

Tax litigation in Switzerland: insights, pitfalls and recommendations

As the Swiss tax authorities take an increasingly aggressive approach, **Matthias Bizzarro** and **Ricardo Marino** of **Bär & Karrer** explain the relevance of tax rulings, taxpayers' means of appeal, and the burden of proof



Tax litigation in Switzerland has traditionally been quite scarce, since potential problems tended to be discussed beforehand with the tax authorities (tax rulings). As an example, in the Canton of Zurich, out of almost 1 million tax assessments, only approximately 300–500 appeals are filed to the tax court of first instance. The trend is slowly moving towards increased litigation, as tax ruling practice becomes more limited and tax authorities more aggressive.

This article provides an overview of Swiss tax litigation practice, its pitfalls, and the available legal remedies.

The relevance of tax rulings

A Swiss taxpayer may obtain guidance from the competent tax authorities on potential/future cases. While a ruling is not an order and is thus not subject to appeal, it can be considered to bind the tax authorities on certain conditions.

Among the requirements, the most important one is that the facts of the case as implemented by the taxpayer match the factual description given in the tax ruling. Another important prerequisite is that the authority that has given the ruling must be competent to do so, which has been the subject of recent clarifications by Switzerland's highest court.

Tax rulings have traditionally been frequently used (in 2022, the federal tax authority received over 6,000 tax rulings for VAT only) and have been a factor in keeping tax controversy numbers low.

Nevertheless, following an international trend, tax authorities are becoming more aggressive and less

compromising with regard to negotiating rulings, partly due to improved investigative resources at their disposal, such as the automatic exchange of information or an increased use of (active) requests for international administrative assistance in tax matters. Furthermore, there may be cases in which there is not sufficient time to request a tax ruling. In other cases (for example, recurring situations, such as transfer pricing), the tax authority may revoke an ongoing tax ruling.

Regardless of the reason that leads to a taxpayer not being covered by a (binding) tax ruling, those are typically the cases that can lead to tax litigation, as the only remaining option to protect the taxpayer's rights.

Tax litigation

A main feature of tax litigation in Switzerland is that the procedures are conducted almost exclusively in writing. The assessment of the relevant facts for tax cases is generally based on written evidence, and any witness statements (if they are relevant) need to be made in writing as well.

Thus, tax litigation is often won or lost in the relevant tax year, not during the actual proceedings. Two examples:

- Swiss courts will generally not recognise a nominee relationship unless there is a written agreement; and
- In cases where the tax authorities suspect (from a comparison of expenses with declared revenue) that the taxpayer has not declared all their revenue, no loans from friends or family members living abroad will be accepted unless evidence of a credit advice from a bank can be shown.

Nevertheless, oral hearings may play an important role at the level of the first remedy.

Tax assessment

Tax assessment procedures vary depending on the type of tax involved.

At the direct tax level (assessed by the cantons), a so-called mixed procedure applies, where the taxpayer files a tax return and the tax authority issues a decision in each case, even when it agrees with the taxpayer's position.

At the federal level (withholding tax, stamp duty, VAT, etc.), the procedure is typically that of so-called self-assessment: the taxpayer needs to assess the taxes due and pay them within the legal deadlines without any request from the tax authority, and the tax authority retains the right to review the self-assessments within a certain timeframe (typically five to seven years), and only issues a tax decision if it disagrees with the taxpayer's self-assessment.

Legal remedy at the level of the tax authority

Typically, the first remedy against a decision by the (cantonal or federal) tax authority is non-devolutive in nature; i.e., it is a formal objection to be filed with the same authority. Obviously, this authority will often not be inclined to change its mind, but it does happen, especially if new documents or pieces of evidence can be produced by the taxpayer. At this stage, requesting an oral hearing can be a helpful tool to find a negotiated solution with the tax authority.

Judicial remedies

After the tax authority's decision on the objection, the taxpayer may file an appeal to the (cantonal or federal, depending on the taxes involved) appellate court.

Generally, the applicable procedure provides for two or three judicial instances. Of these, the first typically has full cognisance; i.e., it can freely assess questions

of law and fact, and, in part, questions concerning the discretionary powers of the tax authorities.

The subsequent appellate courts have only limited jurisdiction over questions of fact and regarding the tax authorities' discretionary powers. This is particularly important, as the facts of the case are often crucial in tax litigation.

Burden of proof

As mentioned, the relevant facts of disputed cases are often essential to win an appeal. In theory, the tax authority must prove facts that increase the tax burden, while the taxpayer has the burden of proving circumstances that reduce it.

However, since the investigative powers of the Swiss tax authorities are very limited, case law has introduced evidentiary reliefs for the tax authorities in various cases. Thus, the authorities often only have to present circumstantial evidence of a fact pattern, with the taxpayer required to provide counter-evidence; failing which, the tax authorities will replace the missing information with estimates and/or assumptions, which will only be reviewed based on very limited scrutiny by the appellate courts.

Therefore, it is highly recommended to involve professional support as early as possible and to collect all relevant and available information (in particular, documents) to be submitted to the tax authority.



Matthias Bizzarro
Partner, Bär & Karrer
matthias.bizzarro@baerkarrer.ch



Ricardo Marino
Associate, Bär & Karrer
ricardo.marino@baerkarrer.ch