

Tax Controversy 2020

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Tax Controversy

2020

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

Lexology Getting The Deal Through is delighted to publish the seventh edition of *Tax Controversy*, which is available in print and online at www.lexology.com/gtdt.

Lexology 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 Lexology 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 new chapters on India and the Netherlands.

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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.

Lexology 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 continued assistance with this volume.



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Global overview

Richard Jeens

Slaughter and May

Introduction

Although progress is being made to secure consensus on the international stage concerning a range of tax issues raised by doing business in the twenty-first century, our experience and the contributions in the chapters that follow suggest that not only will the attention paid to these issues mean that challenges with resolving tax controversies in a timely and cost-effective manner remain a major hurdle for taxpayers, but also that these challenges will themselves lead to great tax-related controversy, not least as businesses adapt and restructure to survive in a changing world. Five main themes stand out.

The fast-shifting tax landscape

Since September 2013, when the G20 leaders endorsed the OECD's ambitious Base Erosion and Profit Shifting (BEPS) Action Plan, the international corporate tax landscape has fundamentally changed and, as a result of governments' concerted action against secrecy and tax avoidance, significant additional tax revenues have been raised. For example, following the implementation of measures recommended as part of the BEPS project in respect of cross-border business-to-consumer supplies of digital services, additional revenues of €10.2 billion were raised during the first three years in the EU alone.

As a result of these changes, taxpayers have incurred significant additional compliance costs – in terms of both initial investment to understand and apply new rules and ongoing costs of complying with additional reporting requirements. However, potentially more fundamental changes are already under international discussion. Earlier this year, the IMF published a report that looked at setting a global minimum rate of corporate taxation.

The OECD is also considering the ways in which corporate tax systems should be redesigned to ensure an effective taxation of digital businesses. Given that a number of countries have unilaterally enacted, or have announced that they will unilaterally enact, their own digital services taxes, there is concern that if progress in this field is not made at an international level in a timely manner, the result will be a patchwork of differing rules, leading to increased complexity, uncertainty, potential double taxation and, as a result, an increase in the number of disputes between taxpayers and tax authorities.

Data and digitisation

One key result of the BEPS project was an increase in transparency. Information-exchange rules have started to bear fruit, providing tax authorities with vast amounts of facts and figures. In June 2019, the OECD reported that, in aggregate, details of more than 47 million financial accounts, with a total value of around £4.9 trillion, and 21,000 previously secret tax rulings, have been exchanged between tax authorities.

A manual analysis of this flood of data is practically impossible and tax authorities are increasingly investing in information technology (IT) as a result. The UK's tax authority set the ambitious target of becoming the most digitally advanced tax authority by 2020 and, earlier this year,

it was a finalist in six categories of the UK IT Industry Awards, winning three. In Germany, the press has reported that tax authorities are harnessing artificial intelligence for the fight against tax evasion.

The improving IT capabilities of tax authorities and their increasing use of artificial intelligence have already had repercussions for taxpayers and their advisers. It is increasingly expected that taxpayers make use of online systems – and this may require investment in additional software and training. The UK tax authority is in the course of 'making VAT digital', but reports suggest that many businesses are unprepared. Similarly, in 2017, Nigeria implemented an initiative to simplify and automate tax-administration processes. The initiative was intended to benefit tax authorities as well as taxpayers, but taxpayers remained unconvinced and uptake was poor.

Improved automatic data analysis may mean that extensive disclosure exercises are expected to be routinely undertaken in a tax-dispute setting. In response, taxpayers and advisers are harnessing technology to undertake initial reviews of documents and emails. Also, it has been suggested that tools could be developed that 'read' standardised documents such as tax authority notices, to flag those – such as notices of an assessment or enquiry – that require immediate attention.

The continuing crackdown on avoidance

Given tax authorities' increasing ability to analyse the growing amounts of data at their disposal, previously undetectable irregularities are likely to become discoverable. In the UK, for example, this led to the introduction of a penalty-backed requirement that individuals correct previous offshore non-compliance by 30 September 2018.

Countries have also enhanced the armoury at their authorities' disposal to combat tax fraud and abuses of tax law. For example, the process for prosecuting cases of tax fraud in France has been streamlined, and the penalties for those found guilty of such offences have been increased. Tax authorities have also become more willing to make use of methods that were previously seen as last resorts. In Germany, the past year has seen a number of high-profile dawn raids: banks and advisers' offices and individuals' residences were searched in relation to the 'cum-ex' scandal and as a result of the leak of the Panama papers. In the UK, the tax authority is bringing an increasing number of cases against taxpayers using its criminal sanctions, including recently convicting more than 20 individuals for offences relating to arrangements that have been promoted and marketed as tax-avoidance schemes.

Many jurisdictions have bolstered the ability of their tax authorities to obtain information about a taxpayer from third parties, not just the individual taxpayer concerned. One common example of this is information requests made to banks about account holders. Not only can this lead to costs for the companies storing that information (eg, costs of compliance and knock-on questions concerning facilitation of avoidance arrangements), but it also leaves them in a difficult position in relation to the customers or clients whose data has been taken or requested.

Within the EU, the European Court of Justice (ECJ) has extended the scope of 'abuse of law' in a tax context so that it is no longer limited to applying to arrangements put in place solely to obtain a tax advantage, but also those where the tax advantage is the principal or one of the principal objectives. Whether local jurisdictions will regard this as a significant change, or choose to consider this judgment as a reaffirmation of business as usual, looks set to be a significant issue for taxpayers to watch over the coming months and years.

In parallel to this rearmament, in order to avoid having to use their more adversarial and aggressive tools, tax authorities are also trying to find new ways to collaborate with taxpayers. For instance, France has launched a new voluntary disclosure facility for companies, and the UK has introduced the profit diversion compliance facility in order to work with companies to resolve issues around the pricing of cross-border arrangements.

International cooperation?

To date, 89 jurisdictions have signed the multilateral instrument (MLI) implementing the changes required to be made to bilateral tax treaties as a result of the BEPS project and, since the beginning of July 2018, these changes have started to take effect. One result is that residence tie-breakers may be replaced by provisions for determination by agreement between the competent authorities in the form of mutual agreement procedures. However, at the time of writing, it is estimated that, in the EU alone, 2,000 such procedures are currently outstanding, out of which around 900 are over two years old.

Without an effective mechanism to resolve disputes between tax authorities, taxpayers can expect more cases where they are left in limbo, stuck between the interests of two competing tax authorities.

Allocation of tax risk

With the issues above being part of a whole range of concerns leading to increased uncertainty for taxpayers, not only in terms of their underlying tax treatment, but also in terms of how any dispute with a tax authority or authorities may be resolved, the allocation of tax risk in a transactional context (whether M&A, financing arrangements or otherwise) is being increasingly focused on. More and more cases are being brought before the courts testing what were previously thought to be established procedural rules and issues of contractual interpretation as a result of the additional commercial stresses that this uncertainty is placing on the traditional view. Establishing a clear allocation of tax risk, as well as setting out the arrangements for who is to have control of any dispute with a tax authority, look set to become increasingly important priorities in transactions. For example, the seller of a company may be willing to cover a particular tax risk under the sale documents provided it has the rights to conduct any related dispute with a tax authority. Careful drafting of such rights of conduct will be particularly important in cross-border scenarios, where the uncertainties inherent in dealing with multiple jurisdictions and multiple tax authorities increase the chances of tax-authority disputes.

Going forward

It is clear that many of the more recent changes hailed as potential solutions to issues of taxpayer uncertainty have led to more questions than they have answered. As gloomy an outlook as that may provide in respect of the current issues being debated on the international stage in institutions such as the OECD, it is not all bad for taxpayers. Greater information exchange between tax authorities should hopefully lead to a more joined-up approach to international tax controversies and a more joined-up framework for taxpayers operating across multiple jurisdictions to navigate.

Austria

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OVERVIEW

Legislation

- 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 Austrian tax authorities must apply Austrian statutory tax law (including EU directives that have been transposed into national law) as well as constitutional law and directly applicable EU law. Bilateral double taxation conventions are transposed to national tax law by parliament and are as such directly applicable.

Ministry of Finance regulations serve to substantiate the law, and within the boundaries provided by the law are also binding for all taxpayers and the courts.

In contrast, guidelines or ordinances issued by the Ministry of Finance are binding only for the tax authorities themselves, and not for the taxpayer or the courts. Such guidelines provide explanations and interpretations of Austrian tax law and are intended to harmonise interpretations of the tax law. If a taxpayer relies on these guidelines or ordinances, he or she can expect protection of his or her good faith under certain conditions.

Case law of the European Court of Justice and the domestic courts is also important.

Relevant authority

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

Austrian tax administration is divided among the federal government, nine provinces and the municipalities. Most taxes (such as income tax, corporate income tax and VAT) are federal taxes. The individual provinces and municipalities have implemented local taxes, which, however, play only a minor role.

The Austrian Ministry of Finance is the head of the federal tax administration and is superior to the local federal tax offices. Assessment of federal taxes is performed by the local tax offices. Local taxes are assessed by the local administration.

ENFORCEMENT

Compliance with tax laws

- 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 returns are subject to a plausibility check before a tax assessment is made.

Normally, a review is only undertaken if certain aspects of the tax return are unclear to the tax office. It is also possible that a certain number of tax returns are randomly chosen for a comprehensive review.

The duration of a review depends on the workload of the tax office, the complexity of the tax return and the taxpayer's responses to questions. A review might take up to several months.

If the review takes place as part of a tax audit, specific rules apply.

Regarding the most important tax-related charges, see questions 11 and 12.

Types of taxpayer

- 4 | Are different types of taxpayers subject to different reporting requirements? Can they be subjected to different types of review?

A resident taxpayer must file an income tax return if his or her annual income exceeds €10,000 (or €730 in addition to received employment income). A non-resident taxpayer must file a tax return if his or her annual income taxable in Austria exceeds €2,000.

In the case of business income, the taxpayer's accounts serve as the basis for income taxation. Under commercial law, individuals or partnerships are obliged to prepare financial statements if their annual gross turnover exceeds €700,000. The financial statements are then the basis for the determination of taxable profits (after correction for deviating provisions in tax law, known as 'book-to-tax adjustments'). Austrian corporations must always prepare financial statements and file an annual corporate income tax return.

With regard to partnerships, the partnership must file a tax return to determine its taxable income, and the partners must file their annual tax returns, in which they have to include their share of the partnership's income (the partnership is transparent for tax purposes).

There are numerous other filing obligations; for example, for real estate transfer tax, for stamp duty and for entrepreneurs, there is an obligation to file monthly or quarterly as well as annual VAT tax returns. Notifications of certain donations have to be filed. Donations to Austrian private foundations are mostly subject to trust-entrance duty of 2.5 per cent (25 per cent in the case of non-Austrian trusts and foundations under certain circumstances).

Normally, the assessment is made by the tax office. Additionally, in case of electronic filing of the tax return, a review can take place after the assessment in an ex-post control decree within a year to adjust the result without further reasons.

Further, after the decree has become final and binding from the side of the tax office, tax audits may be performed (see also question 8). The frequency of tax audits depends on the business size. Large businesses are audited on a permanent basis.

Requesting information

- 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?

Tax authorities can request all kinds of information. The most intensive form of review will be a tax audit.

The voluntary system of 'horizontal monitoring', which entered into force on 1 January 2019 for large enterprises, will involve an additional obligation of cooperation with the tax office on an ongoing basis for enterprises that have opted to participate (see question 9).

In a tax audit, taking place every few years, the taxpayer has the obligation to cooperate with the tax authority. In particular, the taxpayer must clarify his or her standpoint, prove the content of their declarations and supply to the tax authorities all the information that is needed to ascertain the facts alleged that are relevant for taxation. This includes business books, accounts and records, financial information and copies of invoices or transaction documents and the information necessary to understand the records.

The tax authority can also interview third parties, including the taxpayer's employees.

Available agency action

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

During a review or a tax audit, an unjustified refusal to answer an information or document request from the tax authority constitutes a violation of the taxpayer's obligation to cooperate with the tax authority. In such cases, the tax authority has a right to assess the tax based on its justified estimation, applying certain rules as laid down in law and in interpretation by the courts. This assessment cannot be appealed unless the estimation has been wrongfully made.

There is no possibility of conducting compulsory measures (eg, house search or seizures) in the ordinary fiscal audit procedure. By contrast, in a criminal tax audit, the tax authorities may investigate documents on the premises or in the home of the taxpayer and seize what is relevant for the case, unless these are excluded from seizure (eg, because of attorney-client privilege).

Protecting commercial information

- 7 | How may taxpayers protect commercial information, including business secrets or professional advice, from disclosure? Is the tax authority subject to any restrictions concerning what it can do with the information disclosed?

Business secrets are protected in Austria, but not with regard to the tax authorities. The tax offices are bound to confidentiality, with the threat of a fine or up to three years' imprisonment. However, if a criminal tax procedure has been started, the authority may be obliged to inform other authorities or criminal prosecutors.

In the fiscal criminal law procedure, attorneys and legal professionals enjoy attorney-client privilege. Hence, they can lawfully refuse to provide information to the tax authority that was obtained by them in their capacity as the representative of the client (such documents may also not be seized even if they are found during a seizure at the taxpayer's premises). If faced with such refusal by the representative, the documents must be sealed and may only be accessed if a court authorises it.

Limitation period for reviews

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

The results of a tax audit may be assessed until the statute of limitation. The statute of limitation is (generally) five plus one years after the year for which the tax return was filed. In the case of deliberate tax evasion, the statute of limitation is 10 years. However, if the Austrian tax authorities undertake investigative actions within the respective last year, the statute of limitation is extended for one additional year. In any case, the right to assess taxes is time barred after 10 years.

If the tax authority performs an official measure, the period is extended for another year. However, after a period of 10 years, the statute of limitation for the assessment expires in any case.

Alternative dispute resolution

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

No ADR procedures are available. It is always possible for the taxpayer to contact the competent tax office and ask for informal answers to tax questions or informal tax rulings.

Binding rulings can be requested from the tax office concerning group taxation, transfer prices or tax-neutral reorganisations and, as of 1 January 2019, additionally concerning other areas of international tax law and questions of the general anti-abuse provision. Regarding VAT issues, this comes into force on 1 January 2020.

The tax office should decide within a period of two months. A fee to the government becomes due for a positive ruling, which can range from €1,500 to € 20,000, depending on the size of the turnover of the applicant. In the case of a negative ruling, the taxpayer may submit an appeal to the Federal Tax Court.

Additionally, mutual agreement procedures according to double tax conventions should be noted.

A new system of 'horizontal monitoring' entered into force on 1 January 2019. This regime is available for enterprises with an annual turnover exceeding €40 million, as well as generally for banking institutions and insurance companies.

If an enterprise opts for the 'horizontal monitoring', it will not be subject to tax audits, but is reviewed by inspectors of the tax authority on an ongoing basis. There are certain further conditions for the participation in the system – in particular that the previous tax behaviour of the applicant met some standards of compliance (eg, no criminal tax evasion occurred in the past five years; implementation of an effective tax-control system, peer reviewed by a tax advisor).

Collecting overdue payments

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

Enforcement by the tax authorities is possible as soon as a title for execution is given, which is an excerpt of the arrears on the taxpayer's tax account. The tax office may itself perform execution on assets (except immovable assets), receivables and other property rights. Movables belonging to the debtor may be seized and sold at auction. Monetary claims are executed by preventing the debtor from making any payments to his or her creditors. For the execution of immovable assets, the tax office requires court assistance.

Penalties

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

If a tax return is not filed on time, the tax office can impose a late filing penalty. If a tax amount is not paid when due, the tax office can assess a late payment penalty. Additionally, the tax office may impose fines to enforce certain actions of taxpayers (eg, to file a tax return).

12 | How are penalties calculated?

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

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

If a difference arises between Austrian income tax or CIT prepayments and the assessed tax, such difference bears interest beginning on 1 October of the year following which the tax arises until such time that the difference amount is actually paid. This situation may arise also as a result of ex-post tax audits. The interest rate is base interest rate plus 2 percentage points (currently resulting in an interest rate of approximately 1.38 per cent).

Additionally, the tax authorities may impose enforcement charges to enforce certain actions of taxpayers (eg, to file a tax return), which may amount to up to €5,000.

13 | What defences are available if penalties are imposed?

Both the late filing penalty and the late payment penalty are administrative acts against which an appeal is possible. If, however, the underlying tax is appealed against, then no separate appeal is necessary against the late payment penalty.

Collecting interest

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

If an income tax or corporate income tax assessment leads to an additional tax payment, interest accrues to the advantage of the tax authorities. If, on the other hand, the tax assessment leads to a refund, interest accrues to the advantage of the taxpayer. This primarily plays a role in case of tax audits, where the interest accrual begins on 1 October of the year following the assessed year and ends after 48 months (ie, interest accrues for a maximum period of two years). The interest rate is 2 per cent above the base interest rate (which is published by the authorities).

If the taxpayer applies for a full or partial deferral of due tax payments (outside of an appeal procedure; see also question 27), the interest rate is 4.5 per cent above the base interest rate.

With regard to a request for suspension in the course of an appeal, see question 27.

Criminal consequences

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

The taxpayer must notify the tax office and disclose to the tax office truthfully all information relevant for matters of his or her taxation. If a deliberate breach of this obligation leads to a reduction in taxes, criminal tax evasion occurs, for example, in case of deliberately wrong tax returns.

Criminal tax evasion is punishable with a fine of up to twice the reduced tax amount or up to two years' imprisonment. In case of qualified forms of tax evasion (eg, use of falsified documents or fictitious structures), up to 10 years' imprisonment is possible. In other cases, the punishment is up to five years (eg, in the case of commercial tax evasion, which occurs if the taxpayer has intentionally evaded taxes in a criminal manner for several (ie, more than two) years; or for tax evasion as a gang). If the tax evasion is committed with gross negligence, it is considered a tax offence that can be punished with a monetary fine up to the amount of the evaded tax.

The Financial Crime Act applies to individuals and – according to the Association Responsibilities Act – to legal entities if a decision maker or an employee commits the act for the benefit of the legal entity and duties that affect the legal entity are violated; in the case of ordinary employees only, if the decision makers have violated duties of supervision. This means that the legal entities are also subject to large fines.

Enforcement record

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

There is no information available.

THIRD PARTIES AND OTHER AUTHORITIES

Involvement of third parties

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

In general, the tax authorities are entitled to involve third parties in order to investigate the facts and circumstances related to a taxpayer's returns. However, the Austrian statutes impose obligations of secrecy (eg, bank secrecy or professional secrecy), in which cases the disclosure of such information can be prohibited by law. Even illegally obtained information is admissible in administrative tax proceedings as long as it is suitable for determining the relevant facts or circumstances.

Cooperation with other authorities

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 general, Austrian domestic authorities are obliged to cooperate with each other. That also includes a full exchange of information between Austrian tax and other domestic authorities as far as the disclosure of information is not prohibited by law.

In addition, Austria has committed itself to the International Standards for Transparency and Exchange of Information for Tax Purposes, which overrule even the domestic bank secrecy. All recently signed or revised double taxation conventions ensure an exchange of information to the most extensive degree possible, as stipulated by Article 26 OECD MTC. In addition, Austria has signed the multilateral convention – and submitted the ratification instrument to the depositary (the OECD Secretary General) – that also enables mutual administrative

assistance in tax matters. In relation to information exchange instruments between member states of the EU, the EU Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and the EU Directive 2010/24/EU regarding the assistance in the collection of taxes apply. With respect to US citizens, the exchange of information mechanism of the Foreign Account Tax Compliance Act applies.

SPECIAL PROCEDURES

Hardship procedures

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

The Austrian income tax legislation provides for tax relief in the event of debt waivers in the course of insolvency proceedings. For companies, the offset of losses, contrary to the general rule, is not limited to 75 per cent of the profits. In the VAT system, the recipient of services can apply for an input tax refund even if VAT payments were not paid by the contracting party due to insolvency.

Taxpayers may apply for a full or partial deferral of due taxes. Upon application, the tax authorities are obliged to abstain from collecting due tax claims if their collection would be unreasonable. Moreover, if the collectability of due taxes is not possible due to the financial situation of the taxpayer and it can be reasonably assumed that the financial situation of the taxpayer will improve in the near future, the tax authorities may grant a temporary suspension of payments.

Voluntary disclosure and amnesties

20 | Are there any voluntary disclosure or amnesty programmes?

The Austrian Fiscal Act provides for the possibility of voluntary disclosure in order to avoid criminal prosecution arising from fiscal crimes. The taxpayer must voluntarily reveal all facts and circumstances related to the fiscal crime committed before the offence has been fully or partially detected by the Austrian authorities, and pay the amount of tax evaded within one month after the submission of the voluntary disclosure, or at least apply for payment reliefs within this month. If a voluntary disclosure is made at the beginning of a tax audit, a surcharge of 20 per cent of the tax evaded must be paid. Only the persons included in the voluntary disclosure will benefit from the voluntary disclosure.

Moreover, as of 1 January 2019, a system of 'horizontal monitoring' is applicable for large enterprises (ie, banks, insurance companies and other enterprises with an annual turnover of more than €40 million) upon their request (see question 9). Enterprises opting for this system will have to provide tax inspectors with requested documents on an ongoing basis as well as spontaneously address issues that are relevant for the taxation of the current business or business transactions.

RIGHTS OF TAXPAYERS

Rules protecting taxpayers

21 | What rules are in place to protect taxpayers?

One of the fundamental principles of the Austrian tax assessment procedure is that the Austrian tax authorities must review all the facts that are also in favour of the taxpayer and, if necessary, collect additional evidence on their own. In addition, the Austrian Federal Fiscal Code grants several rights for taxpayers following the principles anchored in the Austrian Constitution (such as the principles of legality, judicial protection, efficiency rule, protection for bona fide, requirement of objectivity, unlawfulness of arbitrary rule, fair trial and principle of equal treatment, etc.). The most important are the rights:

- to be heard and to have a fair trial before a decision is issued;
- to inspect the records of the tax authorities;
- to receive legal guidance if the taxpayer is not represented by a professional;
- to appeal before an independent judicial system;
- to file a request for restitutio in integrum; and
- to reopen a tax assessment.

Finally, the tax authorities must comply with tax secrecy.

Requesting information

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

The taxpayer is entitled to full disclosure of his or her tax file by the tax authorities upon request. The taxpayer may inspect any assessment file and any files relating to a tax audit as well. Should the access be denied, no remedy is available against such denial. In such case, the taxpayer may include in the appeal that the procedural right to get disclosure was violated.

In addition, the taxpayer is entitled to ask the tax authorities for any legal information in tax matters. The tax authorities are obliged to provide assistance to the taxpayer if he or she is not represented by a professional.

Tax authority governance

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

Tax offices are subject to oversight by the Austrian Ministry of Finance. Directives issued by the Ministry of Finance must be followed by the tax offices. The Ministry of Finance does not usually direct the tax office or the tax audit team. The tax courts are independent.

COURT ACTIONS

Competent courts

24 | Which courts have jurisdiction to hear tax disputes?

Appeals lodged against decrees of the tax office fall under the competence of the tax courts. There are two kinds of tax courts, competent for different taxes. An Administrative Court in one of the nine federal states is competent in the case of municipal or state taxes, while the Austrian Federal Tax Court is competent when federal taxes are concerned, which include such taxes as income tax, corporate income tax and value added tax. An appeal against the tax court's decision can be brought before the Austrian Supreme Administrative Court in case of legal issues of fundamental importance or, if it is claimed that constitutional rights were violated, before the Austrian Constitutional Court. The Supreme Administrative Court does not decide on the facts and circumstances of the case, but only rules on questions of law and on errors of law or procedure that might have influenced the wrong ascertainment of facts. The Supreme Administrative Court will not perform any factual investigations, nor will it review the facts and circumstances provided by the Federal Tax Court. No new facts will be considered by the Supreme Administrative Court. Only if procedural rules have been neglected which, if considered appropriately, would have led to a different fact-finding, may the Supreme Administrative Court annul the contested decision and refer the case back to the Federal Tax Court.

The tax office and the Federal Tax Court are also competent in the field of fiscal criminal law, in which the courts are generally competent if the amount in question exceeds €100,000 and the violation of the fiscal criminal law was committed with intent.

Lodging a claim

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

If a decree of the tax offices infringes taxpayer's rights, an appeal can be filed by the person addressed in the decree. This is usually the case after the tax office issues new decrees after the completion of a tax audit. An appeal against a tax office's decree must be filed in writing or declared for record within one month from service and is addressed to the competent tax office, not the tax court. This one-month period may, upon the application of the taxpayer for 'good reason', be (also repeatedly) prolonged by the tax office. The tax office may issue a preliminary decision if the taxpayer has not requested that it may refrain from doing so or if only the illegality or unconstitutionality of legal provisions or the illegality of state contracts is claimed. The appeal must name the parties, the matter of the claim, the appeal decision and the arguments of the taxpayer; it is further recommended to provide evidence. There is no value threshold for an appeal. The taxpayer may seek the revision or annulment of the decree. The tax courts may, however, change the decree in any way also to the detriment of the appellant.

Furthermore, the taxpayer may file for suspension or deferral of payment (see question 27) and ask for payment facilities for the case that the tax claim is deemed to be valid.

Combination of claims

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

Different tax claims may only be brought together by the tax authorities for litigation if the underlying tax assessment is contested by several taxpayers respectively or if several appeals are filed against the same tax assessment.

Pre-claim payments

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

An appeal against a tax office's decree or assessment does not have the effect of suspending the execution based on a disputed tax assessment. The disputed amount hence must be paid, even if an appeal is filed.

However, the taxpayer may ask for a deferral of payment before an appeal might be levied, if the immediate full payment of the tax would result in considerable hardship for the taxpayer and if the collectability of the tax is not jeopardised by the deferral. Interest on the deferred payment amounts to 4 per cent over the base interest rate (currently 3.38 per cent) if the amount exceeds €750.

Alternatively, together with the filing of the appeal, the taxpayer may apply for suspension in whole or in part. A suspension must be granted by the tax authorities if the appeal does not, from a reasonable perspective, appear to be almost certainly unsuccessful; and if the taxpayer's conduct does not indicate a danger in respect of the collection of the tax claim.

If the appeal is finally unsuccessful, interest is chargeable by the tax authorities for the period during which the payment of the tax was suspended (currently 1.38 per cent). If the taxpayer decides to pay and consequently the appeal is successful, the taxpayer may in turn also claim interest in respect of the amount paid. The interest rate is 2 per cent over the base interest rate of 1.38 per cent (see question 14).

Cost recovery

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

An appeal against a tax decree does not bear any costs itself. The costs of the tax dispute which occur due to representation by a professional representative, for example, cannot be recovered.

Successful proceedings against a tax court's judgment, however, warrant a claim for a partial refund in the form of a lump-sum payment amounting to €1,106.40 plus a refund of the court fees paid (which currently amount to €240 in the case of both the Supreme Administrative Court and the Constitutional Court).

Third-party funding

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, no such restrictions apply in Austria. Capital maintenance rules, however, prevent affiliated companies from financing the tax litigation of any parent company, sister company or other company that is not a direct or indirect subsidiary or otherwise non-subordinated company within a group of companies.

Court decision maker

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

Generally the tax court's decision is made by a single judge unless the taxpayer (or the judge in specific cases) has requested that the decision should be made by a 'senate', which is a body comprising a judge and two lay judges.

There are no jury trials in Austria in the case of tax proceedings.

When a tax court acts in fiscal criminal matters (see question 24), the senate comprises two judges and two lay judges.

Decisions of the Supreme Administrative Court (see question 38) are made by a panel of five judges. In matters of financial criminal law and in certain procedural matters, a panel of three judges decides. The Constitutional Court regularly decides as a senate of six, whereby the president of the court does not cast a vote. The Constitutional Court may, however, also decide as a larger senate or in a plenary sitting.

Time frames

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

After the appeal is filed, the tax office, if it was not requested that it may refrain from doing so (see question 25), must make its decision within a period of six months. If the decision is not made within six months, the taxpayer is entitled to file a complaint against the tax office's inactivity with the competent tax court. If such a complaint is levied, the tax office still has three months to make its decision.

The same time frames also apply to the tax courts, whereby complaints against the tax court's inactivity are filed with the Supreme Administrative Court.

In practice, it usually takes courts more time to come to their decisions than envisaged by the statute. A tax trial may take between six and 30 months approximately, depending on the court and the subject matter of the case.

An appeal before the Supreme Administrative Court may even take from nine to 36 months, whereas the Constitutional Court is usually quicker to decide on the claims levied that fall within its scope of competency.

Disclosure requirements

32 | What are the requirements concerning disclosure or a duty to present information for trial?

Like the tax authorities, the tax courts must investigate in principle ex officio and may take evidence as well. However, it is in the interest of the taxpayer to clearly present his or her position in the appeal and provide substantiated evidence. The files of the tax authorities will be made available to the court in the course of the preparation. The taxpayer should also dispute the facts and legal arguments brought forward by the tax authorities.

In preparation for a hearing, the judge may conduct informal discussions with the taxpayer and the tax authorities in order to clarify and discuss the facts and merits of the case. Within such discussions, the parties and the judge may also discuss a settlement.

Permitted evidence

33 | What evidence is permitted in a tax trial?

In a tax trial, anything may be considered as evidence that is appropriate according to the situation of the particular case. The most used types of evidence are documentary evidence and the testimony of witnesses, but site visits and expert witnesses are permitted as well. The taxpayer's testimony is generally considered by the court to be of great importance, although he or she is not formally regarded as a witness.

Oral translation assistance is not provided automatically for people who do not understand the language of the proceedings (which is German), but must be organised independently. Only deaf or hearing-impaired people receive mandatory assistance.

Permitted representation

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

Taxpayers may represent themselves before a tax court, or they may be represented by a professional representative such as an attorney at law, a (registered) tax adviser or a certified public accountant.

During the proceedings in front of the Supreme Administrative Court, representation by an attorney, a (registered) tax adviser or a certified public accountant is mandatory, and publicly funded legal aid is available if legal representation cannot otherwise be afforded.

The tax authority is represented by specially qualified public officials.

Publicity of proceedings

35 | Are tax trial proceedings public?

Tax court hearings are held publicly. If neither the taxpayer, in the complaint or in the appeal against the preliminary decision (see question 24), or the single judge or senate requests that a public hearing should be held, the court can also decide on a closed session.

The taxpayer may also request that no public hearing is held, whereby the tax office, witness or experts may only request that the public be excluded if things are discussed that fall under secrecy obligations or if the public would interfere with the objective of levying the taxes.

Burden of proof

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

Tax trials follow the principle of official investigation and there are no statutory provisions on the burden of proof regulations. The taxpayer is in charge of clearly presenting his or her position and providing

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substantiated evidence. In circumstances where it cannot be expected that the taxpayer can provide proof, he or she must at least demonstrate credibility. The tax authority, in turn, must prove all the facts and circumstances necessary to justify a tax claim.

Case management process

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

After the appeal is filed, the tax office that issued the contested decision has to make a preliminary decision unless an exception applies (see question 25). If a preliminary decision is made, the taxpayer has the right to file a request of remittance within one month, thereby initiating proceedings before the tax court. The preliminary decision then becomes null and void. The tax court performs the necessary investigation and may reject the appeal as unfounded or allow the appeal, which leads to the annulment or revision of the tax decision or assessment.

Case management is in the hands of the tax courts. They investigate the case ex officio (see questions 32 and 33), which entails that the courts are in complete charge of the proceedings, including case management. As mentioned above, the courts may, for example, consolidate or split pending cases (see question 26); refer the case to a single judge sitting alone (see question 30); summon and question the parties, third parties, witnesses and expert witnesses; request information; schedule pre-trials (see question 32) and so on. Electronic document filing and file management; pre-trials; and hearings and questioning of parties, witnesses or expert witnesses by video are permissible, albeit not widely used at present.

Appeal

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

A taxpayer may file a 'revision' against the tax court's decision, which must be submitted within a non-prolongable period of six weeks. The revision is decided upon by the Supreme Administrative Court. There is no minimum threshold amount necessary to file a revision (see question

25). The revision is addressed to the tax court, which rules on compliance with procedural requirements and the admissibility. The matters brought before the Supreme Administrative Court must address fundamental questions so that it may secure the uniformity of the application of the (tax) law.

If the tax court negates admissibility, an 'extraordinary revision' to the Supreme Administrative Court is also possible within six weeks, but this requires additional arguments as to why a fundamental question is being raised.

The Supreme Administrative Court does not decide on the facts and circumstances of the case, but rules on errors of law or procedure.

The Supreme Administrative Court is obliged to refer cases to the Constitutional Court if it considers a legal provision to be unconstitutional or to the European Court of Justice if a question arises that needs to be interpreted under EU law.

If a taxpayer is of the opinion that a decision of a tax court violates his or her constitutional rights or is based on an unconstitutional or otherwise illegal provision, he or she may also directly address the Constitutional Court within a period of six weeks after the tax court's decision. The appellant may request that the Constitutional Court transfer the case to the Supreme Administrative Court if non-constitutional rights but no constitutional rights are found to have been potentially violated (this procedure is called 'successive revision'). The Constitutional Court and Supreme Administrative Court may also be addressed simultaneously ('parallel appeal').

UPDATE AND TRENDS

Key developments of the past year

- 39 | What are the current trends in enforcement? What are the current concerns of the authorities and taxpayers? Are there proposals to change the relevant legislation or other rules?

There is a trend for taxpayers to make use of the new opportunity to obtain binding rulings on questions of whether transactions could be subject to the general anti-abuse provision.

Belgium

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OVERVIEW

Legislation

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 codified in the Income Tax Code of 1992 (special codes exist for inheritance taxes, registration duties and VAT), which establishes the rules governing the determination of taxes and the procedure for the assessment of taxes.

The Flemish Region has its own tax code, covering all taxes.

The general principles applicable in Belgian tax law flow from the Belgian Constitution and from the law in general.

Tax law must comply with:

- the Belgian Constitution;
- international treaties; and
- European legislation.

According to the legality principle (article 170 of the Constitution), no tax for the benefit of the state may be waived except by way of a law.

Royal decrees supplement the Income Tax Code and the Belgian tax authorities publish guidelines, but for information purposes only.

A dedicated service of the Belgian tax authorities, the SDA, can issue formal rulings on the assessment of a given situation. These advanced rulings are binding.

Relevant authority

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

The Finance Federal Public Service (Finance FPS) forms part of the Ministry of Finance and falls under the responsibility of the Minister of Finance.

The Finance FPS is divided into different general authorities:

- General Administration of Taxes;
- Tax and Tax Collection;
- Special Tax Inspectorate;
- Customs and Excise;
- Patrimonial documentation; and
- Treasury.

The general administration is geographically organised.

The SDA (the ruling commission) is an autonomous department of the Finance FPS, where taxpayers can secure a ruling in advance. The SDA will give a written opinion on the tax effect of a contemplated transaction and will stick to the opinion provided that the relevant facts have been fairly presented.

Within the Finance FPS, there are centres specially dedicated to large companies. These fall into two types:

- The seven 'big business' centres. These deal with all aspects of taxation. It is no longer the type of tax (VAT or corporation tax) that determines the organisation of services, it is the company itself that is the starting point of these centres.
- The Large Companies Management and Specialised Controls Centre. Within this, the sector coordination division acts as a single point of contact for large companies and the management division is, among other things, responsible for the processing of returns and for the control and the treatment of litigation in five specific fields:
 - the sector of specific activities;
 - transfer pricing;
 - VAT units;
 - tax shelter; and
 - various taxes.

ENFORCEMENT

Compliance with tax laws

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?

All taxpayers subject to individual income tax, corporate income tax, legal entity tax and, subject to certain exceptions, non-resident income tax must file a tax return on a yearly basis. Assessment for income tax purposes is made on the basis of the income and the other data contained in the tax return, unless the tax authorities find these elements to be incorrect.

Upon request by the tax authorities, the taxpayer must communicate all books and documents needed to determinate the amount of taxable income within a month.

This investigative power granted to the tax authorities may be exercised without notice during the three-year period starting on 1 January of the assessment year for which the tax is owed.

An additional four-year period applies if the tax authorities inform the taxpayer in writing of evidence of fraud.

If the tax authorities intend to rectify a tax return file, a notice of deficiency must be sent to the taxpayer indicating the income or the data which the tax authorities intend to substitute for those reported by the taxpayer.

The taxpayer must reply in writing to the notice of deficiency within a month. Extensions of that term may be granted if justified. In the absence of a reply from the taxpayer within the term, the tax authorities may proceed to an assessment ex officio.

The taxpayer must indicate in his or her reply whether he or she agrees with the amendment suggested by the tax authorities.

If the tax authorities are not convinced, they must send a notice of taxation that states any supplementary tax bill and explains the reason for the decision and they may then proceed to the amendment of the tax return and to the subsequent tax assessment.

Claims against assessment are submitted to the locally competent director of taxes. Claims must be filed six months after the assessment date.

Upon request, the claimant may be granted access to the file. The director's decision must be notified and justified to the taxpayer.

If the director does not agree with the taxpayer's arguments and therefore rejects the claim, the taxpayer can appeal the decision before the Court of First Instance (judicial procedure) within three months of the decision.

Types of taxpayer

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

The documents that have to be reported in attachment to the tax returns may differ whether the taxpayer is a corporate entity or an individual.

Corporate entities must attach their balance sheet and profit and loss account to their corporate income tax return.

In line with guidance provided by the OECD under Action 13 of the base erosion and profit shifting (BEPS) project, Belgium introduced transfer pricing documentation requirements in 2016. Belgium thus moved from an era when no transfer pricing documentation was required (unless requested in the context of a tax audit) to a formal transfer pricing documentation regime that includes the electronic filing of documentation.

Individuals must disclose in their tax returns existing bank accounts, insurance contracts and legal entities or trusts held abroad.

The form of the tax return is determined annually by a royal decree which is published in the Official Journal. Different forms exist for individual income tax, corporate income tax, legal entity tax and non-resident income tax. There are special forms for the payment of personal withholding tax, professional withholding tax and such like.

Requesting information

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?

On request by the tax authorities, the taxpayer must provide all books and documents needed to determine the amount of taxable income. For corporate taxpayers, this obligation extends to the registers of the shareholders and bondholders and to the attendance list of the general shareholders meetings. The information so received may also be used in order to tax third persons.

The tax authorities, if holding a mandate, have the right to access without prior notice the taxpayer's professional premises at any time of the day.

Access to the inhabited private premises can only occur between 5 am and 9 pm and requires the prior authorisation of a Police Judge.

The Constitutional Court has ruled that article 319(2) of the Income Tax Code and article 63(3) of the VAT Code – interpreted as meaning that the Police Judge need not give reasons for his or her authorisation – actually violate the Constitution and the European Convention on Human Rights. An authorisation must be well-motivated. If it is not, there is no possible review by the Judge with regard to the regularity of the visit, according to the Constitutional Court.

The authorisation to visit 'must indicate in what instruction, for which domicile and to whom it is issued, as well as the reasons

justifying its necessity' (see point B.9.6 of the judgment in question, paragraph two).

It may be accepted that the Police Judge shall justify the authorisation of the visit by referring to the indications appearing in the application for authorisation or in the attachments and by repeating these indications. These particulars and documents must, however, in this case be subject to contradiction before the court of first instance if the regularity of the tax visit is questioned (judgment of the Constitutional Court No. 104/2019 of 27 June 2019).

In order to assess taxes due by a taxpayer, the tax authorities may request written testament from third parties; they may also request from a third party any information considered to be essential for the establishment and the collection of the tax due. They may proceed to investigations involving third parties and to hearings of third parties, including employees.

In a recent decision, the Constitutional Court ruled on the topic of dawn raids carried out by the tax authorities, following a preliminary referral. The Constitutional Court was asked whether the tax authorities' broad interpretation with regard to dawn raids could be reconciled with the right to privacy and the 'inviolability of the home', as protected by articles 15 and 22 of the Belgian Constitution and article 8 of the European Convention on Human Rights.

The Constitutional Court ultimately decided that the relevant legal provisions do not violate the right to privacy and the inviolability of the home. It did, however, set out some boundaries, making it clear that the tax authorities do not have an unconditional and unlimited right to access and search the professional premises of a taxpayer. The court recalls that the right to privacy and the inviolability of the home are fundamental rights that apply to both individuals and legal entities.

Furthermore, the Constitutional Court accepts that a dawn raid constitutes an interference with these rights. Such interferences are only allowed when they have a sufficiently clear legal basis, respond to a pressing social need and are proportionate to the aim pursued.

Available agency action

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

If the taxpayer does not provide the requested information, the tax authorities may use the ex-officio assessment, which implies the burden of proof being shifted from the tax authorities to the taxpayer.

Penalties can be imposed; criminal sanctions can also apply in the event of an opposition to a tax audit.

Protecting commercial information

7 | How may taxpayers protect commercial information, including business secrets or professional advice, from disclosure? Is the tax authority subject to any restrictions concerning what it can do with the information disclosed?

Tax authorities may not proceed to a 'fishing expedition'. Belgian law provides particular conditions for information requested to financial institutions (banks and insurance companies) about their clients.

If a person approached by the tax authorities invokes the existence of a professional secrecy duty, the tax authorities may require the intervention of the competent disciplinary authority, which would be asked to determine whether and to what extent the requested information or presentation of books and records may be deemed to be compatible with the professional secrecy duty invoked.

It is generally accepted that persons bound by professional secrecy obligations are those referred to in article 458 of the Belgian Criminal Code, which provides that:

Doctors, surgeons, health officers, pharmacists, mid-wives and all other persons who, either by profession or otherwise, have knowledge of confidential information, will be punished if they reveal the confidential information, except in instances when they are called to testify in court and when they are obliged by law.

Tax officials are under a duty of confidentiality:

Whoever intervenes, in any capacity whatsoever, in the application of tax laws or who has access to the offices of the administration in charge of the establishment, or that in charge of the collection and collection, income taxes, is bound to keep, outside the exercise of his functions, the most absolute secrecy with regard to all that he has become aware of as a result of the performance of his mission.

They may, however, transmit information to other authorities provided that they are necessary for the performance of their mission, which needs to be verified case by case.

Limitation period for reviews

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

As a general rule, the tax return can be audited during the taxable period. Furthermore, the tax return can be audited by the tax authorities, 'without notice', during the three years from 1 January of the tax year.

Where there is 'evidence of fraud', provided that such evidence has been notified to the taxpayer, the assessment period could be increased by four years to an aggregate assessment period of seven years.

Alternative dispute resolution

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

The tax conciliation service was created in 2011 and is part of the Finance FPS. Its mission is to examine and clarify the taxpayer's point of view as well as that of the federal tax authorities.

Any taxpayer (private or business) in dispute with the federal tax authorities can call on the tax conciliation service.

Conciliation can take place at any time when the proceedings are in the administrative phase. As soon as the dispute comes before the courts, the tax conciliation service is no longer able to intervene.

Collecting overdue payments

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

The general administration of tax collection and recovery may take precautionary or enforcement measures on the taxpayer's assets (they can serve garnishee, seize estate, undertake a simplified seizure on the attachable portion of wages) to ensure the recovery of the tax.

Penalties

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

As concerns income taxes, where no declaration of income has been submitted at all, or an incomplete or wrong declaration has been filed, within any of the different procedures for levying income taxes, the taxes due can be raised with an incremental penalty from 10 per cent up to 200 per cent, according to a determined scale.

Besides proportional increases, tax law also provides for flat penalties.

The Income Tax Code leaves the administration the option to sanction 'each violation of the provisions of the Income Tax Code as well as its executory decrees' with a fine from €50 up to €1,250.

The essential purpose of the flat penalties is to ensure cooperation of taxpayers and third parties within the tax procedures, under the risk of an additional penalty, in cases where a proportional penalty cannot be asked or would be too low.

Special penalties apply with respect to specific reporting duties.

12 | How are penalties calculated?

With regard to income taxes, the taxes due can be raised with an incremental penalty from 10 per cent up to 200 per cent, according to previously determined scales.

These scales make a difference according to whether the mistake in the tax return was outside the taxpayer's competence (no tax increase); whether the mistake was in good faith (subsequently 10 per cent, 20 per cent and 30 per cent, and the fourth time it is considered to be intentional); whether the mistake was done intentionally to avoid taxes due (subsequently 50 per cent, 100 per cent and 200 per cent); or whether the taxpayer made use of fraudulent documents (automatically 200 per cent).

The increase will only be applied when the non-declared income reaches at least €2,500, while the administrative penalty combined with the regular taxes due can never exceed the non-declared taxable income.

Besides this legal correction, the tax authorities still can correct the percentages in view of the concrete circumstances (in cases where the taxpayer is cooperative for instance).

Besides proportional increases, tax law also provides for a flat penalty for each violation of the provisions of the Income Tax Code.

As for the proportional penalties, these fines also progressively increase from €50 up to €1,250, according to determined scales depending on the repetition of the facts and the faith of the taxpayer.

Special penalties apply, ranging from €1,250 to 25,000 for non-compliance (late, incomplete, or no filing) with the new transfer pricing documentation requirements.

A penalty of €6,250 is imposed on a taxpayer for not reporting a foreign entity or a trust (€6.250 per year and per undeclared entity or trust).

13 | What defences are available if penalties are imposed?

Taxpayers may ask the Finance FPS for a reduction in the penalties provided that some conditions are met (good faith in particular).

Any director's administrative decision may also be challenged (and therefore claims on surcharges and penalties in connection herewith) by the taxpayer by lodging a legal action to the court of first instance.

Taxpayers may request cancellation of penalties where the statement of reasons by the tax authorities is not sufficient or if the penalties are disproportionate.

Collecting interest

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

A late payment interest is charged on any income tax or penalty that remains unpaid after it has become due and payable.

The late payment interest rate is determined annually based on the 10-year linear bond rate (OLO) of the month of July, August and September. The rate varies between 4 per cent and 10 per cent.

Late payment interest for 2019 is 4 per cent.

For tax debts that have already generated late payment interest on 31 December 2017 at least two interest rates will apply. The interest

rate of 7 per cent per year (as of 1 September 1996 until 31 December 2017) and the interest rate of 4 per cent (as of 1 January 2018).

Criminal consequences

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

Belgian criminal law is regulated in separate codes, which describe the general criminal law procedure, as well as different offences and provide for sanctions. They can also be applied in a particular tax context. As such, capital benefits coming from tax offences can be confiscated profit from money laundering and handling of stolen goods is also sanctioned in a tax context.

'Tax fraud' is the basic criminal offence, sanctioned with imprisonment from eight days up to two years and a fine ranging from €250 to €500,000 or one of both sanctions. Tax fraud means each conscious contravention of the regulations provided for in the Income Tax Code as well as its implementing orders and can consist of acting, as well as failing to act.

An aggravated offence is provided in the Income Tax Code called 'Serious tax fraud whether organised or not'.

The fines can be subject to the additional surplus charge and criminal fines for tax offences can add up to €3 million.

Both individuals and legal entities can be subject to criminal proceedings.

Enforcement record

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

The number of enforcement and precautionary measures taken in 2018 was 455,242 (compared with 582,606 in 2017 and 617,816 in 2016).

In 2018, the rate for the recovery of tax debts was of 68.75 per cent.

A total of 2,148 courts proceedings were initiated in 2018 (compared with 1,876 in 2017).

According to the enforcement survey of 2018, reassessed taxes and associated penalties were estimated by the Special Tax Inspectorate to be € 1.009 million (compared with €2.125 million in 2017).

THIRD PARTIES AND OTHER AUTHORITIES

Involvement of third parties

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

In order to assess taxes due by a taxpayer, the tax authorities may request written testaments from third parties; they may also request from a third party any information considered to be essential for the establishment and the collection of the tax due. They may proceed to investigations involving third parties and to hearings of third parties.

Third parties must answer to the questions or penalties may ensue.

Cooperation with other authorities

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 Finance FPS exchanges information at the Belgian level and with foreign tax authorities.

Belgium has signed a bilateral 'FATCA' agreement with the United States for an automatic exchange of data between both countries.

The OECD and its members, including Belgium, have developed the international Common Reporting Standard (CRS) for the purpose

of automatically exchanging fiscal information at the international level (AEOI – automatic exchange of information).

The principles laid down by the OECD have been transposed in the European Union by means of a new directive on administrative cooperation (DAC 2014/107/EU) governing the automatic data exchange between the 28 member states.

Since September 2017, the Belgian tax authorities started automatically sharing information with foreign tax authorities about financial accounts and assets held in Belgium. In parallel, Belgium receives information about accounts and assets held by Belgium residents in other EU member states.

SPECIAL PROCEDURES

Hardship procedures

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

The General Administration of Tax Collection and Recovery may grant payment facilities if the taxpayer is in financial hardship. A write-off of all or part of the taxes may under exceptional circumstances be granted.

Individual taxpayers facing financial difficulties may benefit from the indefinite suspension of payment of taxes. Several conditions must be met. No such procedure exists for companies.

In case of bankruptcy, the debtor is exempt from corporate income tax.

Since 1 April 2009, any company can also enter into an amicable settlement with some or all of its creditors (including the tax authorities) to address its difficult financial situation or to reorganise its enterprise. The parties to this amicable settlement are free to determine its content but the amicable settlement does not affect the rights of third parties. The amicable agreement is based on the free will of the debtor to enter into such agreement if and when he or she wants and with creditors he or she chooses.

Voluntary disclosure and amnesties

20 | Are there any voluntary disclosure or amnesty programmes?

A permanent regime of voluntary disclosure for tax and social security allows a regularisation for both federal taxes (income tax, VAT and social security contributions) and regional taxes (inheritance and registration duties):

- both individuals and legal entities can apply for tax regularisation;
- the taxpayer will have to pay the tax due (at the legal rate) with a penalty of 25 per cent in 2020 (24 per cent in 2019);
- if the taxpayer cannot prove that the capital has already been taxed, a penalty of 40 per cent applies in 2020 (39 per cent in 2019);
- special rates apply for registration duties and inheritance taxes; and
- the taxpayer will, after completion of the disclosure procedure, receive a certificate stating that he or she has a tax and a criminal immunity.

RIGHTS OF TAXPAYERS

Rules protecting taxpayers

21 | What rules are in place to protect taxpayers?

The principle of equality laid down in the Constitution implies that all taxpayers that are in a similar situation must be taxed in a similar way and that taxpayers that are in different situations must be treated differently.

According to the principle of legality, no tax for the benefit of the state may be levied except by way of a statute. This competence may not be transferred to the judiciary or to the executive power.

This implies that tax law must be interpreted in a strict manner; tax law derogates indeed from the fundamental principle that goods and persons are free by nature.

The Constitutional Court is competent to test the potential infringement of the Constitutional principles.

Supranational treaties with direct national effect prevail over Belgian domestic tax law, meaning the domestic tax law must be interpreted in light of such treaties.

The Belgian taxpayer can thus invoke the rights from human rights conventions.

The Belgian taxpayer can also invoke the charter of EU taxation.

Belgium also applies the principle of fair play and of sound administration and the taxpayer has a right to legal certainty and predictability.

Requesting information

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

The taxpayer has a legal right to access its tax file and to be heard by the regional director.

The tax authorities must explain the reasons for the assessment and they must respond to the arguments invoked by the taxpayer. If they do not justify their assessment, the court may declare the assessment null and void.

Tax authority governance

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

Any taxpayer may submit a complaint to the Complaint Coordinator (within the Finance FPS). The complaint must explain the reason why the taxpayer has a grievance against the Finance FPS and which entity is concerned. The Finance FPS will answer within 40 days.

If the taxpayer is not happy with the response, he or she may submit a complaint to the Federal Mediator.

COURT ACTIONS

Competent courts

24 | Which courts have jurisdiction to hear tax disputes?

Tax disputes are under the exclusive jurisdiction of the tax chamber of the court of first instance. Appeals against first instance judgments can be brought before the Court of Appeal. Appeals against judgments of the Court of Appeal are brought before the Supreme Court.

Lodging a claim

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

The taxpayer can start the tax litigation proceedings at the court of first instance to appeal the regional director's decision in the event that the taxpayer is not satisfied with the decision or if the regional director fails to make a decision on a tax complaint within six months of its filing.

Tax proceedings are initiated by filing a petition within three months of the regional director's decision.

Combination of claims

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

There is *lis pendens* whenever requests are made on the same subject and for the same cause, between the same parties acting in the same capacity, before several different courts competent to know and be called upon to rule in the first instance of jurisdiction.

Claims may be treated as related where they are so closely linked that it is desirable to hear and determine them at the same time in order to avoid solutions that would be irreconcilable if cases were judged separately.

The taxpayer may also bring tax claims involving multiple assessments and multiple decisions together into a single procedure.

Pre-claim payments

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

The taxes must not be paid as long as the tax assessment is challenged.

The taxpayer is thus not obliged to pay the amounts in dispute into courts before bringing a claim.

The collection of the challenged amount of tax is suspended while proceedings are pending.

Cost recovery

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

When a party loses its case, apart from the court fees that are automatically to be paid by the losing party, it risks having to settle a compensation for proceedings, granted by the court to the winning party.

The compensation aims at totally or partly covering the fees due by the winner to his or her lawyer.

The compensation is determined in relation to the value of the claim and can be adjusted by the judge at the request of the parties on the basis of the financial capacity of the losing party, the complexity of the case, the amount at stake and the apparently unreasonable character of the situation.

The amount of the compensation is calculated as follows: when the value of the claim is less than €1 million, the standard indemnity ranges from €180 to €24,000.

When the value of the claim exceeds €1 million, the standard compensation is €18,000 and the maximum indemnity is €36,000.

The compensation for proceedings is only due if the successful party has hired a lawyer to assist him or her before the court. In many tax cases, the tax authorities are represented by an official and they do not hire a lawyer and thus cannot benefit from a compensation award.

Third-party funding

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 or rules relating to third-party funding or insurance for the costs of a tax dispute.

Court decision maker

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

Most cases are decided by a single judge. Complex cases are decided by a three-judge panel.

All cases heard by the Supreme Court are decided by a panel consisting of five judges.

There is no jury trial in tax matters.

Time frames

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

Each stage of trial (court of first instance, Court of Appeal and Supreme Court) lasts about two years. There are no mandatory time frames and depends on the complexity of the case.

Disclosure requirements

32 | What are the requirements concerning disclosure or a duty to present information for trial?

All documents are admissible and examined by the court for their relevance, credibility and value to the case at hand.

The court can order the parties to submit evidence in their possession.

The court can also request third parties to submit specified documents.

Permitted evidence

33 | What evidence is permitted in a tax trial?

Tax proceedings are essentially based on written evidence. Witnesses are therefore very rarely heard at a trial.

In some complex cases, experts are asked to testify (eg, in cases of serious and organised tax fraud).

Evidence must be translated in the language of the procedure (French, Dutch or German, depending on the court).

Permitted representation

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

Taxpayers may represent themselves but it is recommended that they are represented by a lawyer.

Representation by a lawyer is mandatory before the Supreme Court.

Taxpayers who cannot afford legal representation may request legal aid.

The tax authority does not generally hire a lawyer before the court of first instance and is represented by its own agents but it is always represented by a lawyer before the Court of Appeal and before the Supreme Court.

Publicity of proceedings

35 | Are tax trial proceedings public?

Tax trial proceedings are public.

Burden of proof

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

According to the rules relating to the burden of proof, the tax authorities have the onus to prove the facts increasing a taxpayer liability and the taxpayer to prove the facts decreasing his or her liability.

When a tax case is brought before the court of first instance, the taxpayer is always the claimant and the tax authorities are the defendant but the court will not presume the tax authorities' tax assessment to be correct.



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Case management process

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

The exchange of briefs is organised by the court. Each party addresses its briefs to the court and to the other party.

Briefs are exchanged in two or three rounds (of approximately two months) and pleadings follow approximately two months after the last exchange of briefs.

Appeal

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

Appeals against first instance judgments in tax matters can be brought before the Court of Appeal. The appeal against the judgment should be brought to the Court of Appeal within one month following service of the judgment. The taxpayer can choose to be heard by a chamber of three judges instead of one.

Appeals against judgments of the Court of Appeal are brought before the Supreme Court within three months following service of the judgment.

The Supreme Court reviews last instance decisions and rules only on points of law.

UPDATE AND TRENDS

Key developments of the past year

39 | What are the current trends in enforcement? What are the current concerns of the authorities and taxpayers? Are there proposals to change the relevant legislation or other rules?

Belgium has implemented the fourth Anti-Money Laundering Directive (2015/849). The Belgian law provides the obligation for companies, international non-profit associations and foundations to collect and hold adequate, accurate and current information on their beneficial owners and for the administrators to transmit this information to the register of ultimate beneficial owners. As from 30 September 2019, companies, international non-profit associations and foundations are therefore required to collect and hold information on their beneficial owners.

Brazil

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Pinheiro Neto

OVERVIEW

Legislation

- 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 grounded on a civil law basis. There are tax provisions under the Federal Constitution, the national tax code, plus supplementary and ordinary laws. As a Federative Republic, not only the federal administration, but also states and municipalities, have their own tax system, with local taxes and local rules.

For regulating such general provisions, each federative entity may issue its own decrees, ordinances, normative rulings, normative opinions and private-letter rulings.

Tax treaties are also considered as part of the normative tax system in Brazil, and when they are internally approved they acquire the legal status of supplementary law. Nonetheless, treaties are not self-enforceable in Brazil. They have to be approved by the Brazilian Congress after being executed abroad.

In parallel to this set of rules, courts may also issue certain standards on tax matters. Except for a few types of decisions, case law is not issued with binding effect, but provides general guidance on matters that are not expressly addressed by tax rules.

Specifically, when it comes to tax disputes, there are certain rules providing on both administrative tax proceedings and judicial litigation. On the federal level of review, the most relevant rules are the following: Law No. 9,784/99; Decree No. 70,235/72; Decree No. 7,574/11 and the Civil Litigation Code.

Relevant authority

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

Collection and payment of federal taxes in Brazil are managed by the *Receita Federal* (the Brazilian IRS), an administrative structure within the Ministry of Economy. This structure also comprises the administrative level of review, when any infraction notices are assessed. The Brazilian IRS has internal divisions for addressing specific topics, such as collection and assistance, taxing and litigation, auditing and inspection, customs and international relations.

States and municipalities also have similar structures for collecting taxes.

Once the tax is considered definitively due and payable, namely, if no claims are presented against the charge, or if the taxpayer challenges it, but at the end of the administrative level of review the debt is maintained, the National Treasury Office is the competent authority for enrolling the tax debt in the Federal Debt Roster and filing the appropriate enforcement action.

ENFORCEMENT

Compliance with tax laws

- 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?

As a general rule, for most of the taxes in Brazil the taxpayer submits a tax return and collects the amount considered due. Tax authorities have a five-year term for claiming any possible outstanding amounts. This is the statute of limitations for tax authorities analysing taxpayers' returns and assessing possible debts or penalties.

This term may be counted either as from the triggering event (when the taxpayer paid any amounts of taxes to the tax administration and there is no simulation, fraud or abuse), or as from the first day of the calendar year subsequent to that when the tax was due (when no taxes have been collected, or when tax authorities claim that the taxpayer acted fraudulently).

In principle, the audit proceedings may involve any past facts that might have affected the collection and payment of taxes over the previous five-year term, there being no particular rules in that respect.

Types of taxpayer

- 4 | Are different types of taxpayers subject to different reporting requirements? Can they be subjected to different types of review?

Yes. Individual and corporate taxes are quite different, each of them subject to specific rules. Although all taxes are managed, audited and assessed by the same authority, taxes paid by individuals and by legal entities differ from each other and are analysed by different divisions of the Brazilian IRS.

Requesting information

- 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?

Tax authorities may request any information that may affect the ascertainment and collection of taxes. In most cases, the request for information is put in writing and the taxpayer has to send this information, also in writing, to the tax authorities. Interviews and requests for meetings with tax authorities are not common, although in certain very particular and specific cases – especially involving large taxpayers – this procedure has been adopted by the Brazilian IRS.

Available agency action

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

If the taxpayer fails to attend to requests for documents and information, tax authorities may impose additional penalties over the assessment and a presumed tax basis for the charges.

Protecting commercial information

7 | How may taxpayers protect commercial information, including business secrets or professional advice, from disclosure? Is the tax authority subject to any restrictions concerning what it can do with the information disclosed?

Brazilian legislation expressly provides for tax confidentiality regarding any information disclosed to tax authorities.

Limitation period for reviews

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

As a general rule, Brazilian tax legislation provides for a five-year statute of limitations. The controversial aspect is when such term starts, that is, whether from the triggering event, or from the subsequent calendar year.

Alternative dispute resolution

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

Brazilian legislation does not provide for alternative dispute resolution methods. Nonetheless, the National Treasury Office recently issued specific guidelines for taxpayers on negotiating certain aspects of tax disputes (eg, guarantees, deadlines for submitting motions, requests and opinions).

Collecting overdue payments

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

If the tax is considered due and payable, it is deemed to be 'enforceable', which means that it would be subsequently forwarded for registration with the Federal Debt Roster – in which situation a 20 per cent additional legal charges fee is included in the updated amount of the debt – and then its new updated amount is sent to be executed against the company in a Tax Enforcement Proceeding to be moved by the National Treasury Office. In a Tax Enforcement Proceeding, the National Treasury Office will try to forcibly seize whatever assets it finds in the company, including bank accounts and other available assets.

Once the Tax Enforcement Proceeding is filed, the taxpayer will have a specified period to offer a guarantee. After the guarantee is offered, a Motion to Stay Enforcement may be filed to challenge the merits of the enforcement once again. This should open a discussion on the merits of the case.

Penalties

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

Whenever taxpayers fail to collect and pay taxes in a timely manner or to submit their tax returns on time, penalties may be imposed. Penalties for non-compliance with ancillary duties may be charged even if there was not any miscollection of taxes.

12 | How are penalties calculated?

There are two types of penalties that can be applied by the tax authorities if they eventually issue an Infraction Notice against the taxpayer: (i) a 75 per cent default penalty; or (ii) a 150 per cent aggravated penalty. The 75 per cent penalty is applied in most of the cases where the tax authorities understand that the taxpayer did not act in wilful misconduct, fraud or simulation. Conversely, the 150 per cent aggravated penalty will be imposed if the tax authorities understand that the taxpayer did practice acts that are to be treated as wilful misconduct, fraud or simulation.

Under Brazilian tax law, an aggravated penalty of 150 per cent can only be imposed in cases where an evident intent of fraud is proved, that is, when the tax authorities are able to establish unequivocally the taxpayer's purpose of deluding, hiding from or deceiving them.

There are also other types of penalties, such as an isolated penalty of 50 per cent if the taxpayer fails to anticipate taxes in a certain collection regime or if it has an offset request denied by tax authorities. Furthermore, under Brazilian tax law, if the taxpayer acknowledges any debts prior to any action being taken by the tax authorities and settles these before any Notice is issued, then it will be subject to a penalty equivalent to 20 per cent on the claimed taxes, added to SELIC interest (base interest rate set by the Brazilian Central Bank to control inflation). Depending on the circumstances, there will be arguments to defend that even the 20 per cent would not have to be paid, as this would be a voluntary disclosure procedure.

In the case of non-compliance with ancillary duties, there are a series of penalties that the taxpayer may be subject to. Those penalties may involve either a small fixed amount or a percentage of the taxpayer's gross revenues or of the challenged transaction.

13 | What defences are available if penalties are imposed?

If an Infraction Notice is issued, the following options are available: (i) settling the Notice within 30 days, with a 50 per cent discount on whatever penalty was applied; or (ii) filing an objection to the Infraction Notice, outlining the reasons why the Notice should be cancelled and then officially initiating the litigation in the tax administrative sphere.

If the notice is settled within 30 days with a 50 per cent discount on the penalty applied, no litigation in the administrative sphere will be permitted. Nonetheless, the taxpayer will still have the option of filing a lawsuit in a court of law seeking to receive back the amounts paid in settlement of the Infraction Notice.

Collecting interest

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

Any possible charges accrue interest, which is calculated, at the federal level, according to the SELIC rate (currently set at 6 per cent per year).

Criminal consequences

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

In Brazil, a tax proceeding may lead to the filing of a criminal proceeding to analyse the same facts that, in addition to characterising an administrative misconduct, could also incur an allegation of tax evasion. In this respect, the tax authorities of the Brazilian IRS are required to communicate to the Federal Public Prosecutor's Office any administrative violation that, in theory, could also represent a crime. Such communication is made through the delivery of a Tax Representation for Criminal Purposes.

However, such criminal claim can only be delivered after a final decision is rendered with regard to the creation of a tax credit within the administrative sphere.

When receiving this communication, the Federal Public Prosecutor's Office may: (i) present charges against the parties responsible for the tax evasion, if it understands it has all the elements required for such; or (ii) request the filing of a police investigation so that the Federal Police Authority may examine the materiality of the supposed crimes and identify the perpetrator of the facts informed.

In Brazilian criminal law, by rule, the only active subjects of crime are individuals who, in any way, have contributed to the practice of a crime, through action (positive conduct) or omission (negative conduct, in cases where the subject had the power and duty to prevent a result considered wrongful).

The criminal liability is subjective and personal, and the participation of the individual in the practice of the crime – whether by fraudulent intent (the general rule, as in the case of a crime against the tax system) or by fault (only in cases in which the law sets forth the option of negligence with regard to the wrongdoing) – must be proven.

However, the public authorities often, and improperly, tend to consider as suspects of committing the crime the representatives of the legal entity at the time of the facts under investigation, without analysing such requirements.

In this respect it is also worth mentioning that the effective settlement of the claimed taxes by the taxpayer, added to the respective late-payment fine and interest, prior to a formal criminal accusation being made by the prosecutor, would be able to eliminate any possible criminal implications connected with the case.

Business entities are not subject to criminal liability. It applies to individuals (subject and personal liability), depending on the participation of the individual in the practice of the crime.

Enforcement record

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

Pursuant to public information made available in databases maintained by the Brazilian IRS, a figure of approximately 1.84 trillion reais in infraction notices is being discussed, being 1,125.29 billion reais still under discussion in the administrative level of review and 339.39 billion reais still under discussion in the judicial level of review.

THIRD PARTIES AND OTHER AUTHORITIES

Involvement of third parties

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

Yes, this is legally possible. The Brazilian tax code determines that certain entities and institutions must cooperate with tax-audit proceedings (eg, government employees, financial institutions, asset managers, brokers, auctioneers and official forwarding agents).

Cooperation with other authorities

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

Within the country, the tax authorities of different spheres (ie, federal, state and municipal) may cooperate in mutual exchange of information and assistance, based on article 199 of the Brazilian National Code (CTN) and specific internal regulations.

It is legally possible to cooperate with the tax authorities in other countries. Brazil has entered into double taxation conventions and

treaties for exchange of tax information (including the Foreign Account Tax Compliance Act (FATCA) and the OECD's Common Reporting Standard (CRS)).

SPECIAL PROCEDURES

Hardship procedures

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

There are certain special regimes for companies in bankruptcy situations, such as instalment programmes. One of them is set forth under Law 13,043/14.

Voluntary disclosure and amnesties

20 | Are there any voluntary disclosure or amnesty programmes?

Yes. In recent years, Brazilian authorities (federal, state and municipal) have issued a series of instalment and amnesty programmes. In parallel to that, federal legislation also provides for the possibility of tax debts being paid in 60 monthly instalments.

RIGHTS OF TAXPAYERS

Rules protecting taxpayers

21 | What rules are in place to protect taxpayers?

Brazilian law provides for a series of principles, prerogatives and rights for taxpayers when dealing with tax matters. Most of them derive from the Federal Constitution, but there are also rules referring to taxpayers' rights.

Requesting information

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

As long as the information does not lead to a breach of tax confidentiality, there are certain mechanisms by which tax authorities may disclose tax information. Also, in recent years, many rules, private-letter rulings, ordinances, normative opinions, etc have been published by the Brazilian IRS.

Federal Law 12,527/11 also provides for a mechanism for citizens to obtain information from federal, state and municipal authorities.

Tax authority governance

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

Yes. Tax authorities are subject to internal oversight within the administrative government body, as they must act in compliance with applicable rules.

COURT ACTIONS

Competent courts

24 | Which courts have jurisdiction to hear tax disputes?

Tax claims may be filed either at the administrative level of review or at the judicial level of review.

Lodging a claim

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

Tax claims may be started either by the taxpayer or by the tax authorities (this latter case usually involving an assessment), and there are two main levels where taxpayers may discuss tax matters: (i) the administrative level of review; and (ii) the judicial level of review. Both have a similar structure, grounded in three different levels of review.

In the administrative level, after the claim has been submitted, there is a first level-decision issued locally by the Federal Revenue Chief Officer (if the dispute derives from an assessment, the taxpayer may present an objection, where it will appoint its arguments and evidences). Once the first-level decision is issued, an appeal (called Voluntary Appeal) may be filed by the party, requesting its case to be reviewed by the Tax Administrative Appeals Council (CARF), at the second level within the administrative sphere.

Each Judgment Chamber in the Tax Administrative Appeals Council is made up of six members, three being appointed by the tax authorities and three by the taxpayers' associations. If a case is tied, it will be deemed to have been ruled in favour of the government.

There is a third level in the administrative sphere, which is the Tax Appeals Superior Chamber (CSRF), but it will only review a case if the party (either the taxpayer or the government, as the case may be) is able to show that a conflicting decision was handed down on the same subject by the Tax Administrative Appeals Council, either by the same Chamber or by a different one.

As a result, if the Tax Administrative Appeals Council rules the case against the taxpayer, and the taxpayer is able to find a divergent decision on the same subject, it will be allowed to file a further appeal (called a Special Appeal) to the Tax Appeals Superior Chamber. The contrary is also true – tax authorities can also file a Special Appeal to the Tax Appeals Superior Chamber if the case is ruled in favour of the taxpayer by the Tax Administrative Appeals Council.

Each chamber of the Tax Appeals Superior Chamber is made up of eight members, four being appointed by the tax authorities and four by the taxpayers. As in the Tax Administrative Appeals Council, a tie result in the Tax Appeals Superior Chamber is deemed to be in favour of the government.

It is important to point out that the taxpayer cannot litigate the same case at the same time in both the administrative and judicial spheres. In practice, the judicial sphere will always be an open option for the taxpayer, whereas the administrative sphere will only review a case of the taxpayer that has not initiated any judicial discussion in the same regard.

It is also worth mentioning that if a final decision is issued in favour of the taxpayer in the administrative sphere, the case will be over, because, except in some very special circumstances, the tax authorities will not be allowed to take the case to the judiciary to be reviewed. In contrast, if a final decision is handed down against the taxpayer in the administrative sphere, the taxpayer will still have the option of going to the judiciary and filing a lawsuit claiming for its case to be further reviewed, either on the same arguments or different ones.

In turn, the judicial level of review is also made up of three levels: (i) first-degree court of law; (ii) Appeals Court; and (iii) the Superior Court of Justice (STJ) and the Federal Supreme Court (STF). In the first-degree court of law, a single judge will examine and rule on the case. In the event of an unfavourable decision, the party (taxpayer or the tax authorities) will be allowed to file an appeal to the Appeals Court, which is made up of three judges. In the case of another unfavourable decision, the party may file another appeal to the STJ and the STF.

While the STJ will review every case where the appealed decision had allegedly violated a law, the STF will only do so if it deems the case to be of general interest to the country and society.

Combination of claims

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

Although not mandatory, this may be possible depending on the specific situation. However, when the superior courts apply binding effects to a case that should be analysed, all other proceedings regarding that matter should be suspended, until the decision is finally issued.

Pre-claim payments

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

It is possible that the taxpayer settles the debt and pursues a refund at the judicial level of review. Nonetheless, such a procedure is rather unusual in Brazil.

Cost recovery

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

At the administrative level of review, each party bears its own costs. At the judicial level of review, in turn, the defeated party may be required to reimburse dispute costs, depending on the type of action.

Third-party funding

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. As a matter of fact, when it comes to judicial proceedings, the taxpayer may be required to post bonds and guarantees for discussing the merits without the risk of tax authorities attempting to enforce the collection of the tax debt (see question 39).

Court decision maker

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

The general aspects of the administrative and judicial litigation are discussed in question 25. Brazilian law does not provide for jury trials for tax matters.

Time frames

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

There is no defined time frame for tax trials. On average, an administrative tax review takes from five to seven years, while a judicial dispute may take from eight to 12 years including the final avenues of review (Superior Court of Justice/Federal Supreme Court).

Disclosure requirements

32 | What are the requirements concerning disclosure or a duty to present information for trial?

Taxpayers may produce evidence in both administrative and judicial proceedings, although it is more common in the latter type of litigation. At the first level of judicial review, there is a specific moment in the hearing (before the decision is issued) when the parties may appoint evidence to be produced, indicate assistants, etc.

Permitted evidence**33 | What evidence is permitted in a tax trial?**

Any evidence is allowed to be presented. Nonetheless, for the issues generally involved in tax matters, it is not common to have testimonies. Expert opinions are relatively common for confirming technical aspects (accounting, regulatory or factual circumstances).

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

At the administrative level of review, there is no formal obligation to have an attorney for filing defences, appeals and presenting the arguments before CARF/CSRF, although it is rather common and even recommended, due to the technicalities usually involved in tax cases.

On the other hand, for judicial claims it is mandatory to have a lawyer duly enrolled with the Brazilian Bar. If the taxpayer is not able to afford legal representation, it may request free judicial assistance (although not common in tax disputes): Brazilian legislation (Federal Law No. 1,060 of 1950) and Special Court's Ruling No. 481 (STJ) allow the taxpayer to be represented by a public attorney, provided that the absence of financial conditions is proved.

Tax authorities are represented by public attorneys.

Publicity of proceedings**35 | Are tax trial proceedings public?**

At the administrative level of review, only the judgment sessions and decisions issued by CARF/CSRF are public. All other case matters are strictly confidential, to which only the involved party and its representative may have access. On the other hand, judicial proceedings are public, except if the parties request judicial confidentiality to be imposed by the judge.

Burden of proof**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, and it is important to mention that tax legislation usually grants to tax authorities an assumption of validity on their allegations, so that the taxpayer is also required to counterargue such claims when made.

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

See question 25.

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

See question 25.

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UPDATE AND TRENDS**Key developments of the past year****39 | What are the current trends in enforcement? What are the current concerns of the authorities and taxpayers? Are there proposals to change the relevant legislation or other rules?**

At the federal level of review, the most relevant subjects currently under discussion involve transfer pricing disputes and assessments disallowing the tax deduction of goodwill amortisation expenses, which involve the most significant amounts assessed by the Brazilian IRS.

Tax authorities and administrative tax courts have been adopting a very strict approach in regard to these complex tax matters, and in recent years many assessments have been maintained as originally issued, regardless of the provisions specifically set forth under applicable rules – the reason why, in our view, such cases will necessarily lead to judicial tax disputes.

These cases also reflect one practical trend that may be subject to future discussions: the requirement of posting guarantees. One very important difference between the judicial and the administrative spheres is that, in the administrative level, the taxpayer is allowed to litigate the case without having to present guarantees or deposit the disputed amounts. In contrast, if an unfavourable decision is handed down at any stage in the judicial sphere, the taxpayer will be required to: (i) make a deposit in court; or (ii) present guarantees covering the whole amount of the disputed tax debt; otherwise, the tax authorities are able to initiate the execution of the disputed amounts, regardless of whether the litigation in the judicial sphere is over yet.

Other than that, in recent years there have been some proposals on whether the administrative tax courts should be restructured or even abolished, but in our opinion they play a very important role in settling tax disputes and, in many cases, avoiding long discussions to be taken to judicial courts. We do not believe that radical changes should take place in regard to tax disputes.

France

Jérôme Barré

Franklin

OVERVIEW

Legislation

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 applicable to tax administration and controversies is tax law that is codified in the French Tax Code (FTC) and the French Tax Procedure Code (FTPC).

The FTC contains legislation on the basis of, and the collection of: income tax; corporation tax; value added tax (VAT); registration fees; local taxes; and other direct and indirect taxes collected by the state and local authorities. The FTPC contains the rules that govern the litigations concerning the calculation and the collection of tax.

There are two types of French tax laws: the French Finance Law, promulgated at the end of the year; and the French Amending Finance Law, which allows changes to the original text during the year.

The legislative process begins with the preparation of a draft law at the initiative of the government. This bill is then passed by the two-chamber French parliament: the National Assembly and the Senate.

French tax law is at the bottom of the hierarchy of norms. It must therefore comply first of all with the conventionality block, which means that it must comply with the norms of international law (international treaties and agreements, including the European Convention on Human Rights) and European Union standards (treaties and derivatives, Community regulations and directives).

It must then comply with the constitutionality block, which is the set of principles and provisions that French laws must respect, and of which the Constitutional Council is the guardian. It mainly includes:

- the articles of the 1958 French Constitution;
- French Declaration of the Rights of Man and of the Citizen;
- Preamble of the 1946 French Constitution;
- French Environmental Charter; and
- principles laid down by either the Constitutional Council or the State Council.

The law is then interpreted and clarified by the French government and the French Tax Administration (FTA) under the control of the courts.

The French tax doctrine is to be found on a dematerialised database called the *Bulletin Officiel des Finances Publiques* (BOFIP); the doctrine is enforceable by the taxpayer against the FTA, when it is more beneficial to the taxpayer.

Finally, taxpayers may ask the FTA to provide them with an interpretation of the tax texts in the light of their particular situation. This answer, called a ruling, is enforceable by the taxpayer against the FTA.

Relevant authority

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

The French Tax Administration (FTA) is a generic name for all government agencies whose role is to establish the basis for direct and indirect taxes, allowing, afterwards, the Public Accountant to collect them.

The FTA depends on the Ministry of the Economy and Finance. It is composed of the General Directorate of Public Finance (DGFIP) and the General Directorate of Customs and Indirect Taxes (DGDDI). However, the Unions de Recouvrement des cotisations de Sécurité Sociale et d'Allocations Familiales (URSSAF), in charge of collecting social security contributions, is not a part of the FTA.

The DGFIP manages the taxation of natural persons and companies, defines the tax guidelines and draws up with the Minister the procedures for the control and payment of public expenditure. The DGFIP is also the competent authority to receive requests for rulings.

The DGFIP has central services that design and develop tax laws and regulations, and decentralised services that establish the basis of the taxes from individuals and companies. After the basis is established, another service called the recovery service is in charge of collecting the different taxes.

The decentralised services operate at the local and regional level under the Regional Public Finance Directorates (DRFiP) and the Departmental Public Finance Directorates (DDFiP).

ENFORCEMENT

Compliance with tax laws

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 France, the tax system is declarative and repressive. To exercise its power of control, the FTA has investigative powers and powers to obtain information through the procedures of requests for clarification or justification, right of communication, and various special measures.

The control operations themselves take various forms: either a simple critical examination of the declarations subscribed, by the control agent, using the information and documents on file (documentary control), or a spot-check carried out at the taxpayer's request, or a thorough control. For companies, this control is carried out in the form of an accounting audit, while for natural persons it is in the form of a contradictory examination of their personal tax situation.

Some guarantees are given to taxpayers. Indeed, the accounting audit procedure may not be renewed for a specified period of time in respect of a tax or group of taxes, and may not exceed three months for taxpayers not exceeding a certain turnover. In addition, for natural

persons, the procedure is limited to one year and may be extended to two years.

Types of taxpayer

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

In France, the reporting requirements depend on the types of taxpayers. Three types can be distinguished: business entities, individuals and trusts.

Individuals are required to file an income tax return each year during the month of May to declare their taxable income for the past calendar year. The reporting requirement should be carried out online unless the taxpayer can justify that he or she cannot have access to it online. Non-residents must also file a French income tax return for all their French income. Finally, certain non-residents are compelled to report information regarding the latent capital gain that they could be indebted to in accordance with the exit tax system.

Business entities are also submitted to certain obligations, they are subject to more taxes and, in consequence, they have more obligations to declare than only their yearly income. These obligations are more or less important according to an entity's size and turnover (eg, VAT or transfer pricing obligations).

For trusts, two reporting obligations are required:

- they must report annually:
 - if one of the settlors, beneficiaries or directors is a French tax resident: property and rights located in France or outside France and capitalised income placed in the trust; or
 - if none of the parties to the trust is a French tax resident but property or rights placed in trust are located in France: only property and rights located in France and income capitalised in the trust; and
- the information declared must be recorded in a register, which shall be made available to the public.

In addition, they must declare any event affecting the trust within the following month, the event being its formation, modification or termination.

Concerning the different reviews the three types of taxpayers can be subjected to, French tax law distinguishes piece control (carried out from the office) and external control:

- Piece control: the tax officers are offered different procedures:
 - Piece control and information requests: this procedure concerns all taxpayers, all taxes and all tax returns for non-prescribed years. In this procedure, the FTA is not obliged to inform the taxpayer that a piece control is in progress. In addition, tax officers are always able to ask for information informally. The information requests are non-binding, but the default of answer can lead to the taxpayer being in an uncomfortable situation.
 - The right of communication: this allows the FTA to obtain certain documents (accounting books and records) or information from taxpayers having the quality of a merchant, the banks, regulated professions, courts and social organisations. Refusal to communicate can lead to a €5,000 fine per document, without exceeding €50,000. The FTA is required to inform the taxpayer of the content of any documents obtained by third parties and on which the tax adjustment is based. Since 2017, the FTA is also authorised to interview all persons susceptible to communicate information in the matter of international fraud.
 - Clarification and justification request: this is a very restrictive procedure for the taxpayer as it can lead to automatic taxation. The procedure can be used in combination with all other procedures. The FTA asks the taxpayer for explanation of all

obscure points in the tax returns. Justification can only be asked regarding precise subjects such as foreign accounts or property income.

- External control: one procedure concerns natural persons, and another concerns companies:
 - The accounting audit procedure: this concerns only taxpayers required to keep an accounting record. The taxpayer must be informed before this procedure is engaged so a counsel can be chosen. The FTA must inform the taxpayer for which fiscal year the control will be conducted. The FTA is also required to offer an oral and contradictory debate before a synthesis meeting in order to understand the operating condition of the company. Afterwards, the FTA propose adjustments to the taxpayer.
 - The contradictory examination of the personal tax situation of a natural person: this concerns, as its name implies, only natural persons. The aim is to control the coherence between the declared income and the inheritance situation of the taxpayer, according to his or her way of life, for example. This procedure must be preceded by a verification notice stating that the taxpayer can be assisted by a counsel of their choice. The procedure cannot last longer than one year from the receipt of the verification notice. If the FTA discovers a concealed activity or when the procedure of communication is used, the duration of this procedure can be extended to two years. As it is a contradictory procedure, the FTA must engage in a debate with the taxpayer on the proposed corrections. This debate can be oral or written; in any case, it is mandatory and its absence is a substantial irregularity. The procedure ends with an audit report.

Requesting information

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?

For natural persons, in the context of a request for information or a tax audit, the FTA may ask the taxpayer for any document proving or supporting the elements declared. The FTA may thus request access to all account statements and financial documents of the taxpayer and must return all documents before proceeding with a request for justification.

For companies, the documents requested are the entire accounting documents; for example, balance sheet, income statement, invoices and statements of account. In addition, where applicable, the company may be required to provide its transfer pricing documentation and all its consolidated accounts.

The FTA may, within the framework of its investigative powers, request certain information from third parties such as employers, customers and suppliers, as well as the tax authorities of other countries. However, the latter are not legally required to respond and may in any case refuse to provide such information.

Available agency action

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

In the absence of a reply or in the event of insufficient replies, the FTA may proceed to the automatic taxation procedure (eg, the FTA refers to the elements in its possession to reconstitute the tax bases) directly or after having issued a formal notice. Furthermore, there will also be automatic taxation if the control cannot take place because of the uncooperative behaviour of the taxpayer or other persons (individual or

collective opposition). This automatic imposition will be accompanied by interest for late payment with a 100 per cent surcharge.

In addition to tax sanctions, opposition to the tax audit may also be sanctioned by criminal sanctions, namely, a fine of €25,000 and, in the event of a repeat offence, a potential affirmative or suspended prison sentence of six months.

Protecting commercial information

7 | How may taxpayers protect commercial information, including business secrets or professional advice, from disclosure? Is the tax authority subject to any restrictions concerning what it can do with the information disclosed?

Professional secrecy cannot be invoked by the taxpayer to refuse to provide certain information. Nevertheless, the principle of confidentiality between lawyer and client is enforceable against the FTA.

Certain guarantees are provided for the taxpayer. Indeed, the FTA is bound by confidentiality under penalty that the defaulting agent may be sanctioned criminally. However, in the context of international administrative assistance, the FTA may have to transmit certain information to foreign administrative entities.

In addition, by a law dated 23 October 2018 on the fight against fraud, administrative officers are released from professional secrecy with regard to the public prosecutor regardless of the existence of a complaint, transmission or legal proceedings in progress.

Limitation period for reviews

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

The right to remedy omissions, deficiencies or errors in the establishment of the tax may only be exercised by the FTA during a specific period, known as the collection or limitation period, at the end of which no further or additional taxation can be established.

While this period is generally three years, specific periods are provided for in terms of local direct taxes, registration fees and real estate wealth tax.

The collection period can be extended to the end of the sixth year in the event of the absence of a declaration or document submitted to any registration formalities, or in the event of the need for further investigations, and to the end of the tenth year in case of concealed activity or fraud in certain specific cases.

Alternative dispute resolution

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

The French tax procedure is characterised by a very important pre-litigation phase. This phase, based on a dialogue with the FTA, can take several months or even years before the courts are involved.

Following the control procedure, the FTA must send a proposal for rectification to the taxpayer by registered mail within a maximum period of three years. To be valid, this proposal must include certain mandatory information (right of assistance, deadline for reply, financial consequences and reasons).

Following this proposal for rectification, the taxpayer has 30 days to make his or her comments. This period may be extended to 60 days. If the FTA maintains its adjustment, the taxpayer has two possible remedies. These routes can be exercised simultaneously.

On the one hand, the taxpayer can refer the matter to the departmental committee on direct taxes and turnover taxes, whose competence is limited to disputes concerning: income tax, corporation tax and VAT. The opinion formulated by the committee is not binding either on the taxpayer or on the FTA.

On the other hand, the taxpayer may refer the matter to the controller's hierarchical superior.

Only if no solution has been found can the taxpayer file a contentious claim. Following this complaint, he or she may bring an action before the competent courts.

During the course of this procedure, the FTA cannot request any payment.

Collecting overdue payments

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

The FTA has a period of four years from the date of the assessment of the tax notice or the sending of the assessment notice to obtain payment of the Treasury's claim. The limitation period is extended to six years for taxpayers established in a foreign country outside the EU. If the taxpayer requests a delay of payment, the limitation period is suspended. This period is interrupted in the case of formal notice, precautionary measures or legal proceedings.

In the event of default and after formal notice, the FTA may take protective or enforceable measures. It has a specific procedure, the notice to third party holders, in addition to the other common law procedures (seizure of real estate, bank accounts, securities, etc.). This procedure has the advantage of being less restrictive in its implementation than other ordinary legal procedures, especially because the Treasury establishes its own enforceable titles without seizing the judge.

Penalties

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

There are many reasons for the tax authority to impose penalties on the taxpayer, such as:

- inaccurate or incomplete tax return filed;
- late filing of tax return;
- no filing of tax return;
- late payment of taxes; and
- non-payment of taxes.

Usually, late payment interest is also due.

12 | How are penalties calculated?

Penalties are calculated depending on the event that arose:

Type of penalty	Calculation method
Inaccurate or incomplete returns	They are assessed on the adjusted tax at different rates: <ul style="list-style-type: none"> • 10 per cent if the error is involuntary (personal income tax); • 40 per cent if the taxpayer omitted voluntarily to file the return properly or made an abuse of law without being the main instigator/beneficiary of it; and • 80 per cent for fraudulent situations, or made an abuse of law being the main instigator/beneficiary of it.
Late filing of tax return	They are assessed on the adjusted tax at different rates: <ul style="list-style-type: none"> • 10 per cent if the filing is made before the sending of a formal notice from the FTA. Can be increased to 20 per cent if a formal notice was sent and the situation was regularised within one month; • 40 per cent if this has been done after that one month; • 80 per cent if the taxpayer carries out an undisclosed activity.
Failure to pay taxes	Penalties are assessed on the basis of 5 per cent or 10 per cent, depending on the taxes involved.

13 | What defences are available if penalties are imposed?

The FTA has to give justification regarding the penalties imposed, relying on the correct legal provisions to characterise the error made by the taxpayer. If the penalties are not justified, taxpayers can ask for them to be forfeited. Sometimes, reductions of penalties are granted automatically or on a discretionary basis.

Collecting interest

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

There is a collection of late-payment interest when the payment of taxes was improperly deferred, or tax returns were not filed on time, or improperly. The late-payment interest may be reduced subject to certain conditions.

Interest on arrears may be reduced or not be due, subject to certain conditions; for example, where a taxpayer has made an explicit declaration in his or her tax return or where legal tolerance may be applied if the amount of the revalued tax does not exceed: (i) 1/20 for income tax; or (ii) 1/10 for transfer taxes and property tax of the taxable income.

Interest for late payment is calculated at the rate of 0.2 per cent on the amount of the reassessed tax and generally begins to accrue from the 1st of the month following the month in which the tax in question should have been paid, ending on the last day of the month following notification of the reassessment.

Criminal consequences

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 taxpayer acts as an opponent to the tax audit, then he or she could be criminally sanctioned and subject to a fine, and in the case of a repeated offence can be subject to a jail sentence decided by a criminal court.

If the taxpayer committed tax fraud, then he or she could also be held criminally responsible for such acts if they acted intentionally and fraudulently (bad faith) in order to avoid tax liability. Such prosecution is started on the initiative of the FTA, with the consent of a tax commission on criminal tax matters.

Since the Law of the 23rd October of 2018 on the fight against fraud, the FTA is required to transfer the matter to the prosecution when the amount is greater than €100,000.

Enforcement record

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

According to the FTA's enforcement survey with respect to 2018, reassessed taxes and associated penalties were estimated at €16.1 billion. Tax audits resulted in the collection of €8.7 billion (compared with €9.4 billion in 2017). Approximately 2.8 million contentious claims were filed in 2018 and an equivalent number of claims were dealt with in 2017. The number of court proceedings filed in 2018 (about 22,000) was lower than the number of court proceedings filed in 2017 (about 23,000). Approximately 800 criminal claims for tax fraud were filed by the FTA in 2018.

THIRD PARTIES AND OTHER AUTHORITIES

Involvement of third parties

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 allowed to request information on the taxpayer from third parties (ie, banks). If the third party is permitted by the FTPC to answer such questions, then it must answer to the FTA request. If it does not do so, it could get a fine for failure. Some financial institutions have to disclose information on their client on their own initiative.

The FTA only has the obligation to inform the audited taxpayer that it obtained information from third parties if the FTA is willing to send a tax reassessment.

Cooperation with other authorities

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 works with other French authorities and with foreign tax and non-tax authorities. Such cooperation may be either on request or automatic.

Concerning cooperation with foreign authorities, the FTA can rely on the provisions of double tax treaties, and on those of Council Directive 2011/16/EU (as amended) and the Protocol to the OECD Convention. These provisions allow the FTA to request information in order to control the tax base of natural and legal persons resident in France and to request assistance in tax collection.

France has signed an intergovernmental agreement with the United States concerning the Foreign Account Tax Compliance Act (FATCA), under which French financial institutions are required to provide information on the accounts of their US customers to the French government, which in turn will exchange this information with the US tax authorities. A reciprocity clause requires the US tax authorities to provide certain information on French residents holding US accounts. France has also introduced common reporting standards, meaning that financial institutions are required to perform certain due diligence to identify account holders, collect information (including tax residence and identification numbers) and provide certain information about account holders and accounts to the FTA.

SPECIAL PROCEDURES

Hardship procedures

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

In the event of financial hardship, taxpayers are allowed to ask for either payment deferral or a write-off of all or part of the taxes. There is not any special collection in such cases. French tax administration may use a preferential right owned over all movable assets of the taxpayer and may obtain a mortgage over their immovable property. The FTA can also recover amounts due from third parties.

Voluntary disclosure and amnesties

20 | Are there any voluntary disclosure or amnesty programmes?

Taxpayers have the opportunity to regularise all mistakes that are unintentional or inaccurate in their tax returns. By acting in good faith, they will be granted a lower rate of late-payment interest. However, even if no amnesty programme exists in France, taxpayers may ask the FTA for leniency by introducing a claim for equitable relief.

RIGHTS OF TAXPAYERS

Rules protecting taxpayers

21 | What rules are in place to protect taxpayers?

The FTA must provide the taxpayer with a tax-audit notice when they start the audit, stating that the taxpayer can be legally represented and explaining the reasons and extent of such audit. If the tax authority fails to provide the right mandatory information, then the procedure may be void.

Usually, a taxpayer bill of rights used to be provided to the taxpayer before an audit. However, at present the letter simply mentions the website on which the bill of rights is located.

The outcome of the audit must be sent to the taxpayer with the reasoning used and adjustments and penalties applied. Then the taxpayer can ask for a report.

Another audit cannot be made for the same tax period and taxes once one has already been made.

Requesting information

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

If the FTA asks third parties to provide information, documents or both related to the taxpayer in order to justify a reassessment, then the FTA has to inform the taxpayer of such process and transmit all related documents.

When the FTA has undertaken a raid, it must provide the taxpayer with an inventory of documents seized by the agents.

Tax authority governance

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

Taxpayers have the opportunity to request a review of their case to be carried out by the appropriate commission, generally composed of practitioners, judges or tax experts.

Moreover, before starting prosecution for tax fraud, the FTA must have the approval of the commission focusing on tax crime.

Taxpayers can also ask for a departmental tax conciliator or ombudsman to find a solution to the conflict arising with the FTA.

COURT ACTIONS

Competent courts

24 | Which courts have jurisdiction to hear tax disputes?

Tax proceedings depend on either administrative or civil courts, depending on the type of tax involved:

	Civil courts	Administrative courts
Field of competence	Income taxes	Transfer taxes
	Local taxes	Indirect taxes other than VAT
	Other direct taxes	Real estate wealth tax
	VAT	

Some questions may be raised with the Constitutional Council to determine whether a specific provision is compliant with the French Constitution.

Courts can also seek preliminary rulings from the Court of Justice of the European Union (CJEU) regarding the interpretation of the EU treaties or the validity and interpretation of acts of the EU institutions or other EU bodies.

Lodging a claim

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

Every taxpayer is entitled to bring a dispute before the courts, as long as he or she has already filed a prior claim before the FTA, and usually has up to three years (31 December of the second year following that of the tax collection) to bring a claim. The FTA has no obligation to answer within a specific time frame; however, if it does not answer within six months, the claim is considered rejected.

In the case of a refusal, the taxpayer has two months to oppose the decision of the FTA before a court, starting with the date of receipt of the refusal letter.

In France, there is no minimum threshold amount for claims.

Combination of claims

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

Tax claims can be brought together as long as they are similar in nature. The judge has to inform the parties of such decision, which they may refuse. However, such a claim may be requested by the taxpayer so that its claim can be consolidated with other similar cases.

Contentious claims on several taxes may be split through different contentious claim refusals if the proceedings are not the same. In such event, each refusal will be treated separately.

Pre-claim payments

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

Once a notice of assessment is received, the taxpayer has to pay the taxes. He or she can then bring a contentious claim. The taxpayer can get a tax deferral as long as he or she presents financial guarantees to the FTA, or it will implement protective measures. The end of the deferral arises when the decision of the lower court is rendered or when the period of claim is over.

If the decision is in favour of the FTA, the taxpayer will have to pay taxes immediately, with the relevant penalty and interest.

If the decision goes against the FTA, the taxpayer will be eligible to default interest on taxes already paid, and is then reimbursed for the fees related to the provision of guarantees.

Cost recovery

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

If the taxpayer wins the case, some costs are reimbursed automatically (eg, registration fees and expertise costs).

Usually, the losing party bears all other costs, up to an amount defined in the judge's decision.

Third-party funding

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 a client or one of his or her representatives. A third party may guarantee a taxpayer (whether individual or company) in the event of a request for deferment of payment.

In some cases, and in some circumstances, third parties may purchase potential overpayments by taxpayers to the FTA and offer to assist in filing a refund application and assume the related costs, in exchange for a portion of the gain obtained.

Court decision maker

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

The number of judges depends on the jurisdiction. Each level has its own number, depending on the importance of the case.

Civil courts:

- lower civil court (TGI): 3;
- civil court of appeal (CA): 3; and
- Supreme Court (*Cour de Cassation*): 3–19.

Administrative courts:

- lower administrative court (TA): 1–3;
- administrative court of appeal (CAA): 3–5; and
- Supreme Court (*Conseil d'Etat*): 3–19.

There is no jury for tax matters.

Time frames

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

The time frame depends on the specificities of the case and the level of jurisdiction. Trials before lower courts and courts of appeal take about one to two and a half years, and trials before the Supreme Court take about one to two years.

Disclosure requirements

32 | What are the requirements concerning disclosure or a duty to present information for trial?

Contrary to UK proceedings, there is no discovery process in France. All documents from taxpayers transmitted to the court are sent to the FTA. However, documents received from the FTA are not always sent to taxpayers.

The court rules its decision on the basis of elements that parties had the opportunity to discuss.

Permitted evidence

33 | What evidence is permitted in a tax trial?

Tax trials are based only on a written procedure. The judge then examines all facts and legal arguments developed by each party in order to understand the case and its consequences. The only oral part happens at the trial, where parties can make oral observations during the hearing.

Experts can be appointed by judges to clarify a point of the case.

Permitted representation

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

In tax cases, legal representation is generally mandatory. However, in lower civil and administrative courts, representation is not required.

The FTA represents itself most of the time, except before the Supreme Court.

Legal aid can be awarded to taxpayers who cannot afford legal representation.

Publicity of proceedings

35 | Are tax trial proceedings public?

Tax trial proceedings are public in France.



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Burden of proof

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

The burden of proof lies on the FTA. However, this can be reversed and then the taxpayer has to prove he or she is not guilty. This arises in situations such as when the FTA has unilaterally adjusted the taxes of the taxpayer, or when the taxpayer did not reply to a reassessment notice.

Case management process

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

During the trial, the court organises the exchange of briefs. Each party has a specific deadline to send its brief or send their answer to the other party. When exchanges are over, the court issues an order for the conclusion of proceedings. Once the order has been issued, no more briefs will be examined by the court.

Appeal

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

If the taxpayer (or the FTA) disagrees with the decision rendered by the court, then they may bring an appeal before the upper court (court of appeal) within two months; and then, if necessary, to the Supreme Court (also within two months).

UPDATE AND TRENDS

Key developments of the past year

39 | What are the current trends in enforcement? What are the current concerns of the authorities and taxpayers? Are there proposals to change the relevant legislation or other rules?

With France's ratification of the Base Erosion and Profit Shifting (BEPS) project, we can observe a real strengthening of control and verification measures, particularly with regard to transfer pricing, the notion of permanent establishment and the notion of substance. In addition, anti-abuse clauses of general scope have been included in domestic law but also in some international conventions.

Finally, there is a real penalisation of cases: on the one hand, by an automatic transmission of cases involving rights exceeding a threshold of €100,000, which has given rise to the application of certain

tax penalties; and on the other hand, by the extension of the notion of abuse of rights where the sanction is no longer limited to arrangements exclusively for tax purposes but also to arrangements mainly for tax purposes.

Germany

Thomas Busching

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OVERVIEW

Legislation

- 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 codified general rules relating to tax administration and controversies on a domestic level are provided in the General Tax Code and the Tax Court Code. In addition, there is domestic secondary legislation as well as relevant international rules laid out in bilateral tax treaties, multilateral EU Regulations, adopted EU Directives and the like. In terms of non-codified authorities, the decisions and opinions of the Court of Justice of the European Union (CJEU), domestic Federal Constitutional Court and Federal Tax Court are generally persuasive for the tax authorities. Finally, tax administrations prescribe tax guidelines and interpretations that clarify and disclose the administration's position. The guidelines are binding for the administration but not for taxpayers and the judicial system.

Relevant authority

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

Principally, there are three levels of tax authorities: federal, state and local with an additional middle authority between state and local in some states. The chief point of contact for the taxpayer is the local tax authority, which is also structured in three tiers: head, department head and officers. The competent tax authority is that which deals with the type of tax concerned. The federal authorities administer customs and excise taxes. The 16 state authorities administer income and corporate income tax in all their manifestations as well as value added tax (VAT) as agents for the federal authority. On their own behalf, the state authorities administer estate and gift tax as well as real-estate transfer tax. Finally, local municipalities administer trade tax and property tax.

ENFORCEMENT

Compliance with tax laws

- 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 with the tax laws is verified by way of enforcing submission of tax returns and reviewing these in terms of consistency, plausibility, cross-checks and select documentary evidence. If any material clarifications are required, the tax authorities will question the taxpayer in writing before rendering notes of assessment. The duration of such desktop review depends on the quality of the tax return and the

taxpayer's responses if questioned, the fiscal impact of the matter and, finally, the workload of the officer and his or her superiors. The review may take a few weeks for individuals up to permanent reviews for large corporate entities. Timely submission of tax returns and payment of taxes are ensured by way of enforcing penalties and interest charges (see questions 11 to 14).

Types of taxpayer

- 4 | Are different types of taxpayers subject to different reporting requirements? Can they be subjected to different types of review?

Individuals have fewer reporting requirements because they are typically only subject to one form of tax (ie, income tax). In contrast, businesses are generally also subject to VAT, trade tax and other taxes that increase reporting obligations. It follows that tax returns of individuals are mostly not as complex as the returns of corporates and can thus be verified in a shorter period of time compared with businesses. In addition, an individual's income is largely evidenced by way of documents that can be cross-checked easily, whereas the income of businesses is largely only evidenced by their financial statements where a review of plausibility and cross-checking tends to be more difficult.

In addition to the statutory field audits all taxpayers may be subjected to, businesses may be exposed to specific on-site reviews regarding, for example, payroll tax and VAT without receiving notice.

Requesting information

- 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 have statutory documentation and document-retention responsibilities regarding taxation. As per the law, tax authorities investigate the facts and circumstances of taxation ex officio. Consequently, an authority may determine the form and extent of its enquiries at its reasonable discretion on a case-by-case basis. This may include interviewing the taxpayer and requesting any kind of documentary evidence, for example, files, accounts, business records, correspondence, agreements and financial information. The tax office may request the details of the taxpayer's creditors or of recipients of payments made by the taxpayer. It may also question third parties, for example, employees or expert witnesses, or even conduct visual inspections. Given such wide discretionary powers, there need to be codified formal and material restrictions to such enquiries, for example, the queries need to be relevant for the taxes of the respective taxpayer – and not of other persons. Third parties should generally only be questioned if the taxpayer is not willing or able to provide the requested information. Relevant facts and circumstances relating to tax events outside Germany need to be documented, recorded in good time and provided by the taxpayer. If not

provided by the taxpayer to the reasonable satisfaction of the tax office, such offshore facts and circumstances may be disregarded and the tax office may estimate the tax base (see question 6). Even more cumbersome cooperation obligations for the taxpayer are prescribed regarding dealings with tax havens.

Available agency action

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

The tax authorities may request the taxpayer to render an affidavit regarding the information he or she provided. If the data is proven incorrect or incomplete the taxpayer may be subject to criminal prosecution. In addition, the administration has several means to apply pressure, for example, fines of up to €25,000 as well as direct or substitute execution by instruction of the court. Finally, the tax authorities are entitled to estimate the relevant tax base if the relevant facts and circumstances cannot be determined or computed. This shall specifically be the case if the taxpayer fails to cooperate in providing requested information. Experience shows that the estimates by the tax authorities tend to exceed the actual tax liabilities. So in practice, the tax officer's entitlement to estimate the tax base and ultimately the tax to be paid is often the most persuasive incentive for the taxpayer to provide requested information.

Protecting commercial information

7 | How may taxpayers protect commercial information, including business secrets or professional advice, from disclosure? Is the tax authority subject to any restrictions concerning what it can do with the information disclosed?

The tax administration is subject to strict tax secrecy. This entails that no information obtained in the course of a fiscal procedure may be disclosed or used by any tax officer without specifically prescribed authorisation. A breach may be sanctioned as a criminal offence. In addition, several personal relations of the taxpayer are privileged regarding disclosure obligations (eg, relatives of the taxpayer, attorneys, tax consultants and accountants).

Limitation period for reviews

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

The general period of limitation is four years, five years in case of gross negligent tax evasion and ten years in case of intentional tax fraud. In case of pending tax procedures, eg appeal or audit procedures, the period of limitation will be extended until such procedure is finalised. In the event a tax return has been submitted, the limitation period starts at the end of the calendar year of filing or at the latest three years following the calendar year in which the tax event had materialised.

Alternative dispute resolution

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

Prior to tax court trials, notices of assessment may be appealed by the taxpayer within one month of receipt. The appeal is filed with the same tax office that rendered the assessment. However, the appeal is moved from the acting officer and is considered by the Appeals Office. Its decision may then be brought to the tax courts (see questions 24 to 38).

In principle, taxation is strictly executed by way of law. Consequently, taxation principally cannot be affected by agreements or settlements between tax office and taxpayer. However, there are limited exceptions; for example, in contrast to the application or interpretation of the law it is permissible to agree on tax-relevant facts and circumstances with

the tax authorities in certain situations (eg, in tax audits or in court). In the case of insolvency of the taxpayer, agreements between insolvency administrator and tax authority are permissible (see question 19). Finally, under prescribed conditions advance tax rulings, advance pricing agreements for transfer pricing purposes and mutual agreements under article 25 of the Model Tax Treaty may be available.

Collecting overdue payments

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

Prior to enforcing tax collections, the tax authority should render a payment reminder with a notice period of one week. If the overdue tax amounts are not settled within two weeks, the tax authority may request the taxpayer to render an affidavit disclosing all current assets and properties, as well as all sales of assets to related parties within the prior two years and any properties transferred free of charge in the past four years. On that basis, the tax office may seize movable and immovable assets, attach claims or even arrest the taxpayer under certain conditions in order to effect collections.

Penalties

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

The most relevant penalties are imposed for late filing of tax returns and late payment of tax debts. There are other penalties for breaching other obligations of the taxpayer in specific situations, for example, the coercion fine mentioned in question 6.

12 | How are penalties calculated?

The penalty for late filing principally amounts to 0.25 per cent per month of the assessed tax minus down payments. The minimum penalty is €25 per month and the total penalty is capped at €25,000. Penalties for late payment are 1 per cent of the late tax amount per month, equivalent to 12 per cent per annum, whereby a partial month triggers a full month's penalty.

13 | What defences are available if penalties are imposed?

Ultimately, appeals may be lodged against both late-filing and late-payment penalties. Penalties for late filing may be challenged if the delay was excusable (eg, in case of severe illness, accident or old age). Reliance on the accountant or tax adviser is not considered a reasonable excuse, in general even in the event of an excessive workload of such professional.

Collecting interest

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

The interest rate is statutory and prescribed at 0.5 per cent per completed month, equivalent to 6 per cent per annum. This rate is widely held to be unreasonable considering market conditions over the last few years. Thus, several cases are pending at the Federal Constitutional Court and a revision seems possible, at least for years from 2015. Interest obligations accrue for both sides, the taxpayer and the tax authorities. Consequently, both tax debts and tax refunds are subject to interest.

The general interest period begins 15 months following the calendar year in which the tax materialised and ends on the day the tax assessment becomes effective. Interest is also imposed, for example, with regard to granted extensions of payment (see question 19) or for

granted suspension of payment in the event of an appeal or lawsuit (see question 27) and for any evaded taxes.

Criminal consequences

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

Tax fraud is a criminal offence sanctioned by a fine or by prison for up to five years. In severe cases, the prison sentence is six months to ten years. Tax fraud is prescribed as the intentional provision of incorrect or incomplete significant information to a tax or other authority, or the failure to provide significant tax-relevant information to a tax authority in breach of the perpetrator's obligations, causing an incomplete or delayed assessment of taxes or generating an unjustified tax refund or benefit for the taxpayer or a third party. As this definition demonstrates, the law does not differentiate between types of taxpayers. If the tax fraud is committed by gross negligence instead of intent, it is categorised as a misdemeanour, carrying a fine of up to €50,000. In addition, several other criminal and misdemeanour tax offences are prescribed (eg, aiding and abetting an offence, obstruction of tax and smuggling). All such offences are heard by criminal courts and not by the tax courts. The legal representatives of entities, for example, their directors, are personally responsible and liable for the entity's tax obligations. In the case of doubt, legal assistance is strongly recommended.

Enforcement record

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

In 2017, field audits (see question 4) generated additional revenues of €17.5 billion in taxes and interest. Some 180,000 large and 790,000 medium-sized entities were in business. Tax audits, covering up to four fiscal years, were completed at 40,000 large and 50,000 medium-sized businesses by some 13,600 tax auditors; €13.8 billion or 79 per cent of the additional revenues were derived from large-entity audits, with corporate income tax (€4.5 billion), trade tax (€3.8 billion) and income tax (€2.6 billion) generating the top revenues. Figures for 2018 are expected in October or November 2019. Further tax revenues were generated by voluntary disclosures of evaded taxes (see question 20). There are no official figures for these, but revenues are estimated to be some €4–5 billion since 2010.

THIRD PARTIES AND OTHER AUTHORITIES

Involvement of third parties

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, third parties – including financial institutions – may be involved if questioning of the taxpayer was or is likely to be inconclusive. From a domestic perspective, however, the General Tax Code explicitly acknowledges the trust and fiduciary relationship between bank and customer. Consequently, the Code requires the tax administration to be 'specifically considerate' when involving financial institutions. Thus, disclosure requests to banks are subject to additional requirements, eg, the taxpayer needs to be informed prior to the disclosure request, requests are handled by a specific authority – and not by the local tax office, and the requests need to be properly documented to enable subsequent data protection reviews. Respective disclosure requests to banks in other EU member states are covered by relevant EU regulations and treaties.

As to the extent of disclosure requests, in principle any gathering of evidence in any form by the tax authorities needs to be based on

a specific reason or concrete, justified suspicion. Consequently, broad-based 'fishing expeditions' and casting of 'wide nets' are generally disallowed. This is specifically relevant to the aforementioned involvement of banks and the administration's request to disclose bank account information.

Cooperation with other authorities

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

Both the domestic judicial system and authorities are required to cooperate with the tax administration. Depending on the situation at hand, the cooperation may be initiated at the request of the tax administration, or proactively by providing tax-relevant information ad hoc or even automatically to the respective tax office – a process similar to the Information Return Reporting system in the US. On the international level, there are a host of bilateral and multilateral treaties addressing the exchange of information (eg, article 26 of the Model Tax Treaty, Directive on Administrative Cooperation (2014/107/EU) expanding the EU Mutual Assistance Directive (2011/16/EU), Common Reporting Standard of the OECD, FATCA).

SPECIAL PROCEDURES

Hardship procedures

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

The tax authorities may waive or extend due payments in full or in part as well as grant instalment payments if collection would cause considerable hardship for the debtor and the claim would not appear to be endangered by the deferment. The same shall apply if the collection would be unreasonable or inequitable. An applicable situation could be insolvency of the taxpayer.

Voluntary disclosure and amnesties

20 | Are there any voluntary disclosure or amnesty programmes?

A statutory voluntary disclosure programme that avoids criminal prosecution is available. The conditions, however, are very strict: for example, disclosure will not be considered if prior notice of field audit or prosecution was given, if the offence had already been detected by an officer, if disclosure was incomplete or not at least complete for the last 10 years or if reimbursement of evaded taxes plus interest is incomplete following disclosure. In the event the evaded taxes exceed €25,000 per criminal act, payment of additional fines is required to avoid prosecution: 10 per cent of evaded taxes under €100,000, 15 per cent between €100,000 and €1 million and 20 per cent over €1 million. Legal assistance is strongly recommended.

RIGHTS OF TAXPAYERS

Rules protecting taxpayers

21 | What rules are in place to protect taxpayers?

Generally speaking, principal protection is already provided by prescription of largely clear and precise tax obligations in Germany's tax rules and regulations. Further and more specific protection is provided by granting the taxpayer, for example, the right to be heard, to be informed, to appeal, and to have access to privileged legal assistance and to an independent judicial system. Additional protection is provided by imposing fundamental obligations on the tax administration (eg, to

maintain tax secrecy) to, for example, execute discretion reasonably and consider facts and circumstances in favour of the taxpayer.

Requesting information

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

In the appeal procedure, the taxpayer is entitled to full disclosure of his or her tax file by the tax administration upon request. The disclosure obligation encompasses the complete tax records and documentation of the tax office relevant to the respective taxpayer and the respective tax period, and includes, for example, computations, information returns, expert opinions, evidence collected, information requests, witness and third-party statements and notes by the tax officer.

Tax authority governance

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

As mentioned in greater detail in question 9, a taxpayer's appeal to a notice of assessment or other administrative action will be considered by the local tax office's Appeals Office. The local tax office itself is subject to oversight by its superior authorities on the state and federal levels. While several NGOs lobby and advocate taxpayers' interests, there is no official taxpayer advocate, ombudsman or similar.

COURT ACTIONS

Competent courts

24 | Which courts have jurisdiction to hear tax disputes?

At first instance, there are 18 regional tax courts to hear tax disputes. There is only one appellate court, the Federal Tax Court, which only reviews the correct application of the law on the basis of the facts and circumstances of the matter as determined by the regional tax court or on the basis of procedural defects. Consequently, the Federal Tax Court will neither continue factual investigations nor review the facts and circumstances provided by the regional tax court, and will generally not consider new factual evidence provided by the parties.

Lodging a claim

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

Tax disputes may be brought before the courts once the internal appeal procedure (see questions 9 and 23) has been completed and the Appeal Office's decision continues to infringe rights of the taxpayer. No minimum threshold amounts are prescribed. The lawsuit needs to be filed in written form one month after receipt of the Appeal Office's decision. The lawsuit needs to name the parties, the matter of the claim and the appeal decision. The initial filing does not need to include the arguments of the taxpayer. These may be filed later; typical extensions granted are for four to eight weeks. At the level of the regional courts, the taxpayer may lodge the lawsuit him- or herself; professional representation by attorneys, tax advisers, accountants and the like is permissible. Professional representation is prescribed for disputes filed with the Federal Tax Court.

Combination of claims

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

The respective claimant (taxpayer or tax authority) may combine several of its claims provided the claims are connected, directed against the same defendant and heard by the same tax court. The same is true for

claims of several claimants. The tax courts have discretionary power to split or add to such combinations by way of a court order, enabling the courts to consolidate or split pending cases so as to hear and decide these together or separately.

Pre-claim payments

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

In general and despite being disputed, taxes must be settled by the taxpayer as and when due. Lodging a claim does not suspend or preclude payment of the disputed taxes by way of law. However, the tax court has discretionary powers to suspend payment. Upon respective request, the tax court shall grant suspension if there are serious doubts concerning the legality of the disputed administrative action, or if its execution would cause unreasonable hardship to the taxpayer not justified by overriding public interests. Should the tax office's assessment be upheld, interest will be charged on the suspended amount at 6 per cent per annum (see question 14).

Cost recovery

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

Costs of a tax dispute typically consist of the taxpayer's counsel fees and court fees plus ancillary costs, if any. The costs of the tax office are not subject to compensation. Should the taxpayer's position be upheld, court fees will be compensated in full. The counsel fees will be reimbursed at scheduled amounts in accordance with statutory regulations and may be lower than the fees under fee agreements with counsel.

Third-party funding

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 related restrictions. On the contrary, publicly funded legal aid is provided for financially distressed taxpayers. In addition, legal protection insurance is readily available on the market. Finally, ad hoc commercial litigation funding against contingency fees is offered by several providers.

Court decision maker

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

At the regional tax court level, the decision makers are a panel of judges consisting of three professional and two magistrate judges (ie, laypersons). Its chair presides over the panel. At the beginning of proceedings, the panel may refer the lawsuit to one of the panel's professional judges to hear and decide the matter in lieu of the panel. The panel has discretion to refer provided the matter does not present major factual or legal difficulties and does not raise a point of principle. If the panel decides to remain competent, the chair will appoint a deputy who will prepare deliberations and hearings for decision by the panel. Finally, the chair or deputy may be asked to decide in lieu of the panel by both parties. However, such consensual request is not binding for the judge. He or she may decide to leave the decision to the panel. The Federal Tax Court's panel consists of five professional judges. With the exception of the aforementioned two magistrates, the tax courts are structured as non-jury bench trials.

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

At the level of the regional tax courts, the statistical nationwide average for a tax trial completed in 2018 was 13.6 months. The respective figure at the level of the Federal Tax Court was eight months. However, considering that these average figures include a number of legally superfluous lawsuits decided swiftly, a more realistic time frame for a well-founded trial is likely to be two years and more in both instances.

Disclosure requirements**32 | What are the requirements concerning disclosure or a duty to present information for trial?**

As is the case for tax authorities during assessment, a tax court investigates the facts and circumstances of a lawsuit ex officio (see question 5). In practice, however, the court's investigation obligation is mitigated by extensive cooperation and information obligations of the taxpayer. Consequently, the taxpayer is well advised to clearly and completely present its position regarding facts and legal implications of the case, to justify such by way of presenting evidence, and, to the extent required, dispute facts and legal interpretations brought forward by the tax office. In addition to the evidence provided by the parties, the court may question the involved parties (see question 33) and conduct visual inspections at its discretion. The parties may attend and also question witnesses or expert witnesses or both. All authorities are obliged to disclose documents and files to the court within the confines of the tax secrecy of third parties (see question 18).

In preparation for a hearing (see question 35), the panel chair or deputy may conduct an informal pretrial in order to clarify and discuss the facts and merits of the case, which may include discussing a potential settlement. Such pretrial usually takes place in chambers.

Permitted evidence**33 | What evidence is permitted in a tax trial?**

As mentioned in question 32, the tax court investigates the matter ex officio. Therefore, tax courts are not confined to submissions, arguments or motions brought forward by the parties. Consequently, it is the court that ultimately determines the evidence required to verify the disputed facts, not the parties. It follows that the court may question the taxpayer, the tax officer, an expert witness or any other involved person. However, the taxpayer and tax officer will not be considered as witnesses, and consequently their questioning will not have the legal effect of a full testimony, for example, as by an expert witness or other witness. If hearings are conducted in the presence of a person who cannot communicate in German, a certified translator will be appointed for assistance.

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

As mentioned in question 25, on the level of the regional courts, taxpayers may represent themselves. Professional representation is required at the Federal Tax Court. The tax office is formally represented by its head, in practice usually by its Appeals Office. If a taxpayer cannot afford legal representation, publicly funded legal aid is provided.

Publicity of proceedings**35 | Are tax trial proceedings public?**

In principle, tax trial hearings are public, while most other trial proceedings are not. With respect to a hearing, the taxpayer may request that

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the public be excluded. No reasons need to be stated and such request may not be rejected by the court. The tax authorities have no such right to request exclusion.

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

As mentioned in questions 32 and 33, the tax court investigates the matter ex officio. Consequently, there are no explicit burden of proof regulations codified in tax law. In practice, however, the tax office carries the burden of proof for such facts and circumstances that cause or increase taxes. The taxpayer is responsible for proving such facts and circumstances causing tax relief.

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

Case management is in the hands of the tax courts. They investigate the case ex officio (see questions 32 and 33), which entails that the courts are in complete charge of the proceedings, including case management. The courts may, for example, consolidate or split pending cases (see question 26), refer the case to a single judge sitting alone (see question 30), summon and question the parties, third parties, witnesses and expert witnesses, request information, schedule pretrials (see question 32), etc. Electronic document filing and file management – plus pretrials, hearings and questioning of parties, witnesses and expert witnesses by video – are permissible, albeit not widely used at present.

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

The regional tax court's decision may be appealed provided the appeal is explicitly admitted in the court's judgment, or the Federal Tax Court has accepted the appeal upon a non-admittance complaint lodged by the defeated party. Appeal shall only be admitted if the matter raises a point of principle, the decision is based on a procedural defect or a Federal Tax Court ruling is required for the advancement of tax law. The appeal must be filed within one month after service of the regional tax court's decision. Professional representation is required. As mentioned in question 24, the appeal to the Federal Tax Court may only be based on points of law and not on factual questions. As mentioned in question 31, Federal Tax Court trials may take two years or more.

Greece

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OVERVIEW

Legislation

- 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, among other matters, the process of tax audits and controversies up to the stage of recourse to Greek courts, and the Code of Administrative Procedure (L 2690/1999), which is in general applicable to the relations of citizens and any public law entity. The applicable legislation relating to controversies with the Greek state (including tax controversies) is the Code of Administrative Courts Procedure (L 2717/1999).

Moreover, the Independent Authority for Public Revenues issues circulars that are binding on the tax authority for the interpretation and implementation of tax legislation. However, these regulations are not binding on taxpayers.

Greece has signed bilateral treaties for the avoidance of double taxation with a long list of countries in the areas of both income tax and inheritance tax.

Relevant authority

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

Every tax authority falls under the jurisdiction of the Independent Authority for Public Revenues, which as of 2017 is an independent authority, released from state control and monitoring. The Authority is governed by the administrative council, a governor and a European Commission expert. The European Commission has appointed two officials in the council.

The competent tax office is determined by the registered seat of the legal entity or the residence of the taxpayer. The three major cities (Athens, Piraeus and Thessaloniki) have separate tax offices for limited liability corporations. 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, audit authority has been granted to specific audit centres in Athens and Thessaloniki.

ENFORCEMENT

Compliance with tax laws

- 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, on submission of a tax return, tax is assessed without further action by the tax authorities, either simultaneously with the submission of the tax return or shortly after in the case of annual income tax returns. However, following a tax audit, the tax authorities may issue a corrective tax assessment, provided that the audit shows that the previously submitted tax return was inaccurate or mistaken.

If the taxpayer does not file a tax return despite his or her respective obligation, an estimated tax assessment 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, the tax authorities may issue a preventative tax assessment prior to the date for submission of the respective tax return. In such a case, the taxpayer either pays the tax indicated on the preventative tax assessment as a lump sum, 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.

Types of taxpayer

- 4 | Are different types of taxpayers subject 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 essentially to an annual income tax return. Such individuals are usually subject to an audit if an unjustified increase in their assets is found (usually following an audit of their bank accounts). Individuals of a certain wealth are audited by a special audit centre.

Businesses (either individuals or legal 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 amount of reporting required, Greece is still a country of complicated and intensive requirements. Businesses are also subject to a variety of tax reviews, including, for example, full audit, partial audit (for a certain tax item), audit for VAT refund and audit for the issuance of fictitious invoices.

Requesting information

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. There is also an obligation for certain third parties (banks, undertakings for collective investment in transferable securities, notaries, etc) to provide the tax authorities with all the requested information they possess in relation to the taxpayer within 10 days, with the exception of privileged information and documents. In the case of data and information in a foreign language, an official translation of them in Greek should be submitted.

Interviews with the taxpayer or the taxpayer's employees are not required by Greek tax legislation. However, in practice, during a tax audit, the auditors may discuss issues raised by the audit with the taxpayer. Additionally, before notification of the final assessment, the tax audit authority is obligated to inform the taxpayer of its preliminary findings and request the taxpayer's written position.

Available agency action

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

Failure to respond to requests by the tax administration to provide the required information constitutes a procedural infringement and a penalty is imposed on the taxpayer. Moreover, if the information not provided refers to the business books and records kept and issued by the taxpayer, the tax authorities may use indirect methods to determine the taxable income by calculating the taxpayer's gross income and outflows on the basis of generally accepted principles and techniques of auditing. Said methods include analysis of: (i) the liquidity of the taxpayer; (ii) the net position of the relation between the sales price and the total turnover; and (iii) the amount of bank deposits and expenses in cash.

Protecting commercial information

7 | How may taxpayers protect commercial information, including business secrets or professional advice, from disclosure? Is the tax authority subject to any restrictions concerning what it can do with the information disclosed?

Data concerning third parties in their transactions with taxpayers are not covered by professional secrecy and therefore there is an obligation to provide such data. However, professional secrecy may be lifted if written permission from the competent prosecutor for the granting of data covered by such secrecy is provided.

Employees of the tax administration are obliged to keep confidential all of the taxpayer's data and information that they receive during the exercise of their duties (duty of confidentiality). If they fail to do so, they are personally liable (for both civil and criminal purposes).

In the case of outstanding debts of more than €150,000, the name of the taxpayer may be published without the taxpayer's consent.

Limitation period for reviews

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

As of 1 January 2014, the tax assessment may be issued within five years from the end of the tax year and may be extended under certain conditions, which were recently defined by the Greek Administrative

Supreme Court. For tax evasion cases, the tax assessment may be issued within 20 years from the end of the tax year. However, since tax evasion may include the inaccurate submission of a tax return aimed at tax avoidance, the 20-year statute of limitation will be considered as the general rule.

Alternative dispute resolution

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).

Collecting overdue payments

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

As soon as the assessment is notified to the taxpayer, the tax administration issues the taxpayer with a payment notice prior to proceeding to any enforcement action. In the event of non-payment of the amount due within 30 days from the notification of the payment notice, the 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 or, in case of the debtor being a legal entity, to all of the directors' assets bearing joint liability (the latter is applicable under conditions specified by the law). On the basis of the above conditions, the tax authorities may also proceed to take appropriate interim measures.

The non-payment of tax due for a period of time longer than four months is a criminal offence (misdemeanour).

Penalties

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

The tax authority may impose penalties in cases of infringement of Greek tax legislation. These penalties distinguish 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, among others.

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, among others.

There are also special penalties for infringements of transfer pricing legislation.

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 on taxpayers who are not liable to maintain accounting books and those liable to maintaining accounting books on the basis of simplified or double-entry accounting principles. Repetition of any infringement within five years results in the imposition of a double penalty, whereas a quadruple penalty is imposed for a second repetition.

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

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 regarding flaws in the formal process of the act of assessment (eg, violations of procedure or a lack of competence), as well as disputing the basis or reasoning of the assessment. *Force majeure* arguments are extremely difficult to prove and reliance on the advice of an attorney or accountant is disallowed.

By virtue of a recent amendment to the law, no penalties may be imposed on taxpayers if they acted following written instructions from the tax administration.

Collecting interest

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

In cases of late payment or non-payment of any amount of tax (the latter being found following a tax audit), the taxpayer is obliged to pay interest for the 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. The interest rate, according to the ministerial decision currently in force, is set at 8.76 per cent. However, up until 31 December 2019, interest is being calculated on a monthly basis, whereas from 1 January 2020, it will be calculated on a daily basis.

The significance of this differentiation lies in the fact that if a debt is paid on the 15th day of the month, according to the calculation currently in force, the taxpayer will be called upon to pay interest for the entire month. In contrast, from 1 January 2019, the same taxpayer will be called upon to pay 15/365 of the relevant interest (which corresponds to the 15 days that the payment was delayed).

Criminal consequences

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 avoids 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 issues false or fictitious tax records as well as receives fictitious tax records or alters 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 the perpetrators or accomplices of tax evasion.

Enforcement record

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

Uncollected taxes due reached about €104.32 billion by April 2019. The Independent Authority for Public Revenues is said to have collected €51.87 billion in 2018 from new and old debt.

THIRD PARTIES AND OTHER AUTHORITIES

Involvement of third parties

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 for 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 (including lawyers) 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 should request permission from the competent prosecutor on proving that the taxpayer is suspected of tax evasion and invoking the reasons for which it wishes to obtain the information by the third party.

A fine ranging from €100 to €500 will be imposed if third parties refuse to provide the above-mentioned information to the tax authority.

Cooperation with other authorities

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 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's 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 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 came into effect in September 2017.

In January 2017, Greece and the United States signed an inter-governmental agreement to facilitate compliance with the US Foreign Account Tax Compliance Act by financial institutions in Greece.

SPECIAL PROCEDURES

Hardship 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 the 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, it may request a settlement to be granted by the Minister of Finance. If the debt exceeds €600,000 the State Legal Council may accept a settlement that may involve:

- 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 instalments (up to 90); or
- a combination of the previous two.

Voluntary disclosure and amnesties

20 | Are there any voluntary disclosure or amnesty programmes?

No. The voluntary disclosure programme, which was implemented in Greece during 2016 and 2017, ceased to apply at the end of 2017. However, there is currently (ie, until the end of September 2019) an ongoing programme that offers taxpayers the opportunity to settle their debts to the tax office in up to 100 instalments, with a corresponding reduction of the surcharges imposed so far.

RIGHTS OF TAXPAYERS

Rules protecting taxpayers

21 | What rules are in place to protect taxpayers?

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

Requesting information

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

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 the petition.

Tax authority governance

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

Every tax authority is subject to the control and monitoring of the Independent Authority 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 or she may file a complaint to the Greek Ombudsman, an independent authority that intervenes in cases involving public bodies, including tax authorities. Upon examination of the complaint, the Greek Ombudsman should attempt to contact the tax authority and resolve the issue.

COURT ACTIONS

Competent courts

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 €60,000 and tax disputes arising from enforcement of tax claims by the tax authority (eg, seizures) fall under the competency of the single-member Administrative Court of First Instance.

Tax disputes from €60,000 and up to €150,000, as well as 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 at more than €40,000 are subject to a petition for cassation before the Supreme Administrative Court 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.

Lodging a claim

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

Tax disputes are brought before administrative courts as a recourse against any act or omission of the tax authority (including assessment of taxes and fines or the 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 Independent Authority for Public Revenues is filed as mandatory. The administrative recourse may be submitted to the DRD within 30 days of the date of 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 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 or she is obliged to pay upon filing a court fee amounting to 1 per cent of the tax in dispute up to €1,000. Another court fee of up to €2,000 is payable for the hearing of the appeal at first instance.

Relief sought is limited to total or partial annulment or modification of the contested act, including an obligation to refund 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 the court to determine the amount of the taxpayer's claim.

Combination of claims

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 (deadline or 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.

Pre-claim payments

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, it is difficult to obtain suspension and it requires the disclosure of the global income and assets of the taxpayer and his or her 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 20 per cent of the amount determined by the court of first instance until the date of hearing before the Court of Appeal is a prerequisite for the appeal to be heard.

Cost recovery

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

The 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 symbolic amounts as costs (a few hundred euros even for the Supreme Court). Court fees paid are refunded in full or in part in case of acceptance of the appeal.

Third-party funding

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.

Court decision maker

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

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. A prerequisite for the hearing (but not filing) of the appeal is payment of 20 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.

Time frames

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

Time frames in Greek administrative courts used to be notoriously long, but the situation has gradually improved (especially before the courts of appeal). An appeal before the Administrative Court of First Instance of Athens may be heard within two to four 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 Courts of Appeal and heard within six to 12 months from filing. A decision is usually rendered within six months from the hearing. Time frames before the Supreme Administrative Court range from one to three years, according to the importance of the case.

Disclosure requirements

32 | What are the requirements concerning disclosure or a duty to present information for trial?

In principle, in trials before the administrative courts there is not a specific requirement to present information and each party bears the burden of proof of its own pleadings (see question 36). 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.

Permitted evidence

33 | What evidence 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. The persons most commonly providing sworn statements or testimonies in tax trials include accountants, employees of the taxpayer or counterparties in various transactions. Experts or persons providing technical reports or legal opinions are also permitted to testify. All written evidence must be translated into Greek. Sworn statements or testimonies by non-Greek speakers are carried out with the assistance of a translator.

Permitted representation

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.

Publicity of proceedings

35 | Are tax trial proceedings public?

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

Burden of proof

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 taxpayer 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 the 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.

Case management process

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

In preparation for a tax trial, all evidence should 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 should 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.



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Appeal

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. A prerequisite for the filing of the appeal is payment of 20 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.

India

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OVERVIEW

Legislation

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 Income Tax Act 1961 (ITA), read along with the Income Tax Rules 1962, governs the tax legislation and tax controversies in India. Along with this, the tax treaties entered into by the government of India with countries across the globe and the judicial precedents laid down by various judicial fora, which include the Supreme Court of India and the High Courts, assist in resolving tax controversies in India.

The Central Board of Direct Taxes (CBDT) is engaged in the general administration and supervision of the ITA. It provides inputs for policy and planning of direct taxes in India, which includes powers to issue rules, circulars, notifications and orders for the proper administration of the ITA, and the same are binding upon all tax authorities.

Goods and services tax (GST) is leviable on taxable supply of goods or services, or both. The Central Goods and Services Tax Act 2017 (CGSTA) and the Integrated Goods and Services Tax Act 2017 (IGSTA) are formulated by the central government and are for intra-state and inter-state supply of goods or services respectively. The Union Territory Goods and Services Tax Act 2017 (UTGSTA) and various state GST Acts are formulated for levy of GST on intra-state/union territory supply of goods, services or both in the respective union territory or state. The Goods and Services Tax (Compensation to States) Act 2017 has also been formulated by the central government for levy of compensation on certain specified, but limited, supplies. These substantive statutes are supported by the Central Goods and Services Tax Rules 2017 and the Integrated Goods and Services Tax Rules 2017, including the notifications and circulars issued thereunder.

The governing law for import and export of goods to and from India is contained in the Customs Act 1962 (Customs Act), Foreign Trade (Development and Regulation) Act 1992 and rules notified thereunder. India is party to several Free Trade Agreements (FTAs), Preferential Trade Agreements (PTAs) and Comprehensive Economic Partnership Agreements (CEPAs), and is also a member of both the World Trade Organization (WTO) and the World Customs Organization (WCO).

Relevant authority

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

The relevant tax authorities are the Central Board of Direct Taxes (CBDT) and Central Board of Indirect Taxes and Customs (CBIC), which are both part of the Department of Revenue in the Ministry of Finance. Matters relating to the levy and collection of all direct taxes are looked after by the CBDT.

The officials of the CBDT in their ex-officio capacity also function as a division of the Ministry of Finance dealing with matters relating to the levy and collection of direct taxes. The Chairman, who is also an ex-officio Special Secretary to the Government of India, heads up the CBDT. In addition, the CBDT has six members, who are ex-officio Additional Secretaries to the Government of India.

The hierarchy of the tax authorities under the ITA (in order of seniority) is as follows:

- CBDT;
- Directorate General of Income Tax or Chief Commissioner of Income Tax;
- Principal Commissioner of Income Tax;
- Commissioner of Income Tax and Commissioner of Income Tax (Appeals);
- Additional Commissioner of Income Tax;
- Joint Commissioners of Income Tax;
- Deputy Commissioner of Income Tax;
- Assistant Commissioner of Income Tax;
- Income Tax Officer;
- Tax Recovery Officer; and
- Inspector of Income Tax.

The CBIC deals with the tasks of administration and formulation of policy concerning levy and collection of indirect taxes. In addition to the CBIC, the state commercial tax bodies administer the state GST.

The highest authority appointed by the CBIC, in regard to central tax, is the Principal Chief Commissioner, followed by the Chief Commissioner, Principal Commissioner, Commissioner, Additional Commissioner, Joint Commissioner, Deputy Commissioner, Assistant Commissioner and any other class of officers as the CBIC may deem fit. The provisions of the Customs Act are administered by the customs officials appointed under the Act in the same hierarchy as under GST. Whereas, for levy of VAT on goods outside the purview of GST, the states have appointed commercial tax officers.

ENFORCEMENT

Compliance with tax laws

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 India, the tax year begins on 1 April and ends on 31 March. The ITA provides a mechanism to taxpayers for declaring income, filing the return of income and paying the tax due in a timely manner.

For verifying whether the taxpayer has complied with the tax laws and made payment of taxes in time, the tax authorities review the tax return electronically. On review of the tax return, the tax authorities may

select the tax return either for a limited scrutiny – in which the review is limited to specific reasons/issues, or for a detailed scrutiny – in which there is detailed examination or assessment of the issues involved. Such scrutinisation procedures are quasi-judicial proceedings. In cases where the taxpayer has not filed a tax return, the tax authorities can make an assessment to the best of their judgment and determine the sum payable by the taxpayer accordingly.

The tax authorities normally conduct the review in the form of a personal appearance of the taxpayer or through an authorised representative appointed by the taxpayer. However, recently, the tax authorities have started conducting these reviews electronically as well.

In cases where tax returns are picked up for limited scrutiny, the review is normally completed expeditiously in a limited number of hearings. However, in case of a detailed scrutiny or assessment, the timeline for completion of the review is 12 months from the end of the tax return filing year (extended by another 12 months, where the case is referred to the transfer pricing officer).

In India, indirect tax compliances are generally on a self-assessment basis. The tax department usually inspects a taxpayer when a proper officer, not below the rank of Deputy Commissioner, has reason to believe that the taxpayer has suppressed any transaction or escaped any payment of tax. This decision is based on a risk profiling of the taxpayer looking at their past tax history, current tax disputes, any high income and various other criteria. The tax authorities generally conduct the review in the form of a personal appearance by the taxpayer or their authorised representative.

Types of taxpayer

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

All the taxpayers liable to pay tax under the ITA are required to file an annual income tax return. The tax filing requirements (including the form in which the tax reporting is undertaken) vary based on the type of taxpayer, gross income, gross turnover and filing status. Individuals with gross total income less than the prescribed threshold are exempt from filing a tax return. The tax return is required to be filed by a taxpayer irrespective of their residential status, in other words, residents as well as non-residents. The taxpayer shall also file tax returns to claim refunds of tax withheld even when the taxable income is nil. The reporting obligation for different taxpayers is dependent on their legal status. Individual and salaried taxpayers are not required to file a comprehensive tax return. However, corporate taxpayers are required to file a detailed and comprehensive tax return. In the case of taxpayers with turnover exceeding 10 million rupees, such taxpayers are required to obtain a tax-audit report from a chartered accountant (however, where the turnover is up to 20 million rupees, the non-corporate taxpayer may opt for payment of tax on a presumptive basis and avoid the requirement of a tax audit). Similarly, where a taxpayer has undertaken a specified transaction with an associated party (where one of the transacting parties is a non-resident), the same is required to be certified by a chartered accountant to be at arm's length price from a transfer pricing perspective. The tax authorities review the tax returns of different categories of taxpayers based on the complexity and risk profiling of the taxpayer within the prescribed time limits. The ITA provides extended time periods for review of cases where transfer pricing is involved. In certain special cases, during the review, an audit in addition to the review by the authorities can be ordered, to be conducted by a chartered accountant.

There is no difference in indirect tax reporting requirements between a business entity and an individual. The GST law prescribes a threshold of 2 million rupees in aggregate turnover for a person or

business entity to become liable for registration and payment of tax if the person is engaged in supply of both goods and services or services alone; however, a person or business entity engaged only in supply of goods has a threshold of 4 million rupees in aggregate turnover to become liable for registration and payment of tax. This threshold has been reduced to 1 million rupees for certain special-category states, in lieu of their economy and the business generated by them. Other than this all taxpayers are supposed to file their returns in a similar fashion.

Requesting information

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 ITA, for the purpose of verifying the correctness of the tax return filed by the taxpayer, during the course of detailed scrutiny or assessment the tax authorities may request the taxpayer to provide books of account along with other related documents such as financial records, vouchers, invoices, agreements, bank statements and any other evidence that the tax officer finds it necessary to examine.

In the case of an individual taxpayer, the tax authorities may interview either the taxpayer or the authorised representative appointed by such taxpayer. In the case of a company or firm, the tax authorities can interview either the employee representing the company or firm or the authorised representative appointed by such company or firm.

There are no restrictions applicable while interviewing a taxpayer or the authorised representative appointed by the taxpayer.

GST laws prescribe that certain documents be maintained by all taxpayers in order to justify the claim in respective tax returns. These documents can be asked for by the tax authorities during the review of the tax return, and the taxpayer is under legal obligation to present them. They include transaction-related documents, bills, vouchers, trial balances, annual financial accounts, agreements, records and books of accounts. The tax authorities have the power to conduct searches/surveys of any premises or interview any taxpayer or any employee of such taxpayer. The tax authorities also have the power to issue a Show Cause Notice where they are under reasonable belief that the taxpayer has not complied with the provisions of the law.

Available agency action

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

Under the ITA, where there is wilful failure on the part of the taxpayer to provide or produce the documents during the time of scrutiny or assessment, then the tax authorities may levy a penalty of 10,000 rupees for each instance of failure. In addition, depending on the facts of the case, the tax authorities may also initiate prosecution of the taxpayer, who could face rigorous punishment in the form of imprisonment for a term that may extend to one year along with a fine.

Depending upon the facts of the case and subject to certain conditions, non-compliance on the part of the taxpayer can trigger search and seizure operations or surveys by the tax authorities.

The tax authorities may summon the taxpayer to furnish any document or information. The tax authorities may also conduct search/survey operations at the premises of the taxpayer to obtain any specific information or document. The tax authorities may also proceed to estimate the taxpayer's taxable turnover on a best-judgement basis if relevant information is not provided by the taxpayer. In such cases, the tax authorities assess the taxpayer based on relevant material available on record together with the past tax history of the taxpayer.

Under GST, a penalty not exceeding 5,000 rupees can be levied if the person fails to furnish the information required.

Protecting commercial information

7 | How may taxpayers protect commercial information, including business secrets or professional advice, from disclosure? Is the tax authority subject to any restrictions concerning what it can do with the information disclosed?

The information exchange between taxpayers and their legal advisors, which includes commercial information, business secrets and professional advice, is protected from disclosure through attorney-client privilege under the Indian Evidence Act 1872.

The tax authorities are not under a statutory obligation to maintain the confidentiality of the information shared by the taxpayer. Also, under the ITA, the tax authorities are empowered to enquire about and request any document or information, whether it is confidential or not. The ITA provides for sharing of information with other authorities notified from time to time. Where the privacy of taxpayers is violated, there lies effective remedy in the Constitutional Courts.

Under GST laws, the information shared between taxpayer and lawyers is protected by attorney-client privileges guaranteed under the Indian Evidence Act 1872. Also, as per the indirect tax laws, the tax authorities are empowered to enquire about and request any document or information whether it is confidential or not.

Information shared with the department in a statement made, return or accounts furnished, or any evidence on record is generally not to be disclosed. However, this protection from disclosure of information is not absolute. The benefit of confidentiality is not available in prosecution under the Indian Penal Code 1860 or Prevention of Corruption Act 1988.

Limitation period for reviews

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

Under the ITA, the tax authorities are empowered to initiate a review of the tax return filed by the taxpayer, which is required to be completed within 12 months from the end of the relevant financial year and is extended by 12 months in transfer pricing cases.

However, in cases of income escaping assessment subject to specified conditions, the tax returns filed by a taxpayer can be made subject to a tax review until the end of the seventh year from the end of the relevant financial year by way of a reassessment proceeding. Moreover, the period gets extended to 17 years from the end of the relevant financial year if the escaped income is in relation to any asset located outside India.

The general period of limitation for review of a GST return and raising of a demand is 33 months, and the period of limitation for issue of an order is three years from the due date for furnishing of the annual return for the financial year to which the tax not paid or short paid or input tax credit wrongly availed or utilised relates to. However, in the case of wilful misstatement or suppression of facts or fraud, the extended period of limitation for review of a GST return and raising of a demand is 54 months, and the period of limitation for issue of an order is five years from the due date for furnishing of the annual return for the financial year to which the tax not paid or short paid or input tax credit wrongly availed or utilised relates to.

Alternative dispute resolution

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

Under the ITA, the dispute resolution mechanism or settlement options available to taxpayers are as follows:

- Dispute Resolution Panel (DRP) is a mechanism that applies to Indian companies where the tax authorities have proposed to

make an adjustment to the arm's length price in relation to their transactions with overseas affiliates, and to all foreign companies that are assessed to tax in India. The DRP mechanism has been brought in at the assessment stage itself to provide the specified categories of persons with a time-bound alternative mechanism instead of adopting the appellate route through the Commissioner of Income Tax (Appeals), namely, the first appellate authority. The direction from DRP is required to be passed within nine months from the end of the month in which the draft order is forwarded to the taxpayer by the tax officer. Such directions issued by the DRP are binding on the tax officer, who is required to pass the final order based on such directions, which is appealable directly before the second appellate authority. The DRP has wide powers and can either confirm, reduce or enhance the additions proposed in the draft order. The taxpayer is not required to pay the tax demand (if any) until the passing of the final assessment order subsequent to the directions of the DRP. The DRP mechanism therefore offers a benefit of timeliness and speedy resolution to non-residents and to a certain category of residents.

- Mutual Agreement Procedure (MAP) is another alternative dispute resolution mechanism, available to the taxpayers covered by the Double Taxation Avoidance Agreement (DTAA). MAP can be resorted to where the taxpayer finds that the taxation is not in accordance with the DTAA regardless of remedies available in the ITA. The purpose behind MAP is to avoid double taxation for which the negotiations take place between the tax authorities of the countries that are parties to the DTAA.
- Advance Ruling and Advance Pricing Agreements are ex-ante settlement options available to taxpayers. Under the Advance Ruling option, the taxpayer can approach the tax authorities to determine the taxability of a specified transaction in advance before entering the transaction, which is binding up to the second appellate authority. Similarly, taxpayers can also enter into an arrangement with the tax authorities for determining the arm's length price of a transaction covered by the transfer pricing regulations in advance.
- The Income Tax Settlement Commission (ITSC) is a quasi-judicial body set up under the ITA. The objective of setting up of ITSC is to settle the tax liabilities in complicated cases, avoiding endless and prolonged litigation. The taxpayer can approach the ITSC during the pendency of assessment proceedings, subject to certain prescribed conditions. For making an application before the ITSC, the tax and interest on additional income disclosed before the ITSC has to be paid. The order passed by the ITSC is conclusive and no appeal to any authority can be made against the order.

The GST laws in India allow for an appeal to be filed by a taxpayer or the tax authority against any order issued by an adjudicating authority or the appellate authority. The GST laws empower revisional authorities to revise an order passed by a subordinate authority. Appeal by the taxpayer against an order passed by the adjudicating authority, the appellate authority or the revisional authority can be filed within three months from the date of receipt of such order. There are no other settlement options currently available under Indian GST law.

Advance rulings are ex-ante settlement options available to taxpayers. Under the advance ruling option, the taxpayer can approach the authority for advance rulings to determine the taxability of a specified transaction before entering the transaction. This option is available under GST law.

Collecting overdue payments

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

Under the ITA, the tax authorities may collect the tax dues by sale or attachment of movable or immovable properties of the taxpayer. Alternatively, the tax authorities may resort to garnishee proceedings for the recovery of tax dues.

Any amount payable by a taxable person in pursuance of an order passed under the GST laws is required to be paid within a period of three months from the date of service of the order, failing which, recovery proceedings shall be initiated. In case of non-payment of the amount, the tax authorities may distrain any movable or immovable property belonging to or under the control of the taxable person. The tax authorities have the power to collect the overdue tax by subsequent sale of movable or immovable property.

Penalties

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

Under the ITA, the tax authorities may impose a penalty in case of under-reporting of income or in case of misreporting of income by a taxpayer in the tax return. Misreporting of income is applicable to the cases where there has been a concealment or suppression of income by the taxpayer, whereas under-reporting refers to the cases where the income assessed by the tax authorities is more than the income reported by the taxpayer in the tax return. The tax authorities may also impose a penalty in case of non-deduction or non-payment of tax by the taxpayer. They may also impose various penalties for other non-compliance of the provisions of the ITA, such as a penalty for non-filing of reports or returns, non-appearance on issuance of summons or not responding to the notices issued.

The GST laws provide for imposition of penalties in case of non-payment of tax, or short payment, or erroneous refund, or wrongful availment or utilisation of input tax credit.

12 | How are penalties calculated?

The penalties levied under the ITA can be either fixed amounts or ad valorem on the amount of tax evaded. The penalty for under-reporting of income is 50 per cent of the amount of tax payable on the under-reported income. The penalty amount for misreporting of income is 200 per cent of the amount of tax payable on the under-reported income. Similarly, the penalty amount for non-withholding or non-payment of tax withheld is 100 per cent of the amount of tax not withheld or paid. Penalty for offences related to not furnishing returns and not complying with notices can be up to 10,000 rupees per offence.

Under the GST laws, the penalties are calculated as a percentage of the tax amount due to be paid to the government. Depending on the nature of contravention or violation, the penalty amount ranges from 10 per cent of the tax amount to an amount equal to the tax due, namely, 100 per cent of the tax amount.

13 | What defences are available if penalties are imposed?

Penalties cannot be imposed on the taxpayer if the taxpayer is able to prove that he or she was under a bona fide belief that there is reasonable cause for the failure. However, levy of penalty is at the discretion of the tax authorities.

Under GST laws, once the order levying penalty is passed by the tax authorities, the taxpayer can challenge the order before the appellate forum. Some of the grounds on which penalty imposed by the tax

authorities can be set aside are absence of mens rea, an interpretation issue and bona fide intent of the party.

Collecting interest

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

Under the ITA, different types of interest are levied for various kinds of delays or defaults. Interest is levied for:

- delay in filing the return of income;
- non-payment or short payment of advance tax;
- non-payment or short payment of individual instalment or instalments of advance tax (ie, deferment of advance tax);
- non-payment or shortfall of tax withheld; and
- non-payment of assessed tax.

Under the GST laws, interest is automatically levied on delay or failure in payment of taxes within the prescribed time limits. The interest on taxes can be collected in various situations. For example, generally interest will be payable in the following cases:

- late payment of taxes, as accepted in the tax return by the taxpayer; and
- late payment of taxes withheld under the withholding provisions.

Criminal consequences

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

Yes, criminal prosecution can be initiated as a result of a tax review initiated by the tax authorities. Under the ITA, a few of the circumstances under which prosecution proceedings can be so initiated are as follows:

- failure to pay tax withheld to the credit of the central government;
- wilful attempt to evade tax, penalties or interest chargeable or impossible;
- wilful failure to furnish returns of income in due time;
- failure to produce accounts and documents before the tax authorities;
- wilfully made false statements regarding the verification of returns of income filed;
- where a taxpayer wilfully and with the intent to enable any other person to evade tax or interest or penalty chargeable or impossible, makes any statement that is false and suppresses any books of accounts or documents that may be used against the taxpayer; or
- abetting or inducing the taxpayer in any manner to make and deliver false statements with the intent to deceive the tax authorities.

Criminal prosecution is not dependent on the type of taxpayer but on the nature of the offence committed by the taxpayer. It is noteworthy that all the offences under the ITA are compoundable in nature.

The GST laws provide for criminal consequences for, by way of example, the following types of offences:

- wilful failure by the taxpayer to produce accounts or documents;
- false statement made by the taxpayer;
- falsification of books of accounts or documents.

Enforcement record

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

Under the ITA, as per the last available data, the total number of returns filed was 68.6 million, out of which only 0.35 per cent were selected for review. Further, out of these 0.35 per cent of the returns, 0.15 per cent were select for limited scrutiny and the remaining 0.20 per cent were

selected for complete scrutiny. Thus, a total of 99.65 per cent of the returns were accepted as is. In the recent past, litigation has significantly reduced due to a retrospective increase in the monetary limit for departmental appeal before different appellate fora. However, there is no clarity on the enforcement based on search and seizure and cases where assessment is reopened based on information received from different sources, and in such cases litigation is rampant in the writ jurisdiction of the High Courts.

THIRD PARTIES AND OTHER AUTHORITIES

Involvement of third parties

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 empowered to call for information from third parties such as stock brokers and banks as a part of the review of the taxpayer's returns. The tax authorities can require them to furnish information in relation to specific points or to furnish statements of accounts and affairs that they think might be useful in the tax proceedings.

If any third party fails to furnish in due time any information, statement or other document as required by the tax authorities, then the tax authorities have an option to impose a penalty on such person for their failure to comply with the directions of the authorities.

In addition to the above, the tax authorities have the power to issue a summons, and in this respect they have the same powers as those of a civil court trying a suit. Such powers include discovery and inspection, enforcing the attendance of any person (including any officer of a banking company) and examining him or her on oath, compelling the production of books of accounts and other documents and issuing commissions.

The tax authorities are empowered to call for information from third parties, for example stockbrokers and banks, as part of the review of the taxpayer's returns. The tax authorities can require them to furnish information in relation to specific points and provide statements of accounts and affairs that are potentially useful in the tax proceedings.

If any third party fails to furnish in due time any information, statement or particulars as required by the tax authorities, then a penalty may be levied, as prescribed, as long as such failure continues.

In addition to the above, the tax authorities have powers to issue summonses, and in this respect they have the same powers as those of a civil court when trying a suit. Such powers include discovery and inspection, enforcing the attendance of any person (including any officer of a banking company and examining him or her on oath), compelling the production of books of accounts and other documents and issuing commissions.

Cooperation with other authorities

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 cooperate with a number of authorities in India, including the Serious Fraud Investigation Office, National Intelligence Grid, Ministry of Corporate Affairs, Central Board of Direct Taxes, CBIC, Ministry of Finance, Directorate of Enforcement and various other enforcement agencies. For the purposes of Customs, the officials cooperate with these agencies.

The Indian tax authorities also cooperate with tax authorities in other countries to share information. India has entered into a number of double tax avoidance agreements, tax information exchange agreements, free trade agreements, progressive trade agreements and comprehensive economic partnership agreements with other jurisdictions under

which the Indian tax authorities and the tax authorities of those countries have agreed to share information in relation to tax matters.

SPECIAL PROCEDURES

Hardship procedures

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

There is no special procedure prescribed under the ITA that applies in the case of financial or other hardship being faced by the taxpayer. However, in some cases, to remove genuine hardships from taxpayers, the board may give some exemptions through a general or specific order. In the context of corporates undergoing an insolvency resolution process, where application for corporate insolvency resolution stands admitted by the National Company Law Tribunal under the Insolvency and Bankruptcy Code 2016, there applies a moratorium on the pending tax proceedings up to the completion of such corporate insolvency resolution process.

There is no special procedure prescribed under the indirect tax laws that apply in the case of financial or other hardship being faced by the taxpayer.

Voluntary disclosure and amnesties

20 | Are there any voluntary disclosure or amnesty programmes?

There have been some voluntary disclosure and amnesty programmes in the past. However, it is very uncertain whether similar schemes will be launched in the future.

There are no specific amnesty programmes provided in the indirect tax laws. However, the benefit of a reduced quantum of penalty can be availed if the tax and interest short paid are paid voluntarily within a specified time frame.

RIGHTS OF TAXPAYERS

Rules protecting taxpayers

21 | What rules are in place to protect taxpayers?

There exists a citizen's charter issued by the Income Tax Department that expresses commitment towards, for example, accountability, equity and transparency. Further, a hierarchy of Grievance Cells at the central and regional levels has been created in the Income Tax Department for prompt redressal of public grievances, safeguarding the rights and dignity of taxpayers and enforcing higher standards of accountability on officers and staff of the department by taking disciplinary action against erring persons in selected cases.

The CBDT has also set up ASK counters at various buildings of the Income Tax Department – a single-window mechanism for taxpayers to get their grievances resolved in a quick, fair and time-bound manner.

Requesting information

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

A taxpayer can inspect as well as obtain certified copies of the assessment and other records on payment of prescribed fees. Normally, the request for inspection or copies of the assessment or other records is complied with within three days of receipt of such request.

A third party can also make an application, to the Principal Chief Commissioner or Chief Commissioner, or Principal Commissioner or Commissioner, in the prescribed form for obtaining any information relating to any assessee received or obtained by the income tax

authorities in performance of their functions. If the Principal Chief Commissioner or Chief Commissioner, or Principal Commissioner or Commissioner, as the case may be, is satisfied that it is in the public interest to do so, he or she will furnish such information as requested by the third party.

The central government has the power to direct that no information shall be furnished or produced by a public servant in respect of a particular class of taxpayers or except to certain authorities. Pursuant to these powers, the central government has directed that no public servant other than the Principal Chief Commissioner or Chief Commissioner, or Principal Commissioner or Commissioner, as stated above, shall furnish or produce any document or information that comes into his or her possession during discharge of official duties.

In India, another statute, the Right to Information Act 2005 (the RTI Act), empowers citizens to have access to information under the control of public authorities. However, the RTI Act also contains restrictive provisions limiting its application in case of certain classes of information. Exceptions include information related to commercial trade secrets harmful to the competitive position of the taxpayer, personal information and information related to income of the taxpayer, that has no relationship to the public interest and can cause invasion of privacy.

Tax authority governance

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

Yes, the tax authorities are subject to internal audit conducted under the aegis of the Comptroller and Auditor General of India. The objective of this internal audit is to ensure that the tax officer has not made any errors, omissions and mistakes in the assessments and if so ensuring remedial action in respect of the same. If any error or mistake is found in the assessment made by the tax authorities, then it is communicated to the respective tax officer by the audit team in the form of an audit objection, and the officer is required to initiate appropriate remedial action within two months of receipt of the audit objection and pass the necessary orders within six months thereafter, having given a reasonable opportunity of being heard to the taxpayer.

COURT ACTIONS

Competent courts

24 | Which courts have jurisdiction to hear tax disputes?

Typically, the tax dispute first arises before the tax authority, which acts in a quasi-judicial manner. It acts as both investigator and adjudicator. The powers of the first appellate body are co-extensive and coterminous to the primary tax authority. The second appellate forum is also a quasi-judicial one – the Income Tax Appellate Tribunal (ITAT), where the appeal is heard in a manner like that of a civil court. The next two appellate fora, the High Court and the Supreme Court, are formal civil courts that deal with only those matters that involve a substantial question of law.

Under indirect tax, the court of first instance for tax disputes is the Customs Excise and Service Tax Appellate Tribunal (the Tribunal). The Tribunal adjudicates disputes in relation to questions of law, questions of fact or both. Taxpayers can file an appeal before the Tribunal without any restriction; however, for the tax authorities, the CBIC prescribes monetary limits of tax demand, from time to time, exceeding which a case can be appealed before the Tribunal.

If either party to the appeal is not satisfied with the order of the Tribunal, then an appeal can be preferred before the jurisdictional High Court; however, such appeal can only be preferred if the issue involves a question of law – in other words, if an issue is related to a question of fact, then the order of the Tribunal is final. Further appeal against the

order of the High Court can be preferred before the Supreme Court, the highest court in India. The order passed by the Supreme Court is final and binding upon both the parties and no further appeal can be preferred against the same.

Lodging a claim

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

A tax dispute arises before the tax authority by virtue of a deficiency notice served upon the taxpayer. The order of the first tax authority is appealable in its entirety before the first appellate authority. The order of the first appellate authority is entirely appealable before the ITAT. However, the order of the ITAT is appealable before the High Court only to the extent there arises a substantial question of law. The judgment of the High Court is further appealable before the Supreme Court.

A tax dispute can be brought before the Tribunal or court by way of appeal against any final decision of the tax authorities to levy tax or penalties. There is no minimum threshold prescribed for the taxpayer to file an appeal before the Tribunal or the court, as the case may be. However, the tax authorities can only file an appeal before the courts if the tax effect is more than as per the monetary limits prescribed by the CBDT or CBIC.

In order to bring an appeal before the Tribunal, the taxpayer has to file an appeal in the prescribed format along with the order against which appeal has been filed. The GST laws prescribe for a mandatory deposit of 10 per cent of the disputed amount if an appeal is preferred before the appellate authority; if the appeal is preferred before the Appellate Tribunal an additional 20 per cent of the disputed amount is to be deposited before filing the appeal.

An appeal against the order of the Tribunal lies with the High Court, and the time limit for filing the same is 180 days from the date of receipt of the order of the Tribunal by the taxpayer. The High Court may admit an appeal even after the lapse of this period if it deems fit.

Further, an appeal against the order of the High Court lies with the Supreme Court and the same can be filed only when the High Court grants a certificate stating that a case is fit for filing an appeal before the Supreme Court. If the High Court refuses to grant such certificate then an appeal can be brought before the Supreme Court by way of a Special Leave Petition.

The Constitution of India also provides an alternate remedy to taxpayers by way of writ petition before the jurisdictional High Court. A writ petition can be filed if gross injustice has been caused to the taxpayer by way of abuse of powers by the tax authorities, or there is wrongful exercise or excessive exercise of jurisdiction by the tax authorities. A writ can also be issued to quash an order that is vitiated by an error apparent on the face of the record or that is passed in violation of the principles of natural justice, or to quash a summons or an order that has been issued without application of mind. The High Court may issue a writ to release an assessee from illegal detention by the officer concerned. The Court will interfere by way of writ if the action is mala fide or arbitrary or does not comply with the statutory requirements, or if the action amounts to an exercise in futility. A writ petition acts as an effective tool in the legal system of India, leading to speedy redressal of the grievances of taxpayers and coming to the rescue of them as an overstepping authority in case of injustice caused by the tax authorities.

Combination of claims

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

Yes, tax claims affecting multiple tax returns are brought together by the appellate fora for the sake of convenient adjudication. Multiple taxpayers are also brought together before the ITAT and higher appellate fora for

the sake of convenient and expeditious adjudication where common issues are to be adjudicated upon.

From an indirect tax adjudication perspective, yes, the Tribunal and the courts have the power to bring multiple claims together so that they can be heard at the same time, to pass litigation orders. Orders can be made for bringing multiple cases together by the Tribunal or court on its own initiative, or at the request of the parties.

Generally, where there are a number of cases that turn on the same point of law, the tax authorities and the taxpayers will agree which case is the most suitable to proceed as the lead case, and ask the Tribunal or court, as the case may be, to decide the issue on the basis of the facts of that particular year. Where, however, agreement cannot be reached, the parties may make representations to the court, and a hearing may occur during which the court will decide which case will be the lead case.

Pre-claim payments

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

The taxpayer need not pay the whole amount of tax in dispute before bringing a claim before the court and can apply for a stay in respect of the demand raised by the tax authorities. The stay is granted by the tax authorities either on the complete amount of the tax demand or on deposit of a percentage of the amount of tax in dispute, which in case of income tax is 20 per cent for the first appellate authority, depending upon the circumstances.

In the case of indirect tax disputes, the taxpayer need not pay the whole amount of tax in dispute before bringing a claim before the court; however, a certain percentage of the disputed amount is required to be paid before preferring an appeal before the appellate authority or the Tribunal. The percentages differ depending on the appellate level in which the appeal is pending. The GST laws prescribe the maximum mandatory deposit of 30 per cent of the disputed amount. Once the mandatory deposit is made, stay against recovery of the remaining amount is automatically granted until the matter attains finality.

Cost recovery

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

Both the taxpayer and the tax authorities are required to pay the prescribed fee at the time of preferring appeals before different appellate fora. Apart from such fee, discretionary costs can be imposed by the courts in exceptional cases on the taxpayer as well as on the tax authorities. There is no other way prescribed in law for recovery of the costs of a dispute.

It is in the inherent powers of the Tribunal and the courts to award costs to the taxpayer as well as to the tax authorities, as the case may be, if they consider that one of the parties has acted unreasonably in bringing, defending or conducting the proceedings before them. However, generally, it has been observed that it is difficult for litigants to recover the costs.

Third-party funding

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 income tax law is silent about third-party funding or insurance for the costs of a tax dispute, including bringing a tax claim to court. There appears to be no restriction on third parties (non-lawyers) funding the litigation and getting repaid after the outcome of the litigation. A taxpayer can also buy an insurance policy in order to cover the costs of a tax dispute.

Court decision maker

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

The decision maker in the ITAT is a bench consisting of a judicial member and an accountant member. In the High Court and the Supreme Court, appeals are decided by a bench consisting of two or more judges. No jury trial is available to hear tax disputes.

Depending on the stage of proceedings, the forum for adjudication will vary and accordingly so will the decision maker. In the Tribunal, the decision maker comprises a judicial member (having a law degree and a minimum of 10 years' experience in law practice) and a technical member (member of Indian Customs or Central Excise Service Group A, or both, and who has held the post of Commissioner or above for at least three years). However, in the GST Appellate Tribunal (yet to become functional), the bench shall comprise a judicial member and two technical members (one representing the centre and the other the state).

In both, in the court of first and second appeal, namely, the High Court and Supreme Court respectively, the decision maker is a division bench comprising two judges. Jury trial is not available to hearings of tax disputes in India.

Time frames

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

Tax trials, in other words, assessment proceedings before the tax officer, are required to be completed within two years from the end of the relevant financial year, which is extended to three years where the taxpayer has entered into international transactions and the case is referred to the transfer pricing officer. The first appeal against the assessment order is recommended to be disposed of within a period of one year from the end of the financial year in which the same is preferred, whereas a four-year period is recommended for the disposal of the second appeal. However, there is no time frame prescribed for completion of appeals pending before the High Court or the Supreme Court.

The time frame for each trial under indirect tax depends on the nature and complexity of the underlying dispute. Before a tax dispute reaches the tax tribunal, the adjudicating tax authorities may take about one to two years (first authority) plus another one to two years (first appellate authority) for completion of first appellate proceedings. At the level of the tax tribunal, while the prescribed outer limit is four years for passing orders, this time limit is discretionary and subject to further relaxation.

Disclosure requirements

32 | What are the requirements concerning disclosure or a duty to present information for trial?

The tax authority, while conducting the trial, is bestowed with immense powers to call for information as well as personal presence. In its quest for information, the tax authority can in specified circumstances resort to the rather intrusive procedure of a survey at the business premises of the taxpayer.

During a tax trial before the court or before the tax tribunal, the parties file all the documents they seek to rely upon. If any such document was not produced at any stage before the tax authorities prior to approaching the Tribunal or court, liberty for relying on it must be sought before producing it. The Tribunal and court have inherent powers to summon production of such additional documents as they deem fit for adjudication of the dispute.

Permitted evidence

33 | What evidence is permitted in a tax trial?

Oral as well as documentary evidence is permitted during the trial. The taxpayer is permitted to testify – in fact, the trial is based primarily on information furnished by the taxpayer. Testimony of the taxpayer is subject to the discretion of the tax authorities. Experts can also testify in exceptional cases. Evidence, as a matter of practice, is furnished in the English language, thus translation is required. It is pertinent to state that the tax trial is not subject to the strict law of evidence or code of civil procedure as the same is conducted in a quasi-judicial manner.

Under indirect tax, a tribunal is the last fact-finding authority in the dispute resolution system. It has inherent powers to summon the party involved in the dispute to make an oral statement (or more than one) during the proceedings.

An appeal can be preferred before the High Court and Supreme Court only on a substantial question of law, and these fora are not for fact-finding. Thus, no new evidence is brought before the courts at this level. However, the pleadings filed before the courts stating all necessary facts and averments supported are by an affidavit and it is presumed that the party making such averment is swearing on oath about the truth and veracity of such statements. Any error in such statements may attract penal consequences.

Permitted representation

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

Normally, the taxpayer can be represented by an advocate or a local certified public accountant before the tax tribunal; and by an advocate before the High Court and Supreme Court. If the taxpayer so decides, he or she can also represent himself before all the courts. Pro bono legal services are provided by various institutions if a taxpayer cannot afford legal representation. The tax authorities are represented by an officer of the Indian Revenue Services and in exceptional cases by a special counsel before the tax tribunal; and by an advocate from the panel of advocates maintained by the tax department before the High Court and Supreme Court. If a dispute involves a complex question of law, then the tax department engages the services of the Additional Solicitor General of India for representation in such matters before the High Court and Supreme Court.

Publicity of proceedings

35 | Are tax trial proceedings public?

The proceedings before the tax authorities are conducted in person and are not public. However, the proceedings before the Tribunal or the courts are conducted in an open court. The written orders passed in such proceedings are also available to the public on the websites maintained by the respective forums. Certified copies of the documents filed by litigants in the courts are made available to the public only upon a specific request put forward in this regard before the appropriate authorities.

Burden of proof

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

The burden of proof in a tax trial is on the taxpayer regarding the claims made by the taxpayer. The burden shifts upon the tax authority regarding the disallowance of expenditure or addition of income made during the trial, except in certain circumstances.

Case management process

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

Tax trials are conducted by numerous jurisdictional tax authorities across the country as per the subjective administrative convenience and the time limits laid down in law. As there is no formal court conducting the trial, there is no formal case management process for a tax trial.

Appeal

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

Yes, a court decision can be appealed. Appeal against an order of the ITAT can be made before the High Court only if it involves a substantial question of law. A decision of the High Court, which presents a substantial question of law, or deals with questions upon which there are conflicting decisions of the High Court, may be appealed against before the Supreme Court.

For indirect tax, see question 25.

UPDATE AND TRENDS

Key developments of the past year

39 | What are the current trends in enforcement? What are the current concerns of the authorities and taxpayers? Are there proposals to change the relevant legislation or other rules?

The trend in enforcement of tax controversies is not entirely encouraging for taxpayers. These concerns continue, considering the backlog of cases in the appellate fora due to which numerous issues stand unresolved.

Having said that, there has been a considerable fall in litigation in the appellate fora due to a retrospective decrease in the monetary limits on the revenue for preferring an appeal. In addition, the introduction of the Advance Pricing Arrangement (with effect from 1 July 2012) has considerably reduced transfer pricing litigation and introduced much-needed certainty for multi-national enterprise (MNE) taxpayers.

There is a proposal to replace the current law contained in the ITA by a Direct Tax Code. The proposal and framework of such Code were being deliberated upon by a taskforce comprised of tax experts. It is expected that the Direct Tax Code would change the manner in which income tax is enforced and administered in India. The taskforce submitted its report to the Finance Minister on 19 August 2019.

The current ITA undergoes amendment by the Finance Act passed in the course of the annual budget session of Parliament. The budget proposals applicable from the current financial year April 2019 to March 2020 were proposed on 5 July 2019; they received presidential assent on 1 August 2019, were notified on the same day and thus became Finance (No. 2) Act 2019. Some of the key amendments to the ITA are summarised below:

- The general corporate tax rate is 30 per cent. Certain prescribed corporates are liable to tax at the rate of 25 per cent. The benefit of this reduced corporate tax rate of 25 per cent has now been extended to domestic companies with turnover up to 4 billion rupees during financial year 2017–18 (previously the benefit was available for companies with turnover up to 2.5 billion rupees for financial year 2016–17).
- Presently, unlisted companies are liable to pay additional income tax at the rate of 23.29 per cent (including surcharge and cess) in case of buy-back of their shares. Such buy-back tax is now extended to shares bought back by listed companies.
- Presently, to qualify for a tax-neutral demerger, the existing provisions require the resulting company to record assets and liabilities at values appearing in the books of account of the demerged

company. It is now proposed to relax this condition and allow the resulting company to record the value of assets and liabilities at a value different from book value in compliance with Indian Accounting Standards (Ind-AS).

- In order to incentivise start-ups, the current conditions for carry-forward and off-set of losses have been relaxed for eligible start-ups. Further, the sunset date of the capital gains exemption, from sale of residential property and investment of such proceeds into equity shares of an eligible start-up, has been extended by two years (ie, until 31 March 2021) along with relaxation of certain other conditions.
- In order to promote development of a world-class financial infrastructure, it has been proposed to give additional benefits to units located in an International Financial Services Centre (IFSC). The additional benefits include: (i) exemptions from tax on capital gains income on transfer of specified assets by category III alternative investment funds (with non-resident investors) located in an IFSC; (ii) tax exemption on interest earned by non-residents from monies borrowed by a unit located in an IFSC; (iii) no dividend distribution tax on distribution of accumulated profits by a unit of an IFSC; and (iv) tax holiday (profit-linked incentive) extended to 100 per cent for 10 consecutive tax years out of a block of 15 years.



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OVERVIEW

Legislation

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 Duties 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, which 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.

Relevant authority

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

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. During 2018 the organisational structure of Revenue was realigned from a regional

division basis to one that is based on a nationally segmented taxpayer base. The following divisions now exist within Revenue:

- Large Corporates Division;
- Large Cases – High Wealth Individuals Division;
- Medium Enterprises Division;
- Customs Division;
- Personal Division;
- Business Division;
- Investigations and Prosecutions Division;
- Personal Taxes Policy and Legislation Division;
- Business Taxes Policy and Legislation Division;
- Planning Division;
- Corporate Services and Accountant General's Division;
- Revenue Solicitor's Division;
- Information, Communications Technology and Logistics Division;
- Collector General's Division;
- International Tax Division; and
- Indirect Taxes Policy and Legislative 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

Compliance with tax laws

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.

Types of taxpayer

4 | Are different types of taxpayers subject 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 Corporates Division who have opted into a cooperative compliance framework would have closer contact with Revenue officials on a more regular basis.

Requesting information

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.

Available agency action

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, and ultimately non-compliance during an audit may result in increased penalties.

Protecting commercial information

7 | How may taxpayers protect commercial information, including business secrets or professional advice, from disclosure? Is the tax authority subject to any restrictions concerning what it can do with the information disclosed?

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 in question 5, 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.

Revenue is obliged by legislation to keep all taxpayer information held by it confidential. Information held by Revenue can only be disclosed in accordance with the TCA or other statutory provisions. Revenue is not obliged to withhold information in criminal proceedings or in proceedings to do with the administration or enforcement of the TCA or related legislation.

Revenue may only keep records that have been obtained from a taxpayer for as long as the investigation or audit into the taxpayer is

ongoing. Information stored and maintained by Revenue is subject to the Data Protection Acts 1988 and 2018, and Revenue must comply with the General Data Protection Regulation (EU) 2016/679. The data protection laws ensure that Revenue must act with a clear legal basis, while safeguarding taxpayers' rights as regards the use of retention and accuracy of information. Whereas before the Finance Act 2017, Revenue was required to disclose the name of the taxpayer relevant to a notice for information from a third party, this is no longer required. Revenue can seek non-specific information on taxpayers from third parties.

The TAC is required to publish determinations but must ensure that the identities of the parties involved are not revealed. The TAC may also publish reports on its decision, which must as far as possible prevent the identification of any party involved in the decisions.

Limitation period for reviews

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.

Revenue is not bound by the four-year look-back period for the raising or amending of assessments in cases of fraud or neglect on the taxpayer's behalf.

Alternative dispute resolution

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 give 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, 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.

Collecting overdue payments

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.

Penalties

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-geared 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's 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.

Collecting interest

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.

Criminal consequences

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.

Enforcement record

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

Involvement of third parties

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. Taxpayers' rights regarding the privacy and security of their personal data are protected by the Data Protection Acts 1988 and 2018.

Cooperation with other authorities

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 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

Hardship 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 to 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.

Voluntary disclosure and amnesties

20 | Are there any voluntary disclosure or amnesty programmes?

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

The procedure for voluntary disclosure is recognised and provided for within the Taxes Consolidation Act 1997 (TCA) and the Revenue's Code of Practice for Revenue Audit and other Compliance Interventions (2017), which sets out the guidelines to be followed by the taxpayer and Revenue when making qualifying disclosures.

The benefit of availing of the qualifying disclosure procedure is that it entitles the taxpayer to a reduction in penalties in any tax settlement with Revenue, and the taxpayer's name will not be published in the list of tax defaulters in accordance with section 1086 TCA.

A taxpayer is entitled to make a qualifying disclosure in respect of undeclared tax, errors or duty liabilities at any time. However, any disclosure will be excluded from being a 'qualifying disclosure' in circumstances where a Revenue investigation has already commenced or the matters contained in the disclosure were already known to Revenue through their own investigations.

There are two types of qualifying disclosures – prompted and unprompted. A prompted qualifying disclosure applies in circumstances where a notification of a Revenue audit has issued from Revenue but before the examination of the books and records or other documents has commenced. In contrast, an unprompted qualifying disclosure is a disclosure letter submitted in the absence of any communication from Revenue. In practice, the level of the penalty will depend on whether the disclosure is prompted or unprompted, with unprompted disclosures attracting lower penalties. Another criterion in the level of the penalty is the degree of cooperation that the taxpayer has provided in dealings with Revenue.

RIGHTS OF TAXPAYERS

Rules protecting taxpayers

21 | What rules are in place to protect taxpayers?

Revenue is subject to the Data Protection Acts 1988 and 2018. 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.

Requesting information

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

Under the Data Protection Acts 1988 and 2018, 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. The implementation of data protection legislation in Ireland is supervised by the Data Protection Commissioner.

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.

Tax authority governance

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. Likewise, actions of the Revenue may be open to judicial review directly before the High Court in certain circumstances.

COURT ACTIONS

Competent courts

24 | Which courts have jurisdiction to hear tax disputes?

In Ireland, the High Court, Court of Appeal and 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 an 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.

Lodging a claim

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

The taxpayer must submit a written notice of appeal to the TAC. It is possible for taxpayers to make their appeals electronically through the TAC website. 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.

An individual can appeal a decision of the TAC to the High Court in situations where they consider that the TAC erred in its decisions in relation to a point of law only, but not in relation to the facts. A party to an appeal process who is dissatisfied with a decision of the TAC as being erroneous on a point of law may by notice in writing require the TAC to state and sign a Case Stated for the Opinion of the High Court. Such written notice must be given to the TAC, and copied to any other party to the appeal, no later than 21 days from the date on which the decision has been notified to the parties, and must specify the particular respect in which the decision is alleged to be erroneous in law. Decisions of the High Court can be then appealed to the Court of Appeal, and from there to the Supreme Court.

Combination of claims

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.

Pre-claim payments

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 precondition 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 will be due and payable one month from the date of the determination of the appeal.

Cost recovery

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

Each party is responsible for its own costs for a TAC hearing. However, the winning party may seek to recover costs of the dispute at the High Court level.

Third-party funding

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.

The Supreme Court has recently confirmed that the law of champerty in Ireland prohibits a third party with no bona fide interest in a dispute from funding another party's litigation.

Court decision maker

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.

Time frames

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.

Disclosure requirements

32 | What are the requirements concerning disclosure or a duty to present information for trial?

The TAC can request that the appellant and the Revenue submit a Statement of Case. The TAC may also direct in what order Statements of Case are to be submitted. Typically a Statement of Case would contain an outline of the relevant facts, a list of and copies of the relevant documents that will be relied upon, details of any witnesses, details of the statutory provisions being relied upon and any case law being relied upon. The Statement of Case must be furnished to the other party at the same time as it is furnished to the TAC and the TAC is to be given written confirmation that the other party has received a copy of the Statement of Case.

Permitted evidence

33 | What evidence is permitted in a tax trial?

The appeal commissioners may summon any person who they think is 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 questioned in person. 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, but will not be compelled, to give evidence. The appeal commissioners may allow evidence to be given orally or in writing and may allow the submission of evidence that would not ordinarily be admissible in court. The appeal commissioners can limit the number of witnesses whose evidence a party may put forward.

Permitted representation

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

The taxpayer can submit their own appeal to the TAC or it can be submitted on their behalf by a legal representative. The TAC 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 TAC may hear such person if they are satisfied it is appropriate to do so. The 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.

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.

Publicity of 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.

Burden of proof

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.

Case management process

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, the 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 should at the same time furnish the other party with a copy of such notification and should 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 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.

Appeal

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 only on a point of law 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



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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.

UPDATE AND TRENDS

Key developments of the past year

39 | What are the current trends in enforcement? What are the current concerns of the authorities and taxpayers? Are there proposals to change the relevant legislation or other rules?

Revenue published its 2018 Annual Report in May 2019. In it, Revenue has reiterated its commitment to protecting Exchequer funds and supporting voluntary compliance by confronted non-compliance. The Annual Report recognises the external challenges presented by the evolving international tax agenda, state aid, Brexit, a strong economy and advancing technology. These challenges have driven the structural change described in question 2.

In relation to audit and enforcement, there continues to be a focus on risk-based auditing and the use of technology. There have been specific initiatives focusing on compliance within the construction and e-commerce sectors.

Italy

Massimo Antonini, Raul-Angelo Papotti and Irene Pellecchia

Chiomenti

OVERVIEW

Legislation

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.

Tax treaties, as long as they are implemented by the Italian Parliament, are also 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 on taxpayers. Taxpayers may 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.

Relevant authority

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 up to three areas, according to the different types of taxpayers and different activities performed) and a legal office (which 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

Compliance with tax laws

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; and
- 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.

Types of taxpayer

4 | Are different types of taxpayers subject 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 payslip or in the pension instalment for July.

Individuals who earned business income and income deriving from the practice of crafts and professions must submit their tax return by 30 September of each year.

Requesting information

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 Italian tax authorities have the faculty to undertake accesses, inspections and tax-audit activities at the taxpayer's place of business; otherwise they can conduct their activities in their offices, requesting the taxpayer or third parties to provide them with information and documents.

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 reply, 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 investigate 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.

Available agency action

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 €250 and €2,000 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.

Protecting commercial information

7 | How may taxpayers protect commercial information, including business secrets or professional advice, from disclosure? Is the tax authority subject to any restrictions concerning what it can do with the information disclosed?

The Revenue Agency's audit must be carried out confidentially and without undermining the potential business secrets of the taxpayer. However, to guarantee privacy and confidentiality, Italian tax law does not specify what duties the tax authority is under.

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.

Limitation period for reviews

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, otherwise subject to forfeiture, by 31 December of the fifth year following the year in which the relevant tax return was filed.

In the case 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.

Alternative dispute resolution

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

Law Decree No. 119 of 24 October 2018 introduced some temporary measures in order to reduce tax litigation, providing for an optional tax amnesty such as:

- settlement of tax-audit reports;
- settlement of tax assessments;
- settlement of tax-collection deeds;
- annulment of tax debts up to €1,000;
- settlement of tax-collection deeds concerning the 'own resources' of the European Union (EU); and
- settlement of pending tax litigations.

An extension of time limits has been announced for the settlement of the tax-collection deeds.

Furthermore, under Italian tax law there are several proceedings that regulate the claims before an appeal is filed before the tax courts. These procedures may contribute to reducing the time and costs of litigation and, in some cases, can lead to a reduction in tax penalties.

The key features of these procedures are analysed below.

Early payment

If taxpayers pay the total amount of the assessed taxes (with related interest) within 60 days from the service of a notice of assessment, they are entitled to a reduction of penalties of up to one-third of the minimum applicable penalty.

Voluntary correction of tax return

The voluntary correction of tax return procedure allows taxpayers to remedy their omissions or to amend irregularities in the filing of the tax returns or in the payment of taxes. The process implies a reduction of the applicable penalties and it is permitted until the deadlines provided for by the law.

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 autonomously withdrawn by the tax authority or at the taxpayer's request. However, the submission of the application does not affect the deadline for filing an appeal before the tax court. Withdrawal may also be carried out if the tax dispute is ongoing before the tax court or if the deed has already become final due to the expiration 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 following the service 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 following 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 before 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. By settling the dispute, the taxpayer also obtains a reduction of penalties due:

- in the case of a settlement before the provincial tax court, the taxpayer would pay a penalty equal to 40 per cent of the minimum provided for by law; and

- in the case of a settlement before the regional tax court, the taxpayer would pay a penalty equal to 50 per cent of the minimum provided for by law.

Tax mediation

For tax assessments claiming less than €50,000, taxpayers who intend to appeal must submit an application for tax mediation. The request will be filed with the tax office that has issued the tax assessment. The application must contain an analytic proposal with the recalculation of the amount of the claim. If the tax office decides not to accept the claim for a full withdrawal 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 filing of the application, the Revenue Agency does not accept the claim, the filing of the application will produce the same effects as a formal appeal against the notice of assessment.

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 that is 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.

Collecting overdue payments

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

Overdue tax collection is entrusted to a public entity (Agenzia delle Entrate-Riscossione) and companies that, within a certain territory, are entrusted on a concession basis with the task of collecting taxes, even by force, on behalf of the Revenue Agency.

Further to the service of a notice of assessment, the taxpayer is requested to pay within 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 movable registered assets (eg, cars). Should this be the case, the Revenue Agency must serve a specific payment claim 30 or 20 days before the mortgage or the block, respectively.

Moreover, 270 days after the service of the notice of assessment, the collector agent can enforce collection procedures, such as the divestiture of movable assets (eg, bank accounts) and the seizure of real estate and movable property.

Penalties

11 In what circumstances may the tax authority impose penalties?

The Revenue Agency imposes administrative penalties if:

- 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 licences, concessions or authorisations necessary for specific businesses or activities.

12 | How are penalties calculated?

The 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 in different fiscal years, commits several violations that, in their progression, prejudice or tend to prejudice the determination of the taxable income or of taxes, a 'juridical' cumulative 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' cumulative penalty, which is a simple sum of the applicable sanctions, is applicable if it is less than the 'juridical' cumulative 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 settle only the penalties by paying an amount equal to one-third of the penalties themselves. The payment must be made before the expiry of the term for filing the tax appeal. The settlement concerns only the economic 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.

Collecting interest

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

Interest on the outstanding amount is automatically calculated as a consequence of tax assessments and is equal to:

- 4 per cent per year, from the day following the one on 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 interest equal to 4.5 per cent per year on the amount due.

Criminal consequences

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 communicate to the competent authority that they have acquired information regarding a taxpayer's conduct that may constitute a criminal offence. The judicial authority then decides whether or not to carry out a 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 indicating therein costs deriving from invoices for non-existent transactions, the criminal penalty would consist of imprisonment for a term ranging from one year and six months to six years; and
- 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 penalty 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 penalty is imprisonment for a term ranging from one year to six years.

Enforcement record

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

According to the report issued in June 2019 by the Ministry of Economy and Finance, the Revenue Agency is totally successful in tax litigation in around 46 per cent of cases.

THIRD PARTIES AND OTHER AUTHORITIES

Involvement of third parties

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.

Cooperation with other authorities

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.

Despite the fact that 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

Hardship 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.

Voluntary disclosure and amnesties

20 | Are there any voluntary disclosure or amnesty programmes?

Non-Italian foreign companies belonging to multinational groups with consolidated group revenues exceeding €1 billion, that sell goods or provide services in the Italian territory for more than €50 million with the support of one or more Italian resident auxiliary companies, may apply to the Revenue Agency for an evaluation of the risk of existence of a permanent establishment in Italy in the past open tax periods.

If the existence of a permanent establishment is assessed, the company may define, in agreement with the Revenue Agency, the income attributable to the permanent establishment related to the tax periods for which the deadline to file a tax return has elapsed. Should this be the case: (i) penalties are reduced to one-sixth of the minimum provided for by the law; (ii) no criminal penalty may be enforced for the failure to file the tax returns; and (iii) the foreign company may apply for the Italian cooperative compliance programme.

RIGHTS OF TAXPAYERS

Rules protecting 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 with a number of executive regulations, on the one hand establishes general principles that the legislator must respect when introducing tax rules, such as a prohibition of analogy, the non-retrospective effects of tax rules, the simplicity of tax rules and a prohibition on 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 with other subsequent ordinary laws.

Requesting information

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 with regard to the applicant.

Tax authority governance

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.

Owing to its public nature, the Revenue Agency is subject to control by the State General Accounting Office and the Court of Auditors.

COURT ACTIONS

Competent courts

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 (third and final instance), which rules on decisions issued by the regional tax commissions, but only on legal grounds.

Lodging a claim

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 monetary 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.

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 his or her 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 deed of appeal must be served to the tax authority that has issued the assessment deed and filed before the tax court. The notification of the appeal may occur in these ways: through the postal service, by hand, via certified email 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 of the date on which the deed of appeal was served to the counterparty, file the trial record with the competent tax court, along with supporting documentation. From 1 July 2019, the appeal must be filed online using the SIGIT software (Sistema Informativo della Giustizia Tributaria). Exceptions are made in certain circumstances where the electronic procedure is optional.

After a claim has been filed, the tax court verifies that the tax due for the participation in tax court proceedings has been paid (*Contributo unificato tributario* (CUT)). CUT is only paid once, and there is no cost for the subsequent filing of briefs and documents. The amount of the CUT depends upon the value at stake in the dispute. The maximum amount 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 €50,000, taxpayers who intend to appeal must submit an application for tax mediation (see question 9).

Combination of claims

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

On the basis of the case law of the Italian Supreme Court, 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.

Pre-claim payments

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

The filing of the appeal does not, per se, interrupt the collection procedures.

If the taxpayer files a tax claim before 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 decision 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 decision 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) 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 juris*).

Cost recovery

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

In tax proceedings, the court shall require the unsuccessful party to bear the costs of litigation.

Under article 15(2) of Decree No. 546/1992, the costs of litigation can be (totally or partially) allocated equally only if both parties lose the lawsuit or for serious and exceptional reasons, to be specifically reported in the judgment.

Third-party funding

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.

Court decision maker

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.

Time frames

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

From the filing of the appeal before the provincial tax court to the relevant judgment: approximately one year.

From the filing of the appeal before the regional tax court to the relevant judgment: approximately one year.

From the filing of the appeal before the Supreme Court to the relevant judgment: approximately five years (longer time frames are usually experienced).

Disclosure requirements

32 | What are the requirements concerning disclosure or a duty to present information for trial?

Tax courts have the power to access and request information relating to the facts submitted by the parties. However, tax judges cannot oblige the parties to submit documents that they consider necessary to reach a decision.

The parties can submit documents to support their arguments within the deadline indicated at question 37.

Permitted evidence

33 | What evidence is permitted in a tax trial?

Only documentary evidence is permitted in a tax trial.

Confessions and witness testimony are not admissible in a tax trial.

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.

For complex matters, the tax courts may request technical advice from the tax authorities, or public administrations. However, experts cannot testify, but just provide for written reports.

Similarly, the tax judge may request access to inspections, data, information and technical reports from public administrations advice.

There is no provision for translation of evidence.

Permitted representation

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.

Publicity of proceedings

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.

Burden of proof

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.

Case management process

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

The briefing process is as follows:

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- 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).

Appeal

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 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. Memoranda and documents acquired during 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.

UPDATE AND TRENDS

Key developments of the past year

39 | What are the current trends in enforcement? What are the current concerns of the authorities and taxpayers? Are there proposals to change the relevant legislation or other rules?

Recently, tax authorities have focused their audits mainly on the following matters: transfer pricing; determining the existence of PEs in Italy; beneficial ownership; and VAT fraud.

There have been no particular tax reforms, although during the past four to five years there has been a debate regarding the reform of the composition of tax courts.

On the political agenda, there are proposals regarding the introduction of a mandatory advance adversarial procedure prior to the service of the notice of assessment, starting from 2022, and tax simplification provisions.

Japan

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OVERVIEW

Legislation

- 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?

Relevant tax acts

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 2019, Japan has concluded 74 tax treaties and such like that are applicable to 130 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.

Relevant authority

- 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 more than 500 tax offices. Local governments, their subordinate prefectural tax offices, city offices and town and village offices handle matters regarding local taxes.

ENFORCEMENT

Compliance with tax laws

- 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 the 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 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, accounting records and inventories of the taxpayer, and interviewing the taxpayer's employees. 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.

Types of taxpayer

4 | Are different types of taxpayers subject 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 on the taxpayer, which is stricter than that imposed on white return taxpayers, to keep book records of its transactions in the manner specified by the relevant ministerial ordinances. The tax authority can request the records from blue return taxpayers in tax audits. In this sense, taxpayers filing blue returns have more obligations at a review than those filing white returns.

Requesting information

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.

Available agency action

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 for 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.

Protecting commercial information

7 | How may taxpayers protect commercial information, including business secrets or professional advice, from disclosure? Is the tax authority subject to any restrictions concerning what it can do with the information disclosed?

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.

National public officers who are in charge of tax matters are subject to a duty of confidentiality regarding what they know in relation to the review (see question 18). A national public officer could face imprisonment for up to two years or a fine of up to ¥1,000,000 if he or she breaches such duty.

Limitation period for reviews

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 (10 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.

Alternative dispute resolution

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. 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.

Taxpayers have an option to file a request for administrative review without having filed a request for reinvestigation. If a taxpayer adopts this option, a request for administrative review is filed with the President of the National Tax Tribunal. It must be filed within three months from the date of receipt of the notice of disposition. Otherwise, a request for administrative review may 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.

See question 25 for details on the judicial appeal system.

Collecting overdue payments

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.

Penalties

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.

For tax evasion, the rate of additional tax as a penalty is increased to 35 per cent (in the case of underreporting 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.

Collecting interest

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 rates 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 plus the certain rate.

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. The amount of interest tax shall be a certain rate calculated based on the average rate of banks' new short-term loans.

Criminal consequences

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 for 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 a 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, a fine or both. 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 taxpayer.

Enforcement record

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

The NTA announced that, in operation year 2016, the number of field examinations that it conducted at the sites of individual and corporate taxpayers are, respectively, approximately 70,000 (while 21.69 million individual tax returns were filed) and 97,000 (while 2.86 million corporate tax returns were filed). These field examinations revealed unreported income of ¥535.9 billion in individual income tax and ¥826.7 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

Involvement of third parties

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 that has failed to provide an answer, provided a false answer or obstructed an audit is punishable by imprisonment for up to one year or a fine of up to ¥500,000.

Cooperation with other authorities

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

Hardship 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.

Voluntary disclosure and amnesties

20 | Are there any voluntary disclosure or amnesty programmes?

Additional tax as a penalty (see question 12) to be imposed on a taxpayer who files a tax return to amend a previously filed tax return in which the tax amount was underreported is reduced to 5 per cent per annum, as long as the taxpayer has not predicted a disposition by the tax authority. In addition, such additional tax is not imposed if the tax return for amendment is filed before a notice for review.

The rate of the additional tax is reduced to 10 per cent per annum if a tax return is overdue but it was not predicted that the tax authority would issue a disposition. In addition, such additional tax is reduced to 5 per cent per annum if the tax return is filed before a notice for review.

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

Rules protecting 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 tax authority is required 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.

Requesting information

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.

Tax authority governance

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 be subject to administrative appeal if requested by taxpayers, as summarised in question 9.

COURT ACTIONS

Competent courts

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.

Lodging a claim

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

Prior to filing a claim with the court to cancel the disposition, the taxpayer is required to have undergone the administrative procedure, which is requesting 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 National Tax 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).

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 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.

Combination of claims

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.

Pre-claim payments

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.

Cost recovery

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

At the time of filing, the court fees to file the claim must be paid by the taxpayer or plaintiff (their amounts are calculated based on the claimed amounts). In addition, the court fees for the examination of testifiers and other services are also required to be paid by the taxpayer when the taxpayer petitions for them.

The court usually awards to the losing party the costs that arose from the administrative matters of the case (ie, the court fees above). Administrative costs can therefore be recovered by the taxpayer if the taxpayer or plaintiff is successful. Not all actual costs borne by the taxpayer are recoverable, which means that a successful taxpayer cannot recover any attorneys' fees from the government or defendant.

Third-party funding

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.

Court decision maker

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.

Time frames

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 2016 for: (i) a first-instance decision was 14.4 months; (ii) an appeal court decision was 5.9 months; and (iii) a Supreme Court decision was 4.7 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.

Disclosure requirements

32 | What are the requirements concerning disclosure or a duty to present information for trial?

As in all litigation concerning civil and administrative matters, a party may file a petition for the court to order the holder of the documentary evidence to submit it (the Petition for Order to Submit Document). A Petition for Order to Submit Document should be filed by clarifying:

- the title of the document;
- a summary of the contents of the document;
- the holder of the document;
- the facts to be proven by the document; and
- the grounds for the obligation to submit the document.

Unless there are statutory reasons otherwise, the holder may not refuse to submit the document. However, in certain cases, a Petition for Order to Submit Document will be dismissed unless this is necessary to make the request to examine documentary evidence.

Coverage of a Petition for Order to Submit Document is limited and there is no broad discovery process in Japan.

Permitted evidence

33 | What evidence is permitted in a tax trial?

As in all litigation concerning civil and administrative matters, testifiers, experts and documentary evidence are permitted in tax litigation.

Tax litigation generally adopts a cross-examination system for examination of testifiers. 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 a translation thereof to the evidence.

Permitted representation

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

As in all litigation concerning 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.

Publicity of proceedings

35 | Are tax trial proceedings public?

Court proceedings in tax cases are generally held at hearings that 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 the 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 material disclosing a party's private life secret or a trade secret.

Burden of proof

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 about the taxpayer, such as changes in the amount of the taxpayer's assets or debts.

Case management process

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 (see question 38).

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.

UPDATE AND TRENDS

Key developments of the past year

39 | What are the current trends in enforcement? What are the current concerns of the authorities and taxpayers? Are there proposals to change the relevant legislation or other rules?

Amendments to the Earnings Stripping Rules

Outline of Earnings Stripping Rules, and amendment under the 2019 Tax Reform

In Japan, since around 2008 there has been an increase in cases where corporations pay an excessive amount of interest for borrowings from foreign related parties (foreign parent companies, foreign subsidiaries, etc) and include these interest payments in their deductible expenses so as to reduce their Japanese tax liability. In order to prevent these companies from claiming excess interest deductions, the Earnings Stripping Rules were introduced under the 2012 Tax Reform.

Prior to the 2019 Tax Reform, the Earnings Stripping Rules provided that in a corporate fiscal year where the net interest payments to related persons exceeded 50 per cent of Adjusted Taxable Income, that excess cannot be claimed as deductible expenses. For the purposes of this calculation:

- 'net interest payments to related persons' means the amount remaining after deducting the total eligible interest payments (ie, the total interest received, calculated through fixed apportionment calculations) from the total interest payments to related persons.
- 'interest payments to related persons' means interest paid to related persons of the corporation (which is not included in the taxable income of the related persons who received the interest). They do not include any amounts paid in relation to certain specified bond repurchase transactions.
- 'adjusted taxable income' means the amount of income (calculated according to a fixed formula) to be compared with net interest payments to related persons.

Under the 2019 Tax Reform, the Earnings Stripping Rules have been amended to align with Base Erosion and Profit Shifting (BEPS) Action 4, via (among other changes): (i) amending the scope of interest payments; (ii) amending the definition of adjusted taxable income; and (iii) lowering the benchmark fixed ratio from 50 per cent to 20 per cent. The amendment is applicable to corporate tax payable for fiscal years commencing on or after 1 April 2020.

Amendments to the scope of interest

The interest payments subject to the Earnings Stripping Rules are 'net interest payments to related persons' before the 2019 Tax Reform. Post-reform, the relevant payments will be 'net interest payments'. The calculation of net interest payments starts with total interest payments, not only interest payments to related persons. The net interest payments for the purposes of the Earnings Stripping Rules are defined as total interest paid (excluding any excluded interest payments, summarised below) minus the corresponding total amount of eligible interest payments.

'Excluded interest payments' is defined as follows:

- for interest payments other than specified bond interest (defined below), interest payments:
 - subject to Japanese taxation in the possession of the recipient (this means interest payments receipts that are declared as income in income/corporate tax returns in Japan);
 - to certain public benefit companies; and
 - under bond transactions with a repurchase agreement in which the borrowing transactions clearly correspond with the lending transactions.
- for interest on specified bond interest (meaning interest on bonds issued by the corporation and paid to unrelated parties, excluding where the number of owners of the bonds falls below a certain threshold):
 - interest payments subject to withholding taxation at the point of payment, or interest payments included in Japanese taxable income for those who receive the specified bond interest, and interest payments paid to certain public benefit companies; and
 - either of the following, depending on the classification of bonds:
 - bonds issued in Japan: 95 per cent of specified bond interest; or
 - bonds issued outside Japan: 25 per cent of specified bond interest.

Amendments to the definition of 'adjusted taxable income'

Prior to the 2019 Tax Reform, when calculating adjusted taxable income, dividends received that were excluded from gross revenue and dividends received from foreign subsidiaries that were excluded from gross revenue would be added to the income for the fiscal year. Under the 2019 Tax Reform, however, the exclusion of received dividends from gross revenue and the exclusion of dividends received from foreign subsidiaries will no longer be added to the company's income for the fiscal year.

Limitation of deduction

Under the 2019 Tax Reform, if net interest payments exceed 20 per cent of adjusted taxable income in a given fiscal year (as opposed to the current threshold of 50 per cent), the excess amount will not be included in the calculation of deductible expenses. This amendment is based on the recommendation set forth in the BEPS final report for Action 4: that the benchmark fixed ratio should be set within the range of 10 per cent to 30 per cent.

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OVERVIEW

Legislation

- 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 governing tax administration and controversies is contained in the Income Tax Act (Chapter 123 of the Laws of Malta) (ITA); the Income Tax Management Act (Chapter 372) (ITMA); the Value Added Tax Act (Chapter 406) (VAT Act); the Duty on Documents and Transfers Act (Chapter 364) (DDTA); and various subsidiary legislation). In addition, Malta has concluded more than 70 double tax treaties which may also bind taxpayers and the Maltese tax authorities.

The Inland Revenue Department (IRD) has, over time, issued guidance relating to this subject area. Although non-binding, such guidelines are meant to assist taxpayers on the interpretation and application of the law. One example in the context of resolving cross-border international tax disputes is the Guidelines on the Application of the Mutual Agreement Procedure.

Relevant authority

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

In 2012, the Commissioner for Revenue Act (Chapter 517) was introduced, establishing the office of the Commissioner for Revenue (the Commissioner) with the aim of merging revenue departments – such as the inland revenue, VAT and customs – into one department. The Commissioner is responsible for supervising inter alia the self-assessment system, the collection of taxes and raising assessments.

The following offices form part of the internal structure of tax authorities: the Director of Administration and the Director Operations and Strategy; the Director General Operations; the Director General Legal and International; the Director General Compliance and Investigations; and the Director General Customs Department.

ENFORCEMENT

Compliance with tax laws

- 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?

Malta operates a self-assessment system of tax where a taxpayer calculates his or her own tax liability. The ITMA requires that every taxpayer file an annual income tax return. Every return is to be accompanied by a computation that is to include:

- the chargeable income of the person for that year of assessment on the basis of the information provided in the return;
- the tax charge; and
- the tax payable or refundable for that year of assessment.

In order to verify information contained therein, the Commissioner may request an array of documentation including books, documents, accounts and returns from a taxpayer and may also request the taxpayer to attend personally (or via a representative) to examine such information.

In order to ensure the timely payment of taxes, the law prescribes tax payment deadlines for both natural and legal persons. Generally, tax is to be settled on the same day that the return is filed. However, there are certain specific circumstances – such as under the Final Settlement System – where tax is withheld at source (rather than settled upon filing a return) from all salaries paid out by an employer to an employee.

Where a taxpayer fails to submit his or her return, the Commissioner determines the amount of tax payable by that person for the year of assessment on the basis of an estimate. If after an estimate, the taxpayer still does not deliver the required return, the Commissioner may make an assessment without having to notify the taxpayer that an inquiry is being conducted into his or her tax declarations and liability. Moreover, as a deterrent from not respecting the tax payment deadlines, the ITMA provides for the imposition of additional tax as well as interest for the late payment of tax.

There is no statutory deadline by which a review of a taxpayer's affairs has to be concluded.

Types of taxpayer

- 4 | Are different types of taxpayers subject to different reporting requirements? Can they be subjected to different types of review?

Individuals and bodies of persons have different reporting periods. The Income Tax (Statutory Dates) Rules (Subsidiary Legislation (SL) 372.16) provide that individuals are to submit their return to the Commissioner by 30 June of the year of assessment and companies are to file their return by the end of the ninth month after their accounting date, or by 31 March of the calendar year following the accounting date, whichever is later.

The format of the return also differs between individuals, companies, clubs and associations and partnerships. Together with the return, a body of persons is also required to file audited financial statements covering the basis period corresponding to the year of assessment for which the return has been filed.

For VAT purposes, the time period within which VAT is to be settled as well as the form of the VAT return depends on the type of VAT registration. An Article 10 registrant generally files a return on a quarterly basis. An Article 11 registrant is required to submit a declaration instead

of a return – it is due on a yearly basis, by 15 February of the following year. An Article 12 registrant files a particular return on a monthly basis as well as an annual summary.

The Commissioner's ability to assess a taxpayer for tax applies to both individuals and companies.

Requesting information

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 ITMA vests the Commissioner with wide formal powers to request an array of information and documentation from taxpayers. Besides books, documents, accounts and returns (including bank statements), the Commissioner may require a taxpayer to furnish a statement containing details of:

- all property held and wherever situated, including property transferred or delivered or held by designated persons (this includes, inter alia, a mandatory, nominee, trustee, agent, depository or custodian);
- all income derived from such property; and
- all facts bearing upon the taxpayer's liability to tax which he or she has, or has been, liable for.

It is pertinent to note that 'property' is widely defined to include property of any kind or description, whether movable or immovable, personal or real and, in relation to rights and interests whether vested, contingent, voidable or future, and including any money, investments, and amounts in savings, loan and other bank accounts, whatever the nature of the account. The taxpayer is to be given a time frame of at least 30 days to furnish the relevant information.

Specific to cross-border situations, the ITMA also provides that the Commissioner may be required to collect additional information to be provided to foreign tax authorities, if arrangements for the purpose of the exchange of information have been made between Malta and another jurisdiction. In such situations, the Commissioner is vested with the power to require any person to:

- appear before him when he has reason to believe the person is able to give additional information;
- produce for examination any books, documents, accounts (including bank statements, passbooks and other bank documents) and any other document which the Commissioner may require a copy or extract thereof; and
- give information by means of written statements.

The Commissioner may also visit the premises of a taxpayer for tax information purposes, where the Commissioner is vested with the power of full and free access for the inspection of any books, documents, accounts, returns and electronic data, and can observe and record the nature and importance of any professional activity carried out there.

Although the power to interview employees is indirectly referred to in the context of collecting information for cross-border exchange, this power is likely applied in domestic disputes. The Commissioner should respect the restrictions set out at law, such as giving 30 days' notice.

Available agency action

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

Where a taxpayer fails to provide the required information, the taxpayer may be subjected to a penalty.

Protecting commercial information

7 | How may taxpayers protect commercial information, including business secrets or professional advice, from disclosure? Is the tax authority subject to any restrictions concerning what it can do with the information disclosed?

Requesting and inspecting books is subject to the protection of any information that falls with the definition of a professional secret in terms of the Professional Secrecy Act (Chapter 377).

Limitation period for reviews

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

An assessment may not be raised by the Commissioner earlier than the time prescribed for the submission of a return (see question 4) and not later than five years from the end of the year in which such a return was filed. That said, the five-year limitation period does not apply when a person:

- has not made a full disclosure in a return of all material facts relevant to the determination of income and allowable deductions; or
- for the purpose of avoiding tax, or through gross or wilful neglect, has furnished an incorrect or misleading return, in any material respect. In such a case, an assessment may be raised at any time.

For VAT purposes, where the Commissioner has reason to believe that a return filed by a VAT-registered person does not contain all the necessary information, he may make a provisional assessment and serve that assessment on the relevant person by not later than six years from the end of the tax period in question.

Alternative dispute resolution

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

The Maltese tax authorities are generally amenable to settling a dispute with a taxpayer prior to a dispute escalating to court. In certain situations, such settlement discussions may also be held while court proceedings are held in parallel. The intention is to hasten the litigation process and to settle the dispute as soon as is practicably possible.

The Mutual Agreement Procedure (MAP) is available in respect of cross-border matters if provided for in the relevant tax treaty.

Collecting overdue payments

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

For the purposes of ensuring the collection of tax, the ITMA prescribes the notices sent by the Commissioner, such as a final assessment, including interest and penalties, that are to constitute an executive title. Executive titles are deemed to be equivalent to a judgment and may be enforced without the need for any court judgment. Where a payment is enforceable against a body of persons in virtue of an executive title, the Commissioner may, without the need of any other act, proceed with such enforcement against every officer thereof. The Commissioner may proceed for the enforcement of the payment of tax within two days from the lapse of 15 days allowed for the settlement of tax due. The Commissioner is thereafter entitled to register in the public registry or land registry (as the case may be) a note of privilege for the amount demanded in the judicial act.

Penalties

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

The ITMA imposes penalties in the form of additional tax and interest charges for the late submission of a return. Additional tax is a fixed amount based on the number of months that the return remains unsettled.

	Individual €	Company €
Within 6 months	10	50
6 months to 12 months	50	200
12 months to 18 months	100	400
18 months to 24 months	150	600
24 months to 36 months	200	800
36 months to 48 months	300	1,000
36 months to 48 months	400	1,200
Later than 60 months	500	1,500

Penalties may be imposed either generally or with respect to specific offences. The ITMA provides that any person that contravenes or fails to abide by any provision of the ITA or ITMA is to be found guilty of an offence and will be subjected to a fine of not less than €23 and not exceeding €116. More specifically, penalties are provided in various situations, including:

- failing to comply with the requirements of a notice, intimation, request or demand note given or made to the taxpayer or served upon him or her, without sufficient cause – a fine of not less than €23 and not exceeding €10,000 and a further fine not exceeding €200 per day during which the default continues; or
- fraud, such as making any false statement or falsifying books – a fine ranging between €700 and €10,000 dependent on the nature of the fraud and an additional fine equivalent to treble the amount of evaded tax, or to imprisonment for a maximum term of six months, or both a fine and imprisonment.

12 | How are penalties calculated?

Penalties as described in question 11 are calculated within the fixed limits prescribed by law.

13 | What defences are available if penalties are imposed?

A taxpayer should not be subjected to a penalty where the taxpayer has a reasonable excuse. What constitutes a reasonable excuse is not explicitly defined in the ITMA. The VAT Act provides that an insufficiency of funds or when reliance is placed on any other person to perform any task, do not constitute a reasonable excuse.

Collecting interest

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

At present, if a taxpayer fails to pay tax by the tax settlement date, the ITMA provides that interest at the rate of 0.75 per cent a month or part thereof, will also be chargeable, for any period beginning on or after 1 January 2009. The interest can never exceed the amount of the said tax. Moreover, no interest runs on additional tax.

Criminal consequences

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

As stated in our response to question 11, a person that wilfully and with an intent to evade or assist any other person to evade tax has committed a crime and may face a trial in a magistrates' court. If found guilty, the person will face a fine (including an additional fine), a period of imprisonment or a combination of both. Fraudulent acts or omissions prescribed by law include inter alia:

- omissions from a return or any document or statement made, prepared or furnished in terms of income tax legislation; or
- false statements or entries in a return or any other document and false answers to any question or request for information.

The ITMA does not differentiate between different types of taxpayers committing the aforementioned offences. Thus, legal persons and natural persons are on an equal footing. That said, for legal persons, the ITMA expressly provides that managers, directors or other principal officers of a body of persons are to be answerable in law for complying with the provisions of tax legislation.

Enforcement record

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

There are no recent official statistics as to the enforcement record of the authorities.

THIRD PARTIES AND OTHER AUTHORITIES

Involvement of third parties

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

The Commissioner's power to involve or investigate third parties as part of the review of the taxpayer's return is wide.

Cooperation with other authorities

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, insofar as local cooperation is concerned, the tax authority necessarily cooperates with the Malta Police Force such as when the Commissioner needs access to the premises of the taxpayer. In 2016, the Joint Enforcement Task Force (JET) was established in order to support the efforts of the tax authorities and detect, investigate and prosecute offences related to unfair business competition and the avoidance and evasion of tax. The JET is not a statutorily established body and is a pooling of resources of the various departments of the tax authorities.

Insofar as foreign cooperation is concerned, Malta has concluded several Tax Information Exchange Agreements on the basis of which Malta exchanges fiscal information with its non-EU treaty partners. A few examples include the Cayman Islands and Gibraltar. Moreover, Malta has implemented FATCA and also adheres to the Common Reporting Standard. Within the EU, Malta cooperates with other EU member states in various instances, via the EU Mutual Assistance Directive for the Recovery of Taxes as well as the Automatic Exchange of Information on Tax Rulings.

SPECIAL PROCEDURES

Hardship procedures

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

Legal aid is available upon application by a taxpayer who cannot afford an attorney. There are certain conditions that need to be met before a person can successfully apply for legal aid. Although there is no formal framework, it may be possible to agree on scheduled payments; however, this is fully dependent on any settlement agreements reached with the tax authorities.

Voluntary disclosure and amnesties

20 | Are there any voluntary disclosure or amnesty programmes?

Malta has a general programme of voluntary disclosure. A taxpayer who has omitted from a return may approach the tax authorities and rectify the omission by delivering a further return. Additional tax chargeable will be reduced by either:

- 90 per cent where the omission is in respect of employment income, investment income or gains from the disposal of immovable property; or
- 50 per cent, generally where an omission is not due to fraud or gross or wilful neglect and provided certain conditions exist.

The Commissioner may impose any conditions.

It is pertinent to note that a special programme, the Reduced Penalties Scheme, allowed taxpayers to regularise their outstanding income tax debts and their unfurnished returns to be settled. Taxpayers with pending tax balances until the year of assessment of 1998 could qualify for a 25 per cent reduction of the amount that would have been payable. This programme is no longer open.

With respect to VAT, by virtue of the Remission of Interest and Administrative Penalties Rules (SL 406.20), the Commissioner may remit any interest or administrative penalties that have been incurred by a taxpayer by virtue of late payment of VAT, if the Commissioner is satisfied that the VAT due was not paid due to a reasonable excuse.

RIGHTS OF TAXPAYERS

Rules protecting taxpayers

21 | What rules are in place to protect taxpayers?

There is no official taxpayer 'bill of rights' or guidelines on taxpayer's rights issued by the tax authorities. That said, the general principles of good administrative behaviour apply in situations where a taxpayer has decided to enter an appeal to the ART. Thus, a taxpayer has the right to have his or her case decided on by the ART within a reasonable amount of time. A case must be decided on by an independent judge who has no interest in that particular case and all parties need to be heard before the ART can make a judgment.

Requesting information

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

It is possible for taxpayers to obtain information from the tax authority via the Data Protection Act (Chapter 586) and the Freedom of Information Act (Chapter 496).

Insofar as data protection is concerned, the taxpayer would have the right to obtain from the tax authorities confirmation as to whether or

not personal data concerning him or her is being processed and, where that is the case:

- the purposes of the processing;
- the categories of personal data concerned;
- the recipients or categories of recipient to whom the personal data has been or will be disclosed; and
- where possible, the envisaged period for which the personal data will be stored, or, if not possible, the criteria used to determine that period.

The Freedom of Information Act also establishes a general right for citizens to obtain information held by public authorities to promote added transparency and accountability.

Tax authority governance

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

Yes, the tax authority is ultimately accountable to the Ministry of Finance. Moreover, the tax authority is in principle subject to the general oversight of the Ombudsman of Malta. The Ombudsman performs an independent function in the investigation and resolving of disputes between government bodies and individuals.

COURT ACTIONS

Competent courts

24 | Which courts have jurisdiction to hear tax disputes?

The domestic dispute resolution process in the Maltese courts is initiated by way of an appeal to the Administrative Review Tribunal (ART) when a person feels aggrieved about a tax assessment after having his or her objection refuted. There is also the possibility of recourse to the Court of Appeal on questions of law – that is, on the legal interpretation of provisions of Maltese income tax legislation. Should the taxpayer not be satisfied with the ART's decision, an appeal has to be filed within 20 days of the decision.

Where the total amount of tax, additional tax, fines and interest in dispute at the time when the appeal was lodged before the ART is less than €1.16 million, appeals are heard before the Court of Appeal in its Inferior Jurisdiction. If the tax, additional tax, fines and interest is of €1.16 million or more, the appeal is heard before the Court of Appeal in its Superior Jurisdiction.

The final domestic outlet for taxpayers is the Constitutional Court.

Lodging a claim

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

Where the Commissioner has carried out an assessment, and the taxpayer does not agree with the findings of that assessment, the taxpayer may resort to the courts. Disputes are brought before the court through the filing of a written application by an advocate, indicating the court in which the action is being brought, the particulars of the parties, and the merits of the application being filed. The defendant will then be notified with the application and will be given 20 days to file his or her statement of defence. It is either upon the statement of defence being filed, or upon the expiration of the 20-day period, that oral proceedings will start in court.

The ART may hear appeals by aggrieved taxpayers about a tax assessment carried out by the Commissioner within 30 days after having been served notice by which the Commissioner has refused to amend the assessment. The ART will reject appeals brought before it unless prima facie proof is brought by the appellant that he or she has filed his or her return for the said year of assessment. With respect to assessments raised by the Commissioner, the ART does not consider

evidence as sufficient to warrant any change in the assessment if the taxpayer appealing against the Commissioner's decision has failed to provide the records, documents, accounts and electronic data previously requested by the Commissioner without any reasonable excuse.

The ITMA further provides that a taxpayer may appeal from the decision of the ART to the Court of Appeal within 20 days from the decision. Appeals are only possible on questions of law – that is, on the legal interpretation of provisions of Maltese income tax legislation. It is also an avenue of appeal for the Commissioner.

The Constitutional Court has appellate jurisdiction in a number of circumstances that may be of relevance from a tax dispute perspective. Recourse to the Constitutional Court is dependent on the claims being made. It hears appeals from decisions of the Civil Court (Superior Jurisdiction) on matters of human rights and fundamental freedoms as protected under Chapter IV of the Constitution of Malta. It also hears appeals as to the validity of laws other than those falling under article 46 of the Constitution that deals with human rights. This is the final outlet that taxpayers have domestically – a measure of last resort.

Combination of claims

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

There is no rule prohibiting tax claims affecting multiple returns from being brought together. That said, in practice, it is unusual for taxpayers to bring an action against a tax claim together. It would also ultimately be dependent as to how the Commissioner has made an assessment.

Pre-claim payments

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

Where a notice of objection or appeal against an assessment has been given, the Commissioner may, using discretion, delay the collection of not less than 90 per cent of the part of the tax assessed that is in dispute. Moreover, the ITMA provides that for the appeal to be formally valid, the tax that is not in dispute must be paid in court. This requirement has, however, been deemed to be unconstitutional.

Cost recovery

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

The respective court that decides a case will determine the costs that are to be settled by the tax authorities and the taxpayer. The court may apportion costs between the parties; having a judgment handed down in favour of either party does not necessarily mean that the said party will not have to settle any fees. Generally, the winning party may recover the filing and related court expenses as well as legal fees and legal procurator fees, according to a tariff established by law.

Third-party funding

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 such restrictions under tax law.

Court decision maker

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

The ART consists of a chairperson, who is appointed for a period of four years by the President of Malta (acting on advice of the Prime Minister),

supplemented by two assistants. The Court of Appeal may consist of one or more chambers. Where the composition is of one or two chambers, each chamber is to consist of the Chief Justice and two other judges. Where the composition is of three or more chambers, the third and other chambers are to be presided by a judge that is nominated on the Chief Justice's advice. Trials by jury are not available in tax disputes.

Time frames

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

There is no specified time period within which a tax trial must be decided. It is not possible to state with accuracy the amount of time such a trial may take as it depends on the facts and the litigation process relating to each particular case.

Disclosure requirements

32 | What are the requirements concerning disclosure or a duty to present information for trial?

The ART is empowered to summon any person to give evidence or produce books or other documents before it. The parties to a case can submit documents to support their arguments. The said documents are generally accessible to the other party.

Permitted evidence

33 | What evidence is permitted in a tax trial?

Parties to a suit are competent to give evidence, either at their own request or at the request of any of the other parties to the suit, or at the request of the court ex officio. In this regard, taxpayers themselves are permitted to testify. Oral and documentary evidence are both permitted in a tax trial. Court experts are permitted under Maltese law. Such a person will issue a report stating the enquiries made and his or her findings, together with the grounds for such findings.

It is pertinent to note that the default language of civil proceedings is Maltese, although certain proceedings may be heard in English. Where any party does not understand the language in which the oral proceedings are conducted, such proceedings must be interpreted to him or her either by the court or by an interpreter, who has been sworn in.

Any evidence that is submitted by an affidavit must be drawn up in the language normally used by the person taking such an affidavit. The affidavit, when not in Maltese, is to be filed together with a translation in Maltese, which is to be confirmed under oath by the translator.

Permitted representation

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

Parties can appear before the ART in person or can be represented through an advocate, a legal procurator or another person.

Publicity of proceedings

35 | Are tax trial proceedings public?

Proceedings before the ART are to be conducted in public. The Code of Organization and Civil Procedure (Chapter 12) also states that cases held before the civil courts of Malta are to be held in public, although the court may order that a case be heard behind closed doors for the purposes of decency or good morals, or if both parties have requested it.

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

The burden of proof is generally on the taxpayer, based on the fact that assessment made by the Commissioner is considered to be correct. Case law has, however, provided that the burden of proof can be shifted to the tax authorities if the assessment is made ex officio, and the taxpayer succeeds in convincing the court that the assessment made by the Commissioner was prima facie unreasonable.

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

See question 25.

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

Yes. See questions 24 and 25.

UPDATE AND TRENDS**Key developments of the past year****39 | What are the current trends in enforcement? What are the current concerns of the authorities and taxpayers? Are there proposals to change the relevant legislation or other rules?**

No significant changes in the regular trends relating to Maltese tax enforcement have recently taken place compared with previous years. However, in light of the recent implementation of the Anti-Tax Avoidance Directive (ATAD) and the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (MLI), new trends in the area of tax enforcement are expected to develop over the coming months and years. The anti-abuse measures implemented in Maltese legislation as a result of implementation of ATAD and MLI, in particular the principal purpose test and the new general anti-abuse rule, may prompt the Maltese tax authorities to adopt alternative or additional review methods from an investigation or enforcement perspective going forward.

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OVERVIEW

Legislation

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.

Relevant authority

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 Customs;
- DRS Tax Intelligence and Investigation Service;
- DRS for income-based allowances;
- DRS for individuals;
- DRS for SMEs;
- DRS for MNEs;
- DRS Central Administration Processes;
- DRS for client interaction and services; and
- DRS for provision of information.

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

Compliance with tax laws

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?

Duration of a review depends on the type of tax, the type of taxpayer and the complexity of the return. 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 in 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. Although 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.

Types of taxpayer

4 | Are different types of taxpayers subject 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 type of Dutch tax involved, specifically, whether it 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.

Requesting information

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. The DRS may not interview employees without permission of the taxpayer.

Available agency action

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 ask for disclosure of the information requested subject to a judicially imposed penalty for non-compliance.

Protecting commercial information

7 | How may taxpayers protect commercial information, including business secrets or professional advice, from disclosure? Is the tax authority subject to any restrictions concerning what it can do with the information disclosed?

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 them to determine which information falls under their legal privilege and which information is disclosed to the DRS. In turn, DRS officials are subject to a professional duty of confidentiality as regards all information that they receive through disclosure (see questions 18 and 22).

Limitation period for reviews

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 owing 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.

Alternative dispute resolution

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

In principle, a conflict between the DRS and a taxpayer can only 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.

Collecting overdue payments

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, for example by 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.

Penalties

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 2019), 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 default and culpability penalties. These penalties may not be imposed or may be mitigated in the 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 be considered 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).

Collecting interest

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 per cent for corporate income tax and 4 per cent for all other Dutch taxes (in 2019) during 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 2019) during 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.

Criminal consequences

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 2019):

- a maximum of six months' imprisonment or a fine of up to €8,300 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 €20,750 (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 €83,000 (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 €83,000 (in 2019). Subject to aggravating and mitigating circumstances, the criminal penalty for money laundering is a maximum of six years' imprisonment or a fine of up to €83,000 (in 2019).

Enforcement record

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

Involvement of third parties

- 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).

Cooperation with other authorities

- 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, which typically allow for exchange of information upon request, with approximately 30 countries worldwide (as of 2019). In addition, the Netherlands has concluded comprehensive double taxation agreements, which include (with some variations) the OECD Model Treaty standard for exchange of information, with approximately 100 countries worldwide (as of 2019). In addition, the Netherlands is in the process of incorporating spontaneous and automatic information exchange in its other bilateral instruments.

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 is particularly in regard to transfer pricing information and artificial profit shifting, while the mandatory automatic exchange of information extends to employment income, pensions and immovable property.

SPECIAL PROCEDURES

Hardship 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.

Voluntary disclosure and amnesties

- 20 | Are there any voluntary disclosure or amnesty programmes?

As of 1 January 2018, the Netherlands no longer has a voluntary disclosure programme for taxpayers to avoid a culpability penalty being imposed for undisclosed taxable income from savings and investments abroad. However, voluntary disclosure is still seen as a mitigating circumstance that results in a culpability penalty being imposed at a reduced rate.

RIGHTS OF TAXPAYERS

Rules protecting 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. The tax judiciary 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, such as statutes on (corporate) income tax, wage tax 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 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.

Taxpayers' 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, case law has developed various principles of proper administration. The DRS has to apply these principles and taxpayers may invoke them. Examples of these 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.

Requesting information

- 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 to those acting on its instructions.

In addition, a taxpayer has a formal right to access its tax file when objecting to 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.

Tax authority governance

- 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

Competent courts

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.

Lodging a claim

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 decision objected to was 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 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 decision appealed against was 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.

Combination of claims

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.

Pre-claim payments

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.

Cost recovery

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. In addition, the court may only order a taxpayer to reimburse the DRS' legal expenses if it sides with the DRS and the taxpayer has engaged in manifestly unreasonable use of procedural law.

Third-party funding

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.

Court decision maker

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.

Time frames

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, and 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.

Disclosure requirements

32 | What are the requirements concerning disclosure or a duty to present information for trial?

Under Dutch tax law, there is no strict discovery process for a tax trial. Rather, a taxpayer has a right to access the case file as part of its objection against a tax assessment (see question 22). When lodging an appeal, the taxpayer is free to submit documents and other evidence to the district or appellate court. In turn, when lodging the defence to a taxpayer's appeal, the DRS is obliged to file all documents and records that it has at its disposal and has considered in issuing the tax assessment at hand. In doing so, the DRS discloses its case file in full. Beyond this obligation, the DRS is free to exchange documents and other evidence during appeal, as is the taxpayer (see question 33).

Permitted evidence

33 | What evidence is permitted in a tax trial?

According to the principle of freedom of evidence, the taxpayer and DRS may provide evidence by all legal means available. After the appeal is lodged and during the hearing, the district court and appellate court may make a 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.

Permitted representation

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.

Generally, the DRS is represented by the involved tax inspector. In Supreme Court litigation, the State Secretary of Finance represents the DRS.

Publicity of proceedings

35 | Are tax trial proceedings public?

The proceedings in tax cases are held behind closed doors and are not public, unless and insofar as the proceedings involve an administrative penalty.

Burden of proof

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.

Case management process

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

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arguments (usually with a three-to-six-month delay). The parties may waive oral arguments, but this seldom happens.

Appeal

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.

UPDATE AND TRENDS

Key developments of the past year

39 | What are the current trends in enforcement? What are the current concerns of the authorities and taxpayers? Are there proposals to change the relevant legislation or other rules?

Preliminary Supreme Court ruling in tax cases

As of 1 January 2016, a district court or 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 (CJEU), with the main difference that the Supreme Court may decide not to issue a preliminary ruling if the question referred carries insufficient significance. If the Supreme Court issues a preliminary ruling, the referring court has to abide by it when deciding the case.

In 2017, the Supreme Court issued its first preliminary ruling. Since then, lower courts have used the preliminary procedure frequently. In 2019, multiple preliminary questions were raised to the Supreme Court regarding the right to a refund of Dutch dividend withholding tax for special collective investment funds, established in Germany, that are exempt from corporation and business tax in Germany. Both a district court on 26 February 2019 and an appellate court on 12 July 2019 raised questions in this regard. The Supreme Court is still processing these requests for a preliminary ruling.

Repeal of voluntary disclosure programme

Until 1 January 2018, there was a voluntary disclosure programme in place. Voluntary disclosure occurring in the grace period (ie, the first two years after intentionally or grossly negligently filing an incorrect or incomplete tax return) did not lead to a culpability penalty being imposed, while voluntary disclosure occurring after the grace period counted as a mitigating circumstance. The voluntary disclosure programme is repealed as of 1 January 2018. Since that date, voluntary disclosure is seen as a mitigating circumstance in all cases, which leads to a culpability penalty at a reduced rate. However, as the grace period is abolished, a taxpayer can no longer avoid the imposition of a culpability penalty.

Norway

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OVERVIEW

Legislation

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 tax administration and controversies is the Tax Administration Act of 2016, which has been in effect since 1 January 2017.

Income and wealth tax are assessed based on the provisions of the Tax Act of 1999. Other important legislation includes the Tax Payment Act of 2005, which 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.

There are a number of relevant regulations to the tax laws. The most important are the comprehensive regulations issued by the Ministry of Finance and the Directorate of Taxes, respectively, to supplement and implement the Tax Act of 1999.

Other than legislation, there are sources of law and binding rules applying to both taxpayers and the tax authorities. These 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 and duties that are set annually;
- the preparatory documents for legislation are highly relevant when 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; and
- 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 Tax ABC.

Relevant authority

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

On 1 January 2019 the Norwegian Tax Administration was reorganised into an organisation that consists of four nationwide performance units for the core businesses. In addition, there are three common functions: development; IT; and administrative services. Approximately 57 local tax offices are open to the public. In the new organisation, all the tax offices have nationwide task-solving functions and are included in the performance units. Formally, the dealings with taxpayers happen at the local tax office.

The Petroleum Tax Office assesses taxpayers 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 working in Norway or in the Norwegian continental shelf; and
- 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.

Municipal treasurers collect the taxes.

ENFORCEMENT

Compliance with tax laws

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 are 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.

Types of taxpayer

4 | Are different types of taxpayers subject 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 from 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 are entered into the tax return in advance, based on information that 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.

Requesting information

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 that taxpayers 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 may 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 programmes and programme 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 for providing 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.

Available agency action

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

The Tax Administration can carry out a field audit at places where the business is conducted – at a third party's premises, at a government agency or at a provider of access to electronic communication networks. The Tax Administration can choose whether it wants to request the information from the taxpayer in writing or immediately make a field audit.

The 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 any kind of required documentation, such as 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 Administration 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.

Protecting commercial information

7 | How may taxpayers protect commercial information, including business secrets or professional advice, from disclosure? Is the tax authority subject to any restrictions concerning what it can do with the information disclosed?

The main rule is that 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.

In accordance with the new Tax Administration Act, anyone who is or has been in a position within the tax administration is subject to a general and far-reaching obligation to maintain secrecy on information regarding companies' and private individuals' wealth, income, and economic, industrial or personal positions and so on. Furthermore, anybody who enters into a position within or with the Tax Administration is obliged to sign a form acknowledging both the existence of professional secrecy and that he or she will comply with it. However, the tax authority can hand over information to other public authorities, such as the police, the Norwegian national authority for investigation and prosecution of economic and environmental crime, the enforcement authorities, among others. If information subject to secrecy is delivered, for example, to another public authority that authority is subject to the same professional secrecy. Furthermore, the person or department within the tax authority that delivers the information is obliged to inform the recipient about the professional secrecy that applies.

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.

Limitation period for reviews

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

The general time limitation under the new Tax Administration Act is five years, regardless of the documentation provided.

There is still a 10-year time limitation. This only applies in cases where the taxpayer is subject to an increased penalty tax of 20 or 40 per cent in addition to the normal penalty tax, or if the taxpayer is subject to a criminal charge of tax evasion.

Alternative dispute resolution

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. During such procedures, the tax authorities can sometimes reach a settlement with the taxpayer.

On choosing the administrative appeal route, 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.

Collecting overdue payments

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 and such like.

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 offices for a deferral or reduction in the overdue tax.

Penalties

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 right of the taxpayer to appeal.

12 | How are penalties calculated?

The penalty for late filing varies somewhat depending on the situation. If the taxpayer has failed to comply with the deadline to submit the tax form, the penalty is half of the court fee for every day. The penalty is one court fee per day if the taxpayer does not fulfil its record-keeping requirement. Finally, the penalty is two court fees per day if a third party – employer, financial institution, company and so on – fails to fulfil its reporting duties under the Norwegian Tax Act and the Norwegian Tax Administration Act. From 1 January 2019, a court fee is 1,150 kroner (approximately €115). The maximum penalty is 50 court fees. However, the maximum penalty for not fulfilling its record-keeping requirements is 1.13 million kroner (approximately €118,400).

The normal rate of penalty tax is 20 per cent of the tax reduction. Additional penalty tax, at a rate of 20 or 40 per cent of the tax deduction, is reserved for more serious cases and 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 or she understands or should understand that it would lead to a tax benefit. More serious cases could involve criminal prosecution (see question 15).

13 | What defences are available if penalties are imposed?

Legal grounds for exemption from penalty tax 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.

The penalty for late filing can be avoided after an overall evaluation based on the cause for late filing, the extent to which the taxpayer can be blamed for the late filing, if the late filing has caused any (tax) benefits and if the person obliged to report has been seriously ill.

It is the taxpayer's responsibility to ensure that the submission of tax returns is 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.

Collecting interest

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.

Criminal consequences

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 the tax authorities incorrect or incomplete information may be prosecuted for tax evasion if the taxpayer understood or should have understood that this may lead to reduced tax or tax-related benefit. Tax evasion cases under criminal law must 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 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.

Enforcement record

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 work-force 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, from a total of 110 court cases becoming final, 62 per cent were held in favour of the tax authorities for material tax issues and 74 per cent were held in favour of the tax authorities on indirect tax. The

statistics suggest outcomes are not in favour of the taxpayer. The higher courts do, however, tend to favour the taxpayer more in their rulings than the municipal/city court level.

THIRD PARTIES AND OTHER AUTHORITIES

Involvement of third parties

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 on money transfers, deposits and liabilities including the parties and regarding the third-party accounts belonging to the taxpayer.

Cooperation with other authorities

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 National Authority for Investigation and Prosecution of Economic and Environmental Crime (Økokrim), the Labour Inspection Authority, the Labour and Welfare Organization, the police and Toll Customs.

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

Hardship 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 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.

Voluntary disclosure and amnesties

20 | Are there any voluntary disclosure or amnesty programmes?

The Tax Assessment Act contains a voluntary disclosure or tax amnesty provision.

Taxpayers who want 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

Rules protecting 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.

Requesting information

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.

Tax authority governance

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 will 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

Competent courts

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 may be the ordinary courts where the taxpayer resides or has his or her principal place of business.

Lodging a claim

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 should state the appeal and the grounds for it. The notice should also invite the counterparty to respond to the claim. The counterparty should 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.

Combination of claims

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 for 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.

Pre-claim payments

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.

Cost recovery

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

In accordance with the new Norwegian Tax Administration Act, the taxpayer can recover costs concerning necessary assistance regarding a matter within the Tax Administration if it changes the tax assessment

in favour of the taxpayer. The taxpayer can recover costs from a lawyer, an accountant, an appraiser, and so on, if the costs have been necessary to change the decision from the Tax Administration in the taxpayer's favour.

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 or her claim, he or she can get his or her costs completely or partly recovered.

Third-party funding

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 of whether the loss is a consequence of a tax dispute, it is possible that 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 or her testimony in court. As a general rule, expenses and losses to fulfil these obligations are not refundable by the state.

Court decision maker

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 it is a criminal or a civil case, and which court instance applies. 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 cases

A fundamental principle in the criminal courts is that ordinary citizens shall participate in the decisions. Therefore, lay judges operate along with professional judges in criminal cases in the District Court and the Court of Appeal. This mix between professional judges and lay judges is called *meddomsrett*. Lay judges are ordinary citizens without any judicial background who sit as judges alongside the professional judges. The lay judges are appointed on a case-by-case basis. The number of professional and lay judges varies according to the complexity and size of the case and the court instance. In the Supreme Court, however, 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 will 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.

Time frames

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 and instance the case is brought before. There are no specific numbers available for tax cases as such, but statistics from the Court Administration for 2017 show that, in general, the time frame for civil

cases in the District Courts was just over five months, while the time frame was just over six months in both the Court of Appeal and the Supreme Court.

Disclosure requirements

32 | What are the requirements concerning disclosure or a duty to present information for trial?

The main rule under the Norwegian Civil Procedure Act is that both the parties and third parties are obliged to present any information and documentation that can be of relevance within a trial. However, within a tax trial, the taxpayer can only produce evidence and documentation that has been put forward during the administrative proceedings, when the tax administration considered the matter. This rule on exclusion of evidence does not apply to questions regarding additional (penalty) tax.

The general rules of pre-trial discovery in civil cases are applicable also to tax cases, but will not commonly be in use due to the above limitation on new evidence.

Permitted evidence

33 | What evidence is permitted in a tax trial?

The main rule under the Norwegian Civil Procedure Act is that all kinds of evidence – both oral and documentary – that can be of relevance in a tax trial are permitted (see question 32 for exceptions from the main rule). In accordance with the main rule, anyone who has knowledge of something that is relevant for the case and is legally summoned can testify in a trial. In general, testimony must 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 will 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 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.

Permitted representation

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

Taxpayers may 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 will 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.

Publicity of proceedings

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.

Burden of proof

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

In criminal tax cases, the public prosecutor has the burden of proof. To fulfil this burden, the taxpayer must be proven guilty beyond reasonable doubt.

In civil tax 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.

Case management process

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 by presenting the case. Thereafter the plaintiff, through his or her attorney, briefly 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.

Furthermore, 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.



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Appeal

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.

UPDATE AND TRENDS

Key developments of the past year

39 | What are the current trends in enforcement? What are the current concerns of the authorities and taxpayers? Are there proposals to change the relevant legislation or other rules?

As of 1 July 2019, article 10-15 of the Tax Administration Act was enacted. This provision grants the tax authorities the right to conduct office and house raids and to seize documents and other objects. The purpose of the provision is to increase the efficiency of the tax authorities' investigation of tax evasion. However, to safeguard the taxpayer, the tax authorities need both a courts approval and the assistance of the police to carry out these actions. Furthermore, these measures can be used only when necessary and in a proportionate manner.

Switzerland

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OVERVIEW

Legislation

- 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 governing tax administration (including non-judicial tax-assessment procedures) as well as material tax law is based on the Swiss Federal Constitution, the relevant Swiss federal laws (eg, with regard to (i) income and corporate income taxes, the Federal Direct Tax Act (DBG); (ii) withholding taxes, the Federal Act on Withholding Taxes (VStG); (iii) securities issue and transfer taxes, the Federal Act on Stamp Duties (StG); and (iv) value added tax, the Federal Act on Value Added Tax (MWSTG)) and cantonal legislation (eg, with regard to cantonal income and corporate income taxes, wealth taxes, inheritance and gift taxes, real estate capital gains taxes and property transfer taxes). Further legislation relating to tax administration matters can be found in federal, cantonal and communal ordinances 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).

Legislation governing tax controversies, including non-judicial tax objection procedures, is based on the legal foundations as set out above. The legislation for judicial (appeal) proceedings can be found in the Swiss Federal Constitution and the relevant Swiss federal procedural laws (eg, the Federal Act on Administrative Procedure (VwVG), the Federal Act on the Federal Administrative Court (VGG) and the Federal Act on the Federal Supreme Court (BGG)), as well as the cantonal procedural laws.

The following questionnaire mainly focuses on income, wealth, corporate income and capital taxes governed by the DBG unless otherwise mentioned.

Relevant authority

- 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, and inheritance and gift taxes, as well as certain fees, are levied only at the cantonal level and, depending on the applicable cantonal legislation, at the communal level.

The Federal Tax Administration is, in addition to certain political functions and its coordinatory functions with regard to 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

Compliance with tax laws

- 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, cantonal and communal income and corporate income as well as cantonal and communal wealth and capital taxes are levied in a mixed-assessment procedure. That is, taxpayers declare the taxable objects themselves based on their qualification and assessment of the relevant taxable (and tax-exempt) factors, and the tax authorities subsequently verify the information submitted in the individual's or entity's tax return form (ie, compliance with the tax laws and practice) and determine the amount of tax in the assessment decision. The tax authorities' review of submitted forms is, particularly 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 and corporate 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 generally 1 March 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 first 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 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, wealth and 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, wealth and capital as well as specifying 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.

Types of taxpayer

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

Income, corporate income, wealth and capital taxes for individuals and (business) entities are generally levied based on similar reporting principles: the basis for taxation consists in the annual tax return, which, 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 (eg, VAT audit).

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*, a 'source tax' (wage withholding tax) mechanism. In certain circumstances, intra-group dividend payments (to entities) may benefit from a notice procedure (*Meldeverfahren*) 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.

Requesting information

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. 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 auditing.

Available agency action

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 or her taxable income, profit, wealth and capital are assessed based on a discretionary judgment called *Einschätzung nach pflichtgemäßem Ermessen* by the tax authorities. In view of the general burden-of-proof rules applicable in taxation matters providing that the tax authorities must support facts leading to (increased) taxation, and the taxpayer must support facts from which he or she 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 judgment.

Furthermore, the failure to meet the obligations to deliver certificates, provide information and meet reporting obligations may be punished with penalties.

Protecting commercial information

7 | How may taxpayers protect commercial information, including business secrets or professional advice, from disclosure? Is the tax authority subject to any restrictions concerning what it can do with the information disclosed?

An important restriction for tax authorities to enforce the disclosure of commercial information 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 to provide specific information (eg, client names within the framework of the taxation of an attorney) that falls under legal confidentiality.

The tax authorities are, generally, bound to the confidentiality obligation. Confidential information may only be sought based on a legal provision. Certain cantonal tax legislations provide for the possibility for interested persons to obtain, under specific circumstances, information on the tax factors of taxpayers resident in the respective canton. Such information rights can, to a large degree, be countered by the taxpayer by a formal data-blocking request.

Limitation period for reviews

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

The limitation period for the assessment of tax on income, profits, wealth and capital is five years (relative limitation) and, in any case, 15 years (absolute limitation) after the tax period.

The limitation period for the collection and enforcement of income, wealth, corporate income and capital taxes is five years (relative limitation) after the assessment has become final and 10 years (absolute limitation) after the tax has been legally established.

Legislation for other federal taxes provides for shorter limitation periods:

- the limitation period for the assessment of withholding tax; and
- the limitation period for stamp duty and VAT is five years after the end of the calendar year during which the taxable event occurred.

The limitation period may, in particular, be interrupted and started afresh by any action of the tax authorities aimed at the assessment of the tax. VAT may not be levied (absolute limitation) 10 years after the end of the calendar year during which the taxable event occurred. The prosecution of income, wealth, corporate income and capital tax offences is subject to a limitation period of up to 15 years after the offender has carried out the last criminal activity.

The tax administrations are held to review tax returns, declarations and forms within the limitation period, whereby the duration of the review may differ from case to case. Currently a motion is pending in the Swiss parliament which aims to harmonise the rules regarding the limitation period for withholding tax, stamp duty and VAT.

Alternative dispute resolution

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

An internal objection against the tax authorities' assessment decision may be raised by the taxpayer in writing within 30 days. The objection is treated by the same tax authority.

Swiss domestic tax legislation does not provide for alternative dispute resolution procedures (ADR). Settlements with regard to the taxable income, profits, wealth and 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 and mutual understanding procedures). Certain Swiss double-taxation agreements contain arbitration clauses.

Collecting overdue payments

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. 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 not, by law, have to (but 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, formal arrest, the refusal of radiation of a liquidating entity from the commercial register and land register blockings. These measures should secure the taxpayer's Swiss assets, which may at a later stage serve as a basis for the enforcement and collection of the tax and interest claims.

Penalties

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

Penalties may be imposed in cases of tax evasion and tax fraud, but also for breach of procedural obligations (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 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 up to 10,000 Swiss francs.

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. Criminal prosecution may be waived if the taxpayer undertakes a spontaneous voluntary disclosure.

Tax fraud in income, corporate income, wealth and capital tax matters may be punished with imprisonment for up to three years or with a fine. A conditional imprisonment may be combined with a fine of up to 10,000 Swiss francs. Tax fraud under the Federal Criminal Code for Administrative Matters (VStrR) is generally sanctioned with imprisonment for up to one year or fines up to 30,000 Swiss francs, with aggravation to imprisonment for up to five years combined with a fine, or a fine only.

13 | What defences are available if penalties are imposed?

Under Swiss law, the offender may be punished only if and in so far as he or she can be held personally responsible for an offence. It requires a case-by-case analysis to determine whether incorrect advice may, therefore, serve as a justification for the offender.

Collecting interest

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

Interest is payable if taxes are levied retroactively and if taxes are not paid within the deadlines set forth in tax legislation or provided in a formal order of the tax authorities.

The interest for federal income and corporate income taxes is fixed annually in the Federal Department of Finance's regulations on the due date and interest. For 2019, 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.

Criminal consequences

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 or judgment on tax evasion or tax fraud or the breach of procedural obligations, the mentioned criminal consequences (penalties, in exceptional cases imprisonment; see question 12) 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.

Enforcement record

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

Involvement of third parties

- 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 (eg, salary certificate of employer).

The authority performing a tax assessment is also entitled to investigate without the taxpayer's participation or consent. However, third parties, as opposed to the taxpayer, do not have a general obligation to cooperate in the evaluation of facts.

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.

Cooperation with other authorities

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

Within the country the authorities implementing and enforcing the tax and further legislation assist each other in fulfilling 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 federal authorities and the authorities of the cantons, districts, counties and municipalities grant the authorities responsible for the enforcement of this law all information necessary upon request.

International assistance in tax matters, from a Swiss domestic perspective, is 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 specific information exchange upon request 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, which provides assistance based on foreign requests and may also request information from foreign states' authorities.

Further to the exchange of information upon request, Switzerland has signed agreements with a number of partner countries and the EU on the introduction of the automatic exchange of information (AEoI and CRS). The legal bases in Switzerland for the introduction of the AEoI, that is, the Mutual Assistance Agreement, the MCAA and the Federal Act on the International Automatic Exchange of Information in Tax Matters, were adopted by the Federal Assembly in December 2015. Furthermore, the Federal Tax Administration has issued a guideline on a standard for the automatic exchange of information on financial accounts. A number of bilateral treaties and the agreement between Switzerland and the EU, as well as the Swiss domestic legislation on the AEoI, entered into force on 1 January 2017. Based on the treaties and the Swiss implementing legislation, Switzerland began to collect data in respect of financial assets and to exchange it in 2018. Switzerland has signed and is expected to sign further AEoI agreements with other countries. An updated list of the AEoI agreements negotiated or signed by Switzerland can be found on the website of the State Secretariat for International Financial Matters (SIF). Furthermore Switzerland agreed to exchange certain information, which substantiates the suspicion that a taxpayer obtained an unduly tax reduction. The Swiss Federal Tax Authority transmitted in the first half of 2018 a total of 82 spontaneous notifications regarding tax rulings to 41 different states.

SPECIAL PROCEDURES

Hardship 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 great hardship for a taxpayer as a result of an emergency or exceptional situation, the tax imposed may be waived fully or partially. 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 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.

Requests for tax abatement and tax payment deferral must be placed in writing with the competent authorities.

Voluntary disclosure and amnesties

- 20 | Are there any voluntary disclosure or amnesty programmes?

Individuals and business entities have the opportunity to file a voluntary disclosure once in their lifetime or existence. The voluntary disclosure and amnesty benefits are only available if the tax authority had no 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. Voluntary disclosure is also available in inheritance cases (to be undertaken by the heirs) and for assets not included in estate inventories.

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 10 tax periods or, in inheritance cases, three tax periods, plus interest for late payment. Furthermore, the voluntary disclosure prevents criminal proceedings for related criminal offences (eg, falsification of documents or accounts).

RIGHTS OF TAXPAYERS

Rules protecting taxpayers

- 21 | What rules are in place to protect taxpayers?

Aside from the remedies the taxpayer may raise in relation to 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 enforcing the tax legislation, and the 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 the 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 judgment and the right to an effective remedy.

Requesting information

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: an illegal tax agreement.

Furthermore, taxpayers are entitled to inspect the files they have submitted to the tax authorities or they have signed with regard to 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.

Tax authority governance

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 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

Competent courts

24 | Which courts have jurisdiction to hear tax disputes?

Tax disputes are initially 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 judicial court instance for tax disputes (eg, the tax recourse court or tax recourse commission). The cantons may provide for a second judicial court instance in tax matters, typically a division of the cantonal administrative court.

On the federal level, the Federal Supreme Court has jurisdiction for tax matters, whereby the Federal Administrative Court is interposed for certain tax-related matters with regard to international administrative assistance, or taxes levied on a federal level (eg, VAT and withholding taxes).

Lodging a claim

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

The taxpayer may raise an objection against the assessment notice within 30 days after notification by the assessment authority. The objection may contest the assessment order, the declaratory order on tax liability and 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 a reminder fee. The objection may be submitted by the taxpayer. But the legitimacy goes even further and applies to all those persons who have been assessed with the assessment order for the tax in question.

The taxpayer may raise a complaint by the independent (first) judicial instance against the objection decision from the assessment authority within 30 days after notification in writing. Those entitled to raise the complaint are the taxpayer and other individuals who 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.

Combination of 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. However, in practice, procedures relating to tax claims from one year or from multiple tax periods are regularly combined either ex officio or upon request.

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 take procedural steps, such as raising objections, independently. 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 or her 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 or her demise, or for real estate held jointly), the heirs are also entitled to raise objections individually, but with effect also for the other heirs.

Pre-claim payments

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

Tax amounts become due during the relevant tax period for cantonal and communal income, wealth, corporate income and capital taxes, and shortly after the relevant tax period for federal income and corporate income taxes, and, in any case, once they are determined in a tax assessment order. Interest for late payment is levied after the payment due date. The submission of an objection or complaint does not interrupt the payment timelines and it is generally recommended to pay the disputed tax, despite 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.

Cost recovery

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

The costs (procedural costs and administrative fees as well as costs for legal representation) of a dispute are, generally, imposed on the losing party by the court and, in certain circumstances, by the tax authorities. The costs may be divided between the parties if the dispute leads to a judgment partially in favour of one party. The applicable federal or cantonal legislation may allow the court to require procedural costs to be paid in advance, for example, by the claimant or by the taxpayer, in order to accept the case for trial. In specific circumstances, the court may also waive the costs.

A final cost assignment issued by a court is, generally, enforceable by means of ordinary debt-enforcement procedures.

Third-party funding

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.

Under the Swiss legislation on the professional behaviour of lawyers, it is not permitted for a lawyer to finance a tax dispute indirectly via purely success-based compensation.

Court decision maker

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

Swiss courts usually sit as a panel of three or five judges, depending on the applicable federal or cantonal legislation. Swiss legislation does not provide for jury trials.

Time frames

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.

Disclosure requirements

32 | What are the requirements concerning disclosure or a duty to present information for trial?

The taxpayer is obliged to do everything possible to allow for a complete and correct assessment, generally during the assessment procedure but de facto also in court. Information may, in this context, be requested in written or oral (interview) form. In accordance with general criminal law principles, no taxpayer may be constrained to accuse him or herself in criminal proceedings.

Within the income and corporate income tax assessment procedure, the law specifically mentions the obligation of employees to file their payroll accounting and account statements regarding any payments received as directors or other official administrative office-holders of a legal entity. Furthermore, the same provisions oblige individuals to provide statements of their securities, outstanding loans and their debt. Legal entities and self-employed individuals must file their balance sheet and P&L statements. Legal entities have an obligation to show the development of their equity, including capital contribution reserves. Every taxpayer has the duty to file a tax return.

Taxpayers who are subject to Swiss VAT must keep records of all relevant transactions, and store bills and accounts for such transactions for up to 20 years. They must provide a statement of all relevant transactions to the Swiss VAT authority within 60 days after the end of each declaration period.

Income from Swiss sources which is subject to the Swiss withholding tax must be declared in the Swiss resident income-recipient's tax return as income in order to be eligible for a refund of the withholding tax. Taxpayers are entitled to inspect the files they have submitted to the tax authorities or have signed regarding the tax authorities (see question 22). 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.

In general, during trial but also in the course of the assessment procedure, the burden of proof for tax-increasing assertions is upon the tax authorities. However, if there is a lack of proof caused by the taxpayer's insufficient cooperation, natural assumptions are put in place. Such assumptions shift the burden of proof to the taxpayer. Furthermore, the taxpayer has the burden of proof for assertions reducing his or her tax burden.

Permitted evidence

33 | What evidence is permitted in a tax trial?

In a tax trial, the facts may be established based on documents, written or oral information provided by the taxpayer, information or testimony from third parties, visual inspections and reports.

According to the federal legislation on criminal proceedings generally, everybody is obliged to give 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 constrained to accuse him or herself in criminal proceedings.

Permitted representation

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 may represent him or herself in the tax assessment, objection and complaint procedure, with regard to 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, 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 by an attorney-at-law admitted to a cantonal bar.

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.

Publicity of proceedings

35 | Are tax trial proceedings public?

Tax assessment and tax objection procedures are non-public procedures. Cantonal legislation governs the publicity of complaint procedures to the cantonal judicial instances (see question 38). Oral hearings in complaint procedures on the level of the Federal Supreme Court are public unless the 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 and are generally public.

Burden of proof

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 must 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. Conversely, the tax authorities bear the burden of proof regarding any facts that lead to the existence or increase of a taxpayer's tax burden.

Case management process

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 (see question 1).

Appeal

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

Income tax assessment orders may be contested by the taxpayer by an objection in writing to the assessing authority within 30 days after notification of the order. The objection need not contain a statement of reasons. An objection against an assessment order based on a discretionary judgment (see question 6) must include evidence showing that the assessment is obviously incorrect. The objection procedure is free of charge for the taxpayer.

The tax authorities' decision in the objection procedure can be contested by a complaint raised by the taxpayer in writing to the respective (first) cantonal judicial instance (eg, 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 an advanced complaint. The complaint is subject to fees in accordance with the applicable cantonal legislation. The complaint must include a request and the relevant facts, 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 cantonal judicial instance may be challenged by the taxpayer or the cantonal tax authorities by a complaint to a further cantonal judicial instance (typically an administrative court). The complaint is subject to fees in accordance with the applicable cantonal legislation and must fulfil the same formal requirements as a complaint filed to the cantonal judicial instance. Proceedings before the cantonal court are often subject to a ban on novenas.

The decision rendered by the (first) cantonal judicial instance or, if applicable, the further cantonal judicial instance may be challenged by the taxpayer or the cantonal tax authorities by a complaint in administrative matters to the Federal Supreme Court. The complaint is subject to fees in accordance with the applicable federal legislation. There are strict rules about substantiation requirements for complaint submissions to the Federal Supreme Court. The Federal Supreme Court generally does not decide on the facts and circumstances but rules on errors of law. Proceedings are subject to a ban on novenas.

UPDATE AND TRENDS

Key developments of the past year

39 | What are the current trends in enforcement? What are the current concerns of the authorities and taxpayers? Are there proposals to change the relevant legislation or other rules?

The past few years have shown an increasing trend towards tax litigation: whereas tax litigation historically was an ultima ratio measure for many taxpayers and also the authorities, the number of cases where opposing views are not settled between taxpayers and the tax authorities in the course of the tax assessment procedure but are brought before courts has increased.



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Further recent developments have resulted from the introduction of the automatic exchange of information and, with this, increased transparency in cross-border situations. The enhanced transparency increases the tax authorities' opportunities and possibilities to enforce taxpayers' filing and taxation obligations.

On 19 May 2019 the Swiss electorate adopted the Federal Act on Tax Reform and AHV Financing (STAF), which will enter into force on 1 January 2020. It is expected that with the implementation of the reform, controversies and tax litigation may increase, particularly in the context of corporate taxation.

United Kingdom

Dominic Robertson, Richard Jeens and Charles Osborne

Slaughter and May

OVERVIEW

Legislation

- 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.

Relevant 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 several different case boards, including Enforcement and Compliance; Large Business; Specialist Personal Tax; Diverted Profits; and Transfer Pricing. A large transfer pricing case may need to be approved by the Transfer Pricing Board, the Tax Dispute Resolution Board and the Commissioners. HMRC also has a Penalty Consistency Panel.

ENFORCEMENT

Compliance with tax laws

- 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 the matters that can then subsequently be disputed in relation to the particular return are 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.

Types of taxpayer

- 4 | Are different types of taxpayers subject 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 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.

Requesting information

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.

Available agency action

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

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.

Protecting commercial information

7 | How may taxpayers protect commercial information, including business secrets or professional advice, from disclosure? Is the tax authority subject to any restrictions concerning what it can do with the information disclosed?

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, client 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.

Subject to a number of limited exceptions, HMRC officials are prohibited by statute from disclosing to any third party any information that is held by HMRC in connection with its functions. There are criminal sanctions for breach of that prohibition if the breach relates to a person whose identity is specified in the disclosure or can be deduced from it.

Limitation period for reviews

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' (which 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 or her 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 or her, 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 20 years from the end of the period to which the assessment relates.

Alternative dispute resolution

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 some 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.

Collecting overdue payments

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.

Penalties

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

Generally, HMRC may impose penalties for:

- inaccuracies in tax returns and documents;
- failures to notify HMRC of a liability to tax;
- failures to file returns on time; and
- 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'.

Collecting interest

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.

Criminal consequences

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.

Traditionally, corporates were 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 in 2017, following recent global tax scandals, the UK government introduced a new strict-liability, US-style approach, where the burden is on corporates to demonstrate that appropriate prevention procedures were in place in order to avoid a criminal charge of 'failing to prevent' a tax-related crime committed by someone else.

The consequences of being found guilty of a tax-related crime depend 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.

Enforcement record

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

The majority of tax disputes are resolved before proceeding to the tribunal, with one or other party conceding, or reaching a compromise settlement (which, to comply with HMRC's Litigation and Settlement Strategy, must be a technically justified outcome). In those cases that do proceed to court, HMRC's enforcement record is good, particularly in cases involving perceived tax avoidance. In 2018/19, the First-tier Tribunal ruled in HMRC's favour in 75 per cent of the tax disputes that it heard.

THIRD PARTIES AND OTHER AUTHORITIES

Involvement of third parties

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 7 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).

Cooperation with other authorities

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 taxation treaties.

SPECIAL PROCEDURES

Hardship 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.

Voluntary disclosure and amnesties

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 would 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

Rules protecting 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.

Requesting information

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.

Tax authority governance

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.

COURT ACTIONS

Competent courts

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 law 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.

Lodging a claim

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 in question 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 relating to when a judicial review claim can be brought (particularly as to timing), and the extent of the failings of the public body, which must be satisfied before a court will agree to hear a judicial review appeal. The First-tier Tribunal cannot hear judicial review claims.

Combination of 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 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.

Pre-claim payments

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 diverted profits tax 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, the taxpayer must pay the disputed tax in question.

Cost recovery

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.

Third-party funding

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.

Court decision maker

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.

Time frames

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.

Disclosure requirements

32 | What are the requirements concerning disclosure or a duty to present information for 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.

Permitted evidence

33 | What evidence is permitted in a tax trial?

The First-tier Tribunal has extensive case management powers to control what evidence is admitted (whether oral or documentary).

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 pre-prepared witness statements standing as evidence before the tribunal.

Permitted representation

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.

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Publicity of proceedings

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.

Burden of proof

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.

Case management process

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.

Appeal

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.

UPDATE AND TRENDS

Key developments of the past year

39 | What are the current trends in enforcement? What are the current concerns of the authorities and taxpayers? Are there proposals to change the relevant legislation or other rules?

HMRC continues to tackle tax avoidance as a key priority, making use of the increasing amounts of information available to it, and its improving ability to process such information. This has resulted in two major trends:

- HMRC is more willing to use methods at its disposal that were previously seen as last resorts. In particular, the number of information requests made to third parties about taxpayers (for example, information requests to banks about their account holders) has increased significantly. In addition, HMRC has taken to bringing an increasing number of cases against taxpayers using its criminal sanctions, including recently convicting more than 20 individuals for offences relating to arrangements that have been promoted and marketed as tax-avoidance schemes.
- At the same time, HMRC is looking to cooperate with taxpayers to bring around voluntary disclosures and settlements in new, non-contentious settings. For example, through the establishment of a profit-diversion compliance facility in order to work with companies to resolve issues around the pricing of cross-border arrangements.

United States

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OVERVIEW

Legislation

- 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.

Relevant authority

- 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

Compliance with tax laws

- 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.

Types of taxpayer

- 4 | Are different types of taxpayers subject 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 may also be required, most commonly to report wages, interest, dividends or other items paid. Information returns also must be filed by US persons who 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.

Requesting information

- 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.

Available agency action

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

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 respond in a timely manner 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.

Protecting commercial information

7 | How may taxpayers protect commercial information, including business secrets or professional advice, from disclosure? Is the tax authority subject to any restrictions concerning what it can do with the information disclosed?

The taxpayer need not disclose protected information to the IRS. In the US, 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.

Limitation period for reviews

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.

Alternative dispute resolution

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 IRS 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.

Collecting overdue payments

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 can also 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.

Penalties

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 can also 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 and 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 that the position is more likely than not correct. These rules will differ if the tax position involves a tax shelter (IRC Sections 6662 and 6664).

Collecting interest

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 three percentage points. For large corporate underpayments, the interest rate enhancement is increased to five percentage points after the IRS proposes a tax deficiency.

Criminal consequences

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 are typically specified to be a monetary fine, a term of imprisonment or both.

Enforcement record

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

Involvement of third parties

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).

Cooperation with other authorities

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

Hardship 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.

Voluntary disclosure and amnesties

20 | Are there any voluntary disclosure or amnesty programmes?

The IRS has an Offshore Voluntary Disclosure Program (OVDP) for submissions made on or after 1 July 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

Rules protecting 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.

Requesting information

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 an FOIA request or withholds documents, the taxpayer can protest to IRS Appeals and, if necessary, initiate suit in federal district court.

Tax authority governance

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

Competent courts

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.

Lodging a claim

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 must then 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.

Combination of claims

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.

Pre-claim payments

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.

Cost recovery

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. The IRS cannot recover litigation costs from a taxpayer.

Third-party funding

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.

Court decision maker

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 a 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.

Time frames

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 are typically sought. Thereafter, the judge and the parties usually agree to a scheduling order which sets a time frame for discovery, the exchange of expert reports, 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.

Disclosure requirements

32 | What are the requirements concerning disclosure or a duty to present information for 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 the potential evidence and witnesses that 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 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.

Permitted evidence

33 | What evidence is permitted in a tax trial?

Documentary evidence may be introduced at 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 or any other individual with relevant information. The government may present 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.

Permitted representation

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 practise in those courts. In the Tax Court, taxpayers may also represent themselves, but more often are represented by lawyers or by non-lawyers admitted to practise 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.

Publicity of proceedings

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 are also 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.

Burden of proof

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.

Case management process

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.

Appeal

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 of 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

* *The information in this chapter was accurate as at August 2018.*

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