

Tax Controversy 2021

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Tax Controversy

2021

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

Lexology Getting The Deal Through is delighted to publish the eighth 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 Ecuador and Taiwan.

Lexology Getting The Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.lexology.com/gtdt.

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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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; (iii) securities issue and transfer taxes, the Federal Act on Stamp Duties; and (iv) value added tax, the Federal Act on Value Added Tax) 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, the Federal Act on the Federal Administrative Court and the Federal Act on the Federal Supreme Court), as well as the cantonal procedural laws. With regard to the international exchange of financial information, the Federal Act on Automatic Exchange of Information and the Federal Act on Administrative Assistance in Tax Matters (StAHiG) contain important procedural elements.

This chapter 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.

- 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 (ie, income and wealth taxes). 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 coordinating 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 Federal Act on the Harmonization of Cantonal Tax Acts.
- Customs duties are administered by the Federal Customs Administration.
- Social security contributions are administered by separate, often cantonal, authorities.

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.

In this context, Swiss law provides that companies and entrepreneurs must keep their books and records available for at least 10 years for Federal income tax) and up to 20 years for VAT.

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 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 legislation provides 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. A motion in the Swiss parliament aiming to harmonise the rules regarding the limitation period for withholding tax, stamp duty and VAT has been rejected.

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. Settlements with regard to taxable income, profits, wealth and capital are not permitted under Swiss law. 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, 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 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 deletion from the commercial registry 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 a tax return or meet declaration obligations).

12 | How are penalties calculated?

According to Swiss criminal legislation 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. The penalties for income taxes (federal level) are structured as follows:

- 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. The scope for voluntary disclosure has narrowed, particularly for individuals, since the introduction of the automatic exchange of information.
- 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. 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 on 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 amounted 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.

Within the covid-19 support measures implemented temporarily by the Swiss Federal Council in March 2020, interest has been temporarily waived on certain tax payments and the tax authorities were held to treat requests for payment plans generously.

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, criminal consequences (ie, penalties – in exceptional cases imprisonment) may apply.

Furthermore, in severe cases of tax fraud within the offender's professional or non-professional context, a ban on performing 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 the authorities' enforcement records. Generally, the cantonal tax administrations handle between 4,000 and 6,000 procedures for tax evasion (including voluntary disclosure cases) each year.

THIRD PARTIES AND OTHER AUTHORITIES

Cooperation with other authorities

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

Third parties have certain attestation, information and notification obligations (eg, employer's salary certificate).

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.

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

Cooperation and assistance differ depending on the scope:

- 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. This 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). 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 the Common Reporting Standard). The legal bases in Switzerland for the introduction of the AEOI, that is, the Mutual Assistance Agreement, the Multilateral Competent Authority Agreement 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 AEOI 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. Furthermore, Switzerland has agreed to exchange certain information that substantiates a suspicion that a taxpayer obtained an undue tax reduction.

SPECIAL PROCEDURES

Voluntary disclosure and amnesties

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 or 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. Extensions of payment deadlines were frequently used within the context of the covid-19 crisis.

Requests for tax abatement and tax payment deferral must be placed in writing with the competent authorities.

20 | Are there any voluntary disclosure or amnesty programmes?

Individuals 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.

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, voluntary disclosure prevents criminal proceedings for related criminal offences (eg, falsification of documents or accounts). Since the introduction of the AEOI, the scope to achieve a voluntary disclosure without penalties has narrowed, particularly where bank accounts abroad have to be declared retroactively, as such accounts are typically deemed to be known to tax authorities already. However, it is still recommended that taxpayers approach the tax authorities proactively to be eligible to benefit from penalty reductions.

A procedure similar to voluntary disclosure is also available in inheritance cases (to be undertaken by the heirs) and for assets not included in estate inventories. Within such a procedure, no penalties will be imposed, but the heirs will be required to pay the taxes due for the three tax years prior to the year of demise of the (former) taxpayer.

RIGHTS OF TAXPAYERS

Rules protecting taxpayers

21 | What rules are in place to protect taxpayers?

Aside from the remedies that 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?

Information can be received from the tax authorities in two ways:

- Taxpayers may seek an advance 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.
- 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 for the tax years for which they are taxed jointly. 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. 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 at a federal level (eg, VAT and withholding taxes).

Lodging a claim

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

Swiss tax legislation provides for a multi-layered court system:

- The taxpayer may raise an objection against the assessment notice within 30 days after notification by the assessment authority. The objection is submitted to the tax assessment authority itself and 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. In the objection, the objector has a claim to unlimited review of the assessment decision and the annulment of reported deficiencies. It is free of charge, but may also lead to a decision in *pejo* (ie, not following the taxpayer's request and therefore worsening the taxpayer's position). However, 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 to the independent (first or second) 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.

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 of 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 if 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 do not contain any restrictions with regard to process financing via insurance solutions or third-party funding. The cost of 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 that is subject to the Swiss withholding tax must be declared in the Swiss resident income-recipient's tax return as income 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. The right to inspect files will normally be granted only once fact-finding has been completed by the tax authorities and if no private or public interests are opposed.

In general, during a 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 procedures, 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. 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.

Appeal

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

Swiss tax legislation provides for a multi-layered court system:

- 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 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 bringing new facts and evidence.
- The decision rendered by the (first) cantonal judicial instance or, if applicable, the further cantonal judicial instance may be



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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 bringing new facts and evidence.

UPDATE AND TRENDS

Key developments of the past year

- 39 | What are the current trends in enforcement of tax controversies? What are the current concerns of the authorities and taxpayers in relation to the enforcement and handling of tax controversies and are these likely to change? 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. The following trends can be seen.

- 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.
- It is expected that in view of the considerable expenses incurred by the Swiss Federal, cantonal and municipal governments in the context of the covid-19 crisis, the Swiss tax authorities will increase their efforts to levy and collect taxes.
- The Federal Act on Tax Reform and AHV Financing (STAF) entered into force on 1 January 2020. With the implementation of the reform, controversies and tax litigation may increase, particularly in the context of corporate taxation.

Coronavirus

40 | What emergency legislation, relief programmes and other initiatives specific to your practice area has your state implemented to address the pandemic? Have any existing government programmes, laws or regulations been amended to address these concerns? What best practices are advisable for clients?

Within the covid-19 emergency legislation, the Swiss Federal Council has adopted the following temporary measures:

- temporary waivers on interest for late payments;
- payment facilitations for taxes and social security contributions (postponement of payments, instalment plans); and
- faster payment of tax refunds and credits by the tax authorities to improve liquidity for taxpayers.

Many taxpayers have reviewed various measures to overcome liquidity and income shortages within their existing structure or beyond, with a view to adapting their structures, dividend policies, intra-group transfer pricing, VAT situation and so on.

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