assessment (certain exemptions apply). After being notified of such official letter, taxpayers have a deadline of 20-working days to provide additional information.

If the documentation provided by the taxpayer is considered insufficient by the tax authorities, they have six additional months to issue the corresponding tax assessment.

A tax audit usually lasts one year (not taking into account the six-month term the tax authorities have to issue the corresponding tax assessment). However, the following exceptions exist:

- audits initiated to financial institutions or business groups that consolidate for tax purposes can last 18 months;
- audits in which the tax authority requests information to foreign tax authorities can last two years; and
- audits related to transfer pricing issues or verification of the origin of goods can last two years.

---

### 4 Are different types of taxpayers subjected to different reporting requirements? Can they be subjected to different types of review?

Yes, the Mexican tax laws provide several differentiated reporting obligations depending on the type of taxpayers (as a matter of fact, such reporting obligations frequently transcend to other subjects dissociated from the tax relationship).

For instance, trustees have to submit a yearly report regarding income generated in the trusts in which they participate; Mexican companies with foreign investors have to submit a report during the three first months

of the fiscal year; public notaries have to submit a report regarding the income tax and value added tax paid in the operations in which they participate; entities authorised to receive deductible donations have to file a yearly report; and Mexican residents that generate income in low taxation regimes are required to file a yearly report (failure to file this report could even result in criminal charges).

Several reporting obligations are concentrated in the financial institutions (for instance, all the financial institutions have to submit a yearly report identifying taxpayers' cash deposits that exceed the quantity of 15,000 pesos).

Nonetheless, the main reporting obligations for taxpayers are condensed in the Multiple Information Report. This report, submitted by taxpayers on 15 February every fiscal year, contains the following appendixes, which are filled by each taxpayer depending on his or her circumstances:

- Appendix 1. Annual report of wages and salaries.
- Appendix 2. Annual report of payments and withholding on income tax, value added tax and special tax on production and services.
- Appendix 3. Annual report on taxpayers granting donations.
- Appendix 4. Annual report on payments and withholdings to foreign entities.
- Appendix 5. Annual report on revenues received from preferential tax regimes.
- Appendix 6. Annual report on operations carried out by holding companies.
- Appendix 7. Annual report on small income taxpayers.
- Appendix 9. Annual report on transactions with foreign related parties.
- Appendix 10. Annual report on transactions performed through trusts.

#### **5 What types of information may the tax authority request from taxpayers? Can the tax authority interview the taxpayer or the taxpayer's employees? If so, are there any restrictions?**

In Mexico, tax authorities are allowed to require a broad spectrum of documentation in order to verify if the taxpayers are complying with the tax laws, provided that such documentation is related with the taxes and fiscal period under review.

Typically, in its first approach the tax authority will request corporate documentation, accounting books, invoices related with the registered operations and the taxpayer's bank statements.

Depending on the information provided, the tax authorities may request supporting documentation related to the taxpayer's operations (eg, agreements, wire transfers, work papers, etc).

As a result of bad corporate practice performed by certain companies, the tax authorities are focusing on the materiality and substance of the services received by the taxpayers in order to determine the deductibility of the corresponding payments. Basically, they request different documentation that they consider proof that the services were effectively rendered and if such documentation is not provided they reject the deduction. However, in many cases taxpayers are not able to provide such documentation, since they were not required to have it, even though the service was effectively rendered. For example, the tax authorities are requesting entry logs, call logs, call recording, camera recording, minutes of meetings, etc.

Unfortunately, our legal framework does not establish clear rules that define the documents the tax authority is entitled to request in order to verify the materiality or substance of a service. Even article 69-B of the Federal Tax Code, which establishes a procedure to generate a legal presumption regarding the nonexistence of a service, is unclear in this matter. Therefore, the most conservative strategy for companies is to record and preserve the largest amount of information and documentation involving any service received by the taxpayer that will be considered as a deductible expense.

The tax authorities have broad authority when conducting their audits and are entitled to request information from third parties to determine the tax situation of a taxpayer. Such third parties could even be the taxpayer's employees, but is uncommon. Requesting information to a third party in connection with the taxpayer's operations has become very common practice that bears mixed results, since the information provided by the third party (even if it is not accurate) carries a lot of weight for the tax authorities when it does not coincide with the taxpayer's information.

It should be noted that, even though formal interviews can take place in certain cases, most audit procedures only include informal work meetings. In many cases, due to the tax authorities' workload, audit procedures are limited to the request, submission and review of the

taxpayer's information and documentation, with a minimum interaction between both parties. We recommend having as much interaction with the tax authorities as possible, since many of the tax authorities' observations usually result from a lack of communication.

#### **6 What actions may the agencies take if the taxpayer does not provide the required information?**

The two most important measures that can be taken by the tax authorities if a taxpayer does not provide the requested documentation are: (i) impose a fine; and (ii) consider that taxes were omitted, since the lack of documentation has generated a legal presumption in prejudice of the audited taxpayer.

Regarding this second matter, there is broad understanding in our legal practice that the taxpayer has the burden of proof of the legality of their tax situation.

In that sense, according to the Federal Tax Code, a deposit registered in a taxpayer's bank account would be deemed a taxable income if not clarified by the taxpayer with the corresponding documents. Similarly, in case of an inquiry by the tax authorities regarding a specific legal requirement for a deduction, the taxpayer must provide the necessary documents to demonstrate the fulfilment of such a requirement to avoid having that deduction rejected.

Finally, it is worth mentioning that if the tax authorities consider that the taxpayer is obstructing the development of the audit (that could happen if the taxpayer appears reluctant to provide the documentation requested), they can estimate the taxpayer's taxable profit based on any element they have (accounting books, tax returns, information provided by third parties, information contained in other tax authorities' cases or any other elements resulting from an economical research).

#### **7 How may taxpayers protect commercial information, including business secrets or professional advice, from disclosure?**

In principle, taxpayers are compelled to provide all the documents requested by the tax authorities, provided that such documents are related to the audited taxes and period.

Consequently, according to article 69 of the Federal Tax Code all public servants are required to keep information gathered in the course of their public functions confidential. However, certain exceptions apply (eg, in the case of criminal matters).

As a result, many taxpayers choose to hide their business secrets from the tax authorities, arguing that the details of such business secrets are not relevant for the purposes of the audit procedure. However, since the main consequence of failing to provide the requested information is the potential imposition of a tax assessment, taxpayers have to be very careful when determining which information they will not disclose. If a tax assessment is imposed, taxpayers can try to evidence the irrelevance of the undisclosed information for tax purposes and, if their arguments prevail, such tax assessment could be nullified.

Besides which, there are a lack of preventive mechanisms to avoid the disclosure of confidential information by public servants in office. Most of the mechanisms to avoid the disclosure of classified information held by public servants are punitive and do not mitigate the economic effects of the information leak.

#### **8 What limitation period applies to the review of tax returns?**

The general statute of limitations is five years following the date from which:

- the tax return from the respective period was filed (if the contribution is calculated by fiscal years), or shall have been filed (if the contribution is not calculated by fiscal years);
- the contribution was caused (if no tax return is filed for such particular tax);
- the infraction was committed; or
- the breach minute was issued (regarding guaranteed obligations).

A 10-year statute of limitations applies when the taxpayer:

- is not registered in the Federal Taxpayers Registry;
- does not have accounting records or does not keep them during the time it is required by law; and
- does not file an annual tax return or does not include in it the required information on the value added tax and the special tax on production and services.

The statute of limitations can either be reset or suspended. The statute of limitations resets each time a corrective tax return is submitted by the taxpayer regarding the modified items. The statute of limitations is suspended by any audit procedure initiated by the tax authorities, by any administrative appeal or annulment lawsuit filed by the taxpayer, and in case of strike, demise of the taxpayer or if such taxpayer cannot be located in its designated tax domicile.

Criminal matters involving tax issues are not subject to the above-mentioned rules.

### **9 Describe any alternative dispute resolution (ADR) or settlement options available?**

The Federal Tax Code establishes the possibility of filing an administrative appeal before the tax authorities. Such appeal is optional before filing an annulment lawsuit before the tax court.

In general terms, the administrative appeal has to be filed within the 30 working days following the day in which the tax resolution was notified.

According to the Federal Tax Code, the tax authorities must issue their resolution three months after the administrative appeal was filed (however, since no consequence results from their non-compliance, administrative appeals usually take longer to be resolved).

On the other hand, in recent years, Congress included an alternative dispute resolution procedure in the Federal Tax Code called conclusive agreement.

The conclusive agreement is a non-controversial procedure in which the tax authorities and the taxpayers review and negotiate the items identified during the audit to try to reach an amicable settlement. This procedure is carried out with the mediation of the Mexican ombudsman in tax affairs (the Mexican Taxpayer's General Attorney).

In general terms, the conclusive agreement initiates with a request filed by the audited taxpayer (such request can be submitted by the taxpayer at any moment before the tax assessment is notified, provided that the tax authorities have already issued an opinion regarding the taxpayers' situation).

In their request the taxpayer must address the observations identified in the audit, submitting any relevant documentation to support their position. Once the request is filed, any deadline relating to the audit procedure (including the issuance of the tax assessment) is suspended, so both parties can focus on reaching a settlement.

Once notified of the conclusive agreement, the tax authorities are granted a deadline of 20 working days to accept (either totally or partially) or reject the proposal.

Upon receiving the tax authorities' response, the Mexican Taxpayer's General Attorney can arrange meetings between the taxpayers and the tax authorities in order to analyse the outstanding observations, provide additional information and try to promote an agreement.

Even though the conclusive agreement is voluntary for both parties (any party can stop the procedure at any time, but if the party opting out of the conclusive agreement is the tax authority it has to provide a valid reason to avoid a declaration of the Mexican Taxpayer's General Attorney stating that the tax authorities position is illegal or arbitrary), if a settlement is reached it will be binding for them. The settlement is not appealable and does not constitute legal precedent.

Finally, reaching a conclusive agreement gives a one-time benefit to each taxpayer, all fines that could be imposed by the tax authorities in connection with the corresponding audit procedure are waived. The taxpayer can decide to use such benefit or not.

### **10 How may the tax authority collect overdue tax payments following a tax review?**

If a tax assessment is not challenged or guaranteed (once notified of the tax assessment, taxpayers have a term of 30 working days to provide a guarantee), the tax authorities are entitled to initiate the administrative collection procedure.

The administrative collection procedure begins with the notification of a payment request made in the taxpayer's tax domicile. If payment is not made the tax authorities are entitled to seize all necessary assets to cover the amount of the tax assessment, even using police force, if necessary.

After the assets are seized, the tax authority values them before selling them through a public auction. Certain types of asset - mostly personal and indispensable for the taxpayer's activity - cannot be seized. Seized assets cannot be sold if the corresponding tax assessment has been

challenged. Taxpayers can recover the seized assets at any moment by paying the total amount of the tax assessment.

In recent years, the tax authorities have been taking a much more aggressive position and, instead of notifying the payment request and seizing tangible assets, they send a notice to the banking commission before seizing the taxpayer's bank accounts. Such practice pressurises taxpayers, compelling them to pay the tax assessment or reach a settlement with the tax authorities.

The administrative collection procedure can be suspended (even when assets have been seized) if the taxpayer files an administrative appeal on time or files an annulment lawsuit before the tax court on time and provides a guarantee. Providing a copy of the filed administrative appeal or of the filed annulment lawsuit, the guarantee is usually enough to stop any action related with the collection procedure. However, if a guarantee is used to suspend the administrative collection procedure, it has to be filed with the tax authorities for validation. There are several types of guarantees that can be used to suspend the administrative collection procedure; however, not all are accepted by the tax authorities, a situation that we consider highly irregular (the tax authorities prefer bonds, but depending on the amount of the tax assessment they can be very costly).

### **11 In what circumstances may the tax authority impose penalties?**

The Federal Tax Code provides an important amount of conducts or omissions that might result in fines. The most common penalties are the ones imposed for not paying taxes (ranging from 55 per cent to 75 per cent of the omitted tax), having calculation mistakes in a tax return (they range from 20 per cent to 25 per cent of the omitted tax) and not complying with formal requirements (eg, lack of registration in the Federal Taxpayers Registry, default in the submission of notices, designating a false tax domicile, default in the submission of a tax return, default in the fulfilment of provisional payments, accounting mistakes under the tax law, opposing to a tax audit, etc). The amount of the fine will depend on the formal requirement that was not fulfilled.

In general, no penalties will be imposed when the taxpayer fulfils the omitted obligation voluntarily.

If certain conditions are met, taxpayers may benefit from a reduction in fines (the reduction may even be of 100 per cent).

### **12 How are penalties calculated?**

Depending on the type of penalty and if the conduct is deemed as aggravated (eg, recurrence, false documents, having two accounting systems, intentional destruction of the accounting systems, etc), the tax authorities can impose a minimum or a maximum penalty.

The minimum or maximum can either be an amount or a percentage, depending on the type of penalties. Penalties related with omitted taxes are usually based on a percentage of the omitted tax, while penalties related with formal obligations are usually an amount in pesos.

Fines are updated in accordance with the inflation.

### **13 What defences are available if penalties are imposed?**

Taxpayers can challenge fines by either filing an administrative appeal before the tax authorities or an annulment lawsuit before the tax court. In both cases, the deadline to file the means of defence is 30 working days after the date in which the resolution's notification is in force (that is roughly 30 plus one working days).

The administrative appeal is resolved by the tax authorities, while the annulment lawsuit is resolved by the tax court.

Even though the administrative appeal is not resolved by an impartial authority, it provides several benefits to the taxpayers (eg, the possibility of challenging the resolution without providing a guarantee, the possibility of filing additional evidence, the possibility of filing simple copies as evidence instead of originals or certified copies). Filing the administrative appeal is optional before attending tax court.

On the other hand, an annulment lawsuit is resolved by the tax court, which is impartial. The details of the annulment lawsuit will be highlighted in ulterior responses.

### **14 In what circumstances may the tax authority collect interest and how is it calculated?**

The tax authority can collect interest for any overdue payment under the tax laws. Such interest is calculated by applying a 1.13 per cent monthly



rate to the amount of the updated omitted taxes. In general, interest can only be generated for a period of five years. However, such an obligation is linked to the tax authorities' statute of limitations; therefore, if the latter is extended the interest-generating period can also be extended.

#### **15 Are there criminal consequences that can arise as a result of a tax review? Are these different for different types of taxpayers?**

Yes. The Federal Tax Code provides a list of tax crimes, which are usually detected during the course of a tax review. Nevertheless, the criminal process has to be initiated separately by the tax authorities by filing a grievance or an accusation before the Attorney General's Office.

Once the grievance or the accusation has been filed, the Attorney General's Office takes over the criminal prosecution. From there, the procedure follows the typical steps of any criminal process.

In general, only individuals can be responsible for a tax crime. Nevertheless, in recent years, the criminal law was modified in order to consider economic consequences against legal entities that are used as a vehicle to commit a crime (although it is not clear yet which kind of crimes will result in consequences for legal entities).

#### **16 What is the recent enforcement record of the authorities?**

During the last years, tax authorities have hardened their audit practices in order to obtain an improvement of their enforcement record. Additionally, the constitutional courts have assumed a pro fisco stance in their recent rulings. As a consequence, the enforcement record of the tax authorities has improved significantly in the later years.

Unfortunately, such improvements have been achieved by sacrificing other important values such as the strict application of the law and respecting taxpayers' human rights.

#### **Third parties and other authorities**

#### **17 Can a tax authority involve or investigate third parties as part of the authority's review of a taxpayer's returns?**

The tax authorities are entitled to request information from third parties in order to verify certain facts related to a tax audit. In this regard, the audited taxpayer is not allowed to participate in any manner in the development of the procedure practiced to the third party.

Nevertheless, the taxpayer does have the right to be notified of the results of the procedure and to make legal allegations regarding such a result during the 20 working days following the corresponding notification.

The Federal Tax Code provides that the third party can be fined if they do not provide the documents required by the tax authorities.

#### **18 Does the tax authority cooperate with other authorities within the? Does the tax authority cooperate with the tax authorities in other countries?**

Yes. Tax authorities, both local and federal, are part of the National Tax Coordination System that allows them to join efforts to audit or collect taxes throughout Mexican territory. Also, the tax authorities are entitled to request information from any other authority within the country.

Finally, Mexico has numerous conventions to avoid double taxation and to promote the exchange of tax information. Such agreements are the result of active interest in cooperating with other countries in connection with tax issues. At this moment, Mexico is very involved in the base erosion and profit shifting discussions and is aggressively pursuing the enactment of provisions that allow an automatic exchange of information (both locally and internationally).

#### **Special procedures**

#### **19 Do any special procedures apply in cases of financial or other hardship, for example when a taxpayer is bankrupt?**

Yes. The Federal Tax Code provides two different scenarios: (i) deferred payment or payment in instalments; and (ii) debt write-off in cases of bankruptcy.

In both situations, several conditions have to be met to obtain the corresponding authorisation.

#### **20 Are there any voluntary disclosure or amnesty programmes?**

Yes. Both the Federal Tax Code and the Federal Taxpayer's Rights Law regulate several hypotheses, in which interest and penalties can be condoned or reduced.

For example, in the case of voluntary disclosure (ie, cases in which the tax authorities have not detected the omission), no penalties will be imposed if the taxpayer pays the omitted taxes or fulfils his or her obligations.

Regarding audit procedures, the Federal Taxpayer's Rights Law establishes a reduced fine (20 per cent instead of the 55 per cent minimum fine established when taxes are omitted), if the taxpayer pays the owed tax after the beginning of the audit but before the final observations are notified.

If the tax is paid after the final observations but before the tax assessment is notified, the fine will be 30 per cent of the amount of the omitted taxes.

Also, the Federal Tax Code establishes some cases outside the audit procedures in which penalties can be written off.

For example, interest can be written off during a transfer pricing mutual agreement procedure (provided that there is a double taxation treaty with the other jurisdiction and that such a country does not refund to the corresponding taxpayer any amount referred to in interest).

Further, if a taxpayer executes a conclusive agreement before the Mexican Taxpayer's General Attorney, they are entitled (as a one-off) to a 100 per cent write-off of the penalties that could be imposed.

Finally, in previous years, different decrees that provide benefits to taxpayers have been enacted.

#### **Rights of taxpayers**

#### **21 What rules are in place to protect taxpayers?**

The Mexican Federal Constitution establishes a set of human rights covering tax affairs.

In addition, the Federal Taxpayer's Rights Law contains some specific guarantees in favour of taxpayers (eg, the right to submit evidence and testify during the administrative procedure; the right to rectify their tax situation; the right to a presumption of good faith regarding their acts; the right to offer as proof the administrative file of the tax audit, etc).

On the other hand, the Federal Tax Code provides several formalities that the tax authorities are requested to follow during tax audits. If any of the formalities are infringed, the taxpayer can request before the tax court the nullity of the audit.

Finally, the Federal Administrative Litigation Law establishes the rules that taxpayers shall follow in order to bring a lawsuit against an illegal tax assessment before the tax court.

#### **22 How can taxpayers obtain information from the tax authority? What information can taxpayers request?**

According to the Federal Taxpayer's Rights Law, taxpayers are entitled to request any information regarding the status of their legal procedures. Therefore, any kind of information regarding such status can be requested directly to the tax authority.

On the other hand, statistical information or data related to other tax procedures can be requested through the Access to Public Information and Data Protection Federal Institute, provided that the corresponding disclosure does not violate the confidentiality provisions established in the Federal Tax Code.

Finally, it is worth mentioning that in certain cases the tax authorities will publish general information from taxpayers (eg, taxpayers who have received a write-off, taxpayers who cannot be found in their tax domicile or taxpayers who are deemed to be carrying out non-existent transactions).

#### **23 Is the tax authority subject to non-judicial oversight?**

Not really. In fact, most of the supervision related to tax collection is carried out internally (even the administrative appeal is filed before a specific area of the TAS). Theoretically, the TAS is always under the supervision of the Mexican Ministry of Treasury and Public Credit (as its hierarchical superior) and the Superior Audit Office of Mexico (in connection with the administering of its budget), but, in general terms, it enjoys a wide autonomy in the development of its functions.

In that regard, the TAS Law clearly establishes that such institution will have management and budgetary autonomy and will have technical autonomy in issuing its resolutions.

### Update and trends

On 13 June 2016, several amendments to the Federal Administrative Litigation Law were enacted.

Among the amendments are some new legal provisions oriented to simplify some aspects of the tax trial process (eg, taxpayers will be entitled to receive notifications through email, avoiding the need of going to tax court to review each notification).

There are also some important additions to the formalities applicable to experts' opinions, as the tax court is now entitled to arrange a meeting between the experts to clarify and discuss differences.

Most of the amendments are designed to reduce some of the deadlines to speed up the tax trial procedure and to standardise the legal term 'to file the annulment lawsuit' (previously, the term varied depending on the amount in contention).

From an administrative perspective, the tax authorities are very involved in the Base Erosion and Profit Shifting discussions and are developing new instruments to question the substance and business purpose of corporate structures. As a result, taxpayers are mainly concerned about the inherent subjectivity of the business-purpose discussions and the broad spectrum of documentation and that they may be required to justify the substance of any given transaction.

Currently there are no relevant proposals to remedy these issues but Mexican courts seem to be leaning to the tax authorities' position, so the most likely scenario is that taxpayers will be facing a more demands in terms of probatory standards regarding the existence of their operations and the legitimacy of their corporate strategies.

### Court actions

#### 24 Which courts have jurisdiction to hear tax disputes?

Two different types of courts have jurisdiction to hear tax disputes: (i) the tax court; and (ii) the district and circuit courts.

Even though the tax court is part of the executive branch of the government, it enjoys full autonomy regarding the issuance of its rulings. In that sense, such rulings are not subjected to any kind of oversight by the executive branch.

The tax court is organised in several courtrooms across Mexico, headed by a superior courtroom (such courtroom only hears relevant disputes based on quantity or importance).

The tax court is mainly in charge of deciding if an administrative resolution (usually resolutions imposing tax assessments) is valid.

The district and circuit courts are part of the judicial branch of the government and are headed by the Supreme Court of Justice.

District and circuit courts usually decide whether a tax provision or a resolution issued by a tax court complies with the principles established in the Mexican Constitution.

#### 25 How can tax disputes be brought before the courts?

Tax disputes can be brought before the tax courts' attention by filing an annulment lawsuit within 30 working days following the date in which the administrative resolution was notified to the taxpayer.

The annulment lawsuit can request the tax resolution be invalid based on the following arguments: incompetence of the issuing authority, omission of a formal requirement, irregularities of procedure, misunderstanding of the facts, wrongful application of the tax law, and inappropriate use of discretionary faculties.

The annulment lawsuit shall be submitted through a leaflet signed by the legal representative or through the digital system of the tax court's digital portal.

The annulment lawsuit shall mention the name of the plaintiff, its tax domicile, the domicile to receive notifications, email, the challenged resolution, the issuing tax authority, the background, the evidence, the arguments, the requested course of action and the name and domicile of any relevant third party.

The plaintiff shall attach to their annulment lawsuit the power of attorney of their legal representative, the challenged resolution with their notification minute, the questionnaire for the legal expert or witnesses, if any, all the relevant documents offered as evidence and enough copies of the lawsuit for all the parties involved.

Any individual or legal entity affected by a tax resolution can file an annulment lawsuit. Also, in some cases, tax authorities can file an

annulment lawsuit in order to invalidate a previous favourable response given to a taxpayer.

There is no minimum threshold required to file a claim. However, the law provides a shorter procedure in case of low-quantity affairs.

The taxpayer who files a claim can request the tax resolution be made invalid or the recognition of a subjective right affected by a negative ruling issued by the tax authorities. Also, tax authorities can request that resolutions given to taxpayers be made invalid if they demonstrate the illegality of such resolutions.

Regarding district and circuit courts, taxpayers can file an *amparo* lawsuit within 15 working days following the date in which the tax provision has been applied for the first time (in certain specific cases, the *amparo* lawsuit can be filed within 30 working days following the date in which the tax provision is in force) or the tax court's resolution has been notified.

In this type of procedure, the claim can only be filed under constitutional grounds invoking a human right affected by the challenged resolution or provision.

The *amparo* lawsuit can be filed before the issuing authority (when the challenged resolution is a tax court ruling) or directly before the federal courts (when the challenged resolution is a general provision).

An *amparo* lawsuit can be filed through a written document or electronically (the law regulates the possibility of filing it verbally in some grave cases, but it is uncommon in tax affairs). The lawsuit must mention the name and domicile of the plaintiff and its legal representative, the name and domicile of any third party involved, the responsible authority, the challenged resolution, the background, the violated human rights and the pertinent legal arguments.

Any individual or entity can file an *amparo* lawsuit, however, authorities are not allowed to file such type of claims.

There is not a minimum threshold to file an *amparo* lawsuit.

The legal effects are usually making the unconstitutional resolution or the non-application of the unconstitutional rule void.

#### 26 Can tax claims affecting multiple tax returns or taxpayers be brought together?

Yes. The Federal Administrative Litigation Law regulates the accumulation of tax cases when the parties and the arguments are the same or when two or more administrative resolutions are causally connected. Under this scenario one tax claim can affect multiple resolutions.

#### 27 Must the taxpayer pay the amounts in dispute into court before bringing a claim?

Taxpayers are not required to pay the amounts in dispute before filing their claim. However, if the amount in dispute is not paid or guaranteed once the annulment lawsuit is filed, the tax authorities are entitled to initiate the administrative collection procedure to seize assets to guarantee the amount of the tax assessment.

If the taxpayer pays the amount in dispute and wins the case in tax court, the tax authorities are required to reimburse the updated amount plus interest.

#### 28 To what extent can the costs of a dispute be recovered?

Expenses relating to the case can only be recovered by the tax authority when the taxpayer filed an annulment lawsuit with the sole intention of delaying a procedure.

However, taxpayers can request the payment of damages if the tax authorities committed a grave mistake when issuing their resolution (eg, the ruling of the tax authority does not take into consideration a binding legal precedent of the Mexican Supreme Court of Justice).

#### 29 Are there any restrictions on or rules relating to third-party funding or insurance for the costs of a tax dispute, including bringing a tax claim to court?

No. The taxpayer can cover his or her expenses through any means that he or she finds appropriate.

#### 30 Who is the decision maker in the court? Is a jury trial available to hear tax disputes?

The ruling of the tax court is made by a judicial body compounded by three judges (the decisions are taken by majority). A jury trial is not available in tax affairs.

**31 What are the usual time frames for tax trials?**

A regular annulment lawsuit before the tax court usually lasts from six to 12 months, depending on the evidence filed by both parties (eg, expert opinions usually delay the process). Nonetheless, special expedited procedures exist for controversies that involve small amounts (these procedures last from three to six months).

If the resolution issued in the annulment lawsuit is unfavourable for the taxpayer, it is entitled to file a constitutional trial (*juicio de amparo*). Depending on the complexity of the case, several successive constitutional trials may be filed. Tax authorities are also entitled to appeal the tax court's resolution. Therefore, depending on the complexity of the case the whole process can spread throughout several years.

**32 Describe the discovery process for a tax trial.**

When filing an annulment lawsuit, the taxpayer is required to offer all the evidence that supports their position. If the taxpayer does not submit the offered evidence upon filing, the tax court will grant the taxpayer a deadline of five working days to submit it. Evidence not submitted before the deadline will not be admissible.

Except for certain types of evidence (eg, confessions made by the tax authorities resulting from questioning), all types of evidence are admitted in tax court (eg, documentation, expert's opinions, etc).

Nonetheless, because of a legal precedent issued by the Mexican Supreme Court of Justice, evidence not provided to the tax authorities during the audit procedure (or during the administrative appeal) that resulted in the challenged tax assessment will not be admissible in court. Therefore, in all cases it is extremely important to identify the evidence that might be needed if a tax assessment is imposed so that it is filed during the audit procedure or during the administrative appeal.

Except from evidence offered and submitted at the beginning of the tax trial, only supervening evidence (eg, evidence that did not exist when the annulment lawsuit was filed) and evidence requested by the tax court to have a better understanding of the case are admitted.

Once all evidence has been offered and submitted most do not require any special procedure.

Nevertheless, expert opinions do require a special procedure. Once the tax court admits the request for an expert opinion, it will summon both party's experts so that they accept their designation and prove their expertise.

Once both experts have accepted their designation, they must render their opinion over a term of 15 working days.

If both opinions are divergent, the tax court will designate a third expert in order to provide an independent ruling of the technical matter at hand.

Once the evidence has been submitted or carried out, the tax court will declare the discovery process concluded and will grant a deadline to file closing arguments.

**33 What testimony is permitted in a tax trial?**

Theoretically, any kind of testimony is allowed in a tax trial, except for the tax authorities' confession obtained through questioning. However, in practice, tax trials are predominantly based on documentation and the only evidence that resembles a testimony is expert opinion.

With regard to the translation of evidence, the Federal Administrative Litigation Law does not establish the translation of evidence as mandatory. However, in recent years the tax court has been demanding that all the documents in a foreign language must be duly translated according to the requirement from the provisions applicable to civil litigation affairs.

**34 Who can represent taxpayers in a tax trial? Who represents the tax authority?**

Taxpayers can be represented by any person in tax court, provided that they grant him or her an appropriate power of attorney (also, individuals can represent themselves before the tax courts). If the tax authority recognised the legitimacy of the legal representative's capacity, it is not necessary to submit a new power of attorney.

Legal advice from a tax lawyer is not mandatory but advisable. Lawyers can be authorised in trials to make arguments and submit proofs. The authorised attorney must have a law degree and needs to be registered before the tax court. If such requirements are not fulfilled, the authorised person will only be empowered to receive notifications and review the case file.

Finally, it is important to mention that the Mexican Taxpayer's Attorney General is entitled to act as the legal representative of taxpayers (if requested) in any tax trial or legal procedure. The services of the Mexican Taxpayer's Attorney General are free of charge.

On the other hand, tax authorities are represented in trials by their legal departments. Tax authorities can also designate delegates to receive notifications and review the case file.

**35 Are tax trial proceedings public?**

No, only the parties and the authorised individuals can be informed of the status of the legal procedure.

Nevertheless, the tax court's final rulings are published. However, the parties are entitled to request that their personal data is not published.

**36 Who has the burden of proof in a tax trial?**

In general terms, the taxpayer (acting as plaintiff) has the burden of proof, as the administrative resolutions are deemed valid until proven wrong.

However, some legal tools can help the taxpayer to revert such burden of proof like the statements contained in a public accountant's opinion or the legal presumption of good faith regarding the taxpayer's acts.

Under special circumstances, tax authorities can act as plaintiff in the annulment lawsuit (eg, when the taxpayer has a favourable resolution issued by a tax authority and the tax authorities want to revoke the resolution). In those cases, the tax authority will have the burden of proof.



CALGARY DALLAS MEXICO BOGOTA

**Christian Solís Martínez**  
**Jorge Arturo Rodríguez Ruiz**

**csolis@smps.com.mx**  
**jrodriguez@smps.com.mx**

Andrés Bello # 10  
Oficina 402  
Col. Polanco  
11560 Mexico City  
Mexico

Tel: +52 (55) 5282 9063  
Fax: +52 (55) 5281 4952  
www.smpslegal.com

---

**37 Describe the case management process for a tax trial.**

Five days after the discovery process has concluded, the tax court will grant a deadline of five working days to all parties to file their closing arguments. Once the deadline has passed, the tax court has 45 days to pass judgment. However, since there is no repercussion for not issuing a ruling within the 45 day-term, sometimes the ruling takes longer.

---

**38 Can a court decision be appealed? If so, on what basis?**

Yes. If certain conditions are met, tax authorities can file a tax appeal within the following 15 working days from the date in which the tax court's resolution was notified. The tax appeal is resolved by a circuit court. On the other hand, the taxpayer can appeal the tax court's resolution through a constitutional trial (the term to file the constitutional trial is the same the tax authorities have to file their appeal).

Both procedures are conceptually different, as only the tax appeal is an appeal in a strict sense, while the constitutional trial is an independent constitutional procedure. However, in most cases the constitutional trial is only oriented to challenge the legality of the tax court's ruling, so both legal means are similar.

The applicable law also regulates the possibility of filing complaints against resolutions issued by the tax court within the process (eg, rejection of the annulment lawsuit, rejection of evidence, etc).

# Netherlands

Frank Pötgens, Ingrid Mensing and Mats Cornelisse

De Brauw Blackstone Westbroek NV

## Overview

### 1 What is the relevant legislation relating to tax administration and controversies? Other than legislation, are there other binding rules for taxpayers and the tax authority?

The relevant legislation is enforced by the Dutch Revenue Service (DRS) and the Dutch tax judiciary. The relevant legislation is found in:

- the Dutch Constitution, which requires all taxes to be levied by statute (principle of legality);
- the General Administrative Law Act (GALA) and General Taxes Act (GTA), which deal with the procedure for the assessment of taxes and access to the Dutch tax judiciary. In this respect, the GTA takes precedence over the GALA as the GTA functions as a *lex specialis* in relation to the GALA;
- various specific statutes on (corporate) income tax, wage and dividend withholding tax as well as other taxes; and
- the Collection of Taxes Act, which deals with the collection of Dutch taxes, including secondary liability for Dutch taxes.

Beyond legislation, rules governing the assessment and collection of Dutch taxes are found in:

- multilateral and unilateral treaties, notably double taxation agreements;
- EU law instruments, including directives, regulations and case law of the Court of Justice of the European Union (CJEU);
- case law of the Dutch tax judiciary, specifically from district courts, appellate courts and the Supreme Court of the Netherlands; and
- administrative guidance from the DRS, which is (in contrast to the preceding instruments) not binding on a Dutch taxpayer or withholding agent but only on the DRS.

### 2 What is the relevant tax authority and how is it organised?

The DRS forms part of the Ministry of Finance and falls under the responsibility of the Secretary of Finance. The Secretary of Finance appoints the directors responsible for the management of the DRS. The DRS is divided into the following divisions:

- DRS for individuals, SMEs, MNEs and semi-massive processes;
- DRS for customs;
- DRS central administration and the Tax Intelligence and Investigation Service;
- DRS for income-based allowances; and
- DRS for several executive services.

The DRS is geographically organised. The place of the economic activity of the taxpayer determines which local DRS office has authority. Each region has one or more local DRS offices that are open to taxpayers. Also, specific expertise within the DRS is geographically concentrated.

## Enforcement

### 3 How does the tax authority verify compliance with the tax laws and ensure timely payment of taxes? What is the typical procedure for the tax authority to review a tax return and how long does the review last?

For practical reasons, the DRS does not scrutinise each tax return submitted. Based on a risk analysis, only a (relatively) small number of tax returns

are scrutinised. Each year the DRS publishes the number of tax returns that have been reviewed and the number of tax audits conducted. The DRS can avail itself of several measures to scrutinise a tax return, including:

- A tax audit: usually an audit commences with a letter from the DRS to the taxpayer in which the audit is announced. The taxpayer and the DRS may agree in advance on the scope, duration and the officials involved with the audit. A tax audit is labour-intensive and its duration varies on a case-by-case basis. Therefore, tax audits usually only take place where there are indications of non-compliance or fraud (see also question 11). Investigation methods employed are, among others, data comparison, statistical analysis, random checks and forensic accounting.
- An exchange of information upon request by the DRS, either during its review of a tax return or before imposing a tax assessment: while disclosure in most cases requires a prior request for information by the DRS, a taxpayer is in a limited set of circumstances required to spontaneously disclose information to the DRS.

An alternative to verifying compliance is 'horizontal monitoring'. The DRS and certain taxpayers may enter into a horizontal monitoring covenant and develop an enhanced relationship in which they cooperate on the basis of mutual trust and understanding. As part of this enhanced relationship, the DRS and the taxpayer often include compliance provisions, such as a tax control framework.

### 4 Are different types of taxpayers subjected to different reporting requirements? Can they be subjected to different types of review?

In principle, taxpayers are not subject to different reporting requirements. Obviously, the applicable reporting requirements differ depending on the specific Dutch tax involved, specifically, whether the Dutch tax is levied by self-assessment or on the basis of a tax return. For example, corporate entities are required to attach their annual report, including the balance sheet and profit and loss account, to their corporate income tax return.

### 5 What types of information may the tax authority request from taxpayers? Can the tax authority interview the taxpayer or the taxpayer's employees? If so, are there any restrictions?

In accordance with the GTA, taxpayers are required, upon request by the DRS, to disclose all information that may be relevant for the levy of Dutch taxes in respect of them as well as all books, documents, records and other data carriers that may reveal facts that in turn may be relevant for the levy of Dutch taxes in respect of them. The disclosure obligation applies to individuals, entrepreneurs and corporate entities irrespective of whether they are domestic or foreign taxpayers. Employees are not obliged to provide the DRS with information about their employer.

### 6 What actions may the agencies take if the taxpayer does not provide the required information?

Non-compliance with a request for disclosure by the DRS may result in:

- the burden of proof being shifted from the DRS to the taxpayer and being increased, requiring the taxpayer to demonstrate convincingly that any subsequent tax assessment is incorrect. The burden of proof is shifted and increased only if the DRS has issued a decision holding the taxpayer to be non-compliant and such decision has become

irrevocable (due to expiry of the statutory period for filing an objection or the exhaustion of legal remedies against the decision);

- a default or culpability penalty being imposed (see question 11); and
- preliminary relief proceedings being initiated by the DRS before a civil court judge, where the DRS would request disclosure of the information requested subject to a judicially imposed penalty for non-compliance.

### 7 How may taxpayers protect commercial information, including business secrets or professional advice, from disclosure?

In principle, a taxpayer is not allowed to refuse disclosure of information requested by the DRS by invoking any legal privilege. The taxpayer remains required to disclose such information, even if disclosure may result in a criminal charge being brought against him or her. However, persons exercising certain functions, for example, clergy, attorneys, physicians and civil law notaries, may refuse disclosure of information concerning the taxation of a third party pursuant to a professional duty of confidentiality. Coupled with the professional duty of confidentiality, these persons are accorded legal privilege. It is for these persons to determine which information falls under their legal privilege and which information is disclosed to the DRS.

### 8 What limitation period applies to the review of tax returns?

The DRS may review a tax return within the statutory limitation period for issuance of a supplemental tax assessment for that return. This statutory limitation period is in principle five years for self-assessment taxes and return-based taxes, starting from the end of the calendar year to which the relevant tax return relates. However, the statutory limitation period is extended for return-based taxes from five years to 12 years if the supplemental tax assessment relates to income from foreign sources. This extension may, under certain circumstances, infringe EU law.

The five-year and 12-year statutory limitation periods for return-based taxes are extended further with the period for which the taxpayer has requested and received an extension for filing their tax return. The five-year statutory limitation period for self-assessment taxes is not so extended.

Furthermore, the statutory limitation period may be extended in cases where too little tax was initially levied by the DRS due to an error that could have reasonably been known by the taxpayer. In this case, the extension is limited to a period of two years after the moment when, if no tax assessment was imposed, the decision was taken not to impose a tax assessment or, if a tax assessment was imposed, it was imposed.

### 9 Describe any alternative dispute resolution (ADR) or settlement options available

In principle, a conflict between the DRS and a taxpayer can solely be settled through the general administrative law procedures. As an alternative dispute resolution mechanism, however, mediation may be available in cases where a taxpayer and the DRS have entered into a horizontal monitoring covenant (see question 3). Because such a covenant is a legal act under Dutch private law, the general administrative law procedure usually available to a taxpayer is not applicable in situations of horizontal monitoring. Mediation may be suitable if conflicts arise in such situations.

### 10 How may the tax authority collect overdue tax payments following a tax review?

The DRS may collect any amount of Dutch taxes formally due mainly through two alternative methods. These methods do not differ depending on whether or not collection is sought following a tax review.

First, the DRS is authorised to use all the means available to a creditor under Dutch private law to collect Dutch taxes on the basis that the amount formally due represents a receivable of the DRS. For example, the DRS may attach a taxpayer's property or, in a limited set of circumstances, pierce a taxpayer's corporate veil. If a third party has curtailed the collection possibilities of the DRS, the DRS may even claim damages (in the amount of the Dutch taxes formally due) from the third party for having curtailed tax collection possibilities.

Second, the DRS has specific authorisation to collect Dutch taxes on the basis of the Collection of Taxes Act. This authorisation allows the DRS to more easily collect Dutch taxes than a regular creditor is able to do under Dutch private law, for example, by more easily attaching a taxpayer's property. Also, this authorisation extends the collection possibilities of the DRS beyond those of a regular creditor, such as holding the directors of a

corporate entity secondarily liable for the amount of Dutch taxes due by this entity, or seizing property that is present on the taxpayer's premises without belonging to the taxpayer.

### 11 In what circumstances may the tax authority impose penalties?

The DRS may impose an administrative penalty on a person who committed an offence under Dutch tax law. The DRS may impose a penalty on a taxpayer who:

- failed to file, or to file on time, any tax return or to pay in full, or to pay on time, self-assessment taxes; or
- failed to disclose information to the DRS that it is required to disclose (in each case, a default penalty).

In addition, the DRS may impose a penalty on a taxpayer or withholding agent who:

- intentionally filed an incorrect or incomplete tax return;
- intentionally or grossly negligently reported less than the amount of taxes formally due;
- intentionally or grossly negligently failed to pay in full, or to pay on time, self-assessment taxes; or
- intentionally or grossly negligently failed to disclose information to the DRS that it is required to disclose spontaneously (in each case a culpability penalty).

For a culpability penalty, the DRS has the burden of proof of demonstrating (by making a plausible case) that the taxpayer had a culpable state of mind at the time when it committed the offence. The requisite culpability involves intent or gross negligence.

Further, the DRS may impose a default or culpability penalty on a person who, while not being a taxpayer:

- co-committed the offence with the taxpayer;
- instigated or incited commission of the offence; or
- (only in respect of a culpability penalty) acted as an accessory to or in commission of the offence.

### 12 How are penalties calculated?

The maximum amount of a default penalty is fixed and ranges from €50 to €5,278 (in 2016), depending on the specific offence committed. The amount actually imposed may be less as a result of mitigating circumstances, which the DRS is required to consider when imposing a default penalty. The amount of a culpability penalty is fixed as a percentage of the amount of Dutch taxes that are deficient as a consequence of the offender's intent or gross negligence, with the maximum being 100 per cent. As a starting point, the DRS generally assesses a culpability penalty at 50 per cent for offences being committed intentionally and at 25 per cent for offences being committed grossly negligently.

### 13 What defences are available if penalties are imposed?

Generally speaking, four defences are available against a default and culpability penalties. These penalties may not be imposed or may be mitigated in case of:

- a defensible position – a default penalty or culpability penalty is not imposed if the offence results from a position that the taxpayer has taken but that is defensible, on the basis of current case law and literature, to such an extent that the taxpayer could reasonably consider to have acted in accordance with Dutch tax law;
- absence of all guilt – a default penalty or culpability penalty is not imposed if an offence under Dutch tax law occurs while the taxpayer has taken all precautionary measures that could reasonably have been required in the case at hand to prevent this offence;
- mitigating circumstances; or
- voluntary disclosure (see question 20).

### 14 In what circumstances may the tax authority collect interest and how is it calculated?

The DRS charges simple interest on the amount of underpaid taxes at an annual rate of 8.05 per cent for corporate income tax and at an annual rate of 4 per cent for all other Dutch taxes (in 2016) between the period from the close of the relevant taxable year up to the date of the assessment for these taxes, with no interest accruing during the first six months.

In addition, the DRS charges simple interest on the amount of Dutch taxes for which the payment terms have lapsed, at an annual rate of 4 per cent for all Dutch taxes (in 2016) between the period from the lapse of the payment terms for a tax assessment up to the date of each payment, until the tax assessment is settled in full.

**15 Are there criminal consequences that can arise as a result of a tax review? Are these different for different types of taxpayers?**

A tax review may result in criminal consequences as a matter of general Dutch criminal law or Dutch tax criminal law. For purposes of Dutch tax criminal law, a taxpayer (regardless of being a business entity, individual or director) may be subject to (figures for 2016):

- a maximum of six months' imprisonment or a fine of up to €8,200 for the intentional failure to disclose information, to maintain books and records or to cooperate with a review by the DRS, or for only doing so incorrectly or incompletely;
- a maximum of four years' imprisonment or a fine of up to €20,500 (or, if higher, the amount of underpaid Dutch taxes) for the intentional failure to file a Dutch tax return on time or to correctly and completely disclose information to the DRS; or
- a maximum of six years' imprisonment or a fine of up to €82,000 (or, if higher, the amount of underpaid Dutch taxes) for the intentional filing of an incorrect or incomplete Dutch tax return or forgery of its books and records.

Further, a taxpayer who committed an offence under Dutch tax criminal law may be subject to a criminal penalty in respect of, for example, forgery or money laundering if the offence under Dutch tax criminal law is considered separate and distinct from the offence under general Dutch criminal law. The criminal penalty for forgery of documents is a maximum of six years' imprisonment or a fine of up to €82,000 (in 2016). Subject to aggravating and mitigating circumstances, the criminal penalty for money laundering is a maximum of four years' imprisonment or a fine of up to €82,000 (in 2016).

**16 What is the recent enforcement record of the authorities?**

Subject to limited exceptions, the DRS is disallowed from disclosing to any other person information that it has obtained as a result of, or in connection with, the enforcement of Dutch tax law, beyond what is necessary for the proper assessment and collection of Dutch taxes. Accordingly, the DRS's enforcement record is not available publicly.

**Third parties and other authorities**

**17 Can a tax authority involve or investigate third parties as part of the authority's review of a taxpayer's returns?**

The DRS may investigate certain third parties as part of its review of a taxpayer's affairs. These third parties include Dutch resident corporate entities, Dutch resident individuals who carry on a business enterprise and Dutch resident individuals who are withholding agents for Dutch taxes. Specifically, the DRS may require these third parties to disclose information relevant for a taxpayer's Dutch tax position or relevant for Dutch taxes that these third parties have to withhold and remit. In this respect, non-compliance is subject to sanctions (see question 6).

**18 Does the tax authority cooperate with other authorities within the country? Does the tax authority cooperate with the tax authorities in other countries?**

Dutch government authorities are required, upon request from the DRS, to exchange information for purposes of the assessment and collection of Dutch taxes. Conversely, the DRS may disclose information to other Dutch government authorities to the extent necessary for the proper performance of such government authority's duty.

At the international level, the Netherlands has concluded tax information exchange agreements with over 30 countries worldwide (as of 2016), which typically allow for exchange of information upon request. In addition, the Netherlands has concluded comprehensive double taxation agreements with over 100 countries worldwide (as of 2016), which include (with some variations) the OECD Model Treaty standard for exchange of information. The Netherlands recently has begun to seek incorporating spontaneous and automatic information exchange in its other bilateral instruments as well.

At the EU level, the Netherlands has implemented spontaneous and mandatory automatic exchange of information with other EU member states pursuant to Directive 2011/16/EU. The spontaneous exchange of information particularly includes transfer pricing information and artificial profit shifting, while the mandatory automatic exchange of information extends to employment income, pensions and immoveable property.

**Special procedures**

**19 Do any special procedures apply in cases of financial or other hardship, for example when a taxpayer is bankrupt?**

Under Dutch tax law, there are no special procedures available in cases of financial or other hardship. However, financial hardship, for example, a taxpayer's bankruptcy, may mitigate a culpability or default penalty (in relation to either reduced culpability or disproportionality to the seriousness of the offence). Further, the DRS may decide to waive payment of a tax assessment in exceptional cases of financial hardship.

**20 Are there any voluntary disclosure or amnesty programmes?**

If a taxpayer voluntarily discloses to have failed to file a tax return, or to have filed it incorrectly, a culpability penalty is not imposed or imposed at a reduced rate as a result of such voluntary disclosure. Specifically, a culpability penalty is not imposed for an incorrect or incomplete tax return only if disclosure occurs on the taxpayer's own accord and within two years after filing, or having had to file, such tax return (grace period). If it occurs after the grace period, a culpability penalty is imposed but at a reduced rate, with voluntary disclosure counting as a mitigating circumstance. With respect to self-assessment taxes, a culpability penalty is not imposed if the taxpayer discloses of its own accord not having paid the amount due. Voluntary disclosure also precludes a taxpayer from being criminally prosecuted for intentionally having failed to file a Dutch tax return, or having filed it incorrectly.

**Rights of taxpayers**

**21 What rules are in place to protect taxpayers?**

Various statutes protect the position of Dutch taxpayers (see also question 1). The Dutch Constitution provides that tax may be levied only pursuant to statute. The Dutch Constitution prohibits the Dutch tax judiciary from reviewing the constitutionality of acts of parliament. It is, however, obliged to assess whether statutory rules are compatible with international treaties. As a result, taxpayers can invoke the rights derived from human rights conventions, for instance, if a fine has been imposed. Furthermore, the taxpayer may refer to the case law of the CJEU and the Charter of the EU in a case where EU law is applied.

Substantive Dutch tax law is found in specific statutes on (corporate) income tax, wage and dividend withholding tax. The GALA codifies rules that apply to Dutch administrative law in general, also pertaining to the protection of taxpayer's rights. The GTA contains a considerable number of additional provisions. It sets out the manner in which tax can be levied and it provides taxpayers with the means to object to the infringement of their rights. The Collection of Taxes Act contains provisions on possible defences against collection measures.

Taxpayer's rights are also found in decrees of the Ministry of Finance. For example, the Administrative Penalties Decree contains instructions to the DRS as regards the imposition of fines. Taxpayers can invoke such a decree as if it were a rule of law. In addition, in case law various principles of proper administration are developed. The DRS has to apply these principles and taxpayers may invoke them. Examples of these types of principles are the principle of legitimate expectations, the fair play principle, the principle of due care and the principle of legal certainty. A few of these principles are included in the GALA.

**22 How can taxpayers obtain information from the tax authority? What information can taxpayers request?**

The GTA subjects DRS officials to a professional duty of confidentiality as regards a person's taxes and tax position. This duty applies to all information that is found or communicated, and not only to information of a confidential nature. Of course, an exception is made for tax officials for the purpose of carrying out their task. According to case law, this duty does not prohibit disclosure to the person or the business of the taxpayer itself or for those acting on its instructions.

## Update and trends

### Horizontal monitoring

Horizontal monitoring is an alternative to vertical monitoring. It is expected that the number of Dutch taxpayers (both MNEs and SMEs) that will enter into a horizontal monitoring covenant will increase, thereby expanding a working method based on mutual trust, transparency and understanding between the taxpayer and the DRS.

The essence of horizontal monitoring is that, on the one hand, the taxpayer implements appropriate controls for its own compliance and proactively shares information with the DRS, while on the other the DRS constructively and openly discusses current tax matters for the purpose of providing certainty in advance. The advantages of horizontal monitoring are levelling the playing field for the taxpayer and the DRS as well as keeping enforcement efforts by the DRS feasible in today's rapidly changing society.

### Information exchange on tax rulings

The 2011 Directive on Administrative Cooperation in the Field of Taxation was amended late 2015. The amended directive calls for EU member states to implement measures for the mutual automatic exchange of certain tax rulings among member states as of 1 January 2017.

The Dutch government announced that legislation implementing these measures will be submitted to the Dutch parliament in 2016, and exchange of information will take place retroactively on some specific rulings, such as rulings issued, renewed, or amended after 1 January 2012 (and before 1 April 2016), with respect to taxpayers with a minimum worldwide revenue of €40 million before 1 January 2018. In anticipation of this new legislation, the DRS declared that rulings have been exchanged already with some member states, for example, Germany and Belgium.

### Preliminary Supreme Court ruling in tax cases

As of 1 January 2016, a district court or an appellate court may request a preliminary ruling from the Supreme Court on general questions of Dutch tax law. The preliminary procedure is largely similar to the existing procedure for preliminary Supreme Court rulings in Dutch civil law cases and for preliminary rulings from the Court of Justice of the European Union, with the main difference being that the Supreme Court may decide not to issue a preliminary ruling if the question referred is hypothetical or carries insufficient significance. If the Supreme Court issues a preliminary ruling, the referring lower court has to abide by this ruling when deciding the case.

In addition, a taxpayer has a formal right to access its tax file when objecting against a tax assessment imposed, to hear the reasons of the DRS for imposing such an assessment and to be heard on the reasons for its objection against it. This right can be claimed before a court.

### 23 Is the tax authority subject to non-judicial oversight?

A taxpayer may file a complaint for having been treated discourteously by any DRS official. Such a complaint is filed with the superior of the relevant DRS official and subsequently with the National Ombudsman, which determines whether there has been discourteous treatment and publishes its findings in a publicly available report. In its report, the National Ombudsman may suggest improvements to the DRS but may not render legally binding decisions. Furthermore, the petitions committees of parliament exercise non-judicial oversight in cases where the taxpayer believes strict application of Dutch tax law results in consequences not intended by the legislature, for example, individual hardship. The decisions of these petitions committees are published and are authoritative.

## Court actions

### 24 Which courts have jurisdiction to hear tax disputes?

Cases that concern the assessment and collection of Dutch taxes, including administrative penalties imposed and interest charged in respect of Dutch taxes, are heard by the district courts in the first instance. Appeals in these cases are heard by the appellate courts with the possibility of appeal to the Supreme Court.

### 25 How can tax disputes be brought before the courts?

Generally speaking, proceedings start with the Dutch taxpayer objecting in writing to a decision by the DRS against which an objection or appeal lies. Under Dutch tax law, an objection and appeal lies against:

- tax assessments (ie, preliminary, final and supplemental assessments), including payment, withholding or self-assessment of Dutch taxes;
- refund decisions by the DRS; and
- other decisions (ie, administrative penalties or a decision on formation of a tax group) if Dutch tax law provides for objection and appeal to lie against such a decision.

The time limit for filing such an objection is six weeks after the objected decision is taken. The DRS has to reconsider the tax assessment on the basis of the written objection, for example, whether it has been issued in accordance with substantive Dutch tax law and does not infringe on any taxpayer's rights as safeguarded by the GALA and GTA.

If the DRS denies the taxpayer's objection wholly or partly, the taxpayer may lodge an appeal with the district court against the decision by the DRS. Again, the applicable time limit is six weeks after the appealed decision is taken. If the taxpayer and DRS so agree, a taxpayer may bring the case directly before the district court (without filing a prior objection to the DRS). The district court reviews the contested decision by determining

whether, as the DRS argues, the correct amount of tax has been levied and collected or, as the taxpayer argues, this amount has to be reduced. In this respect, no minimum thresholds exist. If the parties' arguments do not bear upon the amount of tax levied or collected, they are not admitted to argue the case for lack of interest in the proceedings.

During the proceedings, the DRS and taxpayer may argue the facts of the case but also the application or interpretation of the relevant law. The district court is a court of fact. Upon appeal from the district court, the appellate court reconsiders every aspect of the case to the extent necessary, including questions of fact. There is, however, an essential difference between cassation before the Supreme Court and an ordinary appeal before the appellate court. The Supreme Court is required by statute to base its reasoning on the facts as established by the lower court. The Supreme Court may reverse the lower court's decision on questions of law, including procedural tax law and requirements of due process.

### 26 Can tax claims affecting multiple tax returns or taxpayers be brought together?

The district court, appellate court and Supreme Court may join separate tax claims concerning the same taxpayer if these tax claims involve the same or similar subject matter, either upon their initiative or upon request from the taxpayer or DRS. In addition, a taxpayer may bring tax claims involving multiple Dutch tax assessments or decisions together into a single procedure, provided that the taxpayer observes the time limit for filing the objection or appeal.

### 27 Must the taxpayer pay the amounts in dispute into court before bringing a claim?

Generally speaking, the DRS allows the taxpayer an extension of the payment terms for a tax assessment once the taxpayer has filed an objection against the assessment. This extension is not renewed automatically if the taxpayer decides to lodge an appeal with the district court, appellate court or Supreme Court but is renewed upon request from the taxpayer. Before renewing the extension, the DRS may require additional security from the taxpayer for payment of the tax assessment. Accordingly, the taxpayer in most cases is not required to pay the amount of a contested tax assessment to the DRS before the dispute is settled.

### 28 To what extent can the costs of a dispute be recovered?

The taxpayer is required to pay filing fees upon appeal to the district court, appellate court or Supreme Court under penalty of the case being declared inadmissible. If the court sides with the taxpayer in part or in full, the DRS has to reimburse these fees. To the extent that the taxpayer has incurred travel expenses and legal fees, the court may likewise order the DRS to reimburse these expenses and fees according to a flat-rate system if the court sides with the taxpayer. If the court does not side with the taxpayer, each party bears its own expenses. The court may order at its discretion the DRS to reimburse the filing fees (but not the travel expenses or legal fees) even if it does not side with the taxpayer.



**29 Are there any restrictions on or rules relating to third-party funding or insurance for the costs of a tax dispute, including bringing a tax claim to court?**

The Netherlands has not enacted any statutory restrictions or rules relating to third-party funding or insurance in respect of tax disputes.

**30 Who is the decision maker in the court? Is a jury trial available to hear tax disputes?**

Complex cases heard by the district court and appellate court are decided by a three-judge panel. Other cases are decided by a single judge. All cases heard by the Supreme Court are decided by a panel of judges, consisting of three or five judges. Jury trial is not available.

**31 What are the usual time frames for tax trials?**

Under Dutch tax law, the DRS has to render a decision on an objection within a period of six to 10 weeks. If this period lapses, the DRS is assumed to have rejected the objection that creates a possibility for appeal. Generally speaking, each appeal to the district court, appellate court and Supreme Court lasts for one-and-a-half to two years. In case of undue delay by the DRS or tax judiciary, the taxpayer may be awarded compensation for supposed emotional damage.

**32 Describe the discovery process for a tax trial.**

Instead of a strict discovery process, the DRS and taxpayer may freely exchange evidence and other documents after the appeal is lodged. The district court and appellate court may request the parties to appear in person for disclosure purposes or request them to submit certain documents to the court.

**33 What testimony is permitted in a tax trial?**

After the appeal is lodged and during the hearing, the district court and appellate court may request to hear testimony from witnesses, including from the taxpayer, DRS officials or experts. In each case, the witness has a duty to testify before the court. The district court and appellate court may request written evidence as well as a translation thereof when it is not formulated in Dutch.

**34 Who can represent taxpayers in a tax trial? Who represents the tax authority?**

Taxpayers may represent themselves or be represented by anyone in proceedings, as legal representation is not mandatory in tax cases. Representation by a lawyer is mandatory only for oral arguments before the Supreme Court.

**35 Are tax trial proceedings public?**

The proceedings in tax cases are held behind closed doors and are not public, unless the proceedings involve an administrative penalty.

**36 Who has the burden of proof in a tax trial?**

According to the principle of a fair allocation of the burden of proof, the DRS has the onus to prove the facts increasing a taxpayer's Dutch tax liability and the taxpayer to prove the facts decreasing this liability. The burden of proof may be shifted from the DRS to the taxpayer and increased if the taxpayer does not comply with certain disclosure or reporting requirements (see also question 6). The probative value of evidence is not fixed by statute but determined by the court.

**37 Describe the case management process for a tax trial.**

The briefing process consists of an exchange of briefs in two rounds (usually taking up to four-to-eight weeks) and is followed by oral arguments (usually with a six-to-12-week delay). The parties may waive oral arguments, but this seldom happens.

**38 Can a court decision be appealed? If so, on what basis?**

Appeal lies with the district court, and subsequently with the appellate court and Supreme Court, against a decision by the DRS (see also question 25). In each case, the applicable time limit is six weeks after the contested decision is taken.

**DE BRAUW  
BLACKSTONE  
WESTBROEK**

**Frank Pötgens  
Ingrid Mensing  
Mats Cornelisse**

**frank.potgens@debrauw.com  
ingrid.mensing@debrauw.com  
mats.cornelisse@debrauw.com**

Claude Debussylaan 80  
PO Box 75084  
1070 AB Amsterdam  
Netherlands

Tel: +31 20 577 1771  
Fax: +31 20 577 1775  
www.debrauw.com

# Nigeria

Muhammad Dele Belgore (SAN) and Lateef Omoyemi Akangbe

Sofunde, Osakwe, Ogundipe & Belgore

## Overview

### 1 What is the relevant legislation relating to tax administration and controversies? Other than legislation, are there other binding rules for taxpayers and the tax authority?

The relevant legislation is:

- the Value Added Tax Act LFN 2004;
- the Capital Gains Tax Act LFN 2004;
- the Petroleum Profits Tax Act LFN 2004;
- the Stamp Duties Act LFN 2004;
- the Industrial Development (Income Tax Relief) Act;
- the Casino Taxation Act LFN 2004;
- the Personal Income Tax Act LFN 2004 only applicable in the Federal Capital Territory, Abuja;
- the Federal Inland Revenue Service (Establishment) Act 2007;
- the Companies Income Tax Act LFN 2004;
- the Income Tax (Authorised Communication) Act LFN 2004;
- the Deep Offshore and Inland Basin Production Sharing Contracts Act LFN 2004;
- the Taxies and Levies Act LFN 2004;
- the Education Tax (Amendment) Act LFN 2010; and
- the Tax Appeal Tribunals Act (Establishment) Order, 2009.

Other than legislation, other binding rules include:

- the Transfer Pricing Regulations, 2012;
- the Annual Operating Levy Regulations, 2014;
- the Nigeria Taxpayer Identification Number Regulations, 2014;
- the Tax Administration (Self Assessment) Regulations 2011;
- the Tax authority powers to issue circulars advising or outlining taxpayer obligations; and
- judicial decisions.

Nigeria presently has double taxation treaties with the following 13 countries: Belgium, Canada, France, Italy, Mauritius, the Netherlands, Pakistan, the Philippines, Romania, South Africa, South Korea, Sweden and the United Kingdom.

### 2 What is the relevant tax authority and how is it organised?

The Federal Inland Service (FIRS) is the tax authority at the federal level and the Federal Capital Territory, Abuja. The focus here will be on the FIRS as the tax authority at the federal level. Each one of Nigeria's 36 states has its own tax authority, responsible for administering and collecting state taxes; for instance, the tax authority for Lagos is the Lagos State Internal Revenue Service (LIRS).

Organisationally, the FIRS has offices across Nigeria with its head office in Abuja. Its board, the Federal Inland Revenue Service Board, is charged with overall supervision of the FIRS and its daily running. The board consists of an executive chairman, who heads the board, assisted by six members appointed by the Nigerian President to represent the country's six regions. The board also includes a representative (with the rank of director or above) from the Attorney General of the Federation (AGF), the Governor of the Central Bank of Nigeria and the Minister of Finance.

The FIRS' organisational structure includes:

- an investigation or intelligence department;
- a standards and compliance department;

- a field operations and support-services department; and
- a legal department.

There is also the Joint Tax Board (JTB) created to help improve tax administration across Nigeria; particularly harmonising the Personal Income Tax Act. This body is headed by the executive chairman of the FIRS and its membership comprises a member from each state nominated by the respective state's governor. The other members include representatives of the Federal Road Safety Corps Commission (FRSC), Revenue Mobilization Allocation and Fiscal Commission (RMAFC), Federal Capital Territory Administration, Federal Ministry of Finance and the FIRS. The board's function is to advise all tiers of government on tax matters, so as to evolve an efficient tax administration, resolve areas of conflict on tax jurisdiction among member states and to promote uniformity in the application of tax laws and the incidence of tax on individuals.

## Enforcement

### 3 How does the tax authority verify compliance with the tax laws and ensure timely payment of taxes? What is the typical procedure for the tax authority to review a tax return and how long does the review last?

The FIRS is responsible for administering the taxation of companies, wherever situated in Nigeria, and the taxation of individuals resident in the Federal Capital Territory.

Every company (whether or not it is liable to pay tax under the law) is required to file a self-assessment return with the FIRS in a prescribed form at least once a year. The return must contain the audited accounts, tax and capital allowances computation for the year of assessment and a true and correct statement in writing containing the amount of profit from each and every source computed; a completed self-assessment form, as prescribed by the FIRS, attested to by a director or secretary of the company and such attestation shall contain a declaration that it contains a true and correct statement of the amount of its profit computed in respect of all sources in accordance with the Companies Income Tax Act LFN 2004 and that the particulars given in such return are true and complete, together with evidence of payment of the whole or part of the tax due into a bank designated for the collection of the tax.

There is a timeline for filing company returns. For tax falling under the Companies Income Tax Act LFN 2004, if the company has been in business for more than 18 months, returns shall be filed not more than six months after the end of its accounting year, and in the case of a newly incorporated company, within 18 months from the date of its incorporation or not less than six months after the end of its first accounting period, whichever is earlier. In addition, the returns form shall be signed by a director who must be the chair or the managing director of the company and the secretary respectively.

For tax liable for VAT, returns must be filed on the 21st day of the month following the month of the transaction.

In case of a withholding tax, tax returns must be filed within the statutory period of 21 days after the transaction.

Tax returns submitted as provided above are reviewed by a desk or field review. A desk review consists of a review of the material submitted by the taxpayer. Where a field review is considered to be necessary, tax inspectors visit the taxpayer's premises and conduct a review of relevant material.

#### 4 Are different types of taxpayers subjected to different reporting requirements? Can they be subjected to different types of review?

Different types of taxpayers are subjected to different reporting requirements. The reporting obligations of corporate entities are different from those placed on individuals, as are the methods of review.

All tax obligations, whether on corporate bodies or on individuals, are imposed by federal legislation. The administration of the legislation, for corporations and residents of the Federal Capital Territory and members of the armed forces, are administered by the FIRS, while the legislation dealing with tax on individuals is administered by the Board of Internal Revenue of each individual state.

Corporations are required to ensure registration with the FIRS within six months of commencing business. Where a company declares a dividend, it must also ensure that a list of its shareholders, together with the full particulars of the dividend, is made available to the FIRS within 14 days of declaring the dividends. A company operating in the capital market must file a return of its transactions with the FIRS no later than seven days after the end of a month.

Companies engaged in the petroleum sector are obliged to file estimated tax returns no later than two months after the commencement of each accounting period and file the actual tax return within five months (that is 31 May of each year) after the accounting period.

A taxable person shall file within 90 days from the commencement of every year, without notice or demand, a return of income in a prescribed form together with a true and correct statement containing the amount of income from every source in the preceding year of assessment, with the relevant tax authority in which the taxable person is deemed to be resident.

#### 5 What types of information may the tax authority request from taxpayers? Can the tax authority interview the taxpayer or the taxpayer's employees? If so, are there any restrictions?

The FIRS is at liberty to call for any form of information it deems necessary to perform its duties. The law empowers it to notify any company as often as it thinks necessary, requiring it, within reasonable time, to provide fuller or further returns.

For the purpose of obtaining full information in respect of the profits within the time specified by the notice to any person, the FIRS is required to give notice to the taxpayer, requiring the taxpayer to complete and deliver any return specified in such notice, or appear personally before an officer of the FIRS for examination with respect to any matter relating to such profit.

The FIRS may also serve notice on a bank to provide, within the time stipulated in the notice, information including the name and address of any person specified in the notice. It is also authorised to enter the premises, registered office or place of management or residence of the principal officer of the company to conduct a search and this authority is equivalent to a search warrant and authorises the seizure and removal of any records and documents found on such premises, whether or not belonging to the company.

#### 6 What actions may the agencies take if the taxpayer does not provide the required information?

The FIRS may prosecute a person who does not provide the requested information and upon conviction the person will be liable to a fine of 10,000 naira or to imprisonment of not less than six months, or to both a fine and imprisonment.

#### 7 How may taxpayers protect commercial information, including business secrets or professional advice, from disclosure?

A taxpayer is only protected from disclosing privileged communication between his or her lawyer under the Rules of Professional Conduct, the Freedom of Information Act, the Evidence Act and under common law.

#### 8 What limitation period applies to the review of tax returns?

Where a company that has paid tax for any year of assessment alleges that any assessment made upon it for that year of assessment was excessive by reason of some error or mistake in the return, statement or account made by or on behalf of the company for the purpose of assessment, it may at any time not later than six years after the year of assessment within which the assessment was made, apply for a relief.

Where the FIRS discovers, or is of the opinion that any company liable to tax has not been assessed at all or assessed at a lesser amount than that which it ought to have been charged, the FIRS may within the year of assessment, or within six years after the expiry, assess such company at such amount or additional amount as ought to have been charged, provided that where any form of fraud, wilful default or neglect has been committed by or on behalf of any company in connection with any tax imposed, the FIRS may at any time and as often as may be necessary, assess such company at such amount or additional amount as may be necessary for the purpose of making good any loss of tax attributable to the fraud, wilful default or neglect.

#### 9 Describe any alternative dispute resolution (ADR) or settlement options available?

There is no provision in the statutes for any alternative dispute resolution or settlement option available to the taxpayer.

#### 10 How may the tax authority collect overdue tax payments following a tax review?

Generally, any amount due by way of tax shall constitute a debt due to the FIRS and may be recovered by a civil action brought by it.

The FIRS is also empowered (where a demand note has become final and conclusive) to distrain the taxpayer's goods or other chattels, bonds, securities, any land, premises, or place in respect of which a taxpayer is the owner, and recover the amount of tax owed by sale of anything so distrained.

#### 11 In what circumstances may the tax authority impose penalties?

The FIRS may impose penalties for late filing or failure to file returns.

#### 12 How are penalties calculated?

The penalty for late filing of company returns is 25,000 naira in the first instance. Failure to file incurs a 5,000 naira fine for each subsequent month in which the failure continues.

#### 13 What defences are available if penalties are imposed?

Relying on professional advice (be it an attorney or accountant) is not available as a defence if penalties are imposed.

#### 14 In what circumstances may the tax authority collect interest and how is it calculated?

If any tax is not paid within the prescribed period, a sum equal to 10 per cent of the amount of tax payable shall be added thereto.

In the case of remittances paid in Nigerian naira, the tax due shall carry interest at the prevailing minimum rediscount rate of the Central Bank of Nigeria with its payment period to be determined by the minister from the date when the tax becomes payable until it is paid. The interest is recovered in the same way as the tax due.

In the case of remittances in foreign currency, the tax due shall incur interest at the prevailing London Interbank Offered Rate or the prevailing minimum rediscount rate of the Central Bank of Nigeria, whichever is higher, with its payment period to be determined by the Minister of Finance from the date when the tax becomes payable until it is paid. The mode of tax recovery is applicable to interest recovery.

#### 15 Are there criminal consequences that can arise as a result of a tax review? Are these different for different types of taxpayers?

Yes. Under various tax legislation, there are criminal consequences for filing false statements and returns, or aiding, abetting, counselling, inducing, assisting in preparing, delivering false accounts, or preventing an authorised officer from carrying out a lawful duty, or unlawfully, to refuse or neglect to pay tax.

In addition to the offences in the FIRS Act, there could also be criminal prosecution under any other enactment.

#### 16 What is the recent enforcement record of the authorities?

According to the FIRS' official website, the target for assessment year 2015 was the 4.6 billion naira recovery target. The actual amount recovered was

3.8 billion naira. However, the 2012 assessment year remains the record with 5 billion naira recovered from a 3.6 billion naira target.

### Third parties and other authorities

#### 17 Can a tax authority involve or investigate third parties as part of the authority's review of a taxpayer's returns?

Yes, the FIRS can involve or investigate a third party in order to verify, monitor, or review a taxpayer's return or to call for fuller or further returns.

Upon demand, every bank shall prepare quarterly returns specifying:

- for individuals, all transactions involving the sum of 5 million naira and above; or
- for body corporates, all transactions involving the sum of 10 million naira and above, the names and addresses of all customers of the bank connected with the transaction and deliver the returns to the FIRS.

The FIRS may also, for the purpose of obtaining information for taxation, give notice to any person in Nigeria to provide information within the time stipulated in the notice, including the name and address of any person specified in the notice.

Without demand, every company operating in the Nigerian Stock Exchange is mandated to file with the FIRS' board a return in a prescribed form of its transactions during the preceding calendar month, not later than seven days after the end of each month.

Furthermore, without demand, every person engaged in banking shall prepare a return at the end of each month specifying the names and addresses of new customers of the bank and shall not later than the seventh day of the following month deliver the return to a tax authority of the area where the bank operates, or where such customers are registered as a company with the FIRS.

#### 18 Does the tax authority cooperate with other authorities within the country? Does the tax authority cooperate with the tax authorities in other countries?

Yes. The FIRS cooperates with state tax authorities and this cooperation is exemplified by the work of the JTB.

In accordance with double taxation bilateral treaties between Nigeria and 14 signatory countries (see question 1) the FIRS will cooperate with the tax authorities in those countries.

Furthermore, the federal government has signed up to the Multilateral Competent Authority Agreement (MCAA). The aim of this agreement is to provide a standardised and efficient mechanism to facilitate the automatic exchange of information in accordance with the Standard for Automatic Exchange of Financial Information in Tax Matters (the Standard). This agreement provides for the automatic exchange of information between parties to the agreement, where two parties subsequently agree to do so.

### Special procedures

#### 19 Do any special procedures apply in cases of financial or other hardship, for example when a taxpayer is bankrupt?

No. There are no special procedures in cases of financial or other hardship. On the contrary, where a company is being wound up, the liquidator shall not distribute any of the assets of the company to the shareholders unless, he or she has made provisions for the full payment of any tax payable by the company, including tax deductions relating to the tax of any individual in any part of the country.

#### 20 Are there any voluntary disclosure or amnesty programmes?

The authors are not aware of any voluntary disclosures or amnesty programmes in Nigeria.

### Rights of taxpayers

#### 21 What rules are in place to protect taxpayers?

The following are some of the rights afforded to taxpayers under the law:

- taxpayers have the right to be informed of any assessment and have the opportunity to respond;
- taxpayers have the right to contest or object to an assessment on any grounds cognisable under the law;
- where an objection is refused, a taxpayer has the right of appeal; and
- whenever the FIRS is of the opinion that tax assessed on profits or income of a person has been fully paid, it shall issue a tax clearance

certificate to the person within two weeks of the demand for such certificate by that person or, if not, give reasons for the denial.

#### 22 How can taxpayers obtain information from the tax? What information can taxpayers request?

While a taxpayer can approach the FIRS requesting information about their own tax records, it is unlikely that a taxpayer can obtain information about a third party. Although, under the Freedom of Information Act 2011, a person is entitled to obtain information from the government or any of its agencies, whether or not he or she has an interest in the matter and where the request for information is refused, the reason for the refusal must be given. However, the law recognises issues bordering on national security and privileged communication between a legal practitioner and client, health worker and client, and any other professional privileges conferred by the Act, as grounds for refusal.

Any person entitled to information under the Act shall have the right to initiate court proceedings to compel a public authority to comply with the provisions of the Act.

#### 23 Is the tax authority subject to non-judicial oversight?

The FIRS' board has oversight functions over the FIRS' activities. These functions include:

- providing the general policy guidelines relating to the functions of the FIRS;
- manage and superintend FIRS' policies on matters relating to the administration of the revenue assessment, collection and accounting system under any law;
- review and approve the strategic plans of the FIRS;
- employ and determine the terms and conditions of service, including disciplinary measures, of the FIRS' employees; and
- do such other things deemed necessary to ensure the efficient performance of the FIRS.

### Court actions

#### 24 Which courts have jurisdiction to hear tax disputes?

The Constitution of the Federal Republic of Nigeria, 1999 vests the Federal High Court (FHC) with exclusive jurisdiction over matters concerning taxation or revenue in Nigeria over any other court.

However, certain statutes (the Companies Income Tax Act LFN 2004, the Petroleum Profits Tax Act LFN 2004, the Personal Income Tax Act LFN 2004, the Capital Gains Tax Act LFN 2004 and the Value Added Tax Act LFN 2004, see question 1) have also vested the Tax Appeal Tribunal (TAT) with jurisdiction to hear and determine tax disputes between the taxpayer and the FIRS. Curiously, the Act setting up the TAT confers it with the status of a court.

It is, however, worthy of note that the Court of Appeal in 2010 held that the proper venue for disputes over VAT is the FHC and not the TAT, although this case is now on appeal to the Supreme Court. Similarly, the FHC in 2013, following the earlier Court of Appeal case, held that the TAT lacked the jurisdiction to determine tax disputes and the appropriate forum for same is the FHC. This decision is also currently being challenged at the Court of Appeal.

#### 25 How can tax disputes be brought before the courts?

In the FHC, a dispute is commenced by a writ of summons, followed by disputes of fact and by originating summons where the disputes are purely on questions of law or legislative interpretation.

If the dispute is referred to the TAT, it may be commenced by filing an appeal in no particular form.

There is no minimum threshold amount for claims, and claims can be sought for a declaration, orders for reversal of excessive liabilities or sums or payments of outstanding sums, liabilities, together with interest upon the sum awarded.

#### 26 Can tax claims affecting multiple tax returns or taxpayers be brought together?

Tax claims affecting multiple returns by the same taxpayers can be brought together, but tax claims involving more than one taxpayer cannot be brought together.

**27 Must the taxpayer pay the amounts in dispute into court before bringing a claim?**

No. Once an assessment is being challenged before the TAT or the FHC, the payment of the amount dispute is put in abeyance until judgment is given. Once the TAT or a court, gives a judgment against a taxpayer, he or she shall be required at that stage to pay the judgment sum, notwithstanding that the taxpayer intends to challenge the decision on appeal, except when a delay in carrying out the order is sought and obtained.

**28 To what extent can the costs of a dispute be recovered?**

The cost of filing of an action in court, together with attorneys' fees may be claimed in the same way as costs claimed through normal court actions.

**29 Are there any restrictions on or rules relating to third-party funding or insurance for the costs of a tax dispute, including bringing a tax claim to court?**

There is no restriction on third-party funding, but the use of such rules remains rare.

**30 Who is the decision maker in the court? Is a jury trial available to hear tax disputes?**

There are no jury trials in Nigeria.

In the TAT there are five commissioners, as appointed by the Minister of Finance, with a quorum of three commissioners.

In the FHC, matters are heard with one judge sitting as a court of first instance.

Appeals to the Court of Appeal are heard by three justices or a maximum of five justices.

In the Supreme Court, tax appeals are heard by five justices or a maximum of seven justices.

**31 What are the usual time frames for tax trials?**

The Act establishing the FHC provides that all revenue matters shall, as far as practicable, be tried, determined or disposed of in priority to any other business of the Court.

In practice, however, the Court has the power to adjust the time frame depending on the case at hand, so it may take on average between six and 18 months.

**32 Describe the discovery process for a tax trial.**

Under the rules regulating practice and procedure in the FHC, any party may, in writing, request any other party to any cause or matter, to make discovery on oath of the documents that are or have been in his or her possession, or custody, power or control relating to any matter in question in the case.

Request for discovery is served within seven days of close of pleadings or within such period as the Court may direct and the party upon whom it is served shall answer on oath completely and truthfully within seven days

**Update and trends**

The most significant trend has been the ongoing attempt of the legislature to pass the Petroleum Industry Bill (PIB). The aim is that when (if) the bill is passed into law, it will contain provisions that will replace the PPTA and be the primary legislation that provides for taxation in the petroleum sector.

Another significant controversy is in the provision of the Companies Income Tax Act LFN 2004 on 'commencement rule' for taxing new trade or business that results in double taxation of the company in the first three accounting periods of the company. Under the commencement rule, in assessable profit of a new company from the first year it commenced to carry on business shall:

- in the first year of business, the assembled profit shall be the profit of that year;
- in the second year of business, the assembled profits shall be the amount of the profits of the first year from the date of the commencement of the trade or business; and
- in the third year of business, the assessable profits shall be the profits of the year immediately preceding the year of assessment.

Also of significance is the continuing controversy surrounding the status of the TAT, given the conflicting decisions of the Federal High Court as to its constitutionality. The status of these bodies will remain unsettled until a there is a pronouncement by the highest court in the land.

of the request or within other time as the judge may allow, file an affidavit in answer to a request for discovery of documents, accompanied by copies of documents referred to in the request.

**33 What testimony is permitted in a tax trial?**

In claims before the TAT and the FHC, evidence of the taxpayer and of other witnesses may be adduced including, where relevant, evidence from experts. Where the witness does not testify in English, the testimony of the witness must be interpreted by an interpreter provided by the court or tribunal. Written material must be translated into English in order to be used by the court or tribunal, and such translation will be at the expense of the party seeking to rely upon such material.

**34 Who can represent taxpayers in a tax trial? Who represents the tax authority?**

A taxpayer may appear in person or by a legal practitioner of choice.

The FIRS is normally represented by legal practitioners within the service, who are seconded from the Federal Ministry of Justice.

In criminal proceedings, prosecutions are made by the AGF, legal practitioners in his or her chambers, or a private practitioner by obtaining a consent of the AGF to prosecute.

**Sofunde Osakwe Ogundipe & Belgore**  
legal practitioners

**Muhammad Dele Belgore (SAN)**  
**Lateef Omoyemi Akangbe**

**mdbelgore@sooblaw.com**  
**loakangbe@sooblaw.com**

7th Floor  
St Nicholas House  
6 Catholic Mission Street  
PO Box 80367  
Lagos  
Nigeria

Tel: +234 1 462 2502  
Fax: +234 1 462 2501  
sooblaw@sooblaw.com

**35 Are tax trial proceedings public?**

Yes. Tax proceedings in the TAT and the various level of courts are held in public.

**36 Who has the burden of proof in a tax trial?**

The person who asserts bears the burden of proof. Thus, the party that institutes the claim must prove same on a balance of probability.

In criminal proceedings, the prosecutor must establish the commission of the crime beyond a reasonable doubt.

**37 Describe the case management process for a tax trial.**

The rules of the TAT are silent on the case management process for trial, however, when there is no provision or adequate provision in its rules of practice and procedure, it follows the rules applicable in the FHC.

In the FHC, the process is as follows:

- upon being served with the claim, the defendant shall deliver a defence within 30 days of service;
- if the plaintiff desires to file a reply to the defence, he or she shall file it within 14 days from the service of the defence;
- in the absence of any matter to be disposed of during interlocutory proceedings, the matter proceeds to trial;

- after evidence conclusion, the court adjourns to such time as it deems fit for final addresses; and
- after trial conclusion, judgement shall be delivered within 90 days from the conclusion of evidence and final addresses.

However, where a party defaults in complying with the time frames stipulated above, the party can apply to the court for the time to be extended and the court has the discretion to extend the time, upon payment of a default fee of approximately 1,000 naira for each day of the default.

**38 Can a court decision be appealed? If so, on what basis?**

All decisions of the TAT and other courts except the Supreme Court are appealable, either as of right or with leave of court.

- appeals from the TAT to be laid to the FHC within 30 days of the decision;
- appeals from the FHC laid to the Court of Appeal within 14 days in respect of an interlocutory appeal and 90 days in the case of a final appeal; and
- appeal from the Court of Appeal lies to the Supreme Court within 14 days if the appeal is interlocutory and 90 days where it is in a final decision.

# Norway

Ola Mæle, Sindre Kleive and Lise Onarheim

KPMG Law Advokatfirma AS

## Overview

### 1 What is the relevant legislation relating to tax administration and controversies? Other than legislation, are there other binding rules for taxpayers and the tax authority?

The relevant legislation for income and wealth tax is the Tax Act of 1999.

The Tax Assessment Act of 1980 governs issues relating to tax administration and procedural rules relating tax matters.

From 2017 this will be replaced by the new Tax Administration Act of 2016.

The Tax Payment Act of 2005 governs issues relating to the collection and payment of taxes.

Norway also has important special tax legislation such as the Property Tax Act of 1975 and the Petroleum Tax Act of 1975.

The Tax Administration enforces the tax legislation (see question 2).

There are also a number of relevant regulations to the tax laws. The most important is the regulation to supplement and implement, etc, the Tax Act of 1999.

Other than legislation, there are binding rules for both taxpayers and the tax authorities. These rules include the following:

- Norwegian parliament tax resolutions. These are annual parliamentary resolutions regarding taxes on income and capital in Norway. Parliament's resolutions govern, among other things, tax rates.
- The preparatory documents for legislation is highly relevant when the legislation is interpreted. This includes documents from the Norwegian parliamentary committee, as well as protocols from proceedings in the Norwegian parliament.
- An important source of law is the EEA Treaty with which Norwegian tax laws must be compliant. The EEA Treaty is implemented into Norwegian legislation through the EEA Act of 1992.
- Norway is party to a large network of tax treaties and other international conventions. Tax treaties and international tax conventions have status as Norwegian legislation when the Norwegian government ratifies them.
- Case law from the Supreme Court acts as precedent. However, case law from a lower court can serve as a relevant argument at that instance.
- The Norwegian tax authorities issue binding and non-binding (guiding) tax rulings, as well as statements of general interpretation on tax matters. The Ministry of Finance also issues statements of general interpretation. The Directorate of Taxes collects and issues guidelines for the tax administration annually in a comprehensive publication collection called *Lignings-ABC*.

### 2 What is the relevant tax authority and how is it organised?

The Ministry of Finance is the highest governmental tax authority. Administration, supervision and control of tax matters is delegated to the Directorate of Taxes. Tax Administration offices do the daily administration, supervision and controls of taxpayers. There are five regional Tax Administration units. There are multiple local offices, but formally the dealings of the taxpayer will be with the regions.

The Petroleum Tax Office assesses taxpayers that are engaged in exploration and pipe transportation of petroleum.

Additionally, there are two very important bodies within the tax regions: the Central Office for Foreign Tax Affairs (COFTA) is responsible for tax reviews of foreign companies and their foreign employees on assignments or work in Norway or on the Norwegian continental shelf.

The Tax Office for Large Entities deals with entities above a certain size, and with taxpayers subject to the special tax regimes for shipping and electric power production.

Municipality treasurers collect the taxes.

## Enforcement

### 3 How does the tax authority verify compliance with the tax laws and ensure timely payment of taxes? What is the typical procedure for the tax authority to review a tax return and how long does the review last?

It is the taxpayer's responsibility to ensure that the tax return complies with the tax laws.

The tax authorities may use different types of controls to verify the fulfilment of tax obligations, such as automatic and manual controls. All tax returns undergo an automatic mechanical control, which picks out tax returns for further evaluation. Tax return data and figures are used to determine manual controls. Every year the Tax Administration offices evaluate which data and figures should be subject to particular manual control.

To ensure timely payment of taxes, delayed payment can result in penalty interest. Furthermore, a penalty for late filing can occur if the tax return is not submitted within its deadline. Tax collection and debt enforcement is provided by the Tax Collector's Offices in each municipality.

The tax review for a particular income year starts after receipt of the tax return. If there is nothing particular, the assessment is issued in June for taxpayers with pre-completed tax returns and from August through to October for self-employed, corporations and other legal entities.

Tax returns are reviewed based on the information provided. If the Tax Administration office finds that the taxpayer's tax return is incorrect or incomplete, the Tax Administration can change, omit or add items. The tax authorities have a right to require further information and clarification from the taxpayer and from third parties (see questions 7 and 17).

The Tax Administration and the local treasurer can demand field audits (see question 5 and 6).

It is common that a tax review will consist of several rounds of questions and answers, and it may take several years to complete. Starting out, the questions may be of an exploratory nature, intending to clarify whether there are grounds for reassessment. If the tax authorities intend to amend a tax assessment, a notice of reassessment must be issued to the taxpayer outlining the factual and legal arguments. The tax authorities will also issue a draft assessment for review and comment by the taxpayer before the final assessment is made.

There is no legal time limit for conducting the tax review, but the courts must take extreme undue delay on the part of the tax authorities into account. This doctrine of passivity is based either on case law or on the rules of the European Convention of Human Rights (ECHR). The latter applies only to penalty taxes.

### 4 Are different types of taxpayers subjected to different reporting requirements? Can they be subjected to different types of review?

The official forms used for tax returns require different kinds of information for individuals, self-employed, corporations and other legal entities.

Everyone who conducts business is required to submit an income statement for the enterprise together with the tax return. The income statement is a slightly simplified statement of the main items in the

enterprise's profit and loss account and balance sheet. Those obliged to submit annual accounts complete Income Statement 2, while others in general are required to submit Income Statement 1.

There are different forms for different types of taxpayers.

Instead of the Income Statement, foreign companies and entities that are subject to tax review by COFTA can submit accounting excerpts (form RF 1045) in addition to the tax return.

The deadline for online submission of the tax return together with the required statement is 31 May in the year following the income year for both companies and self-employed persons. For companies that submit their tax return on paper, the deadline is 31 March. For self-employed persons who submit their tax return on paper, the deadline is 30 April.

For employees, pensioners and self-employed persons, suggested data and values have been entered into the tax return in advance, based on information the tax authorities have collected from third-party sources. The taxpayer is, however, still responsible for ensuring that the information in the pre-completed tax return is correct. If the information in the pre-completed tax return is incorrect and incomplete, the taxpayer must correct and submit the tax return to the Tax Administration. If the pre-completed tax return is complete and there is no need for any changes, the taxpayer is not obliged to submit the tax return.

The deadline for submission of the tax return for employees and pensioners is 30 April.

#### **5 What types of information may the tax authority request from taxpayers? Can the tax authority interview the taxpayer or the taxpayer's employees? If so, are there any restrictions?**

The tax authorities can in practice demand taxpayers to provide any information that may affect the taxpayer's taxes. This is the case regardless of where the information exists. The obligation only includes information that can be suitable as means of checking the taxpayer's tax duties.

The obligation to provide information covers all forms of information. The tax authorities may require the taxpayer to provide access to accounting documentation such as vouchers, contracts, correspondence and protocols of board meetings, electronic programs and program systems. The list is not exhaustive.

The obligation to provide information covers factual information. Legal assessments made by the taxpayer or his or her attorneys are not subject to the obligation.

It is the taxpayer, or whoever the taxpayer appoints, that is responsible to provide the information requested. Where the taxpayer or the appointed person is not present in a control situation, the tax authorities may not require employees to provide assistance.

Employers must deduct taxes for their employees. The local tax treasurer must supervise an employer's tax deductions. As part of this oversight, the treasurer can demand a field audit at the workplace. In these checks, anyone performing or having performed work or assignments for the employer is required to provide information about their employment conditions or assignments related to the work.

#### **6 What actions may the agencies take if the taxpayer does not provide the required information?**

The Tax Administration can make a field audit at places where the business is conducted, at a third party's premises, government agency or provider of access to electronic communication networks. The Tax Administration can choose whether it wishes to request the information from the taxpayer in writing or immediately make a field audit.

Tax authorities may request the assistance of the police in field audits. This may typically take place where there is suspicion of serious tax fraud and risk of destruction of evidence. Such police assistance does not extend the rights of the tax authorities in obtaining information.

Furthermore, the tax authorities may request the taxpayer to present basically any kind of required documentation, such as, for example, accounting documents with annexes, contracts, correspondence and minutes of board meetings. Correspondence with lawyers is generally exempt from this obligation.

If no further information is either provided by the taxpayer or obtained from other sources, the tax office can make its assessment based on the information available. Note that any rights to provide supplementary information are severely limited after the tax office has issued its assessment.

#### **7 How may taxpayers protect commercial information, including business secrets or professional advice, from disclosure?**

The taxpayer is obliged to provide the requested information regardless of any duty of confidentiality. However, the taxpayer is only obliged to provide information that is relevant for the tax review. In this regard, it is important to be aware that the taxpayer only has to provide factual information, and not legal assessments made by the taxpayer or the taxpayer's legal adviser. Advice from other (non-legal) professionals is not protected by such privilege. The lawyer-client privilege in tax cases is currently subject to some debate, especially regarding information relating to the use of a lawyer's client account for transaction payments.

The tax authorities are responsible for maintaining confidentiality and establishing safeguards to prevent unauthorised access to confidential information acquired in connection with the information and the check.

#### **8 What limitation period applies to the review of tax returns?**

If the taxpayer has provided correct information, the tax authorities are currently prohibited from going back more than two years from the end of the income year. For amendments in favour of the taxpayer the time limit is three years. From 2017 the general time limitation will be five years, regardless of the documentation provided.

In cases where the taxpayer has provided incorrect or incomplete information, the tax authorities may review and change tax returns up to 10 years after the income year. From 2017 the 10-year time limitation will only apply in cases where the taxpayer is subject to increased penalty tax (*skjerpet tilleggs katt*) of 20 or 40 per cent in addition to the normal penalty tax, or is subject to a criminal charge for tax evasion.

#### **9 Describe any alternative dispute resolution (ADR) or settlement options available.**

Norwegian law does not provide for an ADR procedure in tax matters.

A tax assessment may be contested by means of an administrative or judicial procedure. It does happen in the course of such procedures that the tax authorities reach a settlement with the taxpayer.

Choosing the route of administrative appeal, the taxpayer must lodge a complaint in writing. The complaint must contain specific arguments and explanations of the grounds upon which such arguments are based. The complaint must be filed with the tax office within six weeks from the date the tax assessment was sent to the taxpayer. If the complaint regards a reassessment decision made by the tax office, a board of tax appeals will deal with the complaint. The tax boards are organs independent of the tax office, but the tax office prepares the cases. There is a new independent tax board system on the verge of being implemented.

If the tax board upholds the reassessment decision, the taxpayer has no right of further administrative appeal. If the taxpayer wishes to contest the case further, it must be brought before the courts.

The Directorate of Taxes may demand that a decision by a tax board is brought before the national tax board.

#### **10 How may the tax authority collect overdue tax payments following a tax review?**

Overdue tax payments must be paid even if the assessment is subject to appeal. Delay interest will accrue from the due date until the payment is made. If the claim is not paid voluntarily, the treasurer may enforce the payment, and charges may apply according to court fees.

If the overdue tax needs to be collected by enforcement, the treasurer may take liens over property, force sales of assets, file a petition of bankruptcy, etc.

As a general rule the limitation period for overdue tax payments is three years after the end of the calendar year when the tax was due.

If a taxpayer is in no position to pay overdue tax, the taxpayer may apply to the local treasurer or the Tax Administration for a deferral or reduction in the overdue tax.

#### **11 In what circumstances may the tax authority impose penalties?**

If the taxpayer submits the tax returns, income statements or partnership statements after the deadline, a penalty for late filing is applicable.

If the taxpayer fails to submit the tax returns, or provides incorrect or incomplete information, this may result in penalty tax.



Taxpayers who wilfully or through gross negligence have given the tax authorities incorrect or incomplete information, or who have failed to submit tax returns, income statements or partnership statements, and who understood or should have understood that this could have led to a reduced tax burden, risk a higher rate of penalty tax.

Failure to submit tax returns, income statements or partnership statements can affect the rights for the taxpayer to appeal.

## 12 How are penalties calculated?

The penalty for late filing is 0.1 per cent of net worth and 0.2 per cent of the net income when the delay is less than one month, and 1 and 2 per cent respectively if the delay exceeds one month. The penalty is at least 200 kroner.

The normal rate of penalty tax is 30 per cent of the tax reduction. The normal rate will be reduced to 20 per cent from 2017. Additional penalty tax for more serious cases requires that the taxpayer intentionally or through gross negligence provides the tax authorities with incorrect or incomplete information, or neglects to provide mandatory information when he understands or should understand that it would lead to a tax benefit. The more serious cases could involve criminal prosecution (see question 15).

## 13 What defences are available if penalties are imposed?

Legal grounds for exemption from penalties are illness, age, inexperience and other causes. These exemptions are meant to be limited, but are nonetheless important. Further, in the normal course of a complaint the taxpayer would contest that the information submitted was indeed faulty or incomplete.

It is the taxpayer's responsibility to ensure the submission of tax returns, etc are correct and within the deadline. The use of an accountant or auditor for the tax return generally does not relieve the taxpayer of the responsibility for the information being correct or of timely submission.

## 14 In what circumstances may the tax authority collect interest and how is it calculated?

The tax authorities may add delay interest to outstanding tax amounts. However, according to Norwegian law, interest upon penalty tax is illegal.

A delay interest will accrue from the due date until the payment is made. The Ministry of Finance shall determine the interest every six months, with effect from 1 January and 1 July.

## 15 Are there criminal consequences that can arise as a result of a tax review? Are these different for different types of taxpayers?

Taxpayers who wilfully or through gross negligence give tax authorities incorrect or incomplete information may be prosecuted for tax evasion when the taxpayer understood or should have understood that this may lead to reduced tax or tax-related benefit. Tax evasion cases under criminal law will have to observe the same rules regarding burden of proof as other criminal cases.

The same actions cannot result in both penalty tax and criminal prosecution. This would be a violation of the ECHR. The tax authorities must therefore choose between imposing the additional or increased penalty tax or criminal prosecution of the taxpayer. The choice will largely depend on the seriousness of the violation.

The general rule is that the taxpayer – whether the taxpayer is a company or a person – has the penalty tax or the criminal prosecution imposed. However, in some cases the chairman of the board, the board members and/or the manager can be fined or even imprisoned, for example if the company does not pay the withholding tax on salaries for its employees.

## 16 What is the recent enforcement record of the authorities?

The most recent enforcement record of the authorities is from 2014. Regarding the most serious tax crimes in 2014, the Tax Administration completed 316 inspections and recalculated nearly 728 million kroner in the income data. Regular controls or different levels are in the tens of thousands. The Tax Administration had a particular focus on stopping or limiting tax crime through pursuit of principals and backers in workforce tax violations.

In 2014 the tax crime departments reported 102 cases of organised 'underground' work and fictitious invoicing networks. The Tax Administration reported a total of 741 cases based upon tax reviews or field

audits and 457 reports based upon failed tax returns, income statements or partnership statements.

Twenty-one arrests were made.

In 2015, an interesting statistic is that from a total of 110 court cases becoming final, 62 per cent were held in favour of the tax authorities for material tax issues. Seventy-four per cent were held in favour of the tax authorities on indirect tax. The statistics suggest outcomes favour the taxpayer in the higher court instances.

## Third parties and other authorities

### 17 Can a tax authority involve or investigate third parties as part of the authority's review of a taxpayer's returns?

At the request of the tax authorities, any third party is obliged to provide information that may affect the taxpayer's assessment. No requirements exist relating to the relationship between the person who is obliged to provide the information and the taxpayer. The information must contribute to the clarification of someone's tax assessment.

The tax authorities can conduct a field audit at the third-party premises.

Third parties that are subject to legal confidentiality and requested to provide information only have to provide information of money transfers, deposits and liabilities including the parties and regarding the third-party accounts belonging to the taxpayer.

### 18 Does the tax authority cooperate with other authorities within the country? Does the tax authority cooperate with the tax authorities in other countries?

In tax matters, the tax authorities cooperate with relevant national governmental agencies, especially the Agency for Economic Crime and the Customs Agency.

Norway has signed a number of international treaties with other states to avoid double taxation, prevent tax evasion and exchange information. Norway has particularly close cooperation with the other Nordic countries.

## Special procedures

### 19 Do any special procedures apply in cases of financial or other hardship, for example when a taxpayer is bankrupt?

The tax collector will act more or less as a normal creditor with regard to enforcement. There are, however, certain exceptions.

Deferred payment or reduction of tax due to the taxpayer's condition may be applied in instances of death, serious disease or a permanent reduction in the ability to service debts.

Deferred payment or reduction of tax due to the position of the tax collector as creditor may apply where the taxpayer is unable to service his or her debts in an ordinary manner. The conditions of the payment offer must provide a better return than continued enforcement of the tax claim.

In the case of bankruptcy, the bankruptcy estate is a separate tax entity, separate from the debtor in bankruptcy. Tax debts rank below certain prioritised claims, but above normal creditors.

The estate has a duty to submit a tax return for any taxable activities under the regular rules and deadlines.

### 20 Are there any voluntary disclosure or amnesty programmes?

The Tax Assessment Act contains a voluntary disclosure or tax amnesty provision.

Taxpayers who wish to come clean under the Norwegian tax amnesty provision are free from penalty tax and criminal prosecution, if they do not come forward under threat of investigation. However, they are obliged to pay income and wealth tax, plus interest on the previously unpaid tax amounts.

## Rights of taxpayers

### 21 What rules are in place to protect taxpayers?

The Norwegian Constitution requires that all taxes must be imposed based on legislation (rule of law). New tax laws cannot be applied retroactively. An example is that the High Court declared the new tonnage tax regime implemented in 2007 unlawful with regard to its retroactive effects of taxation.

## 22 How can taxpayers obtain information from the tax authority? What information can taxpayers request?

The Tax Administration has a legal obligation to provide guidance to taxpayers. Taxpayers can call the Tax Administration offices for guidance, or find information on the Tax Administration's websites.

This right extends to guidance on filling in forms relating to the tax return, income statements, partnerships statements and tax reviews. When the work situation permits, the Tax Administration also provides guidance on laws, regulations and common practices that are relevant for the taxpayer's rights and obligations and, if possible, pointing out issues that could especially have an impact.

In addition to the general guidance, the taxpayer may apply to the Tax Administration for an advanced binding statement or ruling.

## 23 Is the tax authority subject to non-judicial oversight?

The tax authority is subject, as are other government and public agencies, to review by the Office of the Auditor General (OAG).

The OAG shall ensure that the community's resources and assets are used and governed according to the Norwegian parliament's decisions. This is carried out through auditing, monitoring and guidance of the agencies.

The OAG is an independent entity in relation to government. It reports the results of its auditing and monitoring activities to the Norwegian parliament.

Taxpayers also have the opportunity to lodge a complaint with the Parliamentary Ombudsman. The ombudsman carries out supervision based on complaints from citizens concerning any maladministration or injustice on the part of a public agency.

## Court actions

### 24 Which courts have jurisdiction to hear tax disputes?

There are no specialist courts for tax matters in Norway. Tax matters are dealt with in the ordinary courts, and there are no specific court structures for tax disputes.

A tax case must be lodged against the state of Norway, normally represented by one of the five regional tax bodies, or by the Petroleum Tax Office. Legal venues can be the ordinary courts where the taxpayer resides or has his principal place of business.

### 25 How can tax disputes be brought before the courts?

In general, the taxpayer has a right to appeal any tax assessment decisions issued by the Tax Administration. However, the taxpayer cannot appeal the advanced binding rulings from the Tax Administration.

There is no minimum threshold to be met before a claim can be brought to the district courts (courts of first instance).

Before lodging a claim before the courts, the taxpayer must provide the counterparty, in most cases the state, with a written notice of the appeal. The notification shall state the appeal and the grounds for it. The notice shall also invite the counterparty to respond to the claim. The counterparty shall have reasonable time to respond before the taxpayer can bring the claim before the courts.

The taxpayer can bring a tax dispute before the courts regardless of whether an administrative appeal procedure has been undertaken or been completed.

An appeal regarding a tax assessment must be brought before the courts within six months after a tax settlement or tax amendment resolution was sent to the taxpayer.

The tax authorities' decisions on tax matters and tax assessments are administrative decisions. It is fundamental that the courts do not act as a tax administration. The courts therefore have somewhat limited competence in hearing decisions on tax matters. The courts will test the assessment of the facts of the case, of procedural matters and of the legal basis. At the outset the discretionary assessment of the tax authorities cannot be tested as long as it is within the law.

On this basis the courts must generally disallow new facts when hearing the Tax Administration decision.

### 26 Can tax claims affecting multiple tax returns or taxpayers be brought together?

Reassessment cases from the tax authorities will often include several income years, depending on the type of transaction(s) involved in a tax

dispute. In principle, decisions regarding changes in the tax assessment can include several taxpayers. Common practice is, however, that the tax office prepares one decision on each taxpayer. This is the general rule, even if the changes involve both a company and its shareholders.

If a decision from the tax office is brought before the court, the Norwegian Civil Procedure Act applies. This means that both the taxpayer and the authorities can involve multiple parties on certain conditions.

### 27 Must the taxpayer pay the amounts in dispute into court before bringing a claim?

The taxpayer must pay the tax and the amounts in dispute, even when the case dispute is brought before the courts.

### 28 To what extent can the costs of a dispute be recovered?

Within the tax administration, one can only get recovered costs concerning necessary assistance from a lawyer, an audit etc regarding the proceedings within the Tax Appeal Board, if the Tax Appeal Board change the tax assessment in favour of the taxpayer.

If a decision from the tax office is brought before the court, the Norwegian Civil Procedure Act Applies. This means that if the taxpayer has sustained his claim, he can get his costs completely or partly recovered.

### 29 Are there any restrictions on or rules relating to third-party funding or insurance for the costs of a tax dispute, including bringing a tax claim to court?

As a starting point, it is important to be aware that private parties have contractual freedom. There is no rule against third-party funding or insurance as such. We sometimes see that third parties formally intervene in a case, but this cannot be done without such party having a direct legal interest in the case.

If a third party suffers a loss, regardless if the loss is a consequence of a tax dispute, it is possible that an insurance can cover the loss. This depends on the terms and conditions in the insurance. From a legal perspective, it is important to bear in mind that a third party can be obliged to give the tax authorities information, or to give his testimony in a court. As a general rule, expenses and losses to fulfil these obligations are not refundable by the state.

### 30 Who is the decision maker in the court? Is a jury trial available to hear tax disputes?

The decision maker in the court depends on whether there is a criminal or a civil case, and which court instance. In Norway, there are three court instances: the District Court (first instance), the Court of Appeal (second instance) and the Supreme Court (third instance).

### Criminal case

It is a fundamental principle in the criminal courts that ordinary citizens shall participate in the decisions. Along with professional judges, lay judges therefore operate in criminal cases in the District Court (first instance) and the Court of Appeal (second instance). The mix between professional judges and lay judges is called a *meddomsrett*. Lay judges are ordinary citizens without any judicial background that are operating as a judge in single cases along with the professional judge. The number of professional and lay judges varies with the complexity and size of the case and the court instance. In the most serious criminal cases in the Court of Appeal, a jury determines the question of guilt, but this is not relevant for tax cases. In the Supreme Court, the decision makers are a panel of professional judges.

### Civil cases

The decision makers are mainly professional judges. In some cases, a party can demand that a lay judge who is a specialist in the field of the case matter shall operate along with the professional judge (*meddomsrett*). The number of judges and lay judges will depend on the complexity of the case and which instance the case is brought before.

### 31 What are the usual time frames for tax trials?

The time frame for tax trials varies from case to case depending on various factors. The time frame will also depend on which regional court or court instance the case is brought before. There are no specific numbers available for tax cases as such, but statistics from the Court Administration from 2014 show that in general the time frame for civil cases in the district

### Update and trends

In May, this year the Norwegian government approved a new tax and fiscal act, regarding the tax and fiscal administration. The new law is planned to come into force on 1 January 2017. The main purpose with the new law is to increase accessibility for users through comprehensive, systematic and orderly legislation that will strengthen taxpayers' legal position. The Ministry of Finance itself says that the tax administration policies today are 'fragmentary and minimally transparent'.

According to the Ministry of Finance, the aim of the new law is not to introduce substantive changes, beyond what is necessary to harmonise and coordinate the different parts of the legislation regarding the tax and fiscal administration. However, the new law includes many changes in the administration of taxes and the procedural rules.

Some of the main changes are:

- a new model for determining both the income tax and the capital tax;
- reduced rate on the standard additional tax, from today's 30 to 20 per cent;
- more extensive use of the apology reasons to avoid the additional tax;

- a right to lodge complaints regarding the tax authorities' binding pre-statements on taxation issues;
- new deadlines for changes in tax assessments;
- the taxpayer should be entitled to postpone payment of penalty tax and interest until the expiry of the deadline for appeals;
- special rules regarding litigation in tax matters: the proposal includes rules about legal action, party positions, litigation deadlines and the right to impose conditions to bring proceedings into court;
- coercive fines can be imposed in response to a failure in the taxpayer's obligation to provide information, without the requirement of any guilt, except in the case of reasonable excuse;
- an administrative complaint procedure must be completed before a tax dispute is brought before the court;
- the taxpayer may appeal an advance ruling and request a retrial; and
- coverage of costs regarding necessary assistance from a lawyer, an audit etc if the tax administration changes a decision in favour of the taxpayer (compare question 28).

courts was just over five months, in the appeal courts six months, and in the Supreme Court six months.

### 32 Describe the discovery process for a tax trial.

There is no discovery system in Norway.

The parties themselves are responsible for the presentation of evidence in tax matters. At any stage of the court case, the parties are bound by a truth and a disclosure duty. This means that the parties have a procedural obligation to present and disclose all relevant evidence that they are requested to present by the other party, including evidence that is against their cause.

The evidence that is to be presented at the trial must be submitted to the court by the end of the casework period. Normally this will be two weeks before the trial.

### 33 What testimony is permitted in a tax trial?

Anyone who has knowledge of something that is relevant for the case and is legally summoned can testify in a trial. In general, testimony has to be presented in person before the court.

Unless the taxpayer has a legally valid reason for absence, there is a requirement to attend and testify at the trial. If the party is present at the hearing, evidence shall be given directly to the court. The taxpayer has a right of protection against self-incrimination. In criminal cases, there is therefore no corresponding duty to testify.

The parties are permitted to hire experts who can testify if it has relevance to the case.

As a general rule evidence should not be translated because translation can affect the content and the value of the evidence in question. Should it be necessary, both the Norwegian Civil Procedure Act, the Norwegian Criminal Code and the Norwegian Courts Act have provisions regarding translation of evidence and appointing interpreters.

### 34 Who can represent taxpayers in a tax trial? Who represents the tax authority?

Taxpayers can represent themselves, except before the Supreme Court. A lawyer may represent taxpayers. If the taxpayer cannot afford legal representation or otherwise raise support for the legal costs, he or she must resort to self-representation. In criminal cases the state will in general appoint a free attorney for the trial.

The state of Norway is the defendant or plaintiff in matters regarding tax assessment and other decisions made by the tax authorities. Claims regarding the collection of taxes shall also be directed to the state. The Tax Administration region where the administrative decisions are taken represents the state position. In claims regarding the collection of taxes, the local treasurer or tax collector represents the state position. The Directorate of Taxes has issued a mandate concerning legal representation in various tax matters. According to these instructions, the tax authorities should refrain from self-representation.

Regarding tax assessments and other decisions the lawyers at the office of the Attorney General and the Tax Directorate's special investigators may represent the state.

In lawsuits against the Ministry of Finance and the Petroleum Tax Office, the Attorney General shall be engaged.

The state or tax regions and tax collectors may also choose to be represented before the courts by lawyers and law firms with a framework agreement with the state for such work.

### 35 Are tax trial proceedings public?

Trial proceedings and verdicts are generally public. There is no mandatory publication. Most tax cases are published in a journal collecting relevant tax material together with extracts of certain decisions and statements by different levels of the tax authorities. Cases with precedents, such as cases from the Supreme Court, are published in full.

### 36 Who has the burden of proof in a tax trial?

In criminal cases the police has the burden of proof. To fulfil this burden, the taxpayer must be proven guilty beyond reasonable doubt.

In civil cases the taxpayer generally has the burden of proof that the tax authorities have made an incorrect or unlawful decision.

In some cases, the court will be able to make exceptions to this principle and place the burden of proof on the defendant.

### 37 Describe the case management process for a tax trial.

#### Civil cases

Before a trial the parties shall consider the possibility of a settlement negotiation. At the trial the judge starts with presenting the case. Thereafter the plaintiff, through his attorney, shortly presents the facts of the case and all the evidence. All evidence is presented orally. The defendant's attorney may thereafter make remarks to the defendant's presentation.

Further, the parties and witnesses provide their testimonies. The plaintiff starts first with questions from the plaintiff's attorney, and thereafter the defendant's attorney. The judge or judges can ask each party and witnesses further questions.

Subsequently the plaintiff's attorney provides the plaintiff's closing speech. After that, the defendant's attorney provides the defendant's closing speech. In the closing speeches, the attorneys explain their perception of the existing law, why their client's explanation of the facts has to be accepted, and which legal consequences this will have. At the end of the procedure the lawyers state the plaintiff's or defendant's claims.

If the plaintiff has remarks on the defendant's legal procedure the plaintiff is allowed to comment thereon, and vice versa.

#### Criminal cases

The process in a criminal case is different from a civil case. Briefly, the prosecutor drives the criminal case and has an obligation to present it from all sides. The taxpayer does not have to testify (although in tax cases they normally do) and the taxpayer's attorney must make sure that any reasonable doubt regarding guilt is taken into account by the court. At the end of the trial the prosecutor and the taxpayer's attorney hold their own legal procedures and present their claims and assertions regarding the case.

**38 Can a court decision be appealed? If so, on what basis?**

For information about court instances see question 30.

A court decision from the District Courts can be appealed to the Appeal Court, and a court decision from the Appeal Court can be appealed to the Supreme Court.

The deadline for an appeal to the Appeal Court in civil cases is usually a month after the judgment of the District Court is made known to the parties, and 14 days in criminal cases after the judgment is formally notified to the taxpayer.

The disputed amount is relevant to whether the case can be appealed. If the appealed object's value is more than 125,000 kroner an appeal will normally be granted. If the value is less than 125,000 kroner permission from the Court of Appeal is required. The Appeal Court also has a limited right to refuse to hear an appeal if the Appeal Committee in the Appeal Court finds it obvious that the appeal will not succeed. The Supreme Court accepts only appeals that are approved by the Supreme Court's Appeal Committee. The main conditions for acceptance are that a decision from the Supreme Court will have fundamental importance or that there is a need to provide essential legal guidance for other cases.



**Ola Mæle**  
**Sindre Kleive**  
**Lise Onarheim**

**ola.maele@kpmg.no**  
**sindre.kleive@kpmg.no**  
**lise.onarheim@kpmg.no**

Postboks 4 Kristianborg  
 5822 Bergen  
 Norway

Tel: +47 4063 9350  
 Fax: +47 5532 7120  
 www.kpmg.no

# Panama

Ramón Anzola, Maricarmen Plata and Andrés Escobar

Anzola Robles & Asociados

## Overview

### 1 What is the relevant legislation relating to tax administration and controversies? Other than legislation, are there other binding rules for taxpayers and the tax authority?

The Panamanian Tax Code, approved by Law No 8 of 27 January 1956, is the main source of tax legislation in Panama. Since its enactment it has undergone a significant number of amendments and supplementary legislation has been approved to regulate specific taxes and procedures. Tax legislation is enforced by the General Revenue Directorate of Panama (DGI).

Further to the Tax Code as amended and regulated, Panama also has a double taxation treaty (DTT) network and a tax information exchange agreement (TIEA) network, as follows:

DTTs signed and ratified	
In force	Pending entry into force
Barbados	Italy
Czech Republic	
France	
Ireland	
South Korea	
Luxembourg	
Mexico	
Netherlands	
Portugal	
Qatar	
Singapore	
Spain	
United Arab Emirates	
United Kingdom	
Israel	

Panama has negotiated DTTs with Austria, Bahrain, Belgium, Colombia and Vietnam.

TIEAs signed and ratified	
In force	Pending entry into force
Canada	Denmark
Faroe Islands	
Finland	
United States	
Greenland	
Iceland	
Norway	
Sweden	

Panama has negotiated a TIEA with Germany and Japan.

Taxpayers may submit to the DGI inquiries and specific applications, such as motions to obtain a benefit under a DTT, or other matters not involving controversy. However, responses and decisions made by the DGI will only apply to the specific request and are not binding for third parties.

### 2 What is the relevant tax authority and how is it organised?

The DGI is a Directorate of the Ministry of Economics and Finances, and operates under a General Revenue Director.

The General Revenue Director is appointed by the executive branch of the government, as the legal representative of the DGI. The General Revenue Director is empowered to:

- issue general tax rules to regulate the relationship between the Treasury and the taxpayer;
- absolve inquiries on non-binding tax matters; and
- delegate certain powers or duties to other DGI officials.

The DGI is further organised into different national offices and sections under the supervision of the General Revenue Director, and into regional offices appointed for each province, as follows:

#### National offices

- National Revenue Subdirectorate;
- Directorate Consultants Office;
- General Secretary;
- Economic and Tax Studies Office;
- Management Control and Planning Office;
- Internal Control Office; and
- Communications and Public Relations Office.

#### National sections

- Organisational Management Section;
- Legal Management Section;
- Collection Management Section;
- Management Control Section;
- Regional Offices Section;
- International Taxation Section;
- Large Taxpayers Section; and
- Information and Technology Section.

#### Regional offices

- Panama Regional Tax Office;
- West Panama Regional Tax Office;
- Colon Regional Tax Office;
- Chiriqui Regional Tax Office;
- Cocolé Regional Tax Office;
- Bocas del Toro Regional Tax Office;
- Los Santos Regional Tax Office;
- Darien Regional Tax Office;
- Herrera Regional Tax Office; and
- Veraguas Regional Tax Office.

#### Sectional office

- Aguadulce Sectional Tax Office.

**Enforcement**

**3 How does the tax authority verify compliance with the tax laws and ensure timely payment of taxes? What is the typical procedure for the tax authority to review a tax return and how long does the review last?**

The DGI verifies compliance with tax laws through general audits that cover all the taxes, fees, contributions and reports that the taxpayer is liable to submit or pay, or special audits that only include specific taxes, fees, contributions or reports that the taxpayer is liable to submit or pay.

The DGI ensures the timely payments of taxes by taxpayers applying fines, monthly interest and surcharges to each tax due. The surcharge will be of 10 per cent over the amount of tax due. The annual interest for 2016 is 9.5748 per cent.

The DGI has powers to directly order an audit process. An individual auditor or audit group is appointed to conduct the process, and a notice that details the general scope of the audit is issued for the appointed auditors to initiate contact with the taxpayer being audited.

The request and review of taxpayer information depends on the type and scope of the audit, since there is no statutory procedure for audits. Income tax return audits are usually the most extensive and, in such cases, the DGI can review:

- the allocation of income and expenses;
- the determination of deductible and non-deductible expenses;
- invoices, accounting registries, agreements and any other documents related to income and expenses;
- a comparison of the expenses and incomes registered in the income tax return of the clients and suppliers of the taxpayer; and
- the application of tax incentives.

There is no specific time period for an audit. The duration of the audit may vary depending on whether it is a general or special audit, the number of auditors appointed by the DGI and the complexity of the taxpayer's operations.

**4 Are different types of taxpayers subjected to different reporting requirements? Can they be subjected to different types of review?**

Individuals and business entities are required to submit different tax reports, as described below.

The DGI may audit business entities or individuals and the law does not stipulate different processes based on the type of taxpayer. However, audits of individuals are uncommon.

**Individual taxpayers**

Individual taxpayers must submit income tax returns and VAT reports. Individuals must pay income tax in accordance with the following rates:

Taxable income	Tax rate
Up to US\$11,000	0%
Between US\$11,000 and US\$50,000	15%
More than US\$50,000	US\$5,850 for the first US\$50,000 and 25% for income over US\$50,000

Individuals who are registered on an employer's payroll and do not generate income other than their salaries are not required to file income tax returns. Employers withhold and submit applicable individuals' income tax to the DGI.

Individuals must pay VAT when transferring chattels or providing a service. The ordinary VAT rate is 7 per cent.

Individuals are not liable for VAT when, during the preceding year, they had an average monthly gross income not exceeding US\$3,000 and an annual gross income not exceeding US\$36,000.

**Business entities**

Business entities are required to submit income tax returns, indirect taxes reports, VAT reports and suppliers' reports.

Business entities must pay VAT when transferring chattels or providing a service. The ordinary VAT rate is 7 per cent.

Business entities are not liable for VAT when, during the preceding year, they had an average monthly gross income not exceeding US\$3,000 and an annual gross income not exceeding US\$36,000.

**5 What types of information may the tax authority request from taxpayers? Can the tax authority interview the taxpayer or the taxpayer's employees? If so, are there any restrictions?**

The DGI may ask taxpayers to provide the information necessary for it to:

- determine tax obligations, sources of income, exemptions, costs, expenses and reserves related to taxes, including business books, accounting registries, records, financial information, invoices, inventories, copies of transactions documents and reports; and
- comply with the exchange of information under a DTT or TIEA when the other contracting state requests foreseeably relevant information.

An information request or inquiry from the DGI may include interviews with a taxpayer's employees or staff. The DGI may also require any public or private entity or third party to provide information that is necessary to review or determine tax obligations.

Information obtained by the DGI is classified, confidential and for the exclusive use of the DGI. Any information exchanged under a DTT or TIEA cannot be used by the DGI for purposes other than those provided for in the request and authorisation for its disclosure.

**6 What actions may the agencies take if the taxpayer does not provide the required information?**

The DGI may issue fines ranging from US\$100 to US\$5,000 to taxpayers who refuse to disclose books, records or documents necessary to verify the accuracy of the data supplied to the DGI, or to facilitate any investigation ordered by the competent fiscal officer relating to compliance with their tax obligations.

The DGI may issue fines that range from US\$1,000 to US\$5,000 for a first offence and from US\$5,000 to US\$10,000 for repeat offences, to public officials and individual taxpayers or business entities who do not submit, within a reasonable time, reports or documents of any kind relating to income tax.

When any of the above infractions occur, the DGI may apply recurrent and multiple fines until the taxpayers comply with its order or request.

**7 How may taxpayers protect commercial information, including business secrets or professional advice, from disclosure?**

The protection of professional secrecy and private documents and information are constitutional rights in Panama. Therefore, private documents and information may only be disclosed if there is an order from a government authority that includes a specific information request that complies with applicable laws.

The DGI may only request information necessary for determining tax obligations, sources of income, exemptions, costs, expenses and reserves related to taxes. Any other information not related to tax obligations shall not be disclosed to, nor required by, the DGI.

Taxpayers have the right for information provided to the DGI to be kept private throughout the administrative and judicial procedures.

The DGI's public officials are obliged to ensure and maintain the strict confidentiality of the information handled during the course of an audit or an administrative or judicial process. A breach of this obligation is considered a major offence sanctioned by dismissal from office, and the officials responsible may also be subject to criminal or civil liabilities.

**8 What limitation period applies to the review of tax returns?**

The limitation period for the review of tax returns depends on the statute of limitations for the applicable tax obligation, as follows:

Income tax - statute of limitations	
General income tax	Statute of limitations period
Income tax	Statute of limitations period
Income tax return recalculation	7 years
Complementary tax	3 years
Withholding tax	Statute of limitations period
Dividend tax	15 years
Services rendered from abroad	15 years
Capital gains tax (shares)	15 years
Salary retentions	15 years

The statute of limitations for payment of general income tax is seven years. However, income tax return audits may only cover the three tax periods immediately prior to the reviewed tax returns and, therefore, no further recalculation of income tax returns can be ordered after three years.

Withholding tax includes any capital the taxpayer is due to retain or withhold on behalf of others, such as dividend tax over shareholders' distributions, payment of services rendered from abroad, capital gains for share transfers and salary retentions. For withholding tax, audits may be performed within the 15-year statute of limitations period.

### 9 Describe any alternative dispute resolution (ADR) or settlement options available?

In Panama, there is no alternative dispute resolution process for tax controversies. However, defaulting taxpayers may settle a payment arrangement with the DGI for overdue tax payments. The DGI allows settlement agreements to include payment arrangements in monthly instalments.

### 10 How may the tax authority collect overdue tax payments following a tax review?

The DGI can directly apply existing tax credits to overdue tax payments. It may conduct administrative enforced collection processes for overdue tax payments and establish liens over any property or goods of the taxpayer to guarantee collection of overdue taxes. The value of the liens over property or goods may not exceed the overdue tax payments, surcharges, fines and interest.

As a result of these processes, the DGI may auction off any seized property to collect outstanding payments.

Administrative enforced collection processes will trigger an additional surcharge of 20 per cent over the taxes due. However, taxpayers may reach settlements with the DGI to negotiate for additional surcharges to be partially or completely waived by the DGI.

### 11 In what circumstances may the tax authority impose penalties?

The DGI may impose penalties on taxpayers for:

- late payment of due taxes;
- contravening tax laws and regulations;
- failing to submit withheld taxes; and
- tax fraud.

Under the Tax Code, the DGI may apply the following penalties:

- fines for specific contraventions detailed in the Tax Code;
- surcharges in the case of withholding obligations;
- interest payments on overdue tax payments; and
- fines or imprisonment for tax fraud.

### 12 How are penalties calculated?

The DGI may impose fines that range from US\$100 to US\$5,000 depending on the specific infringement. The most common infringements and fines are detailed below:

Schedule of applicable tax fines	
Infringement	Fines
Failure to file income tax return	US\$100 to US\$1,000
Failure to maintain statutory accounting records	US\$100 to US\$500
Refusal to submit or provide required information in the course of an audit	US\$100 to US\$5,000
Failure to file supplier's report	US\$1,000 to US\$5,000

### 13 What defences are available if penalties are imposed?

Taxpayers may, via an administrative review, challenge any resolution from the DGI ordering a penalty. Individual taxpayers and business entities must file any administrative review through a legal representative.

An affected taxpayer can request that the DGI correct fines that are levied by errors in the online tax payment system. In such cases, the DGI reviews the taxpayer's correction request and can directly amend or eliminate any penalties that are not applicable.

### 14 In what circumstances may the tax authority collect interest and how is it calculated?

Interest accrues on outstanding tax from the date when it should have been paid to the date when the taxpayer fully pays the overdue tax.

The applicable interest rate is calculated monthly and corresponds to two percentage points above the benchmark rate, which is fixed annually by the Panamanian Bank Superintendent.

The interest rate was set at 0.7888 per cent in 2014 and at 0.7973 per cent in 2015.

### 15 Are there criminal consequences that can arise as a result of a tax review? Are these different for different types of taxpayers?

The Criminal Code does not cover tax offences such as circumvention, evasion and fraud. However, a taxpayer that is under review by the DGI can be subject to penalties if the authorities determine that there has been a tax violation or infringement.

Taxpayers involved in any tax violation or infringement are subject to fines, surcharges and interest payments. Although tax fraud is not considered a criminal offence under the Criminal Code, it is considered unlawful conduct under the Tax Code and can be punished with civil penalties in the form of monetary fines and criminal punishment in the form of imprisonment, which may range from one month to five years depending on the type of breach or violation. The mentioned consequences apply to all type of taxpayers, since the current legislation does not have different types of liabilities for each type of taxpayers.

### 16 What is the recent enforcement record of the authorities?

According to the book *State of Tax Administration in Latin America: 2006-2010*, published in 2013 and prepared in association with the Inter-American Development Bank, the Technical Assistance Center for Central America, Panama and the Dominican Republic of the International Monetary Fund, and the Inter-American Center of Tax Administration, enforcement figures in Panama are as follows:

Taxpayer audit selection	
Selection based on	Percentage (%)
Exchange of information	27.8
Taxpayer's economic reality	10.1
Economic reports per section	0
Random criteria	10.4
Discretionary selection from auditors	4.6
Others	47.1

Tax reviews					
Invoicing control programmes		Massive compliance programmes		Field audits	
Number of taxpayers verified	Verified/active taxpayers	Number of taxpayers verified	Verified/active taxpayers	Number of taxpayers verified	Audited/active taxpayers
153	0.1%	N/A	N/A	413	0.2%

### Third parties and other authorities

#### 17 Can a tax authority involve or investigate third parties as part of the authority's review of a taxpayer's returns?

Third parties are not involved in tax return reviews or audit processes conducted by the DGI. However, the DGI may request information and third parties or other government offices must collaborate with it and provide any information that it considers relevant to a specific review or audit process.

As mentioned in question 5, all information obtained by the DGI in the course of an audit process is classified and treated as confidential. Furthermore, taxpayers have the right to:

- treatment with respect and consideration by DGI officers;
- fair treatment as a taxpayer in good standing while no conclusive evidence proves otherwise;

- require that the DGI's actions do not severely affect the normal business of the taxpayer, as long as this does not affect the DGI's right to audit and ensure tax collection;
- receive assistance from advisers throughout any tax reviews and audits;
- receive notice of any audit process that may affect the respective taxpayer and the identity of the officers in charge of the audit and their superiors;
- access any audit reports that may affect such taxpayer;
- classify information provided to the DGI as confidential, meaning it will remain private during the entire administrative and judicial procedure, except as otherwise expressly provided for by law;
- not be audited twice for the same tax in the same period. Taxes where the taxpayer acts as a withholding agent are exempted from this right; and
- have their electronic devices and equipment protected so that they are not seized during the audit process. The DGI can only obtain copies of relevant tax documents.

**18 Does the tax authority cooperate with other authorities within the country? Does the tax authority cooperate with the tax authorities in other countries?**

The tax authorities can collaborate on tax matters based on a negotiated, signed and ratified DTT or TIEA between Panama and another jurisdiction. See question 1 for a complete list of Panama's DTTs and TIEAs.

To exchange tax information with foreign authorities, the tax authorities must follow the requirements and processes set forth under the applicable DTT or TIEA and Panamanian domestic exchange of information rules that regulate the exchange of information clauses included in DTTs and TIEAs.

When submitting an inquiry under a DTT or TIEA, the foreign tax authority must complete a request for tax information form that should include relevant taxpayer information and the tax inquiry. Although Panama does not have a general form for the request of information under DTTs or TIEAs, tailor-made forms have been agreed with Barbados, Mexico, Portugal and Spain under DTTs. For any other contracting states under DTTs or TIEAs with Panama, information can be requested through notes that must comply with the requirements of the respective DTT or TIEA.

Pursuant to domestic exchange of information rules, any request for tax information from a foreign tax authority of another contracting state must be foreseeably relevant. This means that the request must relate to a legitimate civil, administrative or criminal tax investigation conducted by the competent authorities of the requesting contracting state.

Once a form or note has been submitted by the competent foreign tax authority to the DGI, the International Taxation Section of the DGI will review it to confirm that it complies with any requisite formalities and is a bona fide tax inquiry and not a 'fishing expedition'. If the International Taxation Section deems it appropriate, it will contact prospective local sources of the information sought by the foreign tax authority to ensure compliance with the request.

The domestic exchange of information rules do not specifically address or limit the scope of information that may be sought under a DTT or TIEA.

**Special procedures**

**19 Do any special procedures apply in cases of financial or other hardship, for example when a taxpayer is bankrupt?**

No special tax procedures apply in cases of financial or other hardship, including bankruptcy and insolvency.

Due taxes have priority over other credits of the insolvent debtor.

Defaulting taxpayers may settle a payment arrangement with the DGI for overdue tax payments. The DGI allows payment arrangements to include monthly instalments.

**20 Are there any voluntary disclosure or amnesty programmes?**

No.

**Rights of taxpayers**

**21 What rules are in place to protect taxpayers?**

See question 17.

**22 How can taxpayers obtain information from the tax authority? What information can taxpayers request?**

Taxpayers can obtain and review their own tax information through the DGI's online system (e-tax software) or through a formal information request procedure.

The DGI's online system contains all information regarding due taxes, paid taxes, payment dates, income tax return filings and other report filings.

Taxpayers can register in the DGI's online system with their allocated single taxpayer registration number and access their information using the tax identification number (NIT). The NIT is an access key password to manage online transactions and services offered by the DGI. It is personal and non-transferable, and is accepted by the DGI as the taxpayer's electronic signature under local tax legislation.

Taxpayers can also request or review their information from the DGI's sections and offices. Each section and office has different request-for-information procedures. However, as a general practice, any request must be submitted in the form of a formal letter identifying the requested information and signed by the taxpayer or their legal representative.

**23 Is the tax authority subject to non-judicial oversight?**

The DGI is subject to the policy and guidance of the executive branch of the government and the supervision of the General Comptroller of the Republic of Panama.

**Court actions**

**24 Which courts have jurisdiction to hear tax disputes?**

Any act or resolution issued by the DGI can be contested through an internal administrative procedure. The administrative procedure has two stages: administrative review and administrative appeal before the Tax Administrative Tribunal (TAT). The TAT is an independent government entity of the executive branch of the government. The TAT is formed by three magistrates; two of the magistrates are attorneys and the remaining magistrate is an accountant.

An administrative procedure can also escalate into a judicial challenge before the Administrative Chamber of the Panamanian Supreme Court.

The decision issued by the Administrative Chamber is final, definitive and mandatory for the taxpayer and the DGI.

An administrative review can be filed before the officer of the DGI that issued the act or resolution, or the National Tax Administrator of the DGI if the case is for more than US\$100,000.

An administrative appeal must be filed before the TAT's General Secretariat.

A judicial challenge must be filed before the Administrative Chamber.

**25 How can tax disputes be brought before the courts?**

Taxpayers have the right to challenge any act or resolution issued by the DGI.

A taxpayer can file claims to challenge tax returns, additional assessments, fines and sanctions, acts or resolutions directly related to the determination of taxes and tax obligations, acts or resolutions that undermine the rights of the taxpayer, and acts, resolutions or procedures that violate tax regulations.

There are no threshold amounts for tax claims. The taxpayer can request that excess tax payments are returned, or that acts, resolutions or procedures that infringe the taxpayer's rights and tax regulations are overturned.

As described in question 24, a tax dispute will begin with an administrative procedure and may escalate to a judicial challenge before the TAT. The taxpayer cannot file a judicial challenge before the TAT unless an administrative procedure has been completed.

According to the Tax Code, no stamp tax is required to submit an administrative review or administrative appeal, which must be issued on plain paper, be drafted respectfully and include the identification of the government entity to which it is addressed, clear statements of the claim, facts and applicable tax regulations, the date and place of the recourse, a signature and the address of the applicant.

According to the Judicial Code, a judicial challenge must include identification of the applicant, the legal representative and the process, a statement of the claim, the facts and principal omissions of the act or resolution, a list of the violated tax regulations and the concept of the violation.



## 26 Can tax claims affecting multiple tax returns or taxpayers be brought together?

No, all claims regarding tax returns will be managed individually between each taxpayer and the DGI. The DGI can brought together reviews of different tax returns of one taxpayer.

## 27 Must the taxpayer pay the amounts in dispute into court before bringing a claim?

The taxpayer is not required to pay the amounts in dispute before bringing an administrative procedure and a judicial challenge.

## 28 To what extent can the costs of a dispute be recovered?

If a case is resolved in favour of the DGI, the taxpayer will have to pay all the due amounts plus the interest generates during the process until full payment of said amount.

## 29 Are there any restrictions on or rules relating to third-party funding or insurance for the costs of a tax dispute, including bringing a tax claim to court?

There are no rules regarding third-party funding or insurance for the cost of a tax dispute. However, said funding or insurance is not practised in Panama.

## 30 Who is the decision maker in the court? Is a jury trial available to hear tax disputes?

At the administrative review stage, the decision maker is either the officer of the DGI that issued the act or resolution or the General Revenue Director of the DGI, if the case is for more than US\$100,000.

At the administrative appeal stage, the decision maker is a TAT trial judge.

At the judicial challenge stage, the Administrative Chamber is composed of three magistrates. A judicial challenge of a tax matter is resolved by a simple majority vote.

No jury trial is available to hear tax disputes.

## 31 What are the usual time frames for tax trials?

Although the time frame varies greatly in tax cases, the minimum time for obtaining a final decision in a tax trial is between two and five years.

The administrative procedure can take a minimum of one-to-three years. However, a judicial challenge of a tax case before the Administrative Chamber may take between four and five years or more.

## 32 Describe the discovery process for a tax trial.

At the administrative review stage, the taxpayer must submit any relevant evidence and an DGI officer reviewing the case will decide to admit, accept and review it, or reject it. The DGI may also order that additional evidence be disclosed or presented, and must submit this evidence to the taxpayer. The taxpayer may contest or respond to this new evidence within eight working days.

The taxpayer cannot include new evidence in an administrative appeal. However, the TAT may admit additional evidence that was submitted and improperly rejected at the administrative review stage, or not admitted or presented at the administrative review stage and related to a fact or situation that occurred after the administrative review was filed.

Any request or submission of evidence must be included, together with the administrative appeal. Once the administrative appeal has been acknowledged by the TAT, the DGI has five working days to respond or file against the evidence submitted by the taxpayer. Submitted evidence can then be challenged by either party within the next three working days, and after such term the TAT will decide which evidence is admissible in the process.

The TAT's trial judge may also directly order that evidence be disclosed or presented for review. Once the additional evidence requested by the TAT is submitted, the taxpayer and the General Revenue Director will have a period of eight working days to challenge or contest the evidence.

Following the period for requesting and presenting evidence, the taxpayer and the General Revenue Director will both have five working days to submit written pleadings.

In reviewing a judicial challenge of a tax matter, the Administrative Chamber may request that evidence be presented within five working

## Update and trends

During the past year, the DGI, through its International Taxation Department, has continued to strengthened its programmes for the supervision and enforcement of certain tax reporting requirements, such as those related to transfer pricing guidelines. The DGI is also active in moving forward with procedures and policies for implementation of application requests under DTTs. It is likely that together with the development of Panama's DTT framework, the DGI will also continue to modernise its enforcement tools and capacity.

In July 2016, the DGI modified its tax reports platform, E-Tax 2.0, which is intended to improve taxpayer experience and make it easier for them to file their annual tax reports and engage in tax-related activities with the DGI generally. The DGI said modification will improve the handling of tax reports.

days. The taxpayer and the DGI shall submit the evidence within five working days.

## 33 What testimony is permitted in a tax trial?

In an administrative tax review, administrative appeal and judicial challenge, testimonies are allowed as evidence. Parties may submit testimonies through sworn statements before a circuit judge or a notary public and, when admissible, they must be submitted along with the administrative review or administrative appeal request.

The DGI officer that ordered or issued the challenged action or resolution can require an extension of the testimony in an administrative review. In an administrative appeal, the TAT trial judge has the same powers.

## 34 Who can represent taxpayers in a tax trial? Who represents the tax authority?

At all stages of a tax trial a taxpayer shall be represented by a lawyer or a law firm, and the DGI will represent itself.

The DGI represents itself throughout the tax process including the judicial challenge stage. However, as part of the judicial challenge, the Administration's Public Attorney Office, as part of the Public Prosecutor's Department, must issue its opinion regarding the legality of the tax resolution that denied the administrative appeal.

## 35 Are tax trial proceedings public?

Tax trial proceedings are confidential. Only the taxpayer and the taxpayer's representative, the DGI and the government officers responsible for the tax trial process have access to the documents of the tax trial. In an administrative claim, the Administration's Public Attorney Office will also have access to the documents of the tax trial.

However, the final decision of the administrative appeal issued by the TAT will be published online by the TAT for further cases. References to the taxpayer's identity will be eliminated from the published final decision.

The final decision by the Administrative Chamber will also be published on the website of the Administrative Chamber as a precedent for further cases. References to the taxpayer's identity will not be eliminated from the published final decision.

## 36 Who has the burden of proof in a tax trial?

The taxpayer.

## 37 Describe the case management process for a tax trial.

Only lawyers or law firms may file administrative tax reviews, appeals and judicial challenges before local administrative and judicial authorities.

A request for an administrative review of an act or decision by the DGI can be submitted within 15 working days following the notification of a tax resolution issued by an officer or section of the DGI to the DGI officer that issued the act or resolution, or the General Revenue Director of the DGI if the case is for more than US\$100,000.

If an administrative review is denied, the taxpayer may file for an administrative appeal before the TAT. An administrative appeal shall be submitted within 15 working days following the service notice date of the resolution that decided the administrative review.

Once an administrative appeal has been acknowledged by the TAT, the DGI will have five working days to submit a notice of opposition to the administrative appeal.

The TAT will proceed with the discovery process as described in question 32. After the discovery process, the TAT or the parties, may require a hearing to allow for a better understanding of the case.

Following the discovery process (and the hearing, if applicable), the taxpayer and the General Revenue Director will both have five working days to submit written pleadings.

A decision issued by the TAT ends the administrative procedure, and may be subject to a judicial challenge before the Administrative Chamber. A judicial challenge shall be submitted to the Administrative Chamber within two months following the notification of the resolution that decided the administrative appeal.

### 38 Can a court decision be appealed? If so, on what basis?

In an administrative procedure, the taxpayer can appeal the administrative review through an administrative appeal before the TAT.

The TAT's decision shall be issued within a period of two months following the submission of the administrative appeal. However, the term can be extended by two months if the evidence is submitted and under review by the TAT.

The TAT's decision ends the administrative procedure and may only be challenged judicially before the Administrative Chamber. A judicial challenge before the Administrative Chamber must be filed within two months following the notification of the resolution that decided the administrative appeal.

The decision issued by the Administrative Chamber is final, definitive and mandatory for the taxpayer and the DGI. There is no term for the issuance of the decision.



**Ramón Anzola**  
**Maricarmen Plata**  
**Andrés Escobar**

**rar@anzolaw.net**  
**mcp@anzolaw.net**  
**aescobar@anzolaw.net**

Credicorp Bank Plaza, 26th Floor  
 Nicanor de Obarrio Avenue  
 50th Street  
 Panama City  
 Panama

Tel: +507 263 0003  
 Fax: +507 263 0006  
 www.anzolaw.net

# Portugal

Diogo Ortigão Ramos, Pedro Vidal Matos, Sónia Fernandes Martins and  
Fernando Lança Martins  
Cuatrecasas, Gonçalves Pereira

## Overview

### 1 What is the relevant legislation relating to tax administration and controversies? Other than legislation, are there other binding rules for taxpayers and the tax authority?

The General Tax Law, approved by Decree-Law No. 398/98, of 12 December 1998, and the Tax Process and Procedure Code, approved by Decree-Law No. 433/99, of 26 October 1999, are arguably the most important pieces of legislation currently governing tax administration and controversies. The former sets out the main tax principles and rules of the Portuguese tax system while the latter governs in detail the procedural aspects and relevant material actions pertaining to tax administration, from the notification of taxpayers and issuance of tax certificates, to tax litigation on both first instance and appeal courts and enforcement of tax debts.

It is also worth mentioning the Tax and Customs Audit Procedure Regime, approved by Decree-Law No. 413/98, of 31 December 1998 – governing in detail the legal aspects of tax audits – and the General Regime of Tax Infringements, approved by Law No. 15/2001, of 5 June 2001 – stating the different tax crimes and misdemeanours, the corresponding penalties, and the procedural rules of taxpayers' defence.

Finally, Decree-Law No. 10/2011, of 20 January 2011, approved the Legal Regime of Tax Arbitration, introducing arbitration as an alternative dispute resolution mechanism available to taxpayers concerning most tax disputes.

In addition to ordinary legislation, the Portuguese Constitution, EU law and international treaties complete the legal framework applicable to tax administration and controversies. Tax rulings and tax authorities' guidance information and circular letters are not binding to taxpayers but only to the tax authorities.

### 2 What is the relevant tax authority and how is it organised?

The Tax and Customs Authority (hereinafter tax authorities) is the relevant administrative service of the Ministry of Finance in charge of administering taxes and custom duties. Overseen by the Minister of Finance (and by the State Secretary for Tax Affairs), the tax authorities operate under the direction of a director-general and form a hierarchical structure with a multitude of specialised services, divisions and units.

In broad terms, the tax authorities' structure is topped by central services, which operate in close proximity to the director general to prepare and implement decisions and measures concerning tax policy, directing, coordinating and controlling tax administration actions regarding the assessment, audit and collection of the several taxes. In addition to these central services, there are territorial-based decentralised services, at the regional and local levels, designed to pursue tax administration services in close proximity to taxpayers (with the regional services playing a supporting role to local tax offices in their area of jurisdiction).

In 2013, the government introduced a special unit within the tax authorities exclusively dedicated to corporate taxpayers and high-net-worth individuals qualified as 'large taxpayers' – for example, companies with an annual turnover above €200,000,000 or individuals with an annual income above €750,000. This unit deals with all matters regarding such taxpayers and provides them with a dedicated tax manager who acts as a preferential contact when dealing with the tax authorities.

## Enforcement

### 3 How does the tax authority verify compliance with the tax laws and ensure timely payment of taxes? What is the typical procedure for the tax authority to review a tax return and how long does the review last?

Tax authorities may request clarifications and documents supporting the information disclosed by the taxpayers in their tax returns.

Further control may be carried out through tax audits, which may take place internally within the tax authorities' services or externally, at the taxpayer's premises.

Tax audits may start until the limitation period for tax assessment or infringement proceedings expires and may last up to six months. This deadline may be extended for another six months.

Once the investigation ends, the tax authorities issue a draft audit report. The taxpayer then has the right to a hearing regarding the content of such draft audit report. The tax authorities may only issue the final audit report once the taxpayer has filed its hearing or the deadline granted thereto expired.

Corrections laid down within the final audit report constitute the basis for additional tax assessments issued by the tax authorities.

### 4 Are different types of taxpayers subjected to different reporting requirements? Can they be subjected to different types of review?

Individual taxpayers undertaking independent business activities with an annual gross income above €200,000,00, corporations and companies undertaking a business activity are required to prepare financial statements and file an annual fiscal and accountancy information statement.

Country-by-country reporting obligations exist for resident business entities that either hold or control, directly or indirectly, one or more non-resident entity. These obligations entail for instance the disclosure of financial and fiscal information regarding non-resident group subsidiaries or branches.

### 5 What types of information may the tax authority request from taxpayers? Can the tax authority interview the taxpayer or the taxpayer's employees? If so, are there any restrictions?

The tax authorities' mission is to perform all necessary steps to satisfy the public interest and to discover material facts not being subordinated to the initiative of the applicant regarding the collection of relevant information and data within a tax proceeding.

Accordingly, the tax authorities may collect a wide range of data and evidence from the taxpayers or third parties.

This task is particularly relevant within tax audits as the tax authorities benefit from special prerogatives regarding the collection of information and documents. Therein the tax authorities may, for instance, examine the taxpayer's accounting books, records and transaction documents, access their computer system, request documents in the possession of third parties economically related with the taxpayer under audit, notaries, public registrars and other public entities as well as interview the taxpayers, their employees, directors, chartered accountants and any other person of interest.

Taxpayers may however refuse to disclose information regarding their intimate life as well as legally privileged information (see question 7).

Access to banking information and documents is subject to a specific administrative proceeding. However, previous court authorisation is not required.

### **6 What actions may the agencies take if the taxpayer does not provide the required?**

If the taxpayer does not voluntarily provide information requested within a tax audit, the tax authorities may take cautionary measures to safeguard such information, such as seizing accounting documents and respective computer equipment, sealing the taxpayers' facilities or assets or certifying the taxpayer's books and documents.

Moreover, if the taxpayer unjustifiably fails to cooperate within a tax audit, the tax authorities may resort to assessing tax by indirect evaluation of the taxable base.

Furthermore, refusal to surrender or exhibit accounting or other relevant documents may be punished with a fine ranging between €375 and €150,000.

### **7 How may taxpayers protect commercial information, including business secrets or professional advice, from disclosure?**

Taxpayers may lawfully refuse to provide information legally qualified as confidential such as business secrets or information under attorney-client privilege. If faced with such refusal, the tax authorities may only access the information if authorised by court.

### **8 What limitation period applies to the review of tax returns?**

The tax authorities may review tax returns and assess additional tax until the limitation period for tax assessment expires.

As a general rule, the right to assess taxes expires if the assessment is not properly notified to the taxpayer within four years. For periodic taxes the limitation period starts to run from the end of the year in which the taxable event occurred, whereas for single-incident taxes, this period starts to run from the date in which the taxable event occurred. As regards VAT and income taxes imposed by final withholding, the limitation period is counted from the beginning of the calendar year following that in which, respectively, the chargeability or taxable event occurred.

Where the review of tax returns connects with events under criminal investigation, the limitation period extends until the investigation is closed or the case decided by court, plus one year.

The limitation period extends to 12 years when the tax assessment relates to undisclosed taxable events connected with blacklisted tax havens or undisclosed deposit or securities' accounts held in financial institutions located outside the EU.

The limitation period suspends, for instance, upon notification of the taxpayer of a service order or notice at the beginning of an external tax audit.

### **9 Describe any alternative dispute resolution (ADR) or settlement options available?**

Tax assessments may be challenged within administrative proceedings before the tax authorities. The decision issued in these proceedings is solely governed by law. No administrative or bargaining agreement on facts or on the applicable legal regime is admissible. The taxpayer may file a hierarchical appeal against the first-tier decision issued in this procedure.

Taxpayers may request binding rulings from the tax authorities, regarding the application of law on certain facts.

At the request of the taxpayer, duly justified, the binding information may be provided urgently within 90 days. A fee ranging between €2,550 and €25,500 is due by the taxpayer in such cases.

Large taxpayers may request an advance clearance on the tax and legal qualification of certain highly complex transactions, for instance when such transaction may be subject to anti-avoidance rules or involve non-resident entities.

Mutual agreement procedures in accordance with double taxation treaties and advanced transfer pricing agreements are also set forth in Portuguese tax law.

Finally, a tax arbitration procedure was enacted in 2011 as an alternative to the ordinary judicial tax disputes mechanisms (see questions 24, 25, 30, 31 and 38).

### **10 How may the tax authority collect overdue tax payments following a tax?**

The tax authorities collect overdue tax payments through enforcement procedures.

Within the enforcement procedures, the tax authorities may seize the debtor's assets, for instance, bank accounts, credits over third parties, immovable or movable assets, shares and other securities.

If necessary, seized assets are sold by the tax authorities in a public auction and the earnings used to settle the tax debt.

Taxpayers may request the suspension of the enforcement procedure if the legality of the tax assessment or the enforceability of the tax debt is undergoing litigation and a suitable guarantee is provided by the taxpayer or waived by the tax authorities.

### **11 In what circumstances may the tax authority impose penalties?**

Tax offences specifically set out by law may be punished by penalties imposed by the tax authorities.

Such tax offences fall into two broad categories: (i) failure to withhold and/or surrender withheld or received tax; and (ii) failure to comply with ancillary obligations set out in tax law (eg, failure to submit tax declarations, failure to keep up accounting documents, etc).

Penalties are only applicable to the extent that the tax authorities prove that the taxpayers acted with negligence or malice.

### **12 How are penalties calculated?**

Penalties vary according to the specific tax offences set out by law and may entail both fines and ancillary sanctions.

Tax offences relating to the failure to withhold or deduct and/or surrender withheld or deducted tax, penalties entail a fine calculated according to the amount of tax at stake, whereas penalties arising from failure to comply with ancillary obligations usually entail fines; their fixed minimum and maximum limits set out by law.

Further to the fines, the tax authorities may punish tax offences with ancillary sanctions such as, for instance, the withdrawal of tax benefits or activity licenses.

### **13 What defences are available if penalties are imposed?**

Taxpayers may challenge penalties before the tax courts.

Within this process, taxpayers may present all evidence to ground their claim against the penalties imposed by the tax authorities.

Taxpayers, the tax authorities or the public prosecutor's office, may appeal the first instance decision held within this judicial process to a higher court.

### **14 In what circumstances may the tax authority collect interest and how is it calculated?**

Tax authorities may collect both compensatory interest and late-payment interest.

Compensatory interest is due, currently at a 4 per cent annual rate, if through the taxpayer's fault (i) the assessment of the tax due, the delivery of tax payable in advance or withheld is delayed; or (ii) a larger refund is paid by the tax authorities.

Late-payment interest is due if the taxpayer fails to pay the tax due within the legal deadline. The yearly interest rate corresponds to the annual average of the monthly average of the 12-month EURIBOR rate plus 5 per cent.

### **15 Are there criminal consequences that can arise as a result of a tax review? Are these different for different types of taxpayers?**

Actions carried out with the purpose of avoiding the assessment, the delivery or payment of taxes, or obtaining a tax benefit or refund through (i) the concealment or amendment of facts or amounts that should be recorded in the accounting books or tax returns and used by the tax authorities to assess and determine the taxable base; (ii) the concealment or amendment of facts or amounts that should be disclosed to the tax authorities; or (iii) the execution of sham transactions, may be criminally punished as tax fraud.

Moreover, failure to deliver, totally or partially, more than €7,500 of tax withheld or received (in the case of VAT) may be criminally punished as embezzlement.

Both individual taxpayers and business entities may be punished for these crimes. Directors of business entities are also criminally liable for such crimes.

#### **16 What is the recent enforcement record of the authorities?**

According to the latest information publicly available, in 2015 the tax authorities collected €1,286.9 billion through enforcement procedures that translates to an increase in the amount collected in comparison with 2014 (€1,147.6 billion).

#### **Third parties and other authorities**

#### **17 Can a tax authority involve or investigate third parties as part of the authority's review of a taxpayer's returns?**

The tax authorities are entitled, under the legally set-out cooperation principle, to request information and demand cooperation from third parties – and they often do. Unlawful non-cooperation may amount to a tax infringement and lead to the application of fines.

The main limitation to the cooperation principle arises from the proportionality principle, according to which the tax authorities may not request cooperation from third parties that proves too burdensome or greatly interferes with the normal course of business or activity of the entities concerned. Likewise, tax authorities must refrain from requesting information that they already have on record or can obtain directly from the taxpayer. Historically, Bank secrecy and other professional privilege regimes were major barriers to tax information requests; but nowadays, following a trend of legal amendments aiming to enhance tax authorities' effectiveness, those are easily overcome by tax officials, most of the time without the need to resort to judicial clearance (although still being subject to judicial review after the fact).

On the other hand, any information provided to the tax authorities by third parties is covered by tax secrecy, meaning that it may not be disclosed to other entities. Breaching this secrecy is punishable as a criminal offence.

#### **18 Does the tax authority cooperate with other authorities within the country? Does the tax authority cooperate with the tax authorities in other countries?**

The tax authorities actively cooperate with other public authorities within the country. Together with the police, they often form task forces to detect and fight contraband of goods and control taxpayer compliance in areas such as road and vehicle taxes. Another good example of such cooperation with public authorities happens between the tax authorities and the economic and food safety authority, operating jointly to tackle the shadow economy and fight tax evasion. However, perhaps the most relevant cooperation occurs with the public prosecutor's office. Tax authorities are consistently called upon to provide assistance in the investigation and prosecution of virtually all tax crimes; from tax fraud to embezzlement, but also in white-collar crimes not directly tax-related, such as money laundering or corruption.

Regarding cooperation with foreign tax authorities, first reference must be made to EU Directive 2011/16/EU, which provides for extensive and comprehensive cooperation on tax matters between all EU member states. Regarding non-EU countries, cooperation exists under bilateral exchange of information agreements or under double taxation treaties, which typically follow the OECD model convention and include exchange of information provisions.

Finally, it is worth noticing that since 2015, Portugal is party to the OECD/Council of Europe multilateral Convention on Mutual Administrative Assistance in Tax Matters. The tax authorities, therefore, are currently full participants in what is becoming an international network with the goal of enhancing application and effectiveness of national tax rules worldwide.

#### **Special procedures**

#### **19 Do any special procedures apply in cases of financial or other hardship, for example when a taxpayer is bankrupt?**

As a rule, bankruptcy entails the stay of foreclosure procedures, including those formed to collect tax debts, and their appendment to the bankruptcy procedure.

The tax authorities take part and claim payment of tax debts within the bankruptcy procedure together with all other creditors, with the sole but significant difference that tax debts cannot legally be pardoned with

the context of measures aiming at recovering the failed entity from bankruptcy. Nevertheless, in those circumstances payment by instalments of tax debts may benefit from extended instalment plans, of up to 150 months, while in the absence of any financial hardship the maximum number of monthly instalments is 36.

#### **20 Are there any voluntary disclosure or amnesty programmes?**

Although experience shows that from time to time amnesty programmes are implemented to encourage voluntary disclosure and compliance by evading taxpayers – between 2005 and 2015 there have been no less than four different extraordinary regularisation programmes – no such programme is currently in force.

#### **Rights of taxpayers**

#### **21 What rules are in place to protect taxpayers?**

Proper taxpayer protection is first and foremost a consequence of the rule of law, which in Portugal is clearly asserted by the Constitution. From the rule of law and the constitutional provisions regarding citizens' fundamental rights, it is clear, for instance, that judicial review of tax authorities' actions must be possible and tax law cannot discriminate taxpayers on the grounds of 'ancestry, gender, race, language, place of origin, religion, political or ideological beliefs, education, economic situation, social circumstances or sexual orientation'.

Grounded in constitutional provisions, ordinary law does specify certain tax procedural rules of the utmost importance to taxpayers. Notably, the General Tax Law expressly foresees the taxpayer's right to be informed on decisions concerning them and, what is more, the requirement for such decisions to be clearly and explicitly grounded on both the facts and the law. Additionally, taxpayers also have the right to take part in the tax procedure, including the right to comment on draft decisions that directly affect them.

The General Tax Law also includes the statute of limitation deadlines for tax assessment (as a general rule, four years from the taxable event) and for tax collection (as a general rule, eight years from the taxable event), which is an important facet of a taxpayer's right to legal certainty

#### **22 How can taxpayers obtain information from the tax authority? What information can taxpayers request?**

Taxpayers have a general right of information on matters pertaining to their tax status as well as on the application of tax law provisions. Information requests can be made over the telephone (through a dedicated call centre destined to address taxpayers' queries), via the tax authorities' website, by post, and physically at the tax authorities' local tax offices.

The level and legal value of the information obtained varies greatly, ranging from general information on existing taxes and payment deadlines (available to everyone), to specific information about the status of tax procedures and the taxpayer's information on record (that typically may only be obtained by the taxpayer concerned or their representatives).

In this regard, taxpayers are entitled to ask the tax authorities for binding information on the way a certain tax rule or regime applies, or may apply, to their specific situation. If the taxpayer sees fit, they may choose to present a draft reply together with the binding information request and pay an urgency fee, in which case, if no reply exists within 90 days, the draft reply is considered tacitly accepted and the tax authorities become bound to it.

When tax authorities fail to adequately reply to a formal information request, a court order may be sought by the taxpayer to force such a request to be met and the information to be provided. Additionally, conforming with the tax authorities' reply to a binding information request may be judicially challenged in court by the taxpayer concerned.

#### **23 Is the tax authority subject to non-judicial oversight?**

No. However, to some extent, the Portuguese ombudsman, who often receives and reviews taxpayer complaints, can intervene requesting explanations from the tax authorities (and make recommendations to government and parliament) that is aimed at protecting taxpayers' legal rights.

### Update and trends

Following a trend in recent years, the tax authorities are increasingly focusing on transactions and business arrangements attaining the benefit of tax exemptions or simply not being subject to tax. Fuelled by budget constraints, but also by social pressures to tackle tax fraud and avoidance, the tax authorities are resorting, as never before, to provisions such as the general anti-abuse rule to question the economic substance of tax planning structures, giving rise to a significant volume of associated litigation. Understandably, in such a context, taxpayers are mostly concerned with preserving the value of legal certainty despite the great leeway given to tax authorities in applying concepts such as 'abuse', 'economic substance', or 'valid business reasons' to specific cases. Unfortunately, up until now, tax courts have been capable only to a point of clarifying the limits of the tax authorities' latitude, particularly because fact patterns vary between cases, but also because the number of cases decided on these matters is still relatively scarce. Moreover, the non-appealable aspect of tax arbitration decisions entails that many cases may escape review from higher courts, even if decided at odds with the prevailing jurisprudence.

On a separate but related note, in the near future legislation amendments are expected to implement the EU Commission's Anti-Tax Avoidance Package. As a result, adjustments to existing anti-avoidance measures will almost certainly be made and exchange of tax information between Portugal and other EU member states will predictably be streamlined. Although such measures will perhaps improve the tax authorities' efficiency, they unfortunately do very little in protecting taxpayers from their potential misuse. Additional litigation is therefore anticipated.

### Court actions

#### 24 Which courts have jurisdiction to hear tax disputes?

In Portugal, there are courts specialising in dealing with tax disputes. Except for Lisbon, where there is a first instance court dealing with tax disputes only, the rest of the courts around the country also have jurisdiction over administrative matters.

The tax arbitration courts, created in 2011, are an alternative means to settle tax disputes.

There are three courts of appeal: the administrative central courts (North and South) and the administrative supreme court.

#### 25 How can tax disputes be brought before the courts?

Tax claims are filed in writing. There are different types of legal actions depending on the type and purpose of the claims. There is not a minimum threshold amount applicable to those claims.

Taxpayers, including individuals and legal persons (jointly and severally liable or with an ancillary liability), may bring claims if they can evidence a legal interest worth protecting.

Tax claims are subject to legal costs. To present a claim, taxpayers have to pay an amount between €102 and €1,632 depending on the total value of the litigation.

Unlawful tax assessments may be challenged based on (including but not limited to) the incorrect qualification or quantification of the taxable income, the tax authorities' insufficient powers and the infringement of procedural requirements.

Arbitration proceedings are subject to specific rules that, however, do not vary greatly from those above.

#### 26 Can tax claims affecting multiple tax returns or taxpayers be brought together?

Yes, provided that the type of tax, the grounds and the court for the decision are identical.

Insofar as the requirements above are fulfilled, and as long as it does not prejudice the progress of the proceedings, it is also possible to attach judicial claims on different tax assessments already in course.

#### 27 Must the taxpayer pay the amounts in dispute into court before bringing a claim?

No, there is no such obligation.

#### 28 To what extent can the costs of a dispute be recovered?

The reimbursement of the judicial costs and fees (up to 50 per cent of the sum of the judicial costs borne by both parties) should be claimed by the losing party within five days as from the date on which the decision becomes definitive. Any fees exceeding that threshold may be claimed in an action for damages arising from non-contractual liability of the Portuguese state.

#### 29 Are there any restrictions on or rules relating to third-party funding or insurance for the costs of a tax dispute, including bringing a tax claim to court?

There are no restrictions on or specific rules regarding third-party funding or insurance.

#### 30 Who is the decision maker in the court? Is a jury trial available to hear tax disputes?

The first instance court is constituted by a single independent judge who will make the first ruling on the tax dispute.

The rulings of courts of appeal are taken by a panel of judges formed (in most cases) by three judges.

In tax arbitration courts, if the taxpayer decides not to appoint an arbitrator and the amount at stake is less than €10,000,01 the court operates with a single arbitrator. The remaining cases take place before a panel of three arbitrators, chosen by the Ethics Committee of the Arbitration Centre or appointed by the parties.

#### 31 What are the usual time frames for tax trials?

No up-to-date statistics are available in this regard.

Notwithstanding, practice shows that first instance decisions are often taken within five years from first being filed. For courts of appeal, the time frame is normally lower because rulings are delivered in about three years.

Arbitration courts are more efficient and most of the decisions are obtained within six months.

#### 32 Describe the discovery process for a tax trial.

In principle, evidence is produced with the initial application.

Additional documentation may be brought forward by the parties during the course of the proceedings to the extent they do so by no later than 20 days before the trial hearing. After that date, only documents that became available at a later stage may be presented. The opinions of lawyers, professors or technicians may be submitted at any time.

#### 33 What testimony is permitted in a tax trial?

Whenever the parties or the court consider it convenient, the testimonies of the taxpayers, witnesses and experts can be taken.

Normally, affidavits are not allowed and testimonies have to be made in person or 'live' through a teleconference.

Foreign testimonies do require translation as well as the original language documents.

#### 34 Who can represent taxpayers in a tax trial? Who represents the tax authority?

Where the value of the tax case exceeds €2,500 or the case is at a court of appeal level, the taxpayer is required to be represented by lawyer.

If a taxpayer cannot afford legal counsel, it is possible to request legal aid before through social services, which, depending on that person's financial situation, can include the exemption of payment of fees and legal costs or their payment in periodic instalments.

Normally, public officers with a law degree represent the tax authorities in a tax trial.

#### 35 Are tax trial proceedings public?

Generally, trial proceedings are public. However, the judge can decide otherwise in order to protect the taxpayer's dignity and public moral, or in order not to disrupt the proceedings in progress.

#### 36 Who has the burden of proof in a tax trial?

As a general principle, the burden of proof regarding a certain fact falls on the party invoking it.

Nevertheless, when the evidence of a certain fact is in the possession of the tax administration, the burden of proof is considered to be met by the taxpayer simply on an accurate identification of the relevant.

In addition, should the facts concerned be reflected in tax returns, accounts and any supporting documentation, the burden of proof falls on the tax authorities.

### 37 Describe the case management process for a tax trial.

After the presentation of a claim regarding tax assessments, the court notifies the tax authorities to provide their response within 90 days. Within that same time frame, the tax authorities have to bring forward evidence as well as the administrative procedure.

Subsequently, the trial hearing takes place and the statements of the parties, witnesses and experts are taken.

After that, the parties are notified to present (in a maximum of 30 days) their written arguments (that should summarise the grounds for the claims). Then the public prosecutor has the opportunity to submit his or her opinion and finally the judge issues his decision.

### 38 Can a court decision be appealed? If so, on what basis?

Any party disagreeing with a first instance court decision regarding tax assessments and being negatively affected by it may lodge an appeal within 10 days of the decision's notification. If the disagreement is exclusively based in matters of law, the Administrative Supreme Court will be the

relevant court of appeal. For other situations, the Administrative Central Court (North or South) will be the competent court of appeal.

For cases valued less than €1,250.01 the first instance courts' rulings are definitive.

Courts of appeal rulings may also be disputed on the basis of either a contradiction of a previous judgement (within 10 days from the high court ruling's notification, or when the question at stake is of fundamental importance at a juridical or social level, or is clearly relevant for a better application of the law (in which case a time frame of 30 days applies).

Where a constitutional issue is raised during the proceedings, it is also possible to lodge an appeal to the Constitutional Court.

Appeals on arbitration courts' awards are quite restricted. They are possible only to the extent that they are based on a conflict of previous judgements (in which case they have to be lodged before the Administrative Supreme Court), or on constitutional issues (lodged before the Constitutional Court).

Finally, it is also important to note that the courts of appeal and the arbitration courts are obliged to present a request for a preliminary ruling to the European Union Court of Justice whenever there are uncertainties regarding any potential infringement of EU law.

## CUATRECASAS, GONÇALVES PEREIRA

Diogo Ortigão Ramos  
Pedro Vidal Matos  
Sónia Fernandes Martins  
Fernando Lança Martins

dortigaoramos@cuatrecasas.com  
pedro.matos@cuatrecasas.com  
sonia.fernandes@cuatrecasas.com  
fernando.martins@cuatrecasas.com

Praça Marquês de Pombal, 2  
1250-160 Lisbon  
Portugal

Tel: +351 21 355 3800 / +351 21 355 3845  
Fax: +351 21 353 2362 / +351 21 352 4421  
www.cuatrecasas.com

# Switzerland

Ruth Bloch-Riemer

Bär & Karrer AG

## Overview

### 1 What is the relevant legislation relating to tax administration and controversies? Other than legislation, are there other binding rules for taxpayers and the tax authority?

Taxation is based on the Swiss Federal Constitution, the relevant Swiss federal laws (eg, the Federal Direct Tax Act (DBG), the Federal Act on Tax Harmonisation (StHG), the Federal Act on Withholding Taxes (VStG), the Federal Act on Stamp Duties (StG), the Federal Act on Value Added Tax (VATA) and the Federal Act on Administrative Procedure (VwVG)), cantonal legislation, federal, cantonal and communal ordinances, international agreements (eg, double taxation agreements) and, in practice, the federal and cantonal judicial authorities' and federal and cantonal tax authorities' published practice (eg, Federal Tax Administration's circular letters, Federal Tax Conference's publications, cantonal guidelines).

### 2 What is the relevant tax authority and how is it organised?

The administration of taxation in Switzerland is divided between the Federal Tax Administration, the 26 cantonal tax administrations and the communal tax authorities. Social security contributions are administered by separate, typically cantonal, authorities.

The cantonal tax administrations are responsible for the correct and uniform assessment and the collection of the taxes for the federal government, cantons and municipalities. In addition, they carry out the federal and cantonal tax laws. Real estate capital gains taxes, property transfer taxes, inheritance and gift taxes as well as certain fees are levied only on the cantonal level and, depending on the applicable cantonal legislation, on the communal level.

The Federal Tax Administration is, in addition to certain political functions and its coordinatory functions vis-à-vis other states in the context of double taxation and information exchange, responsible, for example, for value added tax (VAT), withholding taxation, federal stamp duties and the military service exemption tax and has supervisory duties with regard to the application of the DBG and the StHG. Customs duties are administered by the Federal Customs Administration.

## Enforcement

### 3 How does the tax authority verify compliance with the tax laws and ensure timely payment of taxes? What is the typical procedure for the tax authority to review a tax return and how long does the review last?

Federal taxes are, generally, levied by way of a so-called *Selbstveranlagung* (self-assessment) by the taxpayer, that is, the taxpayer declares the taxable objects himself based on his qualification and assessment of the relevant taxable (and tax-exempt) factors. The cantonal and communal tax authorities subsequently verify compliance with the tax laws and practice after submission of an individual's or entity's annual tax return or other declaration. The tax authorities' review of submitted forms is, in particular for entities, supplemented by recurring and non-recurring (ie, extraordinary) audits performed by the tax authorities or a mandated service provider on site.

Cantons invoice the cantonal and municipal taxes as well as the federal income taxes usually in several provisional instalments. The due date for cantonal and communal taxes is determined by the respective cantonal legislation. The due date for direct federal taxes is normally March 1 of the

year following the tax year. In case of late payment, interest for late payment will accrue.

If taxes are not paid, the taxpayer is, in a first step, reminded to pay the outstanding amounts. If the reminder is unsuccessful, debt enforcement measures may be undertaken by the tax authorities.

In a typical procedure, after submission of the tax return, the tax return is reviewed preliminarily to verify its timely submission, the existence of the required signatures and completeness. The tax return is recorded in the electronic assessment system and, subsequently, its content is verified. If necessary, the tax authority may undertake further investigations whereby the authorities determine on a case-by-case basis which information is required for a correct and complete taxation. If the information provided by the taxpayer is deemed incomplete, the authorities may request information from the taxpayer and from third parties (eg, employers). If such further investigations do not lead to satisfactory results, the tax authorities take a discretionary assessment by deciding unilaterally on the taxable income/profits and wealth/capital. The tax authorities' assessment is brought to the taxpayer's attention by way of a formally issued tax assessment order including the applicable taxable income/profits and taxable wealth/capital as well as specifications on the available legal remedies.

The duration of a tax return's review differs depending on the authorities' internal organisation and workload. A duration of two to three years for more complex cases may not be excluded; in principle, the tax authorities are only bound by the limitation periods.

### 4 Are different types of taxpayers subjected to different reporting requirements? Can they be subjected to different types of review?

Income/profit and wealth/capital taxes for individuals and (business) entities are, generally, levied based on similar reporting principles: the basis for taxation consist in the annual tax return that, for entities, is based on their annual accounts. The tax return is accompanied by side forms that may vary depending on the taxpayer's situation and activities:

- detail forms for real estate (individuals and entities);
- professional activities (individuals); and
- specific accounting topics for entities (eg, depreciation and amortisation overviews, base cost overviews, capital contribution reserves).

In addition to the tax return and accompanying forms, entities are typically subject to recurring and non-recurring tax audits by the competent tax authorities, mostly performed on-site.

The taxation of certain capital income streams (mostly dividends) for individuals and entities is, furthermore, secured via *Verrechnungssteuer*, a federal withholding taxation mechanism. Further income streams paid to individuals (eg, wages for certain resident aliens, payments to foreign resident wage recipients, board fee or pension recipients) are secured through *Quellensteuer*, 'source tax' (wage withholding tax) mechanism. In certain circumstances, intra-group dividend payments (to entities) may benefit from a *Meldeverfahren* (notice procedure) instead of the regular tax payment. Compliance with the respective legislation and practice is typically also monitored by the competent authorities by recurring and non-recurring audits.

VAT and customs duties as well as social security contributions are levied in accordance with specific reporting forms and procedures and compliance with the respective legislation and practice is typically



also monitored by the competent authorities by recurring and non-recurring audits.

**5 What types of information may the tax authority request from taxpayers? Can the tax authority interview the taxpayer or the taxpayer's employees? If so, are there any restrictions?**

Under the taxpayer's general requirement of cooperation, the taxpayer is obliged to do everything possible to allow for a complete and correct assessment (DBG 126 and StHG 42 I). Information may, in this context, be requested in written or oral (interview) form. The most important obligation to cooperate is the submission of the tax return.

The assessment authorities may, furthermore, call experts, conduct visual inspection and review accounts and receipts on the spot by way of audits.

**6 What actions may the agencies take if the taxpayer does not provide the required information?**

If the taxpayer does not provide the required documents or information, his taxable income/profit and wealth/capital is assessed based on a discretionary judgement called *Einschätzung nach pflichtgemäßem Ermessen* by the tax authorities (DBG 130 II). In view of the general burden of proof-rules applicable in taxation matters providing that the tax authorities have to evidence facts leading to (increased) taxation and the taxpayer has to evidence facts from which he derives a claim for a reduction of the tax burden (eg, deductions), the tax authorities typically only consider certain minimum deductions provided for by the law (eg, social deductions for children) in the context of their discretionary judgement.

Furthermore, the failure to meet the obligations to deliver certificates, to provide information and to meet reporting obligations may be punished with penalties.

**7 How may taxpayers protect commercial information, including business secrets or professional advice, from disclosure?**

The tax authorities are, generally, bound to the confidentiality obligation (DBG 110). Confidential information may only be sought based on a legal provision (StHG 39).

A restriction is set by the principle of proportionality. There is a balancing of interests between the protection of professional secrecy and the public interest in setting into effect a lawful and equal taxation. Furthermore, from the perspective of reasonableness, it is permissible in particular to refuse information that falls under a legal confidentiality.

**8 What limitation period applies to the review of tax returns?**

The limitation period for the assessment of income/profits tax and wealth/capital tax prescribes after five years (so-called relative limitation) and, in any case, 15 years (so-called absolute limitation) after the tax period (DBG 121 II and StHG 47 II).

The limitation period for the collection and enforcement of income tax, wealth tax and capital tax prescribes after five years (relative limitation) after the assessment has become final (DBG 121 II and StHG 47 II) and 10 years (absolute limitation) after the tax has been legally established (DBG 121 III and StHG 47 II).

Legislation for other federal taxes provide for shorter limitation periods:

- the limitation period for the assessment of withholding tax; and
- stamp duty and VAT prescribes five years after the end of the calendar year during which the taxable event occurred.

The limitation period may, in particular, be interrupted and starts afresh by any action of the tax authorities aiming at the assessment of the tax (VStG 17, StG 30, VATA 42 I). VAT may not be levied (absolute limitation) 10 years after the end of the calendar year during which the taxable event occurred.

The tax administrations are held to review tax returns and declarations/forms within the limitation period whereby the duration of the review may differ from case to case.

**9 Describe any alternative dispute resolution (ADR) or settlement options available?**

Against the tax authorities' assessment decision, an internal objection may be raised by the taxpayer in writing within 30 days (DBG 132 I and StHG 48 I). The objection is treated by the same tax authority.

Swiss domestic tax legislation does not provide for alternative dispute resolution procedures. Settlements with regard to the taxable income/profits and wealth/capital are not permitted under Swiss law (see question 22); settlements may, however, be reached with the tax authorities with regard to the payment of taxes duly assessed and, in certain cases, in the context of a withdrawal of an objection.

Most of the Swiss double taxation agreements contain ADR mechanisms (competent authorities' agreement/mutual understanding procedures). Certain Swiss double taxation agreements contain arbitration clauses.

**10 How may the tax authority collect overdue tax payments following a tax review?**

After an unsuccessful reminder, the formal prosecution is initiated against the taxpayer by way of a regular debt enforcement procedure for overdue taxes and accrued interest for late payment (DBG 165). In this context, the final tax assessment is equal to an enforceable judgment so that the preliminary debt enforcement procedures (eg, formal last invitation to pay) do, by law, not have to (but, of course, may, out of courtesy) be undertaken by the tax authorities. Taxes related to real estate (eg, cantonal real estate capital gains taxes) are, typically, secured by a legal pledge that allows for a direct enforcement of the claim by way of a realisation of the pledge.

Further to formal debt enforcement measures, tax claims may be secured by pledges or guarantees (DBG 169, 173), formal arrest (DBG 170), the refusal to radiation of a liquidating entity from the commercial register (DBG 171) and land register blockings (DBG 172). These measures should secure the taxpayer's Swiss assets that may, at a later stage, serve as a basis for the enforcement/collection of the tax and interest claims.

**11 In what circumstances may the tax authority impose penalties?**

Penalties may be imposed in cases of tax evasion (DBG 175, StHG 56) and tax fraud (DBG 186, StHG 59) but also for breach of procedural obligations (DBG 174, StHG 55, eg, failure to submit tax return or meet declaration obligations).

**12 How are penalties calculated?**

According to Swiss criminal legislation's principles, as a general rule, punishment is measured according to the degree of fault of the perpetrator. The court, in this context, takes into account the individual circumstances and the effect of punishment on the defendant's life. Penalties and fines in taxation cases are calculated according to the personal and economic circumstances of the offender at the time of the judgment, in particular by the income and wealth, living expenses, any possible family and support obligations and to the subsistence level. Similar criteria are applied for fines imposed on entities.

According to legislation, fines for the breach of procedural obligations may amount to up to 1,000 Swiss francs in severe cases or in relapse cases to up to 10,000 Swiss francs (DBG 174 II).

In cases of tax evasion, the fine is, in principle, equal to the amount of tax evaded. It can be reduced to a third in case of a minor degree of fault and increased to up to three times the amount of tax for serious cases of fault (DBG 175 III). Criminal prosecution may be waived if the taxpayer undertakes a spontaneous voluntary disclosure (individuals and entities, with further requirements, see DBG 175 III and DBG 181a).

Tax fraud in income/profits and wealth/capital tax matters may be punished with imprisonment for a duration of up to three years or with a fine. A conditional imprisonment may, as of 1 January 2017, be combined with a fine of up to 10,000 Swiss francs (DBG 186 I). Tax fraud under the Criminal Code for Administrative Matters (VStR), is, generally, sanctioned with imprisonment for up to one year or fines up to 30,000 Swiss francs (VStR 14), with aggravation to imprisonment for up to five years combined with a fine or a fine only (VStR 14 IV).

**13 What defences are available if penalties are imposed?**

Under Swiss law, the offender may be punished only if and insofar as he can be held personally responsible for an offence. It requires a case-by-case analysis to determine whether an incorrect advice may, therefore, serve as a justification for the offender.

#### 14 In what circumstances may the tax authority collect interest and how is it calculated?

Interest is payable if taxes are levied retroactively (DBG 151 I) and if taxes are not paid within the deadlines set forth in tax legislation or provided in a formal order of the tax authorities (DBG 164 I).

The interest is fixed annually in the Federal Department of Finance's regulations on the due date and interest. For 2016, the interest rate amounts to 3 per cent a year. The obligation to pay interest starts 30 days after delivery of the definitive or provisional invoice or 30 days after the initial due date by procedure of supplementary tax.

The cantons determine their applicable default interest rates on an annual basis.

#### 15 Are there criminal consequences that can arise as a result of a tax review? Are these different for different types of taxpayers?

If a tax review leads to an enforceable decision/judgment on tax evasion or tax fraud or the breach of procedural obligations, the mentioned criminal consequences (penalties, in exceptional cases imprisonment) may apply.

Furthermore, in severe cases of tax fraud within the offender's professional or non-professional context, a ban to perform professional activities, typically in sectors exposed to financial topics, may be issued for a limited or unlimited period of time.

#### 16 What is the recent enforcement record of the authorities?

In Switzerland, no official figures are published with regard to enforcement records of the authorities. Generally, the cantonal tax administrations handle each year between 4,000 and 6,000 procedures for tax evasion (including voluntary disclosure cases).

### Third parties and other authorities

#### 17 Can a tax authority involve or investigate third parties as part of the authority's review of a taxpayer's returns?

Third parties have certain attestation, information and notification obligations (DBG 127-129).

The authority performing a tax assessment is entitled to investigate also without the taxpayer's participation or consent. However, third parties do, as opposed to the taxpayer, not have a general obligation to cooperate in the evaluation of facts. Their obligations are, therefore, limited to the obligations contained in DBG 127-129.

In case of refusal to provide the requested certificate or information the third party may, after a reminder, be fined for violation of procedural obligations (DBG 174).

#### 18 Does the tax authority cooperate with other authorities within the country? Does the tax authority cooperate with the tax authorities in other countries?

Cooperation/assistance under tax authorities of all governmental levels is provided for in DBG 111 et seq. The authorities implementing and enforcing the tax and further legislation assist each other in fulfilling of their tasks: they provide the necessary information to the tax authorities and other federal authorities, the cantons, districts, counties and municipalities and allow them to access the official file. The authorities of the federal, cantonal, districts, counties and municipalities grant the authorities responsible for the enforcement of this law all information necessary upon request.

The international assistance in tax matters is, from a Swiss domestic perspective, governed by the Federal Act on Administrative Assistance in Tax Matters (StAHiG). The StAHiG provides the regulations for the implementation of international administrative assistance in tax matters under the double taxation agreements and other international agreements concluded by Switzerland that provide for information exchange in tax matters (in particular the Tax Information Exchange Agreements (TIEA)). The international exchange of information in tax matters is implemented and executed by the Swiss Federal Tax Administration that provides assistance based on foreign requests and may also request information from foreign states' authorities. Switzerland has, today, signed with a number partner countries and the EU agreements on the introduction of the automatic exchange of information (AIA/CRS). The legal basis in Switzerland for the introduction of the AIA, that is, the Mutual Assistance Agreement, the MCAA and the draft Federal Act on the International Automatic Exchange

of Information in Tax Matters, were adopted in the final vote by the Federal Assembly in December 2015. The first data will be collected as of 2017 and it is expected that the first data exchanges will be effectuated as of 2018.

### Special procedures

#### 19 Do any special procedures apply in cases of financial or other hardship, for example when a taxpayer is bankrupt?

If it can be demonstrated that the payment of the tax will lead to a great hardship for a taxpayer as a result of an emergency or exceptional situation, the tax imposed may be waived fully or partially (DBG 167). This does not apply to taxes levied in retroactive taxation procedures and to penalties.

If the timely payment of taxes, interest and costs or penalties for a transgression causes a considerable hardship for the taxpayer, the competent authority may extend the payment deadline or grant payment in instalments upon the taxpayer's request. The granting of payment facilities may be subject to reasonable securitisation (DBG 166).

Requests for tax abatement and tax payment deferral must be placed in writing with the competent authorities.

#### 20 Are there any voluntary disclosure or amnesty programmes?

Individuals (DBG 175 III) and business entities (DBG 181a) have the opportunity to file a voluntary disclosure once in their lifetime/existence. The voluntary disclosure/amnesty benefits are only available if the tax authority did not have any knowledge of the offence, the taxpayer fully supports the administration in determining the correct tax and, in the end, pays all outstanding taxes and interest.

However, supplementary tax and interest rates remain payable. A voluntary disclosure is also available in inheritance cases (to be undertaken by the heirs, DBG 153a) and for assets not included into estate inventories (DBG 178 IV).

As the main feature in voluntary disclosure proceedings, no penalties will be imposed on the taxpayer but the taxpayer will only be required to retroactively pay the taxes due for ten tax periods or, in inheritance cases, three tax periods, plus interest for late payment. Furthermore, the voluntary disclosure prevents from criminal proceedings for related criminal offences (eg, falsification of documents or accounts).

### Rights of taxpayers

#### 21 What rules are in place to protect taxpayers?

Aside of the remedies the taxpayer may raise vis-à-vis court or within the assessing tax authorities, the taxpayer is protected by the general procedural rules for administrative procedures, in particular the secrecy obligation of persons and authorities entrusted with the enforcement of the tax legislation and right to refuse insight into official files to third parties.

To protect the taxpayer in the context of the assessment and enforcement of taxes, Swiss tax legislation is governed by the investigation principle, the requirement for the authorities to determine the relevant facts, the application of law ex officio, the principle of proportionality and the taxpayer's right to be heard. Furthermore, orders must be provided with a right of appeal and the taxpayer's rights to contest and order must be formally stated on the order.

Also Swiss tax legislation, particularly in the criminal law context, is based on the taxpayer's right to equal and fair treatment in the process, the right to a fair hearing, the right to legal aid and judgement and the right to an effective remedy (EMRK 6 and 13, BV 29).

#### 22 How can taxpayers obtain information from the tax authority? What information can taxpayers request?

Taxpayers may seek a tax ruling from the competent tax authorities. In the tax ruling, the competent tax authority provides binding information on the tax treatment of the described fact patterns according to the applicable legislation. Tax ruling requests should be submitted in writing and must be submitted and typically confirmed by the tax authorities in advance, that is, before the described facts materialise. Tax rulings must not include agreements with the tax authorities on tax treatment if a case of the treatment contradicts the legal provisions (*unzulässige Steuerabkommen*, an illegal tax agreement).

Further, taxpayers are, according to DBG 114 I, entitled to inspect the files they have submitted to the tax authorities or they have signed vis-à-vis the tax authorities. Spouses taxed jointly are also entitled to inspect the other spouse's files. In certain cases, heirs have the right to

inspect the decedent's files with the tax authorities. The right to inspect files will normally be granted only once the fact finding has been completed by the tax authorities and if no private or public interests are opposed.

### 23 Is the tax authority subject to non-judicial oversight?

The cantonal tax authorities are under administrative oversight in accordance with the respective cantonal legislation. For the application of the federal legislation, the cantonal tax authorities are, furthermore, supervised by the Federal Tax Administration.

The Federal Tax Administration is supervised by the Federal Department of Finance.

## Court actions

### 24 Which courts have jurisdiction to hear tax disputes?

Tax disputes are, in a first step, treated within the assessing tax authority in the course of the objection procedure (see question 38). For subsequent court proceedings, the cantons are obliged by federal legislation to provide at least one court body for tax disputes (typically the tax recourse court/tax recourse commission (DBG 140 et seq). The cantons may provide for a second independent court instance in tax matters, typically, a division of the cantonal administrative court (DBG 145).

On the federal level, the Federal Supreme Court has jurisdiction for tax matters (DBG 146), whereby the Federal Administrative Court is interposed for certain tax-related matters (eg, international administrative assistance in taxation matters).

### 25 How can tax disputes be brought before the courts?

Against the assessment notice, the taxpayer may raise objection within 30 days after notification by the assessment authority (DBG 132). Contestable with the objection are the assessment order, the declaratory order on tax liability/exemption, the audit decision, the supplementary tax order, the decision regarding a fine, the liability order, the decision regarding a pledge, the decision regarding the recovery of paid tax amounts, the decision of the reimbursement of real estate gains tax, the decision concerning the refund of withholding tax, tax at source and the order concerning reminder fee.

Objection may be submitted according to DBG 132 I by the taxpayer. But the legitimacy goes even further and comes to all those persons who have been assessed with the assessment order for the tax in question.

The taxpayer may raise complaint by the independent recourse commission against the objection decision from the assessment authority within 30 days after notification in writing (DBG 140). Entitled to raise the complaint are the taxpayer and other individuals, if they are affected by the respective order and have a legitimate interest in the annulment.

In the objection the objector has a claim to unlimited review of the assessment decision and the annulment of reported deficiencies. Objections and complaints must be submitted in writing. There is no minimum threshold amount for claims.

### 26 Can tax claims affecting multiple tax returns or taxpayers be brought together?

Under Swiss legislation, tax claims affecting multiple tax periods are, at least formally, not combined in administrative and court proceedings.

According to DBG 9 I, spouses and minor children are taxed jointly so that tax claims brought forward by the tax authorities are formally addressed to both spouses. However, any spouse is entitled to independently take procedural steps such as, for example, raising objections. The objection raised by one spouse also takes effect for the other spouse.

In principle, communities of heirs are, under Swiss legislation, not taxed jointly but every heir's share to the estate is allocated to his own taxation sphere as of the decedent's demise. If heirs are, nevertheless, affected jointly by a taxation (eg, for the decedent's taxation until his demise, or for real estate held jointly), the heirs are also entitled to raise objections individually but with effect also for the other heirs.

### 27 Must the taxpayer pay the amounts in dispute into court before bringing a claim?

Tax amounts become due already during the relevant tax period (cantonal and communal taxes) respectively shortly after the relevant tax period (federal taxes) and, in any case, once they are determined in a tax assessment order. After the payment due date, interest for late payment is levied.

The submission of an objection or complaint does not interrupt the payment timelines and it is, generally, recommended to pay the disputed tax despite of court proceedings in order to avoid interest charges for late payment in case the proceedings are not successful. Overpaid taxes are refundable or credited in favour of the taxpayer if the tax is reassessed, for example, after a court decision.

### 28 To what extent can the costs of a dispute be recovered?

The costs (procedural costs/administrative fees as well as costs for legal representation) of a dispute are, generally, imposed to the losing party by the court. The costs may be divided between the parties if the dispute leads to a judgement partially in favour of one party (DBG 144).

In specific circumstances, the court may also waive the costs (DBG 144 III).

### 29 Are there any restrictions on or rules relating to third-party funding or insurance for the costs of a tax dispute, including bringing a tax claim to court?

Swiss legislation and practice does not contain any restrictions with regard to process financing via insurance solutions or third-party funding. The cost for tax disputes may be covered by legal protection insurances concluded by a certain number of Swiss resident taxpayers. However, the scope of coverage of such legal protection insurances is to be reviewed on a case-by-case basis to determine whether tax disputes are included or explicitly excluded from coverage.

It is to be noted that under the Swiss legislation on the professional behaviour of lawyers, it is not permitted for a lawyer to finance a tax dispute indirectly via a purely success-based compensation.

### 30 Who is the decision maker in the court? Is a jury trial available to hear tax disputes?

Swiss administrative courts (eg, the Federal Administrative Court and the Federal Supreme Court) judge generally as a panel of three or five judges. The cantonal legislations are relevant for the composition of the cantonal courts. Swiss legislation does not provide for jury trials.

### 31 What are the usual time frames for tax trials?

The duration of a tax trial varies depending on the court and the complexity of the dispute in question.

### 32 Describe the discovery process for a tax trial.

In the context of a tax trial, the court determines the case's facts ex officio, if necessary or in cases of doubt by use of the various means of evidence available, in particular testimony, documents, inspection, tax authorities' files. The court decides on the means of evidence to be considered in full discretion.

Aside of the court's obligations deriving from its duties to investigate the facts ex officio, the parties involved in the trial (in particular the taxpayer) include their view and evidence in their briefs.

### 33 What testimony is permitted in a tax trial?

In a tax trial, the facts may be established based on documents, information provided by the taxpayer, information or testimony from third parties, visual inspections and reports (DBG 123 II).

According to the federal legislation on administrative proceedings and on criminal proceedings generally, everybody is obliged to give a testimony. However, exceptions apply in certain cases for professional secrecy holders (these, typically, are required to seek a suspension of their professional secrecy for the proceedings). Furthermore, no one may be constraint to accuse himself in criminal proceedings.

### 34 Who can represent taxpayers in a tax trial? Who represents the tax authority?

Under Swiss legislation, tax procedures and trials are not restricted by the requirement of professional representation of the taxpayer. The taxpayer can represent himself or herself in the tax assessment, objection and complaint procedure, vis-à-vis the authorities and in court (including the Federal Supreme Court). Any party to an assessment, objection or complaint procedure may, however, be represented by a person capable of acting in the process (DBG 117), and it is customary and advisable to be

represented at least for complex cases by a professional. For certain criminal proceedings, the defendant is obliged to be professionally represented.

State aid to cover the procedural and representation costs will be granted based on constitutional grounds if a party does not have the necessary resources and its legal request does not appear unsuccessful.

Depending on the complexity and exposure of the case in question, the tax authorities represent themselves in tax proceedings before the courts or mandate external specialists. In criminal proceedings, the tax authorities are, typically, represented by the prosecutor.

### 35 Are tax trial proceedings public?

Tax assessment and tax objection procedures as well as complaint proceedings to the cantonal recourse commission are non-public procedures. Cantonal legislation governs the publicity of complaint procedures to a second cantonal instance (see question 38). Oral hearings in complaint procedures on the level of the Federal Supreme Court are public unless specific interests of the taxpayer would be offended.

Trial proceedings in criminal matters (eg, in the context of alleged tax fraud) are governed by the Federal criminal procedure legislation (DBG 188 II) and are, generally, public.

### 36 Who has the burden of proof in a tax trial?

In accordance with the general principles as set out in the Swiss Civil Code and as applied also in tax matters, any party has to prove the existence of a fact from which it derives a claim or right in its favour. In consequence, in taxation matters, for any circumstances that aim to reduce the taxpayer's tax burden (eg, income tax deductions), the taxpayer bears the burden of proof. The tax authorities bear, on the other side, the burden of proof to evidence any facts that lead to the existence or the increase of a taxpayer's tax burden.

### 37 Describe the case management process for a tax trial.

Swiss legislation and practice do not provide for specific case management rules in tax trials. Tax trials are governed by the applicable procedural legislation.

### 38 Can a court decision be appealed? If so, on what basis?

According to DBG 132, tax assessment orders may be contested by the taxpayer by *Einsprache* (an objection) in writing to the assessing authority within 30 days after notification of the order. The objection against an assessment based on a discretionary judgement (see question 6) must include evidence showing that the assessment is obviously incorrect (DBG 132 III). The objection procedure is free of charge for the taxpayer.

According to DBG 140, the tax authorities' decision in the objection procedure can be contested by a *Beschwerde* (complaint) to be raised by the taxpayer in writing to the respective cantonal recourse commission within 30 days after notification of the decision. Exceptionally and if all the involved parties agree, an objection may also be treated directly as a *Sprungrekurs* or *Sprungbeschwerde* (advanced complaint), DBG 132 II). The complaint is subject to fees in accordance with the applicable cantonal legislation. The complaint must include a request and the relevant facts and must specify the relevant evidence and include or at least specify in detail the relevant evidence material (documentation). The complaint may concern all aspects of the contested decision and the previous procedure.

The decision rendered by the recourse commission may be challenged by the taxpayer or the cantonal tax authorities by a complaint to a further, independent cantonal court (typically the administrative court eg, in the canton of Zurich) in accordance with DBG 145. The complaint is subject to fees in accordance with the applicable cantonal legislation.

The decision rendered by the recourse commission or, if applicable, the further cantonal court may be challenged by the taxpayer or the cantonal tax authorities by a complaint (complaint in administrative matters) to the Federal Supreme Court (DBG 146). The complaint is subject to fees in accordance with the applicable federal legislation.

**BÄR  
& KARRER**

**Ruth Bloch-Riemer**

**ruth.blochriemer@baerkarrer.ch**

Brandschenkestrasse 90  
CH-8027 Zurich  
Switzerland

Tel: +41 58 261 5000  
Fax: +41 58 261 5001  
www.baerkarrer.ch

# United Kingdom

Dominic Robertson, Richard Jeens and Charles Osborne

Slaughter and May

## Overview

### 1 What is the relevant legislation relating to tax administration and controversies? Other than legislation, are there other binding rules for taxpayers and the tax authority?

The legislation governing the administration of, and the process for dealing with disputes relating to, tax is not located in a single statute. For example, the Taxes Management Act 1970 contains rules for the administration of direct taxes on individuals, the Finance Act 1998 contains rules for the administration of corporate income tax, and the Value Added Tax Act 1994 contains rules for the administration of value added tax (VAT).

In addition to being found in primary legislation, rules relating to tax administration and tax controversies are also found in secondary regulations. These regulations include rules relating to particular taxes, such as the Value Added Tax Regulations 1995, but also the rules governing how disputes are brought before the UK tax tribunals, such as The Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The UK tax authority also publishes guidance that, although not binding, sets out its approach to certain issues.

International legislation and treaties, including double tax treaties (of which the UK has an extensive network) and EU law, may also bind taxpayers and the UK tax authority.

In addition to the legislation and treaties described above, decisions of the UK and EU courts are also binding on taxpayers and the UK tax authority.

### 2 What is the relevant tax authority and how is it organised?

The relevant tax authority is Her Majesty's Revenue & Customs (HMRC). Although HMRC is a government department, ultimately accountable to the Chancellor of the Exchequer, government ministers are not involved in its day-to-day activities.

The legal powers given to HMRC are vested in persons known as the Commissioners for Her Majesty's Revenue & Customs (Commissioners). There are two key managerial bodies within HMRC; the Executive Committee and the HMRC Board, which are broadly analogous to the senior executive team and a supervisory board within a company.

Decisions around tax disputes are taken at various levels of HMRC, depending on the significance and sensitivity of the dispute. Three of the Commissioners sitting together make decisions on the most significant and sensitive disputes. In reaching their decisions, these Commissioners consider the recommendations of the Tax Disputes Resolution Board, which is made up of senior representatives across HMRC. Decisions about the next level down of dispute are referred to case boards that sit within the various business areas of HMRC, and are made up of senior leaders across the department. There are four different case boards: Enforcement and Compliance; Large Business; Specialist Personal Tax; and Transfer Pricing. HMRC also has a Penalty Consistency Panel.

## Enforcement

### 3 How does the tax authority verify compliance with the tax laws and ensure timely payment of taxes? What is the typical procedure for the tax authority to review a tax return and how long does the review last?

The UK tax system is fundamentally a self-assessment system: generally, individuals and companies are required to self-assess their liability to tax

and file a return with HMRC stating their tax liability for the particular period in question.

HMRC is able to open an enquiry into a self-assessment return within 12 months of it being filed. HMRC may open such an enquiry without giving any justification for doing so, and the enquiry can be into any aspect of the return. On opening an enquiry, HMRC typically sets out the specific issues that it wishes to enquire into. HMRC is not bound by the contents of the initial enquiry notice, and may narrow or expand the scope of its enquiry at any time.

There is no legislative deadline by which time HMRC must have completed its enquiry but, where an enquiry takes an unduly long time, taxpayers are able to apply to a tribunal for a direction that HMRC closes the enquiry.

Once HMRC closes an enquiry (using a closure notice), recent case law suggests that what can then subsequently be disputed in relation to the particular return is limited to what is referred to in the closure notice.

HMRC does not enquire into every self-assessment return that it receives, instead choosing which returns to enquire into based on risk factors, such as the taxpayer's size, record of compliance, use of tax avoidance schemes, and involvement in cross-border transactions. In any event, the taxpayer itself is under an obligation to retain all records and documents that were required in order to produce a full and accurate tax return for, generally, a minimum of six years.

### 4 Are different types of taxpayers subjected to different reporting requirements? Can they be subjected to different types of review?

Individuals and companies are required to self-assess their liability to tax and file a return with HMRC, stating their tax liability for the return period. The period in relation to which the individual or company is required to compute their tax liability will depend on the tax in question and the nature of the taxpayer. For example, companies compute their income tax liability by reference to accounting periods that are 12 months in duration, and are required to file their tax return within 12 months of the end of the accounting period in question. VAT liability is typically computed quarterly.

Both individuals and companies may have to make payments on account to HMRC.

HMRC's ability to open an enquiry into a tax return and/or issue a 'discovery' assessment applies equally to individuals and companies. The duration of any enquiry will generally depend on the complexity of the taxpayer's affairs.

### 5 What types of information may the tax authority request from taxpayers? Can the tax authority interview the taxpayer or the taxpayer's employees? If so, are there any restrictions?

HMRC has formal powers to request information from taxpayers, but also commonly requests information informally. Formally, subject to restrictions in the case of information or documents subject to legal professional privilege (LPP) (see question 7), and to a limited right to appeal, HMRC has the power to require a taxpayer to provide information or to produce a document if the information or document is reasonably required by HMRC for the purpose of checking the taxpayer's tax position. HMRC can also require a third party to provide information or produce documents in relation to a taxpayer's tax affairs if that information or document is reasonably required to check the taxpayer's tax position. In both cases, HMRC cannot

require anyone to produce a document that is not in their possession or power (but note the record keeping obligation described above).

HMRC may also inspect a taxpayer's business premises and other property in the exercise of its functions.

Although HMRC's formal powers to interview taxpayers and the employees of taxpayers are generally triggered only in cases of fraud or criminal investigations, in practice, it is quite common for HMRC to informally request such interviews.

## **6 What actions may the agencies take if the taxpayer does not provide the required?**

Failure to comply with a formal information request from HMRC can result in penalties (see questions 11, 12, and 13). Criminal consequences may arise in cases of concealment of information or fraud.

## **7 How may taxpayers protect commercial information, including business secrets or professional advice, from disclosure?**

Subject to specific exemptions in relation to criminal conduct, the key protection for taxpayers in this area is LPP. The two forms of LPP that are most likely to apply are:

- legal advice privilege, which applies to confidential communications that pass between a lawyer and a client for the purpose of obtaining legal advice; and
- litigation privilege, which applies to confidential communications that are made for the dominant purpose of existing, pending, or completed litigation that pass between (i) a lawyer and a client; and (ii) a lawyer or client and/or a third party.

Under its normal powers, HMRC is not able to request or inspect any document protected by LPP, though HMRC may (and frequently does) dispute whether or not particular documents are subject to LPP.

## **8 What limitation period applies to the review of tax returns?**

HMRC is able to open an enquiry into a self-assessment return within 12 months of it being filed.

Once the time limit for opening an enquiry into a tax return passes, or HMRC formally closes its enquiry into a particular tax return, the tax return is generally regarded as final. In such circumstances, HMRC can only collect further tax by raising a discovery assessment.

A discovery assessment is raised by HMRC on 'discovery' (that can extend to a change of heart by HMRC) that a taxpayer has been under-assessed to tax, or has been given excessive relief from tax. Formally, a discovery assessment can only be raised by HMRC where one of the following conditions is satisfied:

- the under-assessment to tax or excessive relief was brought about carelessly or deliberately by the taxpayer or someone acting on his behalf; or
- at the time that the 12-month time limit for enquiry into the relevant return expired or HMRC formally closed its enquiry into the relevant return (as applicable), a hypothetical HMRC officer could not reasonably be expected, on the basis of the information then available to him, to be aware of the under-assessment to tax or excessive relief.

The second of these conditions has been interpreted by the courts very widely.

Where only the second of these two conditions applies, a discovery assessment can only be made within four years from the end of the period to which the assessment relates.

In cases involving a loss of tax brought about carelessly by the taxpayer, a discovery assessment can be made within six years from the end of the period to which the assessment relates. Where such a loss of tax is brought about deliberately, a discovery assessment can be made within twenty years from the end of the period to which the assessment relates.

## **9 Describe any alternative dispute resolution (ADR) or settlement options available?**

HMRC has set out its approach to the resolution of tax disputes in its Litigation and Settlement Strategy document (LSS), which gives HMRC a number of options other than formal litigation.

Once a notice of appeal has been given to HMRC, but before a tax dispute proceeds to the tribunal, taxpayers may request that HMRC carries

out an internal review of their case. This review will be carried out by an officer of HMRC who has not been involved in the taxpayer's case to date. It is up to HMRC to choose the nature and extent of the review. Around 20 per cent of these reviews result in a reversal or amendment of HMRC's initial decision.

Settling tax disputes in the UK using ADR is a relatively recent development that, given the potential savings that it can result in for both taxpayers and HMRC, may become increasingly common. ADR commonly uses mediation and may be suitable to deal with a wide range of tax disputes, but HMRC has made clear that it does not consider it appropriate in cases that turn on a point of law.

It is possible to conclude a contractual settlement agreement with HMRC, however, the LSS sets out a number of restrictions on this:

- HMRC will only agree to such a settlement where it considers that it is better off overall (ie, considering both tax receipts and the use of HMRC resources) to settle than to pursue a claim in the courts;
- where HMRC believes that it has a 51 per cent or better chance of winning a binary dispute, it will not settle for less than 100 per cent of the tax; and
- there must be a technical basis for any settlement outcome.

## **10 How may the tax authority collect overdue tax payments following a tax review?**

HMRC has a wide range of enforcement options available to it, including:

- seizing certain of the taxpayer's goods in order to compel the payment of tax. If the taxpayer continues to refuse to pay, HMRC can arrange for the goods to be sold at auction;
- recovering tax through the civil courts. Where this is unlikely to be effective, HMRC can seek a bankruptcy or winding-up order against the taxpayer;
- recovering tax against taxpayers who are employees through deduction at source on their employment income;
- demanding security for debts of certain taxes; and
- recovering the tax from third parties if the person primarily liable does not pay it.

Legislation was introduced in 2015 that allows HMRC to collect tax due to it directly from taxpayers' bank accounts in the UK provided that the sum that HMRC seeks to collect exceeds £1,000. This is intended to be a measure of last resort.

## **11 In what circumstances may the tax authority impose penalties?**

Generally, HMRC may impose penalties for (i) inaccuracies in tax returns and documents; (ii) failures to notify HMRC of a liability to tax; (iii) failures to file returns on time; and (iv) failures to pay tax on time. There are also distinct penalty regimes relating to failure to comply with HMRC information requests and for the promotion or use of tax avoidance schemes.

## **12 How are penalties calculated?**

Penalties for inaccuracies in tax returns and documents and for failures to notify HMRC of a liability to tax are often described as 'tax-geared' penalties, meaning that they are calculated as a percentage of the tax that is due. The amount of the percentage will depend on whether the inaccuracy or failure was careless, deliberate, or deliberate and concealed and also whether the discovery of the increased liability to tax was voluntarily disclosed to HMRC or not.

Penalties for a failure to file a return or pay tax on time differ depending on the tax to which the failure relates. These penalties often start as requirements to pay fixed amounts, but can become fixed daily penalties, or tax-geared penalties, depending on the nature and length of time for which the failure continues.

Penalties for failure to comply with HMRC information requests start as a requirement to pay a fixed amount, with a variable daily default penalty. Tax-geared penalties will apply in cases of continued failure to comply.

The raising of penalties is subject to review by HMRC's Penalty Consistency Panel.

## **13 What defences are available if penalties are imposed?**

Penalties for a non-deliberate failure should generally not apply if there is a reasonable excuse for the failure. HMRC takes a restrictive view on what amounts to a reasonable excuse, with not having enough money to pay the

tax generally not being sufficient. Reliance on an agent (such as accountants or lawyers) may be a reasonable excuse, or, more likely, indicates that the taxpayer has taken reasonable care.

Penalties may be suspended in situations where the failure is a 'one-off'.

#### **14 In what circumstances may the tax authority collect interest and how is it calculated?**

Interest becomes due when tax is paid late. HMRC publishes a late payment interest rate on its website. This rate is currently the Bank of England base rate plus 2.5 per cent.

#### **15 Are there criminal consequences that can arise as a result of a tax review? Are these different for different types of taxpayers?**

Criminal consequences will generally require fraudulent or dishonest conduct by the taxpayer. Where HMRC suspects a person of acting fraudulently, it has certain criminal investigation powers that go beyond its usual powers.

Presently, corporates are generally only criminally liable for the actions of their employees and other associated persons if the controlling mind of the corporate is proved to have been involved in the relevant criminal behaviour. However, following recent global tax scandals, HMRC is exploring introducing a new strict-liability, US-style approach, where the burden will be on corporates to demonstrate that appropriate prevention procedures were in place in order to avoid a criminal charge of 'failing to prevent' a wrong committed by someone else.

The consequences of being found guilty of a tax-related crime depends on the taxpayer involved. For individual taxpayers and for the directors of corporations, fines and prison sentences are available. For the corporations themselves, fines are available.

#### **16 What is the recent enforcement record of the authorities?**

The majority of tax disputes are resolved before proceeding to the tribunal, with one of either party conceding. In those cases that do proceed to court, HMRC's enforcement record is good, particularly in cases involving perceived tax avoidance. In 2015/16, the First-tier Tribunal ruled in HMRC's favour in 75.1 per cent of the tax disputes that it heard.

### **Third parties and other authorities**

#### **17 Can a tax authority involve or investigate third parties as part of the authority's review of a taxpayer's returns?**

Yes. With the approval of the taxpayer or the tribunal, HMRC can require a third party to provide information or produce documents if that information or document is reasonably required to check the taxpayer's tax position. HMRC cannot require the third party to produce a document that is not in its possession or power, and the LPP rules in the answer to question 6 apply.

HMRC may also inspect a third party's business premises and other property in the exercise of its functions. Recent case law suggests that the taxpayer does not need to be given an opportunity to make representations to HMRC opposing the inspection of the third party's premises where the tribunal gives permission for such an inspection.

If the third party is an auditor, such third party cannot be required to provide information held in connection with the performance of carrying out a statutory audit. Likewise, any person appointed to give advice about the tax affairs of another person cannot be required to produce documents that consist of relevant communications with that person's client or another tax adviser of the client related to advice on that client's tax affairs.

Failing to comply with an information request by HMRC may result in penalties (see questions 11, 12, and 13).

#### **18 Does the tax authority cooperate with other authorities within the country? Does the tax authority cooperate with the tax authorities in other countries?**

Yes. HMRC cooperates with a variety of other authorities in the UK, including the National Crime Agency, the Serious Fraud Office, the Financial Conduct Authority and Her Majesty's Treasury.

HMRC also increasingly cooperates with the tax authorities in other countries to share information. In particular, the UK has entered into many Tax Information Exchange Agreements with other jurisdictions,

under which HMRC and the relevant tax authorities agree to cooperate in tax matters through the exchange of information. HMRC also exchanges information with other tax authorities under the joint Council of Europe/OECD Convention on mutual administrative assistance in tax matters, numerous EU directives and regulations, and many of the UK's double tax treaties.

### **Special procedures**

#### **19 Do any special procedures apply in cases of financial or other hardship, for example when a taxpayer is bankrupt?**

HMRC may agree to scheduled payment plans in cases where the taxpayer's means or situation make it difficult to pay the full amount of tax owed on time. Late payment interest will continue to apply on any tax not paid by the due date.

#### **20 Are there any voluntary disclosure or amnesty programmes?**

HMRC has historically operated a number of campaigns designed to encourage individuals to voluntarily disclose under-declared income. By disclosing as part of one of these schemes, taxpayers will be treated as having made a 'voluntary' disclosure to HMRC, giving the taxpayer the most favourable outcome when it comes to levying applicable penalties.

HMRC has also operated schemes allowing settlement opportunities for the users of certain marketed tax avoidance schemes. The aim is to offer taxpayers and HMRC the best opportunity to resolve disputes in these areas in a way that is both cost-effective and consistent. Where people decline the settlement opportunity, HMRC will move to take legal action against such taxpayers as swiftly as possible.

Given the current climate of cracking down on tax avoidance, whether any similar schemes will be launched in the future is uncertain.

### **Rights of taxpayers**

#### **21 What rules are in place to protect taxpayers?**

HMRC has published a non-binding taxpayer charter that sets out the rights and responsibilities of HMRC and taxpayers in relation to one another. For example, the charter provides that taxpayers can expect HMRC to provide a helpful, efficient and effective service, to protect taxpayers' information and respect their privacy, and to deal with complaints quickly and fairly. Among other things, HMRC expects taxpayers to keep accurate records, to keep HMRC informed and to respond in good time. In addition, although not binding on HMRC, HMRC has published guidance for its employees on resolving tax disputes in the LSS that can be used by taxpayers as a helpful guideline on how HMRC will approach disputes.

HMRC also has well-established internal governance procedures and is ultimately subject to judicial review procedures (see question 25) and parliamentary oversight (see question 23) in the discharge of its functions.

#### **22 How can taxpayers obtain information from the tax authority? What information can taxpayers request?**

Taxpayers can request information from HMRC pursuant to the provisions of the Data Protection Act 1998 (DPA 1998) and the Freedom of Information Act 2000 (FOIA 2000).

Under DPA 1998, taxpayers may request personal information that HMRC holds about the taxpayer. HMRC must comply with requests within 40 days. HMRC may withhold information where, for example, release would be likely to prejudice the prevention or detection of crime, the apprehension or prosecution of offenders, or the assessment or collection of any tax or duty.

Under FOIA 2000, taxpayers may request any recorded information held by HMRC (other than in relation to personal information, for which see previous paragraph). A request under the FOIA 2000 must be made in writing, and HMRC must respond within 20 working days.

#### **23 Is the tax authority subject to non-judicial oversight?**

HMRC is subject to internal reviews, publishes annual reports setting out its performance for the year in question and is ultimately accountable to the Chancellor of the Exchequer (see question 2) and various parliamentary committees.

### Update and trends

Tax, and particularly perceived tax avoidance, continues to remain a 'hot issue' politically and in the media in the UK. In light of this, taxpayers (especially large businesses) have entered into fewer marketed tax avoidance schemes, so the number of disputes over technical interpretations of UK tax law has dropped over the last few years. This has been coupled with greater HMRC interest in transfer pricing enquiries, especially since the introduction of the diverted profits tax last year. Until now, there have been only two reported transfer pricing cases in the UK, but it seems likely that we will see significant transfer pricing litigation over the next few years. It also seems likely that, with HMRC's powers to deal with tax avoidance being regularly added to, we will see more litigation testing the ambit and application of those powers.

### Court actions

#### 24 Which courts have jurisdiction to hear tax disputes?

Generally, the court of first instance for tax disputes is the tax chamber of the First-tier Tribunal. Occasionally, disputes with no contested facts that instead turn on a particularly complex point of law, or that involve a particularly large sum of tax, will bypass this stage. Such cases, and cases on appeal from the First-tier Tribunal, will be heard in the tax and chancery chamber of the Upper Tribunal.

In England and Wales, appeals from the Upper Tribunal are heard by the Court of Appeal and from there proceed to the Supreme Court, the highest court in England and Wales. There is an equivalent process for tax disputes proceeding through the Scottish courts.

The European Court of Justice and the European Court of Human Rights can also hear tax disputes, particularly cases involving EU principles or VAT.

Criminal cases or cases involving judicial review (see question 25) may be heard in other courts, such as the Crown Court or the Administrative Court.

#### 25 How can tax disputes be brought before the courts?

Appeals can generally be brought against any final decision of HMRC to levy tax or penalties. There is no minimum monetary threshold before an appeal can be brought.

In order to bring a claim before the courts, a taxpayer must first give HMRC notice of appeal against the final decision in question. The deadline for doing so is usually within 30 days of the decision being appealed. The taxpayer must then raise the appeal with the tribunal (as discussed in question 24, this will generally be the First-tier Tribunal). Only the taxpayer has the standing to appeal to the tribunal.

As well as the traditional method of bringing a tax appeal, the decisions of UK public bodies (including HMRC) may be reviewed in certain circumstances using judicial review. Where an appellant successfully brings a judicial review challenge in respect of a public body's decision, the public body can be required to revisit its decision, and the reasoning behind it. There are strict requirements that must be satisfied about when a judicial review claim can be brought (particularly as to timing), and the extent of the failings of the public body, before a court will agree to hear a judicial review appeal. The First-tier Tribunal cannot hear judicial review claims.

#### 26 Can tax claims affecting multiple tax returns or taxpayers be brought together?

Yes. The tribunals and courts have broad case management powers (see, for example, question 33), which allow the tribunal or court in question to bring multiple claims together so that they are heard at the same time, to make group litigation orders, and to direct that a number of cases that turn on the same point of law to be stayed pending the outcome of a lead case. Such orders can be made by the tribunal or court on its own initiative, or at the request of the parties.

Usually, where a number of cases turn on the same point of law, HMRC and the relevant taxpayers will agree which case is the most suitable to proceed as the lead case, and ask the tribunal to issue a direction on this basis. Where, however, agreement cannot be reached, the parties may make representations to the court, and a hearing may occur during which the tribunal will decide which case is to be the lead case.

Where a particular issue is relevant to multiple tax returns of a single taxpayer, HMRC may agree with the taxpayer that a decision in relation to one particular tax return will govern the outcome of the disputes relating to each tax return.

#### 27 Must the taxpayer pay the amounts in dispute into court before bringing a claim?

Generally, no. However, in certain cases involving indirect taxes or, since July 2014, perceived tax avoidance, taxpayers may be required to do so.

If the taxpayer ultimately loses its appeal before the courts, the penalty and interest obligations in respect of the tax in dispute will run from the original payment deadline, and not from when the dispute is finally concluded. Taxpayers may, however, apply for a postponement of any tax due that, if accepted, effectively puts a stop on any penalties pending determination of the substantive dispute. If the taxpayer loses a direct tax appeal at first instance then, notwithstanding any onward appeal to the Upper Tribunal, he or she must pay the disputed tax in question.

#### 28 To what extent can the costs of a dispute be recovered?

Generally, costs can only be recovered in the First-tier Tribunal if the case is complex or if the tribunal considers that one of the parties has acted unreasonably in bringing, defending, or conducting the proceedings.

In the Upper Tribunal, Court of Appeal, and Supreme Court, the general approach is that the unsuccessful party will be ordered to pay a proportion of the costs of the successful party. However, the tribunal or court may choose not to take this approach where, for example, the conduct of the successful party is such that it appears appropriate to penalise it by not awarding costs in its favour.

It is generally difficult for litigants in person (see question 34) to recover costs.

#### 29 Are there any restrictions on or rules relating to third-party funding or insurance for the costs of a tax dispute, including bringing a tax claim to court?

There are no formal restrictions on the use of third-party funding or insurance for the costs of a tax dispute. Many third-party funders are members of the Association of Litigation Funders, which issues a code of conduct that sets out rules governing the relationship between a funder and its client and provides clarity on issues such as case control, settlement and withdrawal. Insurance companies that issue policies of legal expenses insurance are regulated in England and Wales by the Financial Conduct Authority and the Prudential Regulation Authority.

#### 30 Who is the decision maker in the court? Is a jury trial available to hear tax disputes?

This depends on which court the proceedings are before. In the First-tier Tribunal and the Upper Tribunal, decisions are generally made by a panel made up of judges or judges and lay members (individuals who are not legally qualified but who have other relevant professional qualifications or experience), but they may also be made by a single judge sitting alone. Whom the case is heard by will depend on the nature of the case. Where there is a panel, decisions are taken based on a simple majority, with the presiding member of the panel having the casting vote in tied decisions.

In the Court of Appeal and Supreme Court, decisions are taken by a panel of judges deciding based on a simple majority.

Jury trials are not used in tax disputes unless these are part of criminal proceedings.

#### 31 What are the usual time frames for tax trials?

The time frame for each trial will vary according to the complexity of the dispute in question.

#### 32 Describe the discovery process for a tax trial.

In the run-up to any tax trial, each party will disclose to the other a list of documents on which it proposes to rely. Should one party form the view that the other is in possession of relevant material that it is not disclosing, that party may request the tribunal to direct that the other party provides documents, information or submissions.

Recent case law suggests that, in cases involving complex issues or serious allegations, there may be a presumption that parties will be under a duty to disclose all relevant material, not just that on which either seeks to rely.



In practice, the parties will often try to agree a statement of agreed facts to save the court having to hear evidence on points that are already agreed.

### 33 What testimony is permitted in a tax trial?

The First-tier Tribunal has extensive case management powers to control what evidence is admitted. The tribunal may permit the testimony of various witnesses of fact (including the taxpayer) and expert witnesses. There is no requirement that the taxpayer gives testimony; however, if a question of fact turns on an issue that the taxpayer ought to be able to give evidence on but chooses not to, the court may draw certain inferences from this.

Nonetheless, in many tax trials, even where testimony is permitted, there will be no need for the witnesses to take to the stand, with their prepared witness statements standing as evidence before the tribunal.

### 34 Who can represent taxpayers in a tax trial? Who represents the tax authority?

A taxpayer can appear as a litigant in person before the full range of courts that deal with tax trials, from the First-tier Tribunal to the Supreme Court.

Taxpayers may also appoint a representative to represent them before the full range of courts. Before the First-tier Tribunal and Upper Tribunal, this representative does not need to be legally qualified. Before the Court of Appeal and the Supreme Court, however, this representative must be a barrister.

Where a taxpayer cannot afford representation, public funding may be available on a means-tested basis. There are also a range of organisations and individuals, including lawyers, who may be able to provide pro bono advice and representation to taxpayers.

HMRC is generally represented by barristers who are appointed and briefed by the HMRC Solicitor's Office.

### 35 Are tax trial proceedings public?

Generally, yes. A tribunal or court may grant permission for proceedings to take place in private, but this will only be granted in exceptional circumstances.

### 36 Who has the burden of proof in a tax trial?

The burden of proof is normally on the appellant. In the context of a first instance tax trial, this will normally be the taxpayer.

### 37 Describe the case management process for a tax trial.

All of the tribunals and courts that deal with tax trials have extensive powers to manage proceedings. These powers include the ability to require expert evidence, to compel the attendance of witnesses and to consolidate cases. Although the tribunals and courts can issue directions on their own initiative, it is more common for the parties to apply for directions. In general, the parties will agree directions for the management of the case between themselves, but if they are unable to do so, the tribunal or court will list a preliminary hearing at which the judge will issue relevant case management directions.

### 38 Can a court decision be appealed? If so, on what basis?

Yes, with permission. At each of the First-tier Tribunal, the Upper Tribunal and the Court of Appeal, the losing party can apply for permission to appeal to both the tribunal or court in which it has just lost and the higher tribunal or court.

Appeals from the First-tier Tribunal must be applied for within 56 days of the decision. Appeals from the Upper Tribunal must be applied for within one month. Appeals from the Court of Appeal must be applied for within 28 days.

Appeals may generally only be made in respect of points of law, however, in certain cases where the finding of facts is such that no judge acting properly could have come to the determination under appeal, this may be extended.

# SLAUGHTER AND MAY

**Dominic Robertson**  
**Richard Jeens**  
**Charles Osborne**

**dominic.robertson@slaughterandmay.com**  
**richard.jeens@slaughterandmay.com**  
**charles.osborne@slaughterandmay.com**

One Bunhill Row  
London  
EC1Y 8YY  
United Kingdom

Tel: +44 020 7600 1200  
Fax: +44 020 7090 5000  
www.slaughterandmay.com

# United States

J Walker Johnson, Robert J Kovacev and Carina C Federico

Steptoe & Johnson LLP

## Overview

### 1 What is the relevant legislation relating to tax administration and controversies? Other than legislation, are there other binding rules for taxpayers and the tax authority?

Tax administration and controversies are governed by the Internal Revenue Code (the IRC), Title 26 of the United States Code. The IRC is amended from time to time by tax acts passed by Congress and those acts contain effective dates and transition rules. The Internal Revenue Service (the IRS) officially interprets the IRC through Treasury regulations, revenue rulings, and revenue procedures, and provides additional guidance in announcements, notices, and publications. In addition, the US is party to income tax treaties with numerous foreign countries under which residents of foreign countries may be taxed at a reduced rate or may be exempt from US income taxes on certain items of US source income.

### 2 What is the relevant tax authority and how is it organised?

The IRS has authority to administer and enforce the IRC. The IRS is supervised by its Commissioner and its enforcement operations are divided into major divisions entitled Large Business and International (LB&I), Small Business/Self-Employed, Tax Exempt and Government Entities, Wage and Investment and Criminal Investigation. The IRS Chief Counsel provides legal interpretations and the Office of Appeals seeks to settle disputes between the IRS and taxpayers. Other departments provide administrative support and govern practice before the IRS by attorneys and other qualified tax practitioners.

## Enforcement

### 3 How does the tax authority verify compliance with the tax laws and ensure timely payment of taxes? What is the typical procedure for the tax authority to review a tax return and how long does the review last?

Compliance is verified by examination of tax returns. Tax returns may be randomly selected, identified by comparing the return to information reported to the IRS or chosen based on the size of the taxpayer or the compliance risk resulting from the taxpayer's status or operations. Tax returns may be examined by mail or during in-person interviews at an IRS office. Larger taxpayers typically have their tax returns examined at their place of business. Depending on the complexity of the return, examinations may be completed in months or over the course of several years. Taxpayers admitted into the IRS's Compliance Assurance Process (CAP) work with the IRS to identify and resolve tax issues before the tax return is filed, generally resulting in shorter and narrower post-filing examinations.

### 4 Are different types of taxpayers subjected to different reporting requirements? Can they be subjected to different types of review?

Whether a US citizen or resident alien must file an annual federal income tax return depends on the individual's gross income, filing status, age, and dependent status. Some individuals may file a return even if they owe no tax, for example to recover withheld taxes or refundable tax credits. Citizens or residents of the US also must file gift tax returns and estate tax returns, when appropriate.

All domestic US corporations, including corporations in bankruptcy, must file annual corporate income tax returns whether or not they have

taxable income. Likewise, partnerships must file annual information returns to report their income, deductions, gains and losses from operations. Numerous other information returns also may be required, most commonly to report wages, interest, dividends or other items paid. Information returns also must be filed by US persons that own foreign business entities, by US corporations that are foreign owned and by foreign corporations operating in the US (IRC Section 6038, 6038A, 6038C).

While all tax returns are subject to IRS examination, high-income individuals and large corporations are more frequently audited. For fiscal year 2014, the IRS audited 0.86 per cent of individual returns, 0.95 per cent of small corporation returns and 12.2 per cent of large corporation returns.

### 5 What types of information may the tax authority request from taxpayers? Can the tax authority interview the taxpayer or the taxpayer's employees? If so, are there any restrictions?

Taxpayers are required by law to maintain documents that are sufficient to establish that the items reported on their tax returns are correct (IRC Section 6001). In order to comply with this requirement, taxpayers should compile all relevant documentation and maintain it pursuant to a document retention policy.

The IRS has broad power to examine the taxpayer's books, papers, records and other data, including electronic data (IRC Section 7602). The only restrictions on the IRS's examination power are that the time and place of the examination must be reasonable and that unnecessary examinations, including multiple examinations, are discouraged. The IRS is able to inspect the taxpayer's premises and is able to interview the taxpayer and the taxpayer's employees.

### 6 What actions may the agencies take if the taxpayer does not provide the required?

The IRS typically requests information from the taxpayer by means of a written Information and Document Request (IDR). All taxpayers should discuss with the IRS the need for and scope of IDRs, their response due date and alternative ways to satisfy the need for information. In LB&I examinations of large corporate taxpayers there are formal requirements for the issuance, response to, and enforcement of IDRs.

If the taxpayer fails to respond to an IDR seeking documents held at a foreign location the IRS can issue a Formal Document Request (IRC Section 982). If the taxpayer fails to respond in a timely manner, the taxpayer may be prohibited from introducing the requested documents in any subsequent tax proceeding. The taxpayer has the right to initiate a proceeding in court to quash the formal document request.

If a taxpayer does not timely respond to an IDR, the IRS can issue an administrative summons to compel production of the information sought (IRC Section 7602). Alternatively, if the taxpayer has not responded to an IDR and the IRS's limitation period for assessment is close to expiration, the IRS can issue a Designated Summons, which tolls the running of the IRS's limitation period for assessment (IRC Section 6503). If the taxpayer does not respond to a summons the IRS can initiate a proceeding in court to enforce the summons.

### 7 How may taxpayers protect commercial information, including business secrets or professional advice, from?

The taxpayer need not disclose protected information to the IRS. In the US, the attorney-client privilege protects confidential communications

between the taxpayer and an attorney, even an in-house attorney employed by the taxpayer. Business communications, however, are not privileged. A similar privilege protects communications between the taxpayer and a federally authorised tax practitioner, which includes accountants (IRC Section 7525). Finally, the work product doctrine protects materials prepared in anticipation of litigation or for trial. Work product generally does not receive absolute protection, but can be disclosed if another party establishes substantial need for the materials. Courts, however, will protect against the disclosure of work product that contains an attorney's mental impressions, analysis, legal theories or conclusions.

If the IRS obtains taxpayer information, its ability to further disseminate that information is limited. The IRS is prohibited from disclosing tax returns and tax return information outside of the IRS unless the disclosure falls within one of various specific exceptions, which generally allow disclosures to other enforcement agencies (IRC Section 6103). Tax return information is broadly defined and includes data received by, recorded by, prepared by, furnished to or collected by the IRS. Wilful violations of the provision are punishable as a felony while negligent violations subject the IRS to a suit for damages. If the IRS seeks to introduce confidential commercial information in a court proceeding the taxpayer may seek a protective order preventing public disclosure of the information.

### **8 What limitation period applies to the review of tax returns?**

The IRS generally must assess any increase in tax owed within three years of the date the tax return is filed (IRC Section 6501). In the case of a failure to file a return, the filing of a false or fraudulent return or a wilful attempt to defeat or evade tax, the IRS may assess an increase in tax at any time. If the taxpayer omits a substantial amount of income from gross income the IRS may assess any increase in tax owed within six years of the date the tax return is filed. The taxpayer and the IRS may agree to extend the limitations period on assessment (IRS Form 872). Subsequent extensions may be agreed to if executed before the expiration of the immediately prior extension.

### **9 Describe any alternative dispute resolution (ADR) or settlement options available?**

Taxpayers who disagree with increases in tax proposed on audit may protest to the IRS Appeals Office. Generally, taxpayers must file a protest within 30 days after receiving examination's final report proposing an increase in tax. After the protest is filed, IRS examination can file a rebuttal to the protest. Thereafter, IRS Appeals will independently assess the issues using a quasi-judicial approach. IRS Appeals may reject the IRS examination's position or the taxpayer's position in full, or may seek to settle the dispute by applying a hazards of litigation standard.

Two alternative procedures allow the taxpayer to involve IRS Appeals at an earlier date. First, under the Fast Track Settlement programme the dispute remains in the jurisdiction of IRS examination, but IRS Appeals acts as a mediator and helps the parties resolve factual or legal issues. If agreement is reached, IRS Appeals will exercise its settlement authority and effect the settlement. If no agreement is reached, the Fast Track issues can be protested later to IRS Appeals. Second, under the Early Referral programme, taxpayers being audited by the LB&I division can ask IRS examination to refer developed, unagreed issues to IRS Appeals, while the examination team continues to audit other issues. IRS Appeals can exercise its settlement authority to settle the Early Referral issue. Unagreed issues are returned to IRS examination and, if the case is later protested, those issues will not be reconsidered by IRS Appeals.

At IRS Appeals, under the Rapid Appeals Process, IRS Appeals can bring IRS examination and the taxpayer together early in the Appeals process, serve as a mediator and use its settlement authority to effect any settlement reached. Also, either IRS Appeals or the taxpayer can seek a Technical Advice Memorandum on legal issues from IRS attorneys and, if the advice favours the taxpayer, IRS Appeals will follow the advice. If IRS Appeals and the taxpayer cannot agree to a settlement, the Post Appeals Mediation procedure may be utilised. A different IRS Appeals officer will be supplied by the IRS to act as a mediator, and the taxpayer may elect to involve a non-IRS co-mediator at its own expense. The mediation is non-binding, but if agreement is reached IRS Appeals will use its authority to effect the settlement. A binding Appeals Arbitration procedure formerly existed, but was discontinued in 2015.

### **10 How may the tax authority collect overdue tax payments following a tax review?**

The IRS will send the taxpayer an invoice seeking payment and, if no payment is received, a second invoice. If no payment is made the IRS can file a notice of federal tax lien, which attaches to the taxpayer's property (real estate and personal property) and rights to future property (amounts owed to the taxpayer and payable later). The IRS also can proceed to seize (or levy) the taxpayer's property and rights to future property. Generally, the IRS can attempt to collect taxes up to 10 years after the date of assessment, although that time period may be suspended for various reasons.

### **11 In what circumstances may the tax authority impose penalties?**

Civil penalties can be imposed for failure to file a tax return, failure to pay taxes or estimated taxes and in a myriad of other circumstances in which the taxpayer fails to comply with an IRC requirement. Penalties also can be imposed if the taxpayer files a tax return showing a knowingly improper amount of tax, such as on a fraudulent tax return. Accuracy-related penalties can be imposed in more ambiguous situations if the tax return reports tax positions the IRS determines are negligent, that disregard rules or regulations, that result in substantial understatements of income tax, that make substantial valuation misstatements, that involve a transaction that lacks economic substance or that involve a transaction the IRS has identified as a reportable transaction (IRC Sections 6662, 6662A).

### **12 How are penalties calculated?**

Many penalties are in amounts specified in the tax code. The civil fraud and the accuracy-related penalties are calculated by reference to the amount of the understatement of tax on the tax return, which is the amount of tax that was required to be shown on the return minus the amount of tax actually shown on the return. The amount of these penalties ranges from 20 per cent to 40 per cent of the understatement.

### **13 What defences are available if penalties are imposed?**

A negligence penalty can be avoided by showing that there was a reasonable basis for the reported tax position. The disregard of rules or regulations penalty can be avoided by showing that there was a reasonable basis for the position and that the position was adequately disclosed on the tax return. The substantial understatement penalty can be avoided if there was substantial authority for the position, or if there was a reasonable basis for the position and it was adequately disclosed on the return. All of the foregoing penalties, and the fraud penalty, can be avoided by showing that there was reasonable cause for the position and that the taxpayer acted in good faith. A reportable transaction understatement penalty can be avoided by disclosing the position on the tax return, having substantial authority, and having a belief the position is more likely than not correct. These rules will differ if the tax position involves a tax shelter (IRC Sections 6662, 6664).

### **14 In what circumstances may the tax authority collect interest and how is it calculated?**

If any tax deficiency or penalty is not timely paid the IRS will charge interest, which will be assessed and collected in the same manner as tax. The underpayment rate is a variable Federal short-term rate plus 3 percentage points. For large corporate underpayments, the interest rate enhancement is increased to 5 percentage points after the IRS proposes a tax deficiency.

### **15 Are there criminal consequences that can arise as a result of a tax review? Are these different for different types of taxpayers?**

Criminal penalties can be imposed on a taxpayer for tax evasion, wilful failure to file a tax return, for filing a false return or statement, and for other specified actions. The consequences typically are specified to be a monetary fine, a term of imprisonment, or both.

### **16 What is the recent enforcement record of the authorities?**

The IRS budget for the current fiscal year is about US\$900 million below that for 2010, which has resulted in a degradation of its compliance, audit and collection programmes, leading to a steady decline in the number of individual audits over the past six years. In fiscal 2015 the IRS completed the fewest audits in a decade. The IRS Commissioner has stated that this trend of fewer audits is expected to continue.

---

**Third parties and other authorities**
**17 Can a tax authority involve or investigate third parties as part of the authority's review of a taxpayer's returns?**

The IRS is able to seek information and documents from, and may interview, unrelated third parties who may have information relevant to the taxpayer's return. Before the IRS contacts a third party it must give the taxpayer notice that such contacts may be made. Thereafter, the IRS must provide to the taxpayer a list of third parties contacted. Taxpayers do not have an automatic right to be present when third parties are interviewed, but the third party can request the taxpayer's attendance.

If a third party fails to respond to an IRS request for information the IRS can issue a third-party summons. The IRS must notify the taxpayer of the issuance of the summons and the taxpayer can initiate a proceeding in court to quash the summons. Alternatively, if the IRS seeks to enforce the summons against the third party in court, the taxpayer has the right to intervene in that proceeding (IRC Section 7609).

**18 Does the tax authority cooperate with other authorities within the country? Does the tax authority cooperate with the tax authorities in other countries?**

The IRS is permitted to disclose tax information to other federal law enforcement agencies and to state tax authorities for tax administration purposes and does so with safeguards to protect that information against misuse and unauthorised disclosure (IRC Section 6103). State agencies likewise share tax information with the IRS. The IRS has tax information exchange relationships with approximately 90 countries, in the form of tax treaties, tax information exchange agreements (TIEAs), and mutual legal assistance treaties (MLATs).

---

**Special procedures**
**19 Do any special procedures apply in cases of financial or other hardship, for example when a taxpayer is bankrupt?**

Taxpayers with unpaid taxes may seek to pay the IRS over time pursuant to an instalment payment agreement or they may make an offer in compromise to pay less than the full amount owed. Taxpayers can seek assistance from the IRS's Taxpayer Advocate Service, request a Collection Due Process hearing, and may access IRS Appeals through the Collections Appeals Program. Bankruptcy courts have the authority to determine the amount or legality of any tax imposed on a debtor. A bankruptcy court can discharge a debtor from personal liability for some taxes, but many tax debts cannot be discharged. The scope of bankruptcy discharge depends not only on the nature of the tax debt, but also on the chapter of the Bankruptcy code under which the case was filed.

**20 Are there any voluntary disclosure or amnesty programmes?**

The IRS has an Offshore Voluntary Disclosure Program (OVDP) for submissions made on or after July 1, 2014, which is available to taxpayers who wish to voluntarily disclose their offshore accounts and assets to avoid prosecution and limit their exposure to civil penalties. The IRS also has a domestic voluntary disclosure procedure.

---

**Rights of taxpayers**
**21 What rules are in place to protect taxpayers?**

The IRS's Taxpayer Bill of Rights accords taxpayers the right to be informed, the right to pay no more than the correct amount of tax, the right to challenge the IRS's position and appeal to an independent forum, the right to finality and privacy, and the right to retain representation. As Federal employees, IRS employees are subject to the Office of Government Ethics Standards of Ethical Conduct.

**22 How can taxpayers obtain information from the tax authority? What information can taxpayers request?**

The IRS issues numerous publicly available publications, notices, announcements, and rulings covering both procedural and substantive topics. Also, taxpayers can request documents from the IRS pursuant to the Freedom of Information Act, 5 USC 552. While all IRS records are subject to Freedom of Information Act (FOIA) requests, the IRS may withhold documents (or parts of documents) based on exemptions and exclusions in the FOIA statute. Commonly withheld documents include inter-agency or intra-agency memoranda or letters covered by the deliberative process

privilege, the work product privilege, or the attorney-client privilege. If the IRS does not respond to a FOIA request or withholds documents the taxpayer can protest to IRS Appeals and, if necessary, initiate suit in federal district court.

---

**23 Is the tax authority subject to non-judicial oversight?**

The Government Accountability Office, the Office of Management and Budget and the Treasury Inspector General for Tax Administration oversee IRS operations. Within the IRS, the Taxpayer Advocate Service operates as an independent organisation to pursue taxpayer complaints. Advisory boards include the IRS Oversight Board and the Taxpayer Advocacy Panel. Finally, both the Senate and House have IRS oversight subcommittees.

---

**Court actions**
**24 Which courts have jurisdiction to hear tax disputes?**

A taxpayer can initiate a tax dispute in the US Tax Court, the Court of Federal Claims or federal district court. In Tax Court, a simplified small tax case procedure is available for certain cases involving US\$50,000 or less. Trials in small tax cases are less formal and result in a speedier disposition, but the decisions cannot be appealed.

---

**25 How can tax disputes be brought before the courts?**

To litigate in the Tax Court, the taxpayer must receive a statutory notice of deficiency (IRC Section 6213). Following an examination or consideration by IRS Appeals, the IRS will inform the taxpayer of any proposed deficiency and request payment. If the taxpayer does not pay the deficiency, the IRS will issue a statutory notice of deficiency. The taxpayer then has 90 days (or 150 days if the notice is addressed to a taxpayer outside the US) to file a petition with the Tax Court. In the Tax Court the taxpayer seeks a determination that the assessment is incorrect and that no tax is due.

In contrast, to litigate in the Court of Federal Claims or a federal district court the taxpayer must first pay the tax. The tax payment can occur with the tax return, following an IRS examination in which a tax deficiency is proposed, or after consideration by IRS Appeals. Within the applicable statute of limitations (Code Section 6511), the taxpayer then must file an administrative refund claim with the IRS (IRC Section 7422). Unless the IRS disallows the claim sooner, the taxpayer must wait six months to file a complaint initiating the suit. If the IRS disallows the claim, the complaint must be filed within two years of the date of the IRS notice of disallowance. In these courts the taxpayer seeks a determination that the tax is not legally owed and must be refunded.

In most cases, the tax Anti-Injunction Act (IRC Section 7421) prevents a taxpayer from filing suit to restrain the assessment or collection of tax and the Declaratory Judgment Act (28 USC 2201) prevents a taxpayer from filing suit to have a court declare whether the taxpayer is liable for tax.

---

**26 Can tax claims affecting multiple tax returns or taxpayers be brought together?**

Each tax year is considered a separate cause of action. Nevertheless, the IRS may examine more than one tax year at a time. If the taxpayer seeks to litigate in the Tax Court, multiple years can be included in the petition. If the taxpayer seeks to litigate in the Court of Federal Claims or a federal district court, the taxpayer must file a separate refund claim for each year, but multiple years can be included in the complaint.

Cases that involve different taxpayers but a common question of law or fact may be consolidated for trial, but separate trials may be ordered to avoid prejudice.

---

**27 Must the taxpayer pay the amounts in dispute into court before bringing a claim?**

To litigate in the Tax Court a taxpayer need not pay the tax assessed, but after the petition is filed the taxpayer may decide to do so to stop the running of interest. To litigate in the Court of Federal Claims or a federal district court the taxpayer must first pay the tax.

---

**28 To what extent can the costs of a dispute be recovered?**

A taxpayer may recover litigation costs incurred in connection with a court proceeding brought by or against the US if the taxpayer establishes that it is the prevailing party, that it exhausted the available administrative remedies, that it has not unreasonably protracted the court proceedings,

and that the claimed litigation costs are reasonable (IRC Section 7430). Recovery will be denied if the taxpayer's net worth exceeds specified limits.

**29 Are there any restrictions on or rules relating to third-party funding or insurance for the costs of a tax dispute, including bringing a tax claim to court?**

No such restrictions exist.

**30 Who is the decision maker in the court? Is a jury trial available to hear tax disputes?**

In the Court of Federal Claims and in the Tax Court a single judge is the decision maker and a jury trial is not available. In district court a single judge will hear the case, but either party may request a jury trial. The judge decides procedural and legal issues. If no jury is requested the judge acts as the trier of fact, while in a jury trial the jury acts as the trier of fact.

**31 What are the usual time frames for tax trials?**

After the taxpayer files its petition or complaint, the government will file an answer, which is due within 60 days, although extensions typically are sought. Thereafter, the judge and the parties usually agree to a scheduling order which sets a timeframe for discovery, the exchange of expert reports, and pretrial conferences, and other matters. Depending on the number of issues and their complexity, this pretrial period may extend for six months or over a year. Trials may take place in a single day or over a month or more, depending on the number of issues, the complexity of the facts, and the number of fact and expert witnesses. A case is likely to proceed more quickly in Tax Court than in the Court of Federal Claims or district court because the Tax Court encourages the parties to stipulate to facts, which may shorten the pretrial and trial stages. After the close of trial the judge likely will not issue a decision for six months or a year or longer.

**32 Describe the discovery process for a tax trial.**

Discovery in the Court of Federal Claims and a district court is often extensive and lengthy. First, the parties are required to make initial disclosures of potential evidence and witnesses they may use to support their case. Thereafter, the parties may serve interrogatories (written questions), take depositions (transcribed interviews), seek admissions and move for the production of documents. The judge may limit the number of discovery requests and the time period during which discovery can occur.

In contrast, the Tax Court requires that the parties are required to seek the objectives of discovery through informal communication before resorting to formal discovery. Moreover, the parties are required to stipulate all relevant facts to the fullest extent possible, which may reduce the need for discovery. As needed, however, the parties can serve interrogatories, take depositions, seek admissions, and move for the production of documents.

**33 What testimony is permitted in a tax trial?**

Fact witnesses can testify at trial regarding facts that are not stipulated. Generally, the taxpayer will present fact witnesses who may be the taxpayer, employees of the taxpayer, counterparties to a transaction and any other individual with relevant information. The government may present

**Update and trends**

As in prior years, the IRS's primary concern is its ability to maintain enforcement efforts in the face of budget cuts and resulting reductions in available enforcement resources. Compared to 2010, the number of IRS employees engaged in tax enforcement has decreased from 50,400 to 38,800, a decline of 23 per cent. As a result, there has been a corresponding reduction in the number of audits performed. In 2010 the IRS audited 1.55 million taxpayers, while in 2015 it audited only 1.2 million.

In response, the IRS has implemented a compliance risk management programme to focus its enforcement efforts on issues and taxpayers that present the highest compliance risk. Under this programme, on a centralised basis, the IRS will identify and prioritise what issues and which taxpayers will be examined. Moreover, also on a centralised basis, the IRS will develop audit protocols and techniques to be applied. This will make individual examiners and examination teams less flexible, as examinations will be controlled by individuals with whom the taxpayer is not in direct contact. Examiners likely will examine using pre-packaged scripts, and be less willing to discuss taxpayer-specific facts, and more likely to reach undeviating conclusions. Taxpayers will need to adjust to this new paradigm.

fact witnesses, but often primarily cross-examines the witnesses presented by the taxpayer. If a fact witness was deposed and is unavailable for the trial, his or her deposition testimony may be read into the trial record. Both parties can present expert witnesses, who can be cross-examined by the opposing party. Written expert reports may be introduced into the record.

**34 Who can represent taxpayers in a tax trial? Who represents the tax authority?**

In the Court of Federal Claims and the district courts taxpayers may represent themselves, but more often are represented by lawyers admitted to practice in those courts. In the Tax Court, taxpayers also may represent themselves, but more often are represented by lawyers or by non-lawyers admitted to practice in the Tax Court.

In the Court of Federal Claims and the district courts the IRS is represented by trial attorneys in the Tax Division of the US Department of Justice. In the Tax Court, the IRS is represented by IRS attorneys. In major cases in all three courts the government trial team may have both Tax Division and IRS lawyers.

**35 Are tax trial proceedings public?**

In all three courts trials are held in courtrooms open to the public. Documents introduced into the trial record, testimony given at the trial, and briefs prepared by the parties also are open to the public. If evidence sought to be introduced is a trade secret or otherwise confidential, the public can be excluded from the courtroom while that evidence is introduced and that part of the trial record can be sealed to prevent public disclosure.

**Steptoe**

STEPTOE & JOHNSON LLP

J Walker Johnson  
Robert J Kovacev  
Carina C Federico

wjohnson@steptoe.com  
rkovacev@steptoe.com  
cfederico@steptoe.com

1330 Connecticut Avenue NW  
Washington  
DC 20036  
United States

Tel: +1 202 429 3000  
Fax: +1 202 420 3902  
www.steptoe.com

**36 Who has the burden of proof in a tax trial?**

The taxpayer has the burden of proof in tax litigation. In tax refund litigation in the Court of Federal Claims and in district court the taxpayer bears the burden not only to prove that its position on the issues raised in the complaint is correct, but also that its asserted amount of tax liability is correct. Thus, if the IRS raises a new issue to offset the taxpayer's claimed decrease tax liability the taxpayer bears the burden of proof on that new issue. In contrast, if the IRS raises a new issue in Tax Court litigation the IRS bears the burden of proof on that new issue. By statute (IRC Section 7491) the burden of proof can shift to the IRS in certain circumstances, but this rule is inapplicable if the taxpayer's net worth exceeds specified limits.

**37 Describe the case management process for a tax trial.**

Case management begins when the taxpayer engages in a transaction giving rise to a potential tax dispute. Relevant documents and electronic information must be carefully compiled and stored. Before the case is filed facts must be marshalled, legal research performed, witnesses identified and experts retained. Once the case is filed discovery will begin in earnest and the value of adequate prior preparation becomes evident.

As trial approaches, the content of the evidence to be introduced and the order of its introduction must be designed. Evidentiary and other motions must be anticipated and responses prepared. In addition, the necessary trial staff must be identified, including the lawyers, staff to organise and manage the documentary evidence, and staff to coordinate the availability of fact and expert witnesses in a timely manner. In the US, the 'electronic courtroom' has become standard, with documents

stored on computers and displayed on screens throughout the courtroom. Arrangements must be made to prepare and operate this system. In addition, demonstratives (charts, diagrams, summaries) must be prepared in advance. Finally, witness testimony outlines and the opening argument must be finalised.

During the trial, the active trial team will present the evidence and examine and cross-examine witnesses. A team of 'backroom' lawyers and staff must be available to locate documents and to research legal issues that become relevant during the trial.

**38 Can a court decision be appealed? If so, on what basis?**

Tax cases can be appealed by either party to one of the 13 US courts of appeals. District courts are located in 94 federal judicial districts, which are organised into 12 regional circuits, each of which is assigned to a court of appeals. Appeals from the Tax Court and a district court are heard by the court of appeals for the judicial district in which the taxpayer is located. Appeals from the Court of Federal Claims are heard by the court of appeals for the Federal Circuit.

The appeal is initiated by timely filing a notice of appeal. Thereafter, the parties submit briefs pursuant to a scheduling order. After briefing concludes the parties will orally argue the case before a three-judge panel. After a decision is rendered, which may take up to a year, the unsuccessful party can file a petition seeking US Supreme Court review. Supreme Court review is discretionary, and only a small percentage of petitions are granted, usually in instances in which courts of appeals have reached different conclusions regarding the same issue.

## Getting the Deal Through

Acquisition Finance  
Advertising & Marketing  
Air Transport  
Anti-Corruption Regulation  
Anti-Money Laundering  
Arbitration  
Asset Recovery  
Aviation Finance & Leasing  
Banking Regulation  
Cartel Regulation  
Class Actions  
Commercial Contracts  
Construction  
Copyright  
Corporate Governance  
Corporate Immigration  
Cybersecurity  
Data Protection & Privacy  
Debt Capital Markets  
Dispute Resolution  
Distribution & Agency  
Domains & Domain Names  
Dominance  
e-Commerce  
Electricity Regulation  
Energy Disputes  
Enforcement of Foreign Judgments  
Environment & Climate Regulation  
Equity Derivatives  
Executive Compensation & Employee Benefits  
Financial Services Litigation  
Fintech  
Foreign Investment Review  
Franchise  
Fund Management  
Gas Regulation  
Government Investigations  
Healthcare Enforcement & Litigation  
High-Yield Debt  
Initial Public Offerings  
Insurance & Reinsurance  
Insurance Litigation  
Intellectual Property & Antitrust  
Investment Treaty Arbitration  
Islamic Finance & Markets  
Labour & Employment  
Legal Privilege & Professional Secrecy  
Licensing  
Life Sciences  
Loans & Secured Financing  
Mediation  
Merger Control  
Mergers & Acquisitions  
Mining  
Oil Regulation  
Outsourcing  
Patents  
Pensions & Retirement Plans  
Pharmaceutical Antitrust  
Ports & Terminals  
Private Antitrust Litigation  
Private Banking & Wealth Management  
Private Client  
Private Equity  
Product Liability  
Product Recall  
Project Finance  
Public-Private Partnerships  
Public Procurement  
Real Estate  
Restructuring & Insolvency  
Right of Publicity  
Securities Finance  
Securities Litigation  
Shareholder Activism & Engagement  
Ship Finance  
Shipbuilding  
Shipping  
State Aid  
Structured Finance & Securitisation  
Tax Controversy  
Tax on Inbound Investment  
Telecoms & Media  
Trade & Customs  
Trademarks  
Transfer Pricing  
Vertical Agreements

Also available digitally



# Online

[www.gettingthedealthrough.com](http://www.gettingthedealthrough.com)



Tax Controversy  
ISSN 2053-8944



THE QUEEN'S AWARDS  
FOR ENTERPRISE:  
2012



Official Partner of the Latin American  
Corporate Counsel Association



Strategic Research Sponsor of the  
ABA Section of International Law