



Tax investigations and disputes across borders

October 2023

Insights into the contentious tax framework
across Europe and the US



Freshfields Bruckhaus Deringer

Introduction

Welcome to the 2023 edition of our guide to tax investigations and disputes across borders - providing insights into the contentious tax framework across Europe and the US.

Our aim in producing this guide is to:

Identify contentious tax trends across Europe and the US to help you and your business prepare for what may lie ahead

Help you understand the risks and processes involved should your business face an investigation by, or dispute with, the tax authorities in these jurisdictions

Provide a helpful and practical comparative analysis on this topic

One of the main drivers for this guide is the expectation that there will be an increase in large-scale tax investigations and disputes over the coming months; something we're already seeing play out in practice. With the global economy reeling from successive crises, and governments across the world under pressure to fill the resulting gaps in their budgets without increasing the tax burden on individuals, we've seen tax authorities adopt increasingly robust positions in tax audits and assessments involving large corporates - and this trend is only set to continue.

Beyond this macroeconomic-driven trend, there are a number of other developments in the contentious tax space that mean the risks to businesses continue to rise, including:

- increasingly sophisticated audits of transfer pricing and tax structuring within multinational groups;
- an increased scrutiny of taxpayers' motives and management incentive plans;
- an ever-growing volume of taxpayer information being shared internationally; and
- an increased use of criminal powers.

Against this background, understanding how tax investigations and disputes work as a practical matter, and the potential consequences that may arise should such conflict with a tax authority arise, is increasingly seen by many businesses as an important part of their decision-making processes.

To help you make informed decisions when managing your contentious tax risk, in this guide we have answered key questions about the contentious tax framework in nine jurisdictions across Europe and the US. These questions cover a range of topics from tax authority powers to potential criminal liability, as well as common tax disputes and trends in each jurisdiction.

We also want to give you some guidance should you need to build a similar picture of the rules in other jurisdictions. To that end, this guide also includes a [checklist](#) of questions you might want to explore with local tax advisors.

We hope that this guide is a valuable reference tool for you.

We are always available to offer more information or to discuss these topics in more detail - please don't hesitate to reach out to me, my colleagues listed at the back of this guide, or your usual Freshfields contact.



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Austria

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1. What type of tax disputes are most common and are there any trends taxpayers should be aware of?

The most common type of tax disputes in Austria are related to income tax, corporate tax and value added tax. In recent years, there has been an increased focus on transfer pricing, with tax authorities in Austria increasingly scrutinising transfer pricing arrangements to ensure that they reflect arm's-length pricing and that profits are not artificially shifted to lower-tax jurisdictions.

Another trend is the use of the automatic exchange of information between countries to uncover undisclosed offshore assets or income. Furthermore, the EU's Anti-Tax Avoidance Directive (ATAD) has led to changes in Austria's tax laws, including measures to limit the use of hybrid mismatches and tax deductions for interest payments, and we expect to see a significant number of disputes involving these measures in the near future.

In the future, taxpayers in Austria should be aware of potential challenges related to the OECD and EU's work on the development of a global minimum tax and the creation of a new global tax framework for the digital economy.

2. What powers do the tax authorities have to require disclosure of information from taxpayers?

Austrian tax authorities have broad powers to require disclosure of information from taxpayers to verify tax compliance. The tax authorities can request information and documents from taxpayers that are relevant to the assessment of taxes. This can include financial statements, invoices, contracts, bank statements and other records.

Austrian tax authorities can also conduct audits to verify the accuracy of tax returns filed by taxpayers. This can include reviewing books and records, interviewing employees, and inspecting premises. The tax authorities can request access to softcopy data, including electronic records and files, as part of a tax audit or investigation. Taxpayers must provide access to such data if it is relevant to the assessment of taxes. The tax authorities can also request information from third parties, such as banks, employers, and suppliers, that is relevant to the assessment of taxes.

In principle, the taxpayer may refuse to submit documents if they are not relevant to the proceedings or are sensitive. However, if the taxpayer wants to assert a right (eg to claim a deduction of business expenses), they will be required to present all necessary documents to substantiate that right, even if those documents include sensitive information.

The tax authorities can conduct searches of premises if they believe that evidence of tax evasion or fraud is present.

Taxpayers may be subject to proactive disclosure requirements. For example, the Austrian government has implemented mandatory disclosure regimes such as Country-by-Country Reporting (CbCR; which requires multinational companies to report annually on their global allocation of income, taxes paid, and other indicators of economic activity on a country-by-country basis), DAC6 (which requires taxpayers and intermediaries to report certain transactions and activities to the tax authorities), and the Common Reporting Standard (CRS; a global information exchange standard for the automatic exchange of financial account information between participating jurisdictions to combat tax evasion). Failure to comply with these regimes can result in penalties.

3. What are the relevant applicable time limits for tax audits/enquiries to be opened and appeals to be made?

As noted at question two above, Austrian tax authorities have the power to conduct tax audits or enquiries to investigate potential tax evasion or errors. The time limit for opening a tax audit is in principle five years from the end of the year in which the tax return was filed. This time period can be extended by the competent Tax Office taking extension actions (eg making enquiries of persons providing information, making requests for additional information) until the absolute statute of limitation, ie 10 years, is reached. The tax audit ends with the issuance of a (revised) tax assessment.

If the taxpayer wishes to challenge the tax assessment issued by the tax authorities, they must file an appeal with the Federal Tax Court within one month from the date of receipt of the decision (although this deadline may be extended upon request if the taxpayer can credibly demonstrate a justified reason for the requested extension). Appeals are directed at the Federal Tax Court but must be submitted to the competent Tax Office. If the taxpayer does not file an appeal within this time limit, the tax assessment becomes final and binding.

The competent Tax Office will render a preliminary appeal decision in which it decides on the taxpayer's appeal. If the taxpayer does not accept the preliminary appeal decision, a request for remittance of the appeal to the Federal Tax Court must then be filed with the competent Tax Office within one month. That Tax Office will then have to forward the appeal to the Federal Tax Court, accompanied with a notification of remittance in which it can repeat and complete its arguments. If the taxpayer does not file a request for remittance within the time limit, the preliminary appeal decision becomes final and binding.

If the Federal Tax Court issues a decision, the taxpayer as well as the competent Tax Office can file an appeal with the Supreme Administrative Court within six weeks from the date of receipt of the decision. If no appeal is filed within this time limit, the decision becomes final and binding. (In exceptional cases, the Supreme Constitutional Court may also be approached (see question five below)).

4. What processes must be followed before a tax dispute reaches court?

The process for appealing a tax assessment (including details of the role of the competent Tax Office) is set out at question three above.

Taxpayers are not required to pay the tax assessed by the Austrian tax authorities before they can file an appeal. However, filing an appeal does not prevent the tax from becoming due. Therefore, a separate application for suspension of collection must be filed for this purpose, if this is desired. Such a suspension will not be granted if the appeal does not appear likely to succeed, if the conduct of the taxpayer is aimed at jeopardising the collectability of the tax, or to the extent that the taxpayer's submissions in the appeal would not affect the tax assessed.

The lodging of the appeal is not in itself accompanied by additional disclosure requirements.

5. Which courts are relevant to tax disputes?

The Austrian tax courts consists of two levels. In the first instance, the Federal Tax Court decides on the appeal. Subsequently, both the taxpayer and the competent Tax Office can appeal to the Supreme Administrative Court as the court of last instance.

The Supreme Constitutional Court also has jurisdiction over tax matters but is only called upon in exceptional cases (eg questions on the validity of laws and violations of fundamental rights). Taxpayers may appeal to the Supreme Administrative Court and the Supreme Constitutional Court in parallel or combine an appeal to the Supreme Constitutional Court with a contingent application for assignment to the Supreme Administrative Court in case the Supreme Constitutional Court rejects or dismisses the appeal.

The Supreme Administrative Court and Supreme Constitutional Courts as courts of last instance are obliged to refer questions on the interpretation of EU law to the CJEU, while the Federal Tax Court as court of first instance is not.

6. Can the tax authorities impose penalties and if so how are these calculated?

The Austrian tax authorities can impose penalties for various types of violations, including both administrative and criminal penalties.

Administrative penalties are typically imposed for administrative violations, such as the failure to file tax returns or pay taxes on time. These penalties vary depending on the severity of the violation and the amount of tax owed. For example, failing to file a tax return on time can result in a penalty of up to 10% of the amount of tax owed, while failing to pay taxes on time can result in a penalty of up to two per cent per month of the amount of tax owed.

Criminal penalties, on the other hand, are imposed for more serious violations, such as tax fraud or evasion. These penalties can include fines, imprisonment, or both, depending on the severity of the offence. The level of penalty imposed will depend on several factors, including the level of wrongdoing and the amount of tax involved. For example, intentional tax fraud or evasion will generally result in higher penalties than unintentional errors or omissions.

There may be the possibility to mitigate or suspend penalties in certain circumstances. For example, if a taxpayer voluntarily discloses an error or omission, they may be able to avoid or reduce penalties (and if the legal requirements for an effective voluntary disclosure are met, the tax authority generally has no discretion in doing so).

7. Can taxpayers reach an out-of-court settlement with the tax authorities?

Austrian tax laws do not generally provide for the possibility of settling disputes between taxpayers and tax authorities by way of an out-of-court settlement, and there are no alternative dispute resolution options available.

8. Can tax authorities impose criminal liability on taxpayers?

Austrian tax authorities can impose criminal liability on taxpayers who violate tax laws. Tax offences in Austria are categorised as either administrative or criminal offences. Administrative offences generally result in fines, while criminal offences can result in fines, imprisonment, or both.

Key Austrian criminal tax offences include tax evasion and tax fraud. Tax evasion involves failing to declare or pay taxes that are due. Tax fraud involves intentionally providing false information or concealing information with the intent of evading taxes.

Austrian tax law also provides for vicarious liability for the criminal acts of employees. Under certain circumstances, employers can be held criminally liable for the tax offences of their employees.

In practice, criminal investigations for tax offences in Austria are not very common, and administrative proceedings are usually preferred. However, the tax authorities can initiate criminal proceedings if they believe that a taxpayer has committed a criminal offence.

Administrative and criminal proceedings are separate and taxpayers need to defend against both. However, there are interdependences between both proceedings and evidence gathered in one of the proceedings might be used in the other, provided there is no statutory prohibition on the use of such evidence.

9. How do tax authorities interact with their foreign counterparts and other agencies or authorities?

Austrian tax authorities may collaborate with other Austrian government agencies, eg to investigate and prosecute tax offences.

Austria is also an active participant in international tax cooperation measures and has signed numerous agreements with other countries relating to the exchange of tax information and the provision of mutual assistance in relation to tax matters. This includes the Convention on Mutual Administrative Assistance in Tax Matters, which provides a framework for information exchange, joint audits, and other forms of cooperation between tax authorities.

In practice, Austrian tax authorities often collaborate with their foreign counterparts on investigations and audits, particularly in cases where cross-border tax evasion or avoidance is suspected. Joint audits may involve tax authorities from multiple countries working together to investigate a particular taxpayer or industry.

In the event of a dispute with a foreign tax authority, Austria has mechanisms in place to resolve these issues through mutual agreement procedures (MAPs). MAPs are designed to resolve disputes between countries that arise from the interpretation or application of tax treaties. Taxpayers who are facing a dispute with a foreign tax authority can request assistance from the Austrian tax authorities to initiate a MAP.

10. Is there anything else taxpayers should know about taking a tax dispute to court?

Oral hearings before the Federal Tax Court and the Supreme Administrative Court are typically held publicly. Decisions of the Federal Tax Court and the Supreme Administrative Court are published online, but without disclosure of the taxpayer's name.

The likely timeline for tax disputes can vary depending on the complexity of the case and the workload of the relevant court, but in general terms it can take several months to several years for a case to be resolved. Overall, tax disputes in Austrian courts can be complex and time-consuming.

Proceedings before the Federal Tax Court are generally free of charge and taxpayers can represent themselves (although this is very uncommon for corporates). In addition, both individual and corporate taxpayers may apply for legal aid which includes free representation.

In proceedings before the Supreme Administrative Court taxpayers must be represented by a tax advisor or attorney, and in proceedings before the Supreme Administrative Court they can only be represented by an attorney. Additionally, a small submission fee of currently EUR 240 must be paid in proceedings before both courts. If the winning party requested cost reimbursement in the appeal, the losing party will be required to reimburse them up to fixed (rather insignificant) amounts determined by law. In addition, taxpayers may apply for legal aid which includes free representation.

Belgium

Nikolaas Van Robbroeck and Maxim Wuyts

1. What type of tax disputes are most common and are there any trends taxpayers should be aware of?

Tackling all sorts of tax optimisation structures through the application of the 'general anti-avoidance rule' (GAAR) is a recurring topic of interest for the Belgian Tax Authority (BTA). Even though an efficient Belgian advance tax ruling practice is able to provide taxpayers with prior legal certainty regarding the application of the GAAR, the number of tax disputes reaching court remains relatively high.

In recent years, there has also been a particular trend of the BTA auditing and challenging the application of dividend and/or interest withholding tax exemptions and reductions in cross-border group structures involving interposed holding companies that the BTA may consider as 'conduit companies' following recent case law from the European Court of Justice (the so-called 'Danish cases' on beneficial ownership and tax abuse).

In addition, the special transfer pricing investigation unit of the BTA has become more active, and increasingly staffed with skilled tax inspectors, in recent years. It carries out a large number of routine transfer pricing audits every year which are followed, in some cases, by in-depth audits often leading to significant tax reassessments.

Generally, the BTA often also focuses on particular 'target areas', such as:

- The application of the Belgian copyrights regime as a way of compensating employees;
- The application of the Belgian salary withholding tax exemption for R&D and compliance with required formalities;
- The use of tax-exempt provisions, irregular use of carried-forward tax losses, and incurring exceptional costs of a considerable amount;
- Companies with abnormal turnover compared to similar companies, or an abnormal evolution of such turnover;
- The application of the Belgian participation exemption and rules giving deductions for dividends received; and
- Particularly more recently, tax-neutral restructurings.

(Until 2018/2019, these 'target areas' were formally publicly announced; more recently, they have instead been identified from practical experience, leaked internal communications within the BTA and/or comments made by the BTA to groups of taxpayers benefitting from certain tax regimes.)

Complex tax legislation, increasing tax compliance requirements and an often somewhat aggressive stance by the BTA means we expect taxpayers will continue to face tax challenges in Belgium in the years ahead.

2. What powers do the tax authorities have to require disclosure of information from taxpayers?

A tax audit generally begins with a written request for information by the BTA. Any document or information considered relevant to the tax audit can be requested by the authorities. The data requested should in principle be provided by the taxpayer within one month, although this is a deadline which can be extended for legitimate reasons, such as a large amount of information being requested.

In recent years, it has become normal for a routine tax audit to start with a request by the BTA for a full set of accounting documents regarding the audited period in digital form.

The taxpayer is also required to allow the BTA entry into its business premises to inspect the activities being carried out and the documents and records located there, even if such inspection was not announced in advance. The BTA is increasingly making use of this power, including for relatively limited tax audits. If access is not granted by the taxpayer, the BTA cannot force entry into the taxpayer's premises, but the taxpayer can be fined by the BTA or sanctioned with penalty payments. If such premises are (at least partly) inhabited, the BTA needs permission from a judge to request entry.

In case of tax-related criminal offences (generally tax fraud), officials can force entry into the taxpayer's business and/or personal premises on the basis of a search warrant issued by the investigating judge, although in such case the investigation is led by the public prosecutor instead of the BTA.

The BTA also has powers to request relevant information from third parties (such as clients or suppliers) for checking a taxpayer's tax position. Certain limitations and specific procedural requirements apply for information requests to certain types of third parties, such as parties subject to professional secrecy (most notably lawyers) or banking secrecy (broadly, financial institutions), although the latter can be set aside if certain procedural requirements are met.

If the taxpayer or third party does not comply with the aforementioned requests made by the BTA, the BTA can impose administrative fines. In addition, a recent law allows the BTA to request a judge imposes penalty payments (*dwangsom/astreinte*) in order to enforce cooperation with a tax investigation (including compliance with information requests).

Taxpayers are not required to proactively disclose to the BTA if they take a position in their tax returns which is uncertain, but such disclosure could limit penalties should a reassessment be made in the future.

Certain other specific disclosure requirements must however be complied with in Belgian tax returns, such as the disclosure of payments made to tax havens.

The BTA also receives disclosure from, or about, taxpayers under the various mandatory disclosure regimes applicable in Belgium – including Country-by-Country Reporting (*CbCR*), the Common Reporting Standard (*CRS*), *FATCA*, and *DAC6*.

The BTA has introduced a ‘Co-Operative Tax Compliance Programme’ (*CTCP*), giving an option for very large companies to enter into a collaborative approach with the BTA to improve tax compliance via legitimate expectations, transparency and faster legal certainty. Companies wanting to make use of *CTCP* must have in place, among other things, a robust internal tax risk management and control system (a ‘tax control framework’). Companies making use of *CTCP* are able to benefit from a tailored audit strategy, a single point of contact at the BTA, and an improved tax reputation. Although the *CTCP* remains relatively new, Belgian companies may increasingly see their use of *CTCP* as forming part of their corporate social responsibility efforts.

3. What are the relevant applicable time limits for tax audits/enquiries to be opened and appeals to be made?

The investigation, assessment and retention periods in direct tax and VAT procedures have recently been changed (generally, extended).

For income taxes, the new rules apply as from ‘assessment year’ 2023, with the assessment year generally referring to the year following that in which the income was realised. Hence, the new rules generally apply to income realised as from financial year 2022. For withholding taxes, the new rules apply to relevant payments made as from 2023. For VAT, the new rules apply to VAT that has become due as from 1 January 2023.

Only the new investigation, assessment and retention periods are summarised below.

In general, the BTA can open an enquiry into a **personal or corporate income tax** return within three years of the first day of the relevant assessment year. The BTA can make a tax assessment within that same period for tax that should have been assessed but has not been due to an incorrect tax return.

Extended investigation and assessment periods apply in specific cases:

- four years for tax returns that are filed late or are not filed.
- six years in case of:
 - transfer pricing investigations for companies subject to international reporting obligations;
 - companies having made payments to tax havens;
 - companies having applied for an exemption or waiver from, or reduction in the rate of, withholding taxes based on a double tax treaty or EU Directive;
 - companies having applied foreign tax credits to reduce the Belgian tax payable; or
 - the BTA having obtained information from foreign authorities in relation to the tax return under *DAC6* or *DAC7* reporting requirements.
- 10 years in case of:
 - tax fraud (provided the BTA notifies the taxpayer of its intention to apply this extended period where fraud is suspected); or
 - so-called ‘complex tax returns’, involving the presence of hybrid mismatches, the application of CFC rules or the presence of reportable legal constructions.

As a result, the statutory retention period for accounting and tax records has also been extended to 10 years.

In relation to **withholding taxes**, an additional specific assessment period of five years applies.

For VAT, the standard investigation and assessment period is three years, extended to four years for VAT returns that are filed late or are not filed. A 10-year investigation and assessment period applies in case of fraud related to VAT matters.

Different deadlines apply to other taxes, such as regional taxes and miscellaneous taxes.

In relation to income tax matters, taxpayers have one year from the third business day following the date on which a tax assessment notice was sent to initiate an administrative appeal before the Regional Director of Taxes (see question four below). In relation to VAT matters, the administrative appeal procedure is not regulated by law, but in practice the BTA allows taxpayers to initiate an administrative appeal within

three months of the third business day following the date on which a VAT assessment was sent.

4. What processes must be followed before a tax dispute reaches court?

Taxpayers are able to challenge in court any tax assessment by the BTA (including in relation to interest and/or penalties).

In relation to income tax matters, an administrative appeal must first be lodged before the Regional Director of Taxes. Such administrative appeal must be initiated within one year of the third business day following the date on which the tax assessment notice was sent.

The taxpayer has three months from the notification of a decision in an administrative appeal to lodge a judicial appeal before the court. In the absence of an administrative decision within six months as from the lodging of the administrative appeal, the taxpayer may lodge an appeal before the court.

The above administrative appeal requirement does not apply in relation to VAT matters, meaning that taxpayers are able to immediately challenge a VAT assessment in court.

Different rules apply to other taxes, such as regional taxes.

There is no ‘pay-to-play’ rule in relation to taxes in Belgium, such that the payment of a disputed tax is not required in order for a taxpayer to challenge it in court. Except for in exceptional circumstances, the recovery of the disputed tax shall be suspended during the appeal process, although taxpayers should take into account that interest on unpaid taxes continues to accrue during the (often lengthy) legal proceedings.

If taxpayers want to bring a constitutional law challenge against a tax law, a request for annulment before the Belgian Constitutional Court should generally be introduced within six months of the publication date of such law.

5. Which courts are relevant to tax disputes?

Most tax disputes are heard initially before the civil section of the Court of First Instance. The decisions of the Court of First Instance can be appealed to the Court of Appeal; and Court of Appeal decisions can be appealed to the Belgian Supreme Court purely on points of law (although generally only a minority of Court of Appeal decisions are appealed to the Supreme Court).

Criminal tax cases can generally be brought before the Criminal Court by the public prosecutor. Decisions of the Criminal Court can be appealed to the Court of Appeal, followed by the Belgian Supreme Court.

If taxpayers want to bring a constitutional law challenge against a tax law, a request for annulment should be introduced before the Belgian Constitutional Court. If questions on the constitutionality or EU-law compliance of a national tax provision are raised before other courts, such courts may also decide to refer such question(s) to either the Constitutional Court or the European Court of Justice for a preliminary ruling.

Certain local taxes (ie taxes introduced by Belgian municipalities or provinces) should be challenged before the Belgian Council of State.

6. Can the tax authorities impose penalties and if so how are these calculated?

Civil (‘administrative’) tax penalties can be imposed by the BTA for each violation by the taxpayer of its obligations under Belgian tax law.

Such penalties can consist of:

- administrative fines generally ranging from EUR 50 to EUR 1,250 (with higher fines applying in case of specific violations, including of transfer pricing reporting obligations, reporting obligations in relation to foreign bank accounts and legal constructions, and *DAC6* and *DAC7* reporting obligations); and/or
- in case of tax returns filed late or not filed, or in case of incomplete or incorrect tax returns, a tax increase calculated as a percentage of the income that has not been declared or has been declared late (see below).

If a tax increase of at least 10% has been applied in the case of undeclared income or income declared late, the reassessed amount constitutes a minimum tax base against which (with very few exceptions) no deductions or losses can be offset.

The above-mentioned tax increases range from 10% to 200%, with the applicable percentage generally depending on (i) whether or not the taxpayer had the intention to evade taxes, (ii) the number of violations already committed by the taxpayer, and (iii) whether the taxpayer has made use of false or forged documents or has tried to bribe tax officials. Where the taxpayer has acted ‘in good faith’ (ie the violation has been caused by circumstances outside of the taxpayer’s control), no tax increase is imposed. In practice, when discussions with the BTA concern a ‘matter of principle’ (ie the interpretation of tax law) that has not yet been settled in case law or

administrative practice, the BTA also generally agrees not to impose a tax increase.

This generally leads to the following range of potential tax increases:

	Increase
Taxpayer acting 'in good faith' (ie the violation has been caused by circumstances outside of the taxpayer's control)	None
No deliberate intent to evade taxes	
First violation	10%
Second violation	20%
Third violation	30%
Fourth violation onwards	Considered deliberate (see scales below)
Deliberate intent to evade taxes	
First violation	50%
Second violation	100%
Third violation onwards	200%
Deliberate intent to evade taxes paired with false or forged documents or (attempted) bribery of tax officials	200%

Similar penalties apply for taxes other than income taxes.

A separate request for a reduction or waiver of the aforementioned administrative penalties and/or late payment interest can be introduced before a specific service within the BTA, which may at their discretion be granted in exceptional circumstances ('equity reasons').

7. Can taxpayers reach an out-of-court settlement with the tax authorities?

It is quite common that civil tax disputes are terminated before they reach court, with the BTA agreeing to a full or partial cancellation of the tax assessment. It is also possible to reach an agreement with the BTA during court proceedings, which agreement may be endorsed in an enforceable judgment. The length (and cost) of court proceedings in Belgium is often an element taken into account by taxpayers when deciding to pursue an acceptable settlement.

A Tax Mediation Service is available as an independent service of which taxpayers can make use to try and resolve a dispute with the BTA, after an administrative appeal has been initiated but before the dispute reaches court. After such mediation, the Tax Mediation Service issues a non-binding mediation report that can serve as a basis for a subsequent decision by the BTA on the matter.

In criminal tax-related cases, a settlement may be proposed by the public prosecutor (or the taxpayer can request the public prosecutor to propose a settlement). It will be a condition of such settlement that the full amount of evaded taxes (including any late payment interest) is paid and that the BTA agrees with the settlement.

8. Can tax authorities impose criminal liability on taxpayers?

Criminal penalties can only be imposed by a criminal judge, following the prosecution of the taxpayer before the criminal court. Prosecutions are generally brought by the public prosecutor, and never by the BTA.

Specific criminal penalties may be imposed on taxpayers if a criminally sanctioned offence is committed as part of a violation of tax law. Such criminally sanctioned offences generally include tax fraud (ie a violation of tax law with fraudulent intent) and/or the use of false or forged documents.

For tax fraud, a prison sentence of eight days to two years and/or a criminal fine ranging from EUR 250 to EUR 500,000 can be imposed. In case of serious (organised) tax fraud, the prison sentence can be up to five years. For the use of false or forged documents to commit tax fraud, a prison sentence of one month to five years and/or a criminal fine ranging from EUR 250 to EUR 500,000 can be imposed.

Such criminal penalties may be imposed in parallel to any civil ('administrative') penalties imposed by the BTA (see question six above). In determining the criminal penalty, the criminal judge should however take into account the amount of these civil penalties to ensure that the taxpayer is overall not subject to an 'unreasonably heavy' penalty.

Although BTA officials generally have the obligation to notify the public prosecutor's office of criminally sanctioned offences discovered as part of their investigation, a criminal prosecution in tax matters (ie by the public prosecutor) is in practice generally reserved for the most serious cases of tax fraud (for example, where large amounts of tax has been evaded).

9. How do tax authorities interact with their foreign counterparts and other agencies or authorities?

The BTA works together with a number of other Belgian authorities, including the social security services, the public prosecutor's office, the police forces and the National Bank of Belgium.

Similarly, the BTA increasingly works together with foreign tax authorities. Belgium has an extensive network of (tax) information exchange agreements (both itself and within the context of the EU) and double taxation treaties, and is part of the OECD/ Council of Europe Multilateral Convention on Mutual Administrative Assistance in Tax Matters. Joint audits with foreign tax authorities are possible under the Multilateral Convention on Mutual Administrative Assistance in Tax Matters, and a new framework for such joint audits within the EU has been introduced as part of DAC7 (implemented and taking effect in Belgium as from 1 January 2023), meaning that officials of a foreign tax authority can take part in a tax audit in Belgium (with the permission of the BTA) or the other way around.

Disputes between the BTA and foreign tax authorities do arise, particularly in the context of double taxation treaties. Such disputes are resolved under the mutual agreement procedure (MAP) provided for in such treaties. In 2021, 407 MAP cases were started in Belgium.

10. Is there anything else taxpayers should know about taking a tax dispute to court?

Tax litigation – both civil and criminal - can take a number of years to reach a definitive conclusion, particularly if the case is appealed to the Court of Appeal or Supreme Court and/or legal questions are referred to the Constitutional Court or the European Court of Justice.

Full recovery of costs is highly unlikely: if the dispute is won by the taxpayer, the relevant court generally grants the taxpayer an 'indemnity for the cost of legal proceedings', but such indemnity is determined by law on a lump-sum basis and is generally lower than the legal costs actually incurred by the taxpayer.

In theory, taxpayers can represent themselves at all levels of court proceedings, except before the Belgian Supreme Court. In practice, however, taxpayers are mostly represented by a lawyer. The BTA can be represented by a tax official or a lawyer (although the former is only common in smaller disputes).

Taxpayers should be aware that, in the absence of exceptional circumstances, proceedings are public and decisions are published and publicly available.

France

Cyril Valentin, Vincent Daniel-Mayeur, Juliette Brasart,
Edouard Laperriere and Louis-Antoine Jacquet

1. What type of tax disputes are most common and are there any trends taxpayers should be aware of?

Tackling tax avoidance has been a major focus of the French tax authorities (FTA) for some time now and we expect that to continue to be the case for the foreseeable future.

There is a trend towards challenging cross-border structures which erode the French tax base. Current challenges concern notably: structures involving foreign holding entities lacking economic substance, transfers of intangible assets, commissionaire/agent/service provider structures, 'undisclosed' French permanent establishments (*établissements stables occultes*), and eligibility to double tax treaty (DTT)-based foreign tax credits.

The FTA continue to rely on traditional tools, such as transfer pricing, the general anti-abuse rule (GAAR) and the beneficial ownership requirements under French DTTs. In addition, the tools available to the FTA have been increasing, with the introduction of two new anti-abuse rules by the Finance Act for 2019, both relying on a principal purpose test (PPT), as well as new PPT clauses in French DTTs following the entry into force of the OECD's multilateral instrument

The risk of criminal prosecution for tax offences and tax fraud has been increasing in recent years, due notably to the entry into force of the Act # 2018-898 of 23 October 2018 (the *Anti-Fraud Act*), pursuant to which the FTA have now the obligation to automatically forward matters to the public prosecutor in cases where the amount of the reassessed taxes exceeds EUR 100,000 and the FTA applied one of the heaviest tax penalties.

Equity trading by financial institutions is under particular scrutiny in France at the moment, with a number of ongoing audits focusing on the withholding tax treatment of French source dividend equivalent payments (manufactured dividends) paid under stocks loans and derivatives, in which the FTA allege that French banks have carried out 'CumCum'/ 'abusive' dividend arbitrage transactions. While these dividend equivalent payments have historically not been subject to withholding tax, the FTA are now taking the position that withholding tax should apply, in the same way as it does to French source portfolio dividends. In this context, five French banks were subject to raids by the financial public prosecutor (*Parquet national financier*) at the end of March 2023 as criminal investigations have also been opened for aggravated tax fraud laundering and aggravated tax fraud.

Finally, we have also seen the FTA focusing on 'traditional' areas of controversy such as VAT (notably in the financial sector), tax deductibility (especially of financial expenses), the use of reliefs (notably tax credits, such as the research tax credit (*crédit d'impôt recherche*)) and valuations.

We expect that large multinational groups will continue to face challenges from the FTA in the areas of controversy mentioned above, as well as increasing risks of criminal investigations. Multinational taxpayers should be aware that tax authorities increasingly look at what their counterparts are doing: an audit or assessment in one jurisdiction could easily spill over to another if similar structures have been used across the group. Taxpayers should, more than ever, be alert to challenges affecting their peers that have the potential to become sector-wide issues.

2. What powers do the tax authorities have to require disclosure of information from taxpayers?

The FTA may use non-binding or binding information requests to obtain the disclosure of information or documents relating to a taxpayer's situation, either from the taxpayer directly or from a third party that may hold useful information relating to the taxpayer's situation (eg banks, suppliers and social security services). The scope of information and documents the FTA may request, although broad, is circumscribed by law. Third parties cannot use professional secrecy/privilege as a justification not to answer the requests of the FTA. Failure to answer the FTA's binding requests may lead to the application of an estimated assessment procedure (*taxation d'office*) and/or a fine for the taxpayer.

The FTA may also obtain information and documents from a taxpayer in the frame of a formal tax audit (*vérification de comptabilité* (for legal entities) or *examen contradictoire de la situation fiscale personnelle* (for individuals)).

In case of suspected tax-related criminal offences, the FTA have the ability to conduct dawn raids (*visites et saisies*), subject to the prior authorisation of a judge, to enter and search premises and seize documents capable of evidencing the relevant criminal offence. Such authorisation is granted by a judge upon request from the FTA, where there are reasonable grounds for believing that a taxpayer is avoiding the payment or assessment of taxes by making purchases or sales without invoices, by using or issuing invoices or documents that do not relate to actual transactions, or by deliberately failing to make bookkeeping entries. Dawn raids are commonly used for undisclosed permanent establishment and transfer pricing matters.

To combat international fraud and tax avoidance, the FTA have the ability to conduct interviews of persons, other than the relevant taxpayer (eg clients, suppliers, service providers, employees and former employees) capable of holding information about the existence of a fraudulent scheme.

DAC6 has introduced obligations on French taxpayers, intermediaries and their advisers to proactively report details of certain cross-border arrangements to the FTA, where such arrangements meet at least one of certain ‘hallmarks’. Under certain of the hallmarks, arrangements are only reportable if they also meet a ‘tax advantage main benefit’ test.

Since 2017, certain companies belonging to multinational groups are required to disclose information to the FTA, under the mandatory Country-by-Country Reporting (CbCR), including, for each tax jurisdiction in which the multinational group does business, the turnover, the profit before tax, the income tax paid and accrued and the number of employees. The information disclosed under the CbCR is not public, but new public CbCR reporting requirements will apply for financial years beginning on or after 22 June 2024.

3. What are the relevant applicable time limits for tax audits/enquiries to be opened and appeals to be made?

Applicable limitation periods vary depending on the taxes concerned, amongst other things.

As far as corporate income tax and individual income tax are concerned, the FTA are in principle able to issue a reassessment notice until the end of the third year following the year in relation to which the tax was originally due, subject to extensions in specified circumstances. Longer limitation periods apply, inter alia: (i) in case of undisclosed activity; (ii) where certain reporting obligations have not been complied with; (iii) in case of ‘tax flagrancy’; (iv) in case of tax fraud having led to a complaint from the FTA; or (v) in case the FTA activate an exchange of information procedure between tax authorities.

As far as VAT is concerned, the FTA are in principle able to issue a reassessment notice until the end of the third year following the year during which the VAT has become payable.

The FTA may challenge withholding tax on French source dividend payments until the end of the third year following the year in relation to which the tax was due, subject to extensions in specified circumstances.

The issuance of a tax reassessment notice by the FTA following an audit interrupts the applicable limitation period. Its notification opens a new limitation period of the same length as the initial

limitation period. The FTA must initiate the collection of the reassessed amount before the expiry of the new limitation period.

Before launching proceedings in the tax courts, the taxpayer must first file a reclaim with the FTA. In most cases, reclaims may be filed until 31 December of the second year following the year (as applicable): (i) during which the tax was collected or the tax collection notice was notified; or (ii) during which the tax was paid, where no collection occurred/no collection notice was issued; or (iii) during which the event motivating the reclaim occurred.

Where the reclaim follows a reassessment by the FTA, the taxpayer benefits from the same time limit as the FTA to file a reclaim, starting from the date of the notification of the tax reassessment notice.

In principle, the FTA must respond to the taxpayer’s reclaim within six months from the filing of the reclaim, subject to an up to three-month extension. Absent any response after that period, the FTA are considered to have implicitly rejected the reclaim.

Subsequently, depending on the taxes concerned, the taxpayer may submit the dispute to the administrative courts or to the judicial courts. Generally domestic taxpayers have two months, and foreign taxpayers have four months, from the receipt of a rejection letter from the FTA (or once a reclaim is considered as implicitly rejected by the FTA) to submit the dispute to the competent court of first instance.

4. What processes must be followed before a tax dispute reaches court?

Where the tax dispute does not stem from a reassessment of the taxpayer, the process is as follows: (i) the taxpayer files a reclaim with the FTA; (ii) the reclaim is examined by the FTA; and (iii) if the reclaim is rejected explicitly or implicitly (ie no answer within the applicable time limit), the matter can be referred to the lower court.

Where the tax dispute stems from an initial reassessment of the taxpayer by the FTA, the process before reaching the tax courts may be longer as a result of the taxpayer having the right to provide written observations on the tax reassessment notice which the FTA must respond to (if they reject them). In some cases, the taxpayer may request a hierarchical appeal, to discuss the case with more senior representatives of the FTA, or request that the case be submitted to specific commissions, both of which also extend the time frames.

In both scenarios, the taxpayer is required to pay the tax due before filing a reclaim. It may request the payment obligation be suspended, and collateral must be provided to the FTA for this request to be granted. Where a court of first instance decides against the

taxpayer, this ends the suspension period, even if the taxpayer appeals the decision.

5. Which courts are relevant to tax disputes?

The administrative courts are competent for most tax matters (ie *tribunal administratif* (lower administrative tax court), *cour administrative d’appel* (administrative court of appeal), and *Conseil d’Etat* (supreme court of the administrative order)).

The judicial courts are competent for disputes relating to stamp duties, wealth tax, indirect contributions and assimilated taxes (ie *tribunal judiciaire* (lower court), *cour d’appel* (court of appeal), and *Cour de cassation* (supreme court of the judicial order)).

Criminal courts are competent for criminal cases involving tax related offences (ie *tribunal correctionnel* (lower court), *cour d’appel* (court of appeal), and *Cour de cassation* (supreme court of the judicial order)).

Lower courts and courts of appeal decide on the merits of the cases, based on the facts they sovereignly assess and on the rules applicable to the cases. The supreme courts do not decide on the merits of the cases, but on whether the rules of law have been correctly applied.

The judicial review procedure (*recours pour excès de pouvoir*) may be used in certain instances to refer a matter of law to the *Conseil d’Etat* directly.

Taxpayers may challenge the constitutionality of French legislation. Such challenges are submitted to the French constitutional court (*Conseil constitutionnel*), and decisions cannot be appealed by taxpayers.

6. Can the tax authorities impose penalties and if so how are these calculated?

The FTA can impose civil tax penalties as a result of:

- the failure to file a tax return within the applicable time limit, calculated as a percentage of the amount of the tax due, as follows:
 - 10% in the absence of any formal notice issued by the FTA or if the return is filed within 30 days following the receipt of such formal notice;
 - 40% where the return is not filed within 30 days following the receipt of the formal notice; or
 - 80% in case of an ‘hidden’ activity;
- inaccuracies or omissions in tax returns or documents including information necessary to compute a tax due, or the fact for a taxpayer to unduly obtain from the FTA a refund which is

not due, calculated as a percentage of the tax due, as follows:

- 40% in case of wilful misconduct (*manquement délibéré*);
- 80% in case of abuse of law (decreased to 40% where the taxpayer was not the main beneficiary of the abuse or did not have the initiative); or
- 80% in case of fraudulent manoeuvres; and
- a delay in the payment of taxes, calculated as a percentage of the amount of tax due, as follows:
 - 10% in case of delay in the payment of income tax, social security contributions, wealth tax, local taxes; or
 - five per cent in case of delay in the payment of taxes, including corporate income tax, VAT and stamp duties.

Several other penalties apply in specific situations. Tax penalties may be mitigated in the context of certain settlement procedures (see question seven below).

7. Can taxpayers reach an out-of-court settlement with the tax authorities?

Several out-of-court settlement procedures are available to the taxpayers. These include: (i) the ‘tax transaction’ (*transaction fiscale*); (ii) the ‘overall settlement’ (*règlement d’ensemble*); and (iii) the ‘*convention judiciaire d’intérêt public*’ for criminal cases involving tax fraud.

Data made public by the FTA show that the number of tax transactions and overall settlements entered into by the FTA has increased significantly between 2019 and 2022. The number of CJIPs concerning tax fraud cases remain low, due to the more exceptional nature of this type of cases, but is also increasing.

Under a tax transaction, only penalties may be mitigated. Both the taxpayer and the FTA commit not to litigate the case, once the transaction is concluded.

Overall settlements usually concern complex matters, the legal analysis of which is uncertain. Both the principal of the tax and the penalties may be mitigated through such settlements. From the FTA’s perspective, they aim at accelerating the treatment of the case, improving tax collection and limiting litigation risk. The taxpayer must commit not to litigate the case, but (in principle) such commitment is not binding on the taxpayer, contrary to what is provided for a tax transaction.

The CJIP is a type of deferred prosecution agreement entered into with the public prosecutor. They have the effect of extinguishing the public prosecution if the relevant entity complies with certain obligations.

These obligations, which may be alternative or cumulative, may consist of:

- the payment of a ‘public interest fine’ to the French Treasury, the amount of which may not exceed 30% of the average annual turnover of the company (computed based on the last three turnovers known for the company);
- the implementation, under supervision, of a program to bring the taxpayer’s anti-corruption and prevention procedures into compliance, for a maximum period of three years; and/or
- the compensation of the victim’s damages, if any.

The CJIP must be submitted to, and approved by, a judge.

A specific settlement procedure is also available to the taxpayers via the ‘corporate compliance’ department created in 2019 (*Service de Mise en Conformité Fiscale* – SMEC).

8. Can tax authorities impose criminal liability on taxpayers?

Key tax-related criminal offences include (i) tax fraud offence and assimilated offences (eg omissions of accounting entries or inclusion of book entries which are false or fictitious); (ii) complicity in tax fraud offence; and, (iii) ‘laundering’ of tax fraud (*blanchiment de fraude fiscale*) (ie facilitating by any means the false justification of the origin of the property/assets or income of the perpetrator of a tax fraud offence which has provided to such perpetrator a direct or indirect benefit).

Tax fraud is characterised where a taxpayer has fraudulently avoided (or has attempted to fraudulently avoid) the establishment or the payment of all or part of any tax provided in the FTC, by deliberately omitting to file its tax return within the set time limits, or deliberately concealing part of taxable sums, or having organised its own insolvency or obstructing by other means the collection of tax, or by acting in any other fraudulent ways. Taxpayers found guilty of tax fraud are liable for five years’ imprisonment and a fine of EUR 500 000, which can be raised up to twice (or, in the case of corporates, ten times) the income derived from the commission of the offence. The criminal penalties may be increased when specified aggravating circumstances exist.

Both companies and individuals (employees/*de jure* or *de facto* representatives/directors/managers) may be subject to criminal investigation and prosecution for tax fraud or laundering offences.

The FTA may not prosecute taxpayers for tax-related criminal offences. Prosecution is initiated by the public prosecutor.

The Anti-Fraud Act provides for an obligation on the FTA to automatically forward a matter to the public prosecutor in cases where the amount of the

reassessed taxes exceeds EUR 100,000 and the FTA applied one of the heaviest tax penalties, ie:

- the 100% penalty for opposition to a tax audit;
- the 80% penalty for hidden activity, abuse of law, fraudulent practices, illicit activity, concealment of prices, non-declaration of foreign accounts; or
- the 40% penalty for non-filing a tax return within 30 days from a formal notice or the 40% penalty for wilful misconduct or abuse of law if during the six previous calendar years, the taxpayer had, during a previous audit, one of the penalties listed above assessed against it or had been the subject of a complaint from the FTA for tax fraud.

The public prosecutor is then responsible for deciding whether or not to initiate criminal proceedings.

Pursuant to established case law of the *Cour de cassation*, tax and criminal proceedings are independent. This means that in principle, a criminal court does not have to wait for the decision of a tax court on a case, to decide on the case, and the decision of the tax court has not the force of *res judicata* vis-à-vis the criminal court. There is an exception to the latter principle, where a tax court decides in a final decision on substantive grounds that the relevant taxpayer is not liable for any tax; in such case, the taxpayer cannot be found guilty of tax fraud.

Case law of the European Court of Human Rights, the French constitutional court, the *Cour de cassation* and the CJEU has imposed limitations on when tax and criminal penalties may be combined in the same matter, but many practical questions remain open at this stage.

9. How do tax authorities interact with their foreign counterparts and other agencies or authorities?

The FTA do interact and cooperate with other French authorities and agencies, and in particular with judicial authorities and social security organisations to combat fraud. The judicial authorities and social security organisations transmit information to the FTA spontaneously or upon request.

The FTA also increasingly cooperate with their foreign counterparts. There is extensive information sharing between the FTA and foreign tax authorities, under tax information exchange agreements, DTTs, the OECD/ Council of Europe Multilateral Convention on Mutual Administrative Assistance in Tax Matters and the ‘DAC’ directives. Exchange of information with foreign tax authorities may occur automatically, upon request or, in certain instances, spontaneously.

Joint investigations with foreign authorities may occur, although this is not yet commonplace.

Disputes between the FTA and their foreign counterparts do arise, particularly in the context of DTTs. Most French DTTs provide for the mutual agreement procedure (MAP) to be used in such circumstances. At the end of 2021, more than 800 MAP cases were still being processed, mostly in relation to transfer pricing matters, with resolution taking an average 25 months for transfer pricing matters and 18 months for the other cases.

10. Is there anything else taxpayers should know about taking a tax dispute to court?

Except in very exceptional circumstances, proceedings are public and decisions are published and publicly available (either on an official website or in tax publications), although the name of the concerned taxpayer may be removed in order to anonymise the decision. Memorandums summarising the arguments of each party, which are exchanged between the parties before a hearing takes place, are not public.

Litigating against the FTA is generally a lengthy process, taking a number of years to reach a conclusion – this varies, but tax proceedings may take around seven years from the reclaim until the decision of the *Conseil d’Etat* (ie about two years before reaching the courts, and then about five years before the courts).

Even where the taxpayer prevails, the taxpayer usually does not recover the entirety of the costs (including in particular legal fees) incurred during the proceedings. This is because in practice, French courts tend to cap at very low amounts the reimbursements granted to the prevailing party in this respect.

Each court has its own rules regarding representation. In most cases, taxpayers must be represented by an *avocat* (attorney-at-law). Before the *Conseil d’Etat* and *Cour de cassation*, the taxpayer must generally be represented by an ‘accredited’ attorney-at-law (*avocat aux Conseils*).

Germany

Philipp Redeker and Elena Münster

1. What type of tax disputes are most common and are there any trends taxpayers should be aware of?

Tackling tax avoidance has been a major focus of the German tax authorities (GTA) for some time now and we expect that to continue to be the case for the foreseeable future.

There is a particular trend towards challenging cross-border structures which erode the German tax base. Many of the current challenges in this space relate to transfer pricing and CFC tax rules. Going forward we expect to see more cases involving anti-hybrid mismatch rules.

In the large business context specifically, we have also seen GTA focusing on other areas of controversy, such as tax provisions, tax deductibility, the use of reliefs, valuations, corporate tax residence, VAT and wage taxes.

The complexity of these areas of tax law and practice, taken together with rules requiring the disclosure of transnational tax structures, means we expect large multinational groups will continue to face challenges from GTA.

In responding to challenges, it is more important than ever to have a strong handle on the evidence. GTA will always insist on testing the evidence for itself and increasingly is threatening penalties or even criminal sanctions against corporate taxpayers who it feels are defending the indefensible.

2. What powers do the tax authorities have to require disclosure of information from taxpayers?

GTA investigate the legal and factual circumstances, which are significant for taxation, ex officio. The taxpayer is, however, obliged to cooperate and must disclose all facts relevant for taxation.

GTA may – at their reasonable discretion – request information or documents from the taxpayer or third parties (including employees and financial institutions). Documents include, for example, books, records and business papers, as well as soft copy data. GTA may – at their reasonable discretion – also enter and inspect (but not force entry or search) business premises.

If the taxpayer or third party does not provide the required information, GTA may instigate coercive measures, including imposing fines of up to EUR 25,000. They may also ask the taxpayer to provide an affidavit confirming the information provided is correct. Furthermore, penalties may arise in the context of late filing of tax returns or tax audits (see question six below).

In practice, the right of GTA to issue assessment notices based on an estimated tax basis is the most common and effective enforcement measure. The tax authorities may in particular apply such an estimate where the taxpayer breaches his obligations to cooperate, or where the taxpayer cannot furnish accounts or records which she or he is obliged under tax laws to store. Experience shows that such estimates are generally higher than the actual tax liabilities.

In principle, taxpayers have no right to refuse to cooperate in taxation proceedings. In particular, they cannot rely on concepts of bank, business or trade secrets to refuse disclosure. Given the very limited rights to refuse disclosure of information, GTA are bound to strict tax secrecy requirements. Certain third parties, including close relatives and advisers with professional privilege (including lawyers and tax consultants), have a right to refuse to furnish GTA with certain information and documents.

GTA also receive disclosure from, or about, taxpayers under the mandatory disclosure regimes which exist under German law – including Country-by-Country Reporting, the Common Reporting Standard, FATCA, DAC6 and DAC7. Generally, German tax law requires greater cooperation in the clarification of facts for international tax cases.

In the context of criminal investigations, GTA have additional powers under criminal law in addition to their tax investigation powers. These powers include the examination of witnesses, the seizure of documents and the judicially-approved search of premises. Pressure and coercive means from a tax investigation procedure may not, however, be used in the context of a criminal procedure.

3. What are the relevant applicable time limits for tax audits/enquiries to be opened and appeals to be made?

The general limitation period for the review of tax returns and the issuing of tax assessment notices is one year for excise duties and four years for other taxes. This period commences at the earlier of: (a) the end of the calendar year in which the relevant return was filed, or (b) three years following the end of the calendar year in which the tax liability has arisen. This period is extended to five years where taxes have been recklessly understated and 10 years in the case of intentional tax evasion. In certain cases, such as in the case of a tax audit, the assessment limitation period is suspended.

In principle, a tax assessment notice can be changed within the limitation period if this is permitted by legal provisions (so-called correction provisions). GTA may, however, issue tax assessment notices subject to review. The review can take place any time within the above-mentioned periods. For VAT, wage tax and

capital gains tax self-assessment tax returns are required. These usually qualify as tax assessment notices subject to review.

Anyone who claims to be aggrieved by a tax administrative act – in particular, by a tax assessment – has until one month after receipt of the relevant notice to file an administrative appeal. The time limit for filing an appeal against the final decision in the administrative procedure is also one month (see question four below).

4. What processes must be followed before a tax dispute reaches court?

Unless the relevant GTA agrees to a direct court challenge, the taxpayer must complete an internal administrative appeal procedure before challenging in court an administrative decision of the relevant GTA to impose tax, interest or penalties. The appeal has to be submitted with the tax office whose administrative act is being disputed. If the taxpayer is not remedied in full by the tax office's decision, the taxpayer can file a judicial appeal with the tax courts within one month of that decision.

Neither the filing of an administrative appeal before GTA nor of a legal action before court suspends an obligation to pay the taxes due under the challenged tax assessment notice. The taxpayer can, however, apply for a suspension of payment. The GTA or the court (as applicable) shall grant such suspension where there are serious doubts as regards the legality of the challenged administrative action (eg the tax assessment notice) or if its execution would cause unreasonable hardship to the taxpayer and is not justified by an overriding public interest. Generally, when considering such an application, the courts apply a summary assessment of the prospects of success of the case, and in practice this can lead to a de facto pre-determination of the case. Because of this, and as suspended tax payments bear interest, taxpayers should carefully consider applying for a suspension of payment.

The tax court investigates the facts of a case ex officio. The taxpayer is obliged to cooperate and provide information and, upon request, books, records, business papers and other documents. In practice, the tax court's obligation to conduct its own investigation is reduced to a minimum and it mostly relies on the facts, evidence and arguments brought forward by the parties.

In addition to the evidence submitted by the parties, the tax court may take a visual inspection, hear witnesses, experts and participants, or refer to documents. All authorities are obliged to disclose

documents and files of third parties to the tax court while maintaining the tax secrecy of third parties.

5. Which courts are relevant to tax disputes?

In Germany, the tax courts have jurisdiction to hear tax disputes. The judgments of the tax courts are subject to appeal to the Federal Tax Court (FTC). The tax courts are the only courts with the jurisdiction to decide on the facts of the case; the FTC only decides on: (a) questions of law on the basis of the facts adopted by the tax court, or (b) questions of procedural defects.

The decision of the tax court can be appealed to the FTC if this has been expressly admitted in the judgment of the tax court or if the FTC has admitted the appeal after a non-admission complaint. Such an appeal must be filed within one month after notification of the decision of the tax court at the FTC.

A constitutional complaint against a decision of the FTC may be filed with the Federal Constitutional Court if the taxpayer is of the opinion that the decision violates national constitutional law. Furthermore, both the tax courts and the FTC may bring a case to the Federal Constitutional Court if they consider a tax code provision in dispute to be unconstitutional.

Where European law is involved in a case, any of the courts may refer questions of interpretation to the ECJ.

6. Can the tax authorities impose penalties and if so how are these calculated?

Civil tax penalties may be imposed on taxpayers as a result of certain breaches of their obligations. A taxpayer who fails to comply with the obligation to file a tax return, or fails to do so on time, may be subject to a late-filing penalty. The same is true for the late payment of taxes. GTA may also impose coercive fines upon a taxpayer for breaching other obligations (eg obligations to provide requested information).

The late-filing penalty is 0.25 per cent. of the assessed tax less the sum of assessed prepayments and withheld taxes to be credited, for each month or part of a month that a return is late, subject to a EUR 25 minimum for each month or part of a month. The total penalty is, in principle, capped at EUR 25,000 except for late real estate transfer tax notification where no cap applies.

The late-payment penalty is one per cent. of the overdue tax liability per month, with late payment by a partial month triggering the late-payment penalty for the entire month.

Notices ordering the payment of a penalty are subject to appeal and can be contested in court. Late-filing penalties may be challenged if the taxpayer demonstrates that the delay was excusable. GTA also allow for a waiver of late-payment penalties if such penalties would pose an undue hardship on the taxpayer.

From 2025, penalties may be imposed during tax audits if requested documents and information are not provided in time. For each day of delay (up to 150 days), EUR 75 will be charged (ie up to EUR 11,250). In addition, in cases of repeated delays or exceptional solvency of the auditee, GTA may request a surcharge of up to EUR 25,000 (ie up to EUR 3.75 million). GTA already assume exceptional solvency if the audit periods include sales revenues of EUR 12 million or EUR 120 million if the company is part of a consolidated group.

7. Can taxpayers reach an out-of-court settlement with the tax authorities?

As GTA are strictly bound to apply codified law, settlements are generally not permissible in tax matters although certain limited exceptions exist. The most important such limitation is that agreements on tax-relevant facts and circumstances are permissible if such facts and circumstance cannot be investigated or can only be investigated with difficulty.

In order to avoid a future dispute, the taxpayer may file an advance binding ruling request asking for confirmation of the tax treatment of certain facts and measures by the tax office.

In addition, under the law implementing the EU directive on tax dispute resolution and under applicable tax treaties, alternative dispute resolution mechanisms are available for cross-border disputes, such as advance pricing agreements or mutual agreement procedures (MAP).

8. Can tax authorities impose criminal liability on taxpayers?

The key criminal offence in Germany is tax evasion which is punishable with a monetary fine or up to five years (or, in severe cases, 10 years) imprisonment. Custodial sentences require an individual to have intentionally provided GTA with incorrect or incomplete information about tax-relevant facts or failed to inform GTA about tax-relevant facts when obliged to do so (in particular, omitted or delayed tax returns), and, as a result, evaded taxes or obtained

unjustified tax advantages for either him or herself, or for another (natural or legal) person.

There is a voluntary disclosure programme that protects against criminal liability as long as no notice of a field tax audit or prosecution has been given and the offence has not yet been detected. However, voluntary disclosure under this programme has to meet strict requirements in order to be valid.

Companies and business entities are not liable to criminal prosecution, but they can be subject to a monetary fine if lead personnel of such companies have committed an offence. However, as the legal representatives of a company are personally liable for the company's tax compliance, they may face criminal prosecution.

If the tax evasion is committed by gross negligence instead of intent, it is categorised as a misdemeanour, carrying a fine of up to EUR 50,000.

Several other criminal and misdemeanour tax offences also exist (eg endangering of withholding obligations, obstruction of tax and smuggling).

Criminal and misdemeanour offences are prosecuted by the public prosecutor's office and specialised departments in the tax offices and are heard by the criminal courts, not the tax courts.

9. How do tax authorities interact with their foreign counterparts and other agencies or authorities?

Within Germany, all authorities (ie administrative authorities and courts) cooperate with each other by providing administrative assistance. The assistance can be provided following requests or automatically without an explicit request (eg where authorities or courts (but also broadcasting companies, notaries, credit institutions, insurance companies and asset managers) become aware of circumstances relevant for taxation, in which case they have to make a 'control notification' to GTA).

In addition, administrative assistance and cooperation exists at international level under tax treaties and, most importantly, the laws implementing DAC6.

Disputes between the GTA and its foreign counterparts do arise, particularly in the context of double taxation treaties. Most such agreements provide for a mutual agreement procedure (MAP). In 2021/22, the German tax authorities admitted 166 MAP cases with resolution taking an average of 17 months. The contracting states may also agree on the abstract interpretation of certain treaty provisions if legal uncertainties between the treaty states arise.

However, the German courts carefully review these agreements.

10. Is there anything else taxpayers should know about taking a tax dispute to court?

Tax court trial hearings are, in principle, public. However, the court may exclude the public to preserve tax secrecy; it has to exclude the public at the request of the taxpayer who does not need to provide any reasons for such request. GTA may not request to exclude the public.

From experience, tax proceedings are likely to take two to three years to finish each stage.

Proceedings before the tax court trigger court fees plus ancillary costs (eg witness expenses) and, in most cases, counsel fees. If and to the extent the taxpayer succeeds in court, court fees are fully compensated. The fees for the taxpayer's counsel are compensated at amounts calculated on the basis of the value in dispute in accordance with statutory rules. Such compensation may be lower than the fees owed under fee agreements with counsel. The cost and expenses of GTA do not have to be borne by the taxpayer if she or he is not successful.

Before the first instance tax courts, the taxpayer may lodge the lawsuit him or herself. Professional representation (e.g, by attorneys or certified tax advisers) is permissible and generally advisable at all levels, but is only mandatory for disputes filed with the FTC.

Italy

Renato Paternollo and Alessia Mandelli

1. What type of tax disputes are most common and are there any trends taxpayers should be aware of?

The Italian Tax Authority (the *ITA*) has quite an aggressive approach when auditing banks and multinational companies.

In our experience, the *ITA* is frequently challenging the following fact-patterns:

- hidden Italian permanent establishments (*PE*): the *ITA* often challenges the existence of an Italian hidden *PE* of a foreign company in cases where an Italian entity provides sales support services to the foreign company or where the foreign company acts in Italy through a representative office. In such a case, the *ITA* typically attributes to the *PE* a portion of the profits generated by the Italian sales of the foreign company. Similar *PE* challenges are raised by the *ITA* in cases where employees of a foreign company regularly travel to Italy and, when in Italy, carry out business on behalf of that company;
- challenges on the application of the withholding tax (*WHT*) exemption under the Interest and Royalties Directive (the *IRD*) or under the Parent Subsidiary Directive (the *PSD*): the *ITA* usually challenges the application of the *IRD* and the *PSD* in cases where the recipient of the income (interest or dividend) is not considered under Italian law to be the beneficial owner of the relevant income and instead distributes it to foreign investors which could not themselves benefit from the *IRD* or *PSD*;
- challenges relating to transfer pricing, particularly in relation to multinational groups;
- abusive transactions: the *ITA* frequently challenges cross-border transactions on the basis of the Italian general anti abuse law.

There is also a trend of the *ITA* bringing innovative challenges against multinational companies within the tech sector, such as in relation to the application of *WHT* on deemed royalties and the application of *VAT* on the alleged barter of personal data in exchange of the access to IT platforms, as recently reported by the press.

Going forward we expect to see an increase in challenges involving the anti-hybrid mismatch rules.

2. What powers do the tax authorities have to require disclosure of information from taxpayers?

The *ITA* and the Italian tax Police (the *ITP*) have the power to request taxpayers to deliver:

- (i) books and records that taxpayers must keep available for review for 10 years pursuant to the Italian corporate laws; and
- (ii) other documents which are accessible to the taxpayer from Italy (including if held in servers or clouds outside of Italy), such as communications to clients for marketing purposes, internal corporate papers and internal communications within the company.

Taxpayers have no right to redact or withhold privileged documents.

Failure to deliver the documents requested by the *ITA/ITP* triggers a tax penalty and the documents not delivered to the *ITA/ITP* cannot be relied upon by the taxpayer in the subsequent stages of the tax dispute.

These document requests are usually put forward on a formal basis on the first day of a tax audit. The *ITA* and the *ITP* often make dawn raids when starting a tax audit.

During a tax audit, employees must give the required credentials and passwords to the *ITA/ITP* on request to allow the *ITA/ITP* to access the information sought. The *ITA* and the *ITP* also have the power to interview such employees during a tax audit. The *ITA* also receives disclosure from, or about, taxpayers under the mandatory disclosure regimes which exist under Italian law, including Country-by-Country Reporting, the Common Reporting Standard, *FATCA* and *DAC6*.

The *ITA* is permitted to access and rely on documents collected by the *ITP* in the context of criminal proceedings. Likewise, documents collected by the *ITA* in the context of tax audits can be used by the *ITP* in criminal proceedings.

3. What are the relevant applicable time limits for tax audits/enquiries to be opened and appeals to be made?

The statute of limitation under Italian tax law for the *ITA* to issue a tax assessment relating to corporate income tax, regional tax or *VAT* is:

- (i) six years in case of an 'unfaithful tax return' (for example, the 2017 tax year can be assessed until year-end 2023);
- (ii) eight years in case of an 'omitted tax return' (for example, the 2017 tax year can be assessed until year-end 2025).

Taxpayers have 60 days from the notification of a tax assessment to file a tax appeal in front of the first level tax court, unless a settlement procedure is started on a without prejudice basis. In such a case, the term to file a tax appeal would be extended by an additional 90 days (ie 150 days in total) in order to enable the parties to try to reach a settlement.

Different deadlines apply in respect of different taxes. For example, for stamp duty it is generally three years from the relevant payment date and for registration tax it is generally either two, three or 10 years from the relevant payment date.

4. What processes must be followed before a tax dispute reaches court?

Taxpayers can challenge in front of the Italian tax court (the TC) tax assessments in which the ITA requests taxes, interest and/or penalties.

As set out under the reply to the question three above, following the notification of a tax assessment and before starting tax litigation, the taxpayer can enter without prejudice into a settlement procedure with the ITA. If no settlement is reached, and a litigation starts in front of the TC, the appeal must be first sent to the ITA and then notified to the TC.

When starting tax litigation, the taxpayer must pay in advance one-third of the additional tax and interest as set out in the assessment. This interim payment will be refunded (plus interest thereon) should the TC rule in favour of the taxpayer.

It is possible to request that the TC suspend this interim collection, by proving that the interim payment, even if then refunded, would create a serious financial damage to the taxpayer. The TC are often reluctant to grant such suspension when the request is filed by banks, large multinational or insurance companies.

5. Which courts are relevant to tax disputes?

Under Italian law, tax litigation involves up to three levels of judgment: first level TC, second level TC and Supreme Court.

An appeal in front of the Supreme Court can be filed against the decision of the second level TC, but only on the basis of legal principles. The Supreme Court cannot rule on the factual aspects of a case.

TC do not have the jurisdiction to hear criminal cases, which are handled by the criminal courts instead.

6. Can the tax authorities impose penalties and if so how are these calculated?

Civil tax penalties are applied by the ITA. The amount of such penalties varies depending upon the relevant violations. In general terms, for corporate income taxes, regional taxes and VAT violations, penalties are equal to:

- 90%-180% of the additional taxes in case of an 'unfaithful tax return'; and
- 120-240% of the requested taxes in case of an 'omitted tax return'.

Where penalties fall within those ranges depend upon the behaviour of the taxpayer (ie whether they are more or less aggressive in the context of the challenged transaction/cooperative in the context of the tax audit).

Generally speaking, under a tax settlement, penalties are usually reduced to one-third.

It is rare that the ITA disapply penalties. To do so, there must be specific circumstances to warrant this, such as the fact that the taxpayer relied in good faith on certain clarifications issued by the ITA that then have been changed.

7. Can taxpayers reach an out-of-court settlement with the tax authorities?

Yes, as anticipated at question three above, a tax settlement can be reached with the ITA before entering into litigation (including before a formal notification of a tax assessment following the closure of a tax audit). Settlement generally reduces tax penalties payable to one-third.

In the context of a settlement procedure, the taxpayer may suggest factual circumstances and/or legal aspects which may lead to a reduction of the tax claim. A settlement does not entail the acknowledgment by the taxpayer of any violation or the acceptance of the arguments put forward by the ITA, and it is normally justified by the need to avoid the costs, delays and uncertainty of tax litigation.

In Italy, it is increasingly common for large corporations to settle the tax claims raised by the ITA rather than to engage in litigation in front of the TC. The outcome of tax litigation is unpredictable in Italy and the TC often issues decisions which are not correctly grounded, and companies often prefer to avoid facing the risk and uncertainties of such tax litigation.

A settlement can also be reached whilst tax litigation is pending. In such cases, different rules would apply with respect to the determination of applicable penalties, with a less favourable reduction available.

8. Can tax authorities impose criminal liability on taxpayers?

There are various Italian criminal offences deriving from tax violations.

If, in the context of a tax audit, the ITA or the ITP believe that a criminal offence has occurred, they will inform the public prosecutor accordingly which will in turn start a criminal investigation into the matter.

In such a case, it is very common that the administrative audit and the criminal investigation continue on a parallel basis.

Usually, a tax settlement is reached with the ITA to mitigate the possible criminal exposure on the matter (in addition to the other benefits discussed at question seven above). This is often important for the taxpayer in terms of reputational risk.

9. How do tax authorities interact with their foreign counterparts and other agencies or authorities?

A tax audit can be carried out by both the ITA and the ITP. If an audit is carried out by the ITP alone, the ITA will subsequently work together with the ITP before issuing a tax assessment in relation to the matter.

The ITA and the ITP can coordinate with the public prosecutor in cases in which the tax violation potentially also amounts to a criminal offence.

In addition to the above, we are increasingly seeing the ITA interact with tax authorities outside of Italy. Moreover, there is extensive information sharing between the ITA and its foreign counterparts including under Tax Information Exchange Agreements, double taxation treaties and the OECD Convention on Mutual Administrative Assistance in Tax Matters.

Disputes between Italy and its foreign counterparts do arise, particularly in the context of double taxation treaties. The mutual agreement procedure (the MAP) could be used in such circumstances. However, the MAP is not commonly considered practically viable due to the backlog and extremely long delays usually faced.

10. Is there anything else taxpayers should know about taking a tax dispute to court?

Tax litigation in Italy may take in excess of 10 years to reach a conclusion.

If the TC rules in favour of the taxpayer, it could rule that the ITA must pay the taxpayer's legal fees. In such a case, however, the TC would normally determine the taxpayer's legal fees as a lump sum which is often a fraction of actual costs incurred in the litigation.

Tax appeals are normally heard in front of the TC in a public hearing.

The Netherlands

Eelco van der Stok

1. What type of tax disputes are most common and are there any trends taxpayers should be aware of?

The Dutch Tax Authorities (DTA) are increasingly focusing on transfer pricing issues. This is particularly the case in the context of restructurings, where for example the DTA may levy an exit charge for the removal of certain assets from the Dutch tax net in case of a corporate migration. Transfer pricing investigations can also arise in the context of the conversion of the business (eg from full-fledged entrepreneur into a contract manufacturer). In recent years, the DTA have started investigating, and sometimes challenging, transfer pricing even where an Advance Pricing Agreement (APA) has been concluded.

Other common tax disputes in the Netherlands relate to dividend withholding tax and reclaims thereof, and the deductibility of interest. The latter is of particular relevance in private equity acquisitions.

Furthermore, management incentive plans (MIPs) regularly lead to discussions, and sometimes disputes, with the DTA, including with respect to the economic value of the investment (and where applicable, the unwinding of their previous investment).

2. What powers do the tax authorities have to require disclosure of information from taxpayers?

The DTA may require taxpayers to disclose information in several ways. Every taxpayer has to provide the DTA, upon request, with all data and information that may be relevant to any taxpayer's tax position. There is no exception for commercially sensitive information.

Information requests may also be directed to third parties that possess relevant information regarding a specific taxpayer. In such a case, legal privilege may prevent privileged information from being shared with the DTA (although only lawyers registered with the Bar – *Advocaten* – have formal privilege and are therefore not obliged to provide the information in question).

Witnesses and experts may also be requested to disclose certain information. Experts are in principle not required to comply with this request whereas witnesses are.

Information requests may extend to, amongst other things, invoices, the calendar of business appointments, bank statements, travel documents and (digital) correspondence (ie emails and voice call records). However, under the *nemo tenetur* principle enshrined in Dutch law, a taxpayer is not required to cooperate in its own prosecution and thus the DTA

may not request information that can only be relevant for determining the amount of a penalty or fine (with certain exceptions, for example with respect to already existing, factual materials). In addition, an exemption from providing requested information may apply to information that the taxpayer does not and cannot reasonably possess.

Failure to comply with the information request may result in (i) a penalty and/or (ii) the burden of proof as to the incorrectness of the assessment shifting to the taxpayer.

The DTA is authorised to conduct tax investigations through dawn raids, in which case the taxpayer is obliged to grant the DTA access to all relevant parts of the premises it uses.

Other disclosure rules also exist. For example, taxpayers may be required to provide information to the DTA under DAC6, Country-by-Country Reporting, the Common Reporting Standard and FATCA.

3. What are the relevant applicable time limits for tax audits/enquiries to be opened and appeals to be made?

For Dutch 'return and assessment'-based taxes, a taxpayer must file a tax return within four months (in respect of personal income tax) or five months (in respect of corporate income tax) of the end of the respective fiscal year. The DTA has three years from the end of the fiscal year covered by the tax return to review it and issue a tax assessment. If a taxpayer has been granted a filing deferral, the deferral period is added to the three years (or in certain cases five or twelve years – see below).

Taxes levied on the basis of self-assessment (such as VAT and payroll taxes) are formalised and payable once the taxpayer has filed the return. This must generally be done within one month of the end of the period covered by the return.

Additional tax assessments may be imposed within five years of the end of the relevant fiscal year, but only if (i) the DTA has discovered a new fact, (ii) the taxpayer has acted in bad faith or (iii) the DTA has made an obvious mistake (such as a clear typo). If the underpaid tax relates to foreign capital or income, this period is extended to twelve years.

A taxpayer may object to a tax assessment (or other formal DTA decision) within six weeks (see question four below). (Both the objection and the appeal may be filed *pro forma*, meaning that the grounds of the objection or appeal may be submitted four to six weeks after the official six-week deadline.) After this period has lapsed, however, the taxpayer may still submit a so-called 'request for reduction' with the DTA up to five years after the end of the respective fiscal year. The DTA will then assess whether this request should be granted as it would do in the case

of a formal objection (although the decision of the DTA in such case is non-appealable).

4. What processes must be followed before a tax dispute reaches court?

Prior to a Dutch court ruling on a formal DTA decision (eg a tax assessment or a penalty), the taxpayer must first object to that decision with the DTA (see question three above). The decision has to be reviewed by a tax inspector who was not involved in issuing the initial decision, unless the taxpayer requests otherwise. The taxpayer can appeal the DTA's decision on its objection before the relevant tax court within six weeks of its issuance.

During an objection process with the DTA, the taxpayer has the right to be heard and, if it exercises this right, it is entitled to access all documents pertaining to its case. With respect to decisions appealed in court, the DTA is obliged to submit all relevant documents to the respective court. In general, there is no disclosure obligation on the taxpayer.

There is no 'pay-to-play' rule in the Netherlands: if a taxpayer objects to an assessment or appeals a DTA decision on an objection, a payment deferral is generally granted. Deferred amounts are subject to interest.

5. Which courts are relevant to tax disputes?

Only tax chambers of general courts can rule on tax cases.

Both the taxpayer and the DTA may appeal a general court ruling to the Court of Appeal where the rules, procedures and timelines are similar to those of the general courts. Decisions of the Court of Appeal can be appealed before the Supreme Court, although the Supreme Court only rules on the application of the law and not on questions of fact. All courts may, and the Supreme Court must, refer questions regarding the interpretation of unclear EU law to the ECJ. Lower Courts can also refer prejudicial questions to the Supreme Court.

6. Can the tax authorities impose penalties and if so how are these calculated?

The DTA may impose default penalties (in cases of negligence) and punitive fines (in cases of gross negligence or intent).

A default penalty is imposed on taxpayers for not (timely) requesting a tax return form, not (timely) filing a tax return, submitting an incomplete or incorrect tax return or not paying tax within the applicable deadline. The standard penalty for not (timely) filing a tax return is a fixed amount, which

may increase in the event of repeated defaults. The standard penalty for not paying the tax within the applicable deadline is proportional to the amount of tax owed.

In cases of gross negligence or intent, a punitive fine of up to 100% of the tax due may be imposed. The fine may be higher if the DTA has previously imposed a punitive fine on the taxpayer or if the taxpayer has committed fraud.

The default penalties and punitive fines imposed by the DTA are administrative (and therefore not criminal) fines, against which the taxpayer can lodge an objection with the court.

Not filing correct returns and not paying tax may also be criminal offences. If a taxpayer has committed a criminal offence, the DTA has the authority to impose a criminal fine or refer the case to the public prosecutor. (See question eight below.)

7. Can taxpayers reach an out-of-court settlement with the tax authorities?

Disputes between a taxpayer and the DTA may be resolved by way of settlement, which may be preceded by mediation. Settlements are generally used to resolve disputes over factual issues, but may also concern the application of law to a specific case. Penalties or interest cannot be subject to a settlement. Settlements are not public and cannot be used by other taxpayers to obtain a similar position.

8. Can tax authorities impose criminal liability on taxpayers?

Taxpayers may be criminally prosecuted for offences involving tax fraud or other non-tax specific offences (eg, forgery, deceit, money laundering, being part of a criminal organisation) by the Public Prosecution Service (often following a referral from the DTA). If it is determined that a legal person has committed, or is an accessory to, a criminal offence, the *de facto* managers or principals may also be criminally prosecuted. This may occur if the criminal conduct resulted from the actions of these persons or if they failed to take measures to prevent the criminal conduct. If an employee commits a criminal tax offence and ignores instructions from their manager or principal to alter their behaviour, the principal will be vicariously liable for these acts if they were aware that they were being committed.

Dutch law enshrines the *una via* principle, according to which a taxpayer may not be prosecuted and penalised twice for the same offence (eg through both a criminal and administrative penalty). Thus, a taxpayer's offence must be addressed either through criminal law or through administrative proceedings. To this end, the DTA may work with the tax investigation and audit service (*FIOD*) and the Public

Prosecution Service to decide how a case should proceed.

9. How do tax authorities interact with their foreign counterparts and other agencies or authorities?

The DTA cooperates with a number of national agencies (both private and public parties) in the joint enforcement of governmental regulations and the exchange of information (to the extent permitted by law). In tax fraud investigations, the DTA is assisted by *FIOD*.

As a basic matter, the DTA may not disclose any information about a taxpayer. The Netherlands is, however, party to a number of international agreements that override this duty of confidentiality. The most important examples of such agreements are bilateral tax treaties and Tax Information Exchange Agreements (*TIEAs*) that contain information exchange provisions based on Article 26 of the OECD Model Convention. In addition, information may be (and in practice is) exchanged with foreign authorities under a number of OECD conventions and EU directives/regulations that the Netherlands has implemented via the Dutch International Tax Assistance Act (*Wet op de Internationale Bijstandsverlening*).

In cross-border situations, the DTA may face disputes with its foreign counterparts in relation to the tax position of taxpayers. Under most bilateral tax treaties, the DTA may initiate a mutual agreement procedure (*MAP*) to resolve such disputes.

10. Is there anything else taxpayers should know about taking a tax dispute to court?

Proceedings before the tax courts are not public, unless (and to the extent that) they involve a penalty. Not all tax court decisions are published, and published cases are anonymised.

The respective taxpayer may be defended by a lawyer or other representative, but this is not required (except for pleadings before the Supreme Court). On appeal or defence, the taxpayer may claim that – in case the court rules in its favour – the DTA be ordered to pay the costs of the proceedings. Such an order for costs, however, is determined on the basis of fixed sums and will often not result in full reimbursement of the costs incurred. The taxpayer itself may be ordered to pay the costs of the proceedings only if it has made a manifestly unreasonable use of procedural law.

Litigation with the DTA may take several years to reach a conclusion, especially if the case is brought before the Court of Appeal or the Supreme Court.

Spain

Bosco Montejo, Álvaro Fernández and Carmen Delgado

1. What type of tax disputes are most common and are there any trends taxpayers should be aware of?

In our experience, and noting the General Tax Control Plan published yearly by the Spanish tax authorities which identifies the areas in which tax auditors will focus their reviews, the Spanish tax authorities have recently been concentrating their tax audits on several key areas.

- Non-residents: tax auditors have been scrutinising payments to non-residents, particularly in relation to private equity fund structures involving tax havens or non-EU beneficiaries. They have also been active in examining the allocation of profits to permanent establishments in Spain, with a focus on intangible assets.
- Corporate tax: more 'traditional' corporate tax issues (such as the deductibility of cross-border intra-group acquisition debt, tax credits requirements, and transactions/expenses that may be disguised as (non-deductible) dividends) continue to be closely examined.
- Individuals: individuals are actively being investigated for issues relating to tax residency, the fraudulent use of legal entities to hide income or avoid taxation, and the recharacterisation of employment income relating to carried interest. The tax administration is also interested in analysing economic/business reasons behind reorganisations subject to the roll-over regime.
- Indirect taxes: in this respect, the tax authorities has a specific focus on the payment of transfer tax on the sale of leased property.

These areas of focus are expected to continue to be relevant in future tax audits in Spain.

In addition to the foregoing list, it is worth highlighting the particular focus by the tax authorities on private equity structures prepared by private equity managers, including the taxation of distributions from portfolio companies to non-resident funds, compensation structures of managers (such as carried interest), and the allocation of profits to management companies in Spain.

2. What powers do the tax authorities have to require disclosure of information from taxpayers?

In the context of a tax audit, the Spanish tax authorities have the ability to examine and obtain a copy of any document with tax relevance (ie books, accounts, files, invoices, supporting documents, correspondence with tax implications, and any other document with tax implications). This information is generally requested through the notification of a formal 'Information request' and the taxpayer generally has 10 business days to provide the requested documentation.

When conducting tax audits, the Spanish tax authorities also have the statutory power to enter and audit the business premises of the taxpayer, for which they need an administrative resolution (or taxpayer consent). Exceptionally, Spanish tax authorities can enter to the taxpayer's personal domicile if they have a judicial authorisation (or taxpayer consent).

In addition, taxpayers who carry out economic activities in Spain, pay income subject to Spanish withholding tax or intermediate in economic transactions with a Spanish nexus must regularly provide certain information through the submission of reporting tax returns. These reporting obligations include, amongst others, (i) reporting transactions with third parties that individually and on a yearly basis are above EUR 3,000; (ii) CRS reporting obligations; (iii) reporting of information on securities, insurance and income by Spanish custodians, fund managers and insurers; (iv) reporting of information regarding transactions with financial securities (tax form 198); (v) reporting of information regarding debt securities; (vi) DAC6 reporting obligations; (vii) Country-by-Country Reporting (CbCR) obligations; (viii) FATCA reporting obligations; and (ix) reporting obligations relating to income subject to Spanish withholding tax.

Additional specific information can be obtained through individual information requests outside the context of a tax audit (although limitation exist, for example in relation to requests regarding bank information).

Information obtained by the Spanish tax authorities is confidential and it may only be used for the effective application of the relevant taxes; it may not be transferred or communicated to third parties, except in certain cases of collaboration with other authorities (on which, see question nine below).

Professional secrecy protects lawyers from having to provide to the Spanish tax authorities information about clients obtained as a result of the provision of professional advice or defence services. The above should also imply that taxpayers have the right not to provide copies of professional advice obtained from their lawyers as these documentation is protected under the professional secrecy. However, it should be noted that if the information is shared with third parties, this protection will be lost.

3. What are the relevant applicable time limits for tax audits/enquiries to be opened and appeals to be made?

The statute of limitations for the tax authority's right to assess a tax debt is **four years** starting on the day after the expiry of the voluntary tax filing period. This four-year period may be interrupted by (i) any action performed by the tax authorities with the formal knowledge of the taxpayer to verify, investigate and/or liquidate the tax debt; (ii) the filing by either the taxpayer or the tax authorities of an appeal or claim; or (iii) any action carried out by the taxpayer to determine or liquidate the tax debt. When the statute of limitations is interrupted, the four-year period will start running again (from 0) as from such interruption.

If a taxpayer considers that a self-assessment tax return has damaged its legitimate interests in any way, it has the right to request before the Spanish tax authorities the rectification of the self-assessment tax return in the **four years** following the end of the deadline for filing the relevant tax return. The Spanish tax authorities may accept the request, open an audit procedure or do nothing (in which case, once six months has elapsed, the taxpayer can consider the request implicitly dismissed and an appeal can be brought).

If the Spanish tax authorities issue a final decision confirming that a tax must be paid or denying the taxpayer's request for a tax refund, then the taxpayer may appeal this decision in front of the administrative courts within one month from the notification of the final decision (see question four below).

From a criminal tax offence perspective, the statute of limitations is, in general terms, five years, when the amount defrauded exceeds EUR 120,000 and **10 years**, when the amount defrauded exceeds EUR 600,000. The statute of limitation runs from the moment the criminal tax offence is committed.

4. What processes must be followed before a tax dispute reaches court?

In case of a tax audit, the tax authorities must issue their final decision within **18 months** of the audit being initiated. This deadline can be extended to 27 months if the annual turnover of the taxpayer is at least EUR 5.7 million or if the taxpayer is part of a Spanish tax consolidation group that is subject to a tax audit. There are certain cases in which the 'clock' can be temporarily paused.

Within **one month** following the notification of the final tax assessment finalising the tax audit, the taxpayer can appeal before the Spanish administrative tax courts. If the administrative courts deny the taxpayer's claims, an appeal may be filed in front of the judicial courts (see further question five below).

Without prejudice to the taxpayer's right to appeal, any tax debt assessed by the Spanish tax authorities (noting that this does not include administrative penalties) must be either (i) **paid** within the voluntary payment period to avoid late payment surcharges (if the final tax assessment is notified between the 1st and 15th of any month, the deadline for payment is the 20th of the following month; and if the final tax assessment is notified between the 16th and the last day of any month, the deadline for payment is the 5th day of the second month thereafter); or (ii) **suspended** by providing a guarantee covering the full amount claimed by the Spanish tax authorities (plus legal interest and potential surcharges).

Administrative penalties are automatically suspended during the administrative appeals procedure without providing a guarantee (although a guarantee is required for suspension during further appeals in front of the judicial courts).

5. Which courts are relevant to tax disputes?

Appealing to the administrative courts is mandatory before any appeal to the judicial courts can be brought. Although for a tax debt above EUR 150,000 (or EUR 1.8 million for disputes related to the taxable base of the taxpayer) there are two instances (regional and central administrative court, so called *TEAR/TEAC*), as a general rule, appeals are filed directly before the central administrative court for the sake of efficiency.

The administrative courts have a deadline of **one year** from the submission of the claim to resolve the dispute. Otherwise, the taxpayer can consider the claim implicitly dismissed.

Taxpayers can appeal in front of the judicial courts, generally in front of the High Court (*High Court – Audiencia Nacional*), within two months of the resolution of the relevant administrative court appeal (or the elapse of the one year period mentioned above). There is no specific provision under the Spanish legislation that obliges the High Court to issue its judgment within a specific time period.

The High Court shall refer the case to the Constitutional Court (*Constitutional Court – Tribunal Constitucional*) if it considers that the applicable law may be contrary to the Spanish Constitution, or to the European Court of Justice (*ECJ*) if it has doubts as to whether the Spanish law applicable to the relevant dispute violates the EU law.

Exceptionally, High Court judgments can be **appealed in cassation** before the Spanish Supreme Court (*Supreme Court – Tribunal Supremo*) if (i) the matter raised by the appellant has an objective appeal interest for the Supreme Court (eg when the case affects a large number of persons, when the constitutional validity of a law is debated, or when rules on which there is no case law have been applied); and (ii) the resolution that is appealed has breached domestic or EU law or the case law of the Spanish Supreme Court or ECJ. An appeal in cassation is not a new jurisdictional instance in which the case is discussed again, but its purpose is to determine in substance whether the court of instance (ie the High Court) has infringed the domestic or EU legal framework, laws and/or jurisprudence through its judgment.

6. Can the tax authorities impose penalties and if so how are these calculated?

The Spanish tax authorities have the power to impose administrative penalties on taxpayers who fail to submit their tax returns or submit them incorrectly or incompletely. The severity of the penalty depends on the specific circumstances.

If the taxpayer files their tax return and pays the tax upon request from the tax authorities, penalties can range from 50% to 150% of the outstanding tax, plus delay interest. The highest end of this range is generally reserved for scenarios where fraudulent means have been used, such as falsified documents or the use of interposed persons.

For taxpayers who file their tax return and pay the tax voluntarily (ie without being requested to do so by the tax authorities), no penalty is imposed, but surcharges and interest are applied. If the tax return is submitted late, a one per cent surcharge is added to the outstanding tax for each full month of delay, and a 15% surcharge is added for delays of more than 12 months. However, these surcharges can be reduced by 25% if they are paid within the voluntary payment period, along with the relevant tax debt.

Additionally, there is a specific penalty regime for taxpayers that do not comply with their general reporting obligations (ie those detailed above at question two). Penalties could be up to EUR 20,000 if taxpayers do not submit these tax reporting forms on time (increasing to between one per cent and three percent of the taxpayer's turnover, with a maximum of EUR 600,000, if taxpayers do not answer the Spanish tax authorities after the 'third warning'); or, if taxpayers submit these tax reporting forms incorrectly or incompletely, the penalty could range from between 0.5 per cent and two per cent of the amount reported incorrectly or incompletely if the transactions not reported exceed 10% of the total reportable transactions.

Penalties might be reduced: (i) by 30% if there is an agreement in relation to the penalties imposed, and (ii) by an additional 40% if the penalty is paid within the legal deadlines and no appeal is filed.

Under Spanish tax legislation there is a general principle of non-imposition of a penalty when the necessary diligence has been exercised in complying with tax obligations.

7. Can taxpayers reach an out-of-court settlement with the tax authorities?

As a general rule, the Spanish tax legislation does not provide for a process for agreeing a settlement with the Spanish tax authorities. However, exceptionally, the law foresees the possibility of reaching such an agreement (the so-called *Actas con Acuerdo*) in relation to very specific cases in which the tax debt cannot be quantified (eg to determine the valuation of intangible assets in certain specific cases).

8. Can tax authorities impose criminal liability on taxpayers?

The Spanish tax authorities cannot impose criminal tax liabilities on taxpayers. If the Spanish tax authorities find indications of a criminal tax offence in the course of a tax audit, they must report this to the criminal jurisdiction. In these cases, the Spanish tax authorities are allowed to continue with the tax administrative proceedings and issue a final tax assessment linked to the commission of a criminal tax offence (*liquidación vinculada a delito*), obliging the taxpayer to pay the relevant tax debt. Then, the Spanish tax authorities report the potential criminal tax offence. If the claim is not admitted, the tax assessment linked to the commission of a criminal tax offence will have no effect, and the tax audit proceedings will be restarted again as at the moment before the tax assessment proposal was issued.

According to the Spanish Criminal Code (*Código Penal*), a criminal tax offence is committed when an individual or entity commit fraud against the Spanish tax authorities of an amount above EUR 120,000. The commission of a criminal tax offence requires the existence of malice/premeditation (ie a deliberate intention to defraud the tax authorities (*dolo*)). The existence of *dolo* is a matter of fact and therefore, in practice, there may be many situations in which the distinction between a criminal tax offence and an administrative tax infraction is complex.

An entity may also be liable for a criminal tax offence if (i) its legal representatives (or those authorised to take decisions on its behalf) commit a criminal tax offence in the name of, or on behalf of, the entity and for its direct or indirect benefit; or (ii) if the persons under the authority of the above representatives and authorised persons (eg employees) commit a criminal tax offence in the exercise of the entity's corporate activities, on behalf of the entity and for its direct or indirect benefit, provided that the duties of supervision, monitoring and control have been seriously breached.

An entity will be exempt from criminal liability if it had reasonable procedures of control in place to avoid the commission of a criminal offence.

9. How do tax authorities interact with their foreign counterparts and other agencies or authorities?

The Spanish authorities actively collaborate with other domestic public administrations and other domestic entities (eg regional and local tax authorities, the National Securities Market Commission (*Comisión Nacional del Mercado de Valores* (CNMV)), and the Bank of Spain).

The Spanish tax authorities have in place many information exchange mechanisms with other tax authorities to share tax information. These mechanisms include double tax treaties, the Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation (*Administrative Cooperation Directive*) and the Agreement on Mutual Administrative Assistance in Tax Matters (*Mutual Assistance Agreement*).

In addition, once the Spanish legislative process for implementing the Council Directive (EU) 2021/514 of 22 March 2021 amending the Administrative Cooperation Directive (DAC7) is finalised (which is expected to be completed by mid-2023), joint tax audits with other Member States will be an additional tool available for the Spanish tax authorities.

If disputes between the Spanish tax authorities and foreign tax authorities arise in circumstances where the action of one of them has given rise to, or could give rise to, taxation that is not in accordance with a DTT, Mutual Agreement Procedures (MAP) are the mechanism used for resolving them. In 2021, the Spanish tax authorities concluded 142 MAP cases, with resolution taking an average time of 19.6 months. Spain has the shortest average time for reaching resolution of MAP transfer pricing disputes of any jurisdiction in the world.

10. Is there anything else taxpayers should know about taking a tax dispute to court?

Tax administrative proceedings, such as tax audits and administrative appeals before the TEAC, are not public (subject to the caveat that the resolution issued by the TEAC is usually published, but without the taxpayer's identification details). On the contrary, judicial proceedings before the High Court and the Supreme Court are public.

Litigation against the Spanish tax authorities in all instances up to the High Court could take at least five or six years to reach resolution. In case of success, the taxpayer can recover the cost of the proceedings if agreed by the court, but only up to a maximum amount (meaning that normally the full cost is not recovered).

Taxpayers can represent themselves at all levels of tax administrative proceedings. However, it is mandatory to be represented by a lawyer and a solicitor (*procurador*) at all levels of judicial proceedings.

United Kingdom

Helen Buchanan, Sarah Bond, Alison Dickie and Laura Western

References to the United Kingdom should be read as references to England and Wales only. Similar considerations may apply in respect of Scotland and Northern Ireland, but these jurisdictions are outside the scope of this guide.

1. What type of tax disputes are most common and are there any trends taxpayers should be aware of?

Tackling tax avoidance has been a major focus of the UK tax authority (HMRC) for some time now and we expect that to continue to be the case for the foreseeable future even though most multinational groups no longer engage in the types of aggressive tax planning seen in the early 2000s.

There is a particular trend towards challenging cross-border structures which erode the UK tax base. Many of the current challenges rely on the traditional tools such transfer pricing and unallowable purpose rules. Going forward we expect to see more cases involving anti-hybrid mismatch rules and potentially the UK's diverted profits tax (or DPT), although the Profit Diversion Compliance Facility (PDCF) has been effective in short-cutting many of these disputes.

In the large business context, we have also seen HMRC focusing on more 'traditional' areas of controversy, such as tax deductibility, the use of reliefs, valuations, corporate tax residence, VAT and employment taxes.

Complex disputes of this nature, taken together with new UK rules requiring the disclosure of uncertain tax positions by large businesses, means we expect large multinational groups will continue to face challenges from HMRC. In responding to challenges, it is more important than ever to have a strong handle on the evidence. HMRC will always insist on testing the evidence for itself and increasingly is threatening penalties or even criminal sanctions against corporate taxpayers who it feels are defending the indefensible.

2. What powers do the tax authorities have to require disclosure of information from taxpayers?

In practice, HMRC makes most of its requests for information on an informal basis. HMRC does, however, have the statutory power to compel the disclosure of information or documents that are reasonably required for checking a person's tax position or collecting a tax debt by issuing a formal information notice. Certain exclusions apply, including for documents that are not within the recipient's possession or power and privileged documents.

HMRC also has statutory powers permitting it to enter and inspect (but not force entry or search) business premises, including business assets and documents therein, where reasonably required for checking a person's tax position in the context of a civil enquiry.

HMRC has additional powers in relation to suspected tax-related criminal offences, including the ability to conduct so-called 'dawn raids' using magistrate-granted warrants to enter and search premises (such warrants granted on application where there are reasonable grounds for believing a criminal offence has been committed). However, these are rarely used against large businesses.

Witness interviews of taxpayers (or their employees) can only be compelled by HMRC in the course of criminal investigations, although in practice informal requests for witness interviews are common in the civil context.

Large businesses are required to proactively disclose to HMRC if they take a position in their corporation tax, VAT, partnership or PAYE returns which is uncertain. HMRC also receives disclosure from, or about, taxpayers under the mandatory disclosure regimes which exist under UK law – including Country-by-Country Reporting, the Common Reporting Standard, FATCA, DOTAS and POTAS.

3. What are the relevant applicable time limits for tax audits/enquiries to be opened and appeals to be made?

As a basic matter, HMRC can generally open an enquiry into a company's, individual's or partnership's self-assessment tax return (which typically, but not exclusively, deal with corporation tax, income tax and CGT as applicable) within 12 months of the relevant return being filed (or, for companies in groups which are not small, 12 months of the deadline for filing that return). Different deadlines exist if the relevant return was filed late, or if the enquiry relates to an amended return.

After that date, or if no return was filed, HMRC may issue a discovery assessment if HMRC makes a 'discovery' to the effect that an amount of tax that should have been assessed has not been, an assessment to tax is insufficient or relief given is excessive. HMRC can only make a discovery assessment within four years of the end of the relevant accounting period (increasing to six years in the case of carelessness and 20 years in the case of deliberate behaviour).

Taxpayers have 30 days from a final HMRC decision being made (for example, a closure notice being issued at the end of an enquiry or a discovery assessment being issued) in which to appeal it (see question four below).

Different deadlines also apply to different taxes, for example, the deadline for HMRC to enquire into stamp duty land tax (SDLT) returns is typically nine months from the filing date. The process is also different for VAT, where HMRC can make assessments for VAT, for example, if a person makes an incomplete/incorrect VAT return, broadly up to two years after the end of the VAT period for which the tax was due (or was wrongly repaid or credited) (but this can be extended to up to four years after the end of the relevant VAT period in some circumstances or 20 years in the cases of fraud/dishonesty).

4. What processes must be followed before a tax dispute reaches court?

Taxpayers are able to challenge in court any final decision of HMRC to impose tax, interest or penalties (generally the tax chamber of the First-tier Tribunal (FTT), see question five below). As a technical matter, the appeal must be made to HMRC and then notified to the FTT. If the taxpayer asks for (or accepts an offer of) an internal review by HMRC, this review process must be completed before notification to the FTT is made. There is no obligation on the taxpayer and HMRC to seek to come to an agreement before litigation commences but the FTT will facilitate alternative dispute resolution where appropriate.

There is no general ‘pay-to-play’ rule in relation to direct taxes in the UK, such that payment of the disputed corporation tax can usually be postponed during any challenge. One exception is DPT, which must be paid upfront and can only be appealed after the expiry of a 15-month review period. The rules also differ for indirect taxes: generally payment must be made in full before the FTT will hear the appeal, although a delay can be requested if this would cause extreme financial difficulty.

Different rules apply for judicial review (in broad terms, a constitutional law challenge of the lawfulness of an action by a public body), which taxpayers can use to challenge HMRC decisions on the grounds of illegality, procedural unfairness and irrationality, including breach of a legitimate expectation.

5. Which courts are relevant to tax disputes?

Most tax disputes are heard initially before the FTT, although cases in which the underlying facts are not disputed and which turn on legal points may (with the consent of all involved) be heard by the Upper Tribunal (UT) in the first instance.

FTT decisions are appealed to the UT; UT decisions are appealed to the Court of Appeal; and Court of Appeal decisions are appealed to the Supreme Court (although it is rare for tax cases to go that far).

Criminal tax cases are heard before magistrates’ courts or the Crown Court (depending on the alleged offence).

Judicial review applications are heard before the UT or the High Court in the first instance, and can be appealed to the Court of Appeal and then the Supreme Court in the normal way.

6. Can the tax authorities impose penalties and if so how are these calculated?

Civil tax penalties can be imposed as a result of inaccuracies in tax returns and documents, unless the taxpayer took reasonable care to avoid this.

These penalties are calculated as a percentage of the ‘potential lost revenue’ (broadly, the additional tax resulting from correcting the relevant inaccuracies). The applicable percentage range depends on whether: (a) the disclosure of the inaccuracy by the taxpayer was prompted or unprompted, and (b) whether the behaviour of the taxpayer was careless, deliberate or deliberate and concealed, as follows:

	Unprompted disclosure	Prompted disclosure
Careless	0-30%	15-30%
Deliberate	20-70%	35-70%
Deliberate and concealed	30-100%	50-100%

Although the starting point is the highest percentage in the applicable range, reductions are then available for the quality of the taxpayer’s disclosure, capped such that the penalty remains within the applicable range.

Penalties for careless behaviour may be suspended for up to two years, with conditions attached, at HMRC’s discretion.

Separate rules exist in relation to penalties for failing to notify HMRC that a tax liability has arisen.

7. Can taxpayers reach an out-of-court settlement with the tax authorities?

Yes – and most tax disputes are resolved in this way. However, HMRC’s Litigation and Settlement Strategy (LSS) only permits HMRC to enter into a settlement with taxpayers ‘on a basis which it believes could reasonably be determined by the [FTT]’ – meaning that if HMRC has reached a ‘considered and definitive view of what is the right tax treatment’, they will not settle out-of-court on any other basis. HMRC must consider each dispute individually for these purposes, such that ‘horse-trading’ of issues in the way one might in a commercial negotiation is not possible. There are also strict governance processes so the case team will not generally have authority to resolve a dispute without approval from the relevant governance panel.

HMRC is in principle willing and able to utilise alternative dispute resolution mechanisms – eg mediation or structured facilitation – to reach an out-of-court settlement, although our experience is that this remains rare in practice for cases involving large businesses other than where the case is being managed through the High Risk Corporates Programme (HRCP).

8. Can tax authorities impose criminal liability on taxpayers?

There are various criminal offences for which taxpayers may be prosecuted in the UK, generally involving fraud of some description. Historically, a company could only be vicariously liable for the criminal acts of its employees or directors if it could be established that, in committing those acts, the individual was the ‘directing mind and will’ of the company. Outside the context of owner-managed businesses, this is a difficult hurdle for HMRC to surpass.

Since 2017, a company can also be liable for the strict liability offence of failing to prevent the facilitation of tax evasion, unless the company can establish that it had reasonable procedures in place to prevent the facilitation (the CCO). No prosecutions have yet been brought in relation to the CCO, but as of the end of June 2023, HMRC had nine live investigations and a further 25 live opportunities under review. These investigations and opportunities span 10 different business sectors, including software providers, labour provision, accountancy and legal services and transport. These statistics suggest that HMRC is increasingly considering employing the CCO in cases where tax fraud is suspected.

In addition, the UK government is introducing a new corporate criminal offence of failing to prevent fraud. Once introduced, organisations will have committed an offence if a specified fraud offence (including certain offences with a tax angle) is committed by an employee or agent of an organisation, for the organisation’s benefit, and the organisation did not have reasonable fraud prevention procedures in place. At the time of writing, the Economic Crime and Corporate Transparency Bill (via which this offence will be legislated) has not yet received Royal Assent.

HMRC usually investigates fraud using their civil powers (so-called Code of Practice or COP8/COP9 procedures), with criminal investigations reserved for cases where HMRC needs to send a strong deterrent message or the conduct involved is such that only a criminal sanction is appropriate. In practice, criminal investigations are relatively unusual in circumstances where the taxpayer is being co-operative with HMRC – although not a risk that can always be discounted.

9. How do tax authorities interact with their foreign counterparts and other agencies or authorities?

HMRC works together with a number of non-tax authorities in the UK – including the Serious Fraud Office, the Financial Conduct Authority and the National Crime Agency. Our experience is that this is becoming more common.

Similarly, HMRC increasingly works together with tax authorities outside the UK. There is extensive information sharing between HMRC and its foreign counterparts including under Tax Information Exchange Agreements, double taxation treaties and the OECD/Council of Europe Multilateral Convention on Mutual Administrative Assistance in Tax Matters. Joint investigations with foreign tax authorities also occur, although this is not yet commonplace.

Disputes between HMRC and its foreign counterparts do arise, particularly in the context of double taxation treaties. Most such agreements provide for the mutual agreement procedure (MAP) to be used in such circumstances. In 2021/22, HMRC admitted 96 MAP cases in relation to transfer pricing and permanent establishment profit attribution issues alone, with resolution taking an average of 21 months.

10. Is there anything else taxpayers should know about taking a tax dispute to court?

Litigation with HMRC can take a number of years to reach a conclusion and, even if successful, full recovery of the taxpayer's costs is unlikely – especially if the dispute is heard by the FTT, in which costs are recovered only in complex cases or if HMRC has acted unreasonably.

In theory, taxpayers can represent themselves at all levels of court proceedings. In practice, however, almost all large taxpayers with high-value disputes are represented by a barrister (or solicitor-advocate). The same is true of HMRC.

Taxpayers should be aware that, in the absence of exceptional circumstances, proceedings are public and decisions are published and publicly available (although the extent of publicity differs depending on the identity of the taxpayer and issue in question).

United States

Joe Soltis and Brendan Counihan

1. What type of tax disputes are most common and are there any trends taxpayers should be aware of?

Transfer pricing is a common area of scrutiny by US tax authorities. There is a continuing expansion of information sharing among jurisdictions with the result that audits are becoming increasingly forensic and focused on groups rather than individual entities or businesses.

The US Internal Revenue Service (IRS) has also increased enforcement efforts with respect to tax return filing requirements for foreign corporations. Specific issues in this area include non-filing, delinquent filing, and incorrect claims for deductions and refunds.

Future challenges relating to the interaction (and potential conflict) between the US corporate book minimum tax of 15% passed by the Inflation Reduction Act and the OECD's Pillar two framework which imposes a 15% global minimum tax on a jurisdictional basis are anticipated.

There is also concern that large companies in particular will face greater IRS scrutiny in the future given the surge in the IRS budget and headcount provided by the Inflation Reduction Act.

2. What powers do the tax authorities have to require disclosure of information from taxpayers?

Typically, the IRS first requests information on a voluntary basis. If the information is not provided voluntarily, the IRS has the statutory power to compel the disclosure of information or documents that are reasonably required for checking a person's tax position or collecting a tax debt by issuing a summons. Certain exclusions apply, including for documents that are not within the recipient's possession or power and for privileged documents.

In the criminal investigation context, the IRS has statutory powers permitting it to enter and inspect business premises under a search warrant, including business assets and documents therein, where reasonably required to establish any criminal activity. Such search warrants are granted on the grounds of probable cause to believe that criminal activity has been committed, and will include details of particular property to be seized. The IRS may also use other investigative techniques to obtain evidence, including witness interviews, surveillance, subpoenaing bank records, and reviewing other financial data.

Corporations are generally required to proactively disclose uncertain positions in their corporate income tax returns. The IRS also receives disclosure from, or about, taxpayers under FATCA which

requires reporting by US taxpayers and certain financial institutions of financial assets and accounts held outside the US.

3. What are the relevant applicable time limits for tax audits/enquiries to be opened and appeals to be made?

The statute of limitations for the assessment of federal income and employment taxes is three years from the later of (i) the date of filing the tax return and (ii) the due date for such tax return (or 15 April the following year in the case of employment tax returns). This limitation period does not apply if a return was not filed or in case of fraud. The three-year limitation period is extended to six years for federal income taxes where there is a 25% or greater omission of income.

The statute of limitations on assessment is suspended when the IRS issues a notice of deficiency. If the taxpayer does not file a timely petition with the Tax Court, the statute of limitations on assessment for the tax years covered in the notice of deficiency is suspended for 150 days. If the taxpayer files a timely petition with the Tax Court, the statute of limitations on assessment for the tax years at issue is suspended until 60 days after the Tax Court decision becomes final.

The deadline for filing a petition with the Tax Court is 90 days after the date the notice of deficiency or a liability was mailed, except that if the notice is addressed to a person outside the US, the petition must be filed within 150 days after the date the notice is mailed. If the deadline specified on the notice is later than 90 days from the date the notice was mailed, the later date controls.

A Tax Court decision becomes final 90 days after the decision is entered, unless the taxpayer files a timely appeal. To appeal a decision of the Tax Court, a party must file a notice of appeal with the Clerk of the Tax Court within 90 days after entry of the decision.

The statute of limitations for collection begins to run on the date of assessment. From that date, the IRS has 10 years to levy or commence a proceeding in court to collect the assessed liability.

4. What processes must be followed before a tax dispute reaches court?

Deficiency notices include IRS contact information to allow taxpayers an opportunity to discuss the contents of the notice with an IRS representative and raise questions or reasons why the taxpayer believes the assessment is incorrect.

A case may be taken directly to Tax Court without appealing within the IRS. To invoke the Tax Court's jurisdiction to review a deficiency assessment from the IRS, the taxpayer must file a petition with the

court within the deadline set out at question three above. If the taxpayer misses the applicable deadline, the IRS can proceed to assess and collect the tax. At this point, the taxpayer must pay the entire assessment of tax and file a claim for refund. If the IRS does not grant the claim, the taxpayer may sue for a refund in a federal district court or the Court of Federal Claims. The Tax Court does not have jurisdiction over refund suits.

Taxpayers can appeal a decision of the Tax Court by filing a notice of appeal with the Clerk of the Tax Court within the deadline set out at question three above. Where the taxpayer decides to appeal a Tax Court decision determining a deficiency and wants to delay assessment and payment of the deficiency, the taxpayer must file with the Tax Court a bond either before or with the notice of appeal. The taxpayer must file a motion with the Tax Court to set the amount of the bond required. Appealing taxpayers rarely file a bond, since they will have to pay additional interest if there is an affirmance (which is not deductible for individuals), and they will have to pay a premium to the surety.

5. Which courts are relevant to tax disputes?

Where the IRS issues a notice of deficiency, the taxpayer can litigate the matter by filing a petition with the Tax Court for redetermination of the proposed deficiency. This has the benefit of allowing the taxpayer to defer payment of the proposed deficiency until a final determination has been made in the case. If the taxpayer has already paid the deficiency, it may file a claim for a refund, and if the IRS does not grant the refund, the taxpayer may file refund suit in federal district court or the Court of Federal Claims (but not Tax Court).

A final decision of the Tax Court is reviewable by a federal circuit court of appeals, provided that a notice of appeal is filed with the Tax Court clerk within 90 days of the decision. Finality generally requires that a judgment dispose of all of the claims in a given case.

Venue on appeal by a corporation is generally to the federal circuit in which the corporation's principal place of business or principal office or agency is located. If there is no principal place of business or principal office or agency in the US, then venue lies in the circuit in which the IRS office where the return was filed is located.

6. Can the tax authorities impose penalties and if so how are these calculated?

The IRS can impose both civil and criminal penalties. Civil penalty amounts depend on what the penalty is for (eg failure to file a tax return, failure to pay tax due, or failure to deposit employment taxes) and are generally assessed as a percentage of the amount of tax due and can increase when due to a taxpayer's intentional disregard. Civil penalties accrue interest daily at rates that are determined and published quarterly by the IRS.

The IRS is able to remove or reduce some civil penalties if the taxpayer is able to establish that it acted in good faith and can show reasonable cause for why it did not meet its tax obligations.

Criminal tax offences require more extreme violations of tax law and the criminal standard for burden of proof – beyond a reasonable doubt. Criminal tax prosecutions typically involve tax losses in excess of USD 100,000. Small tax loss amounts make it more difficult for the IRS to meet the evidentiary burden for criminal cases. Criminal tax evasion is one of the most severe criminal tax charges and can carry fines of up to USD 500,000 for corporations and/or imprisonment of up to five years. Depending on the level of direct involvement and responsibility, a corporation's directors and employees may face criminal charges for tax crimes of the corporation. This typically requires the prosecutors to show wilfulness or 'wilful blindness' on the part of the responsible individuals. Factors that may increase the level of criminal penalty include having a significant amount of taxes due and a pattern of tax evasion over an extended period of time.

7. Can taxpayers reach an out-of-court settlement with the tax authorities?

Taxpayers frequently settle with the IRS before their case reaches trial. The process generally begins with the taxpayer filing a formal written protest with the IRS Appeals Office in response to a letter of proposed tax adjustment. Only attorneys, certified public accountants, or enrolled agents are allowed to represent a taxpayer before the Appeals Office.

The taxpayer usually then makes an initial settlement offer. If the taxpayer's offer is unacceptable, the Appeals Office usually will make a counter-offer. The settlement offer made by the Appeals Office is typically based on the 'hazards of litigation' (ie the risks to the US government's interests if they do not prevail in court).

For certain cases that are already in the appeals administrative process and that are not docketed in any court, taxpayers may request mediation to resolve the disputed issues. Under this procedure, the taxpayer and the Appeals Office attempt to negotiate a settlement, assisted by a mediator who is an Appeals Office employee (and, at the election and expense of the taxpayer, a non-IRS co-mediator) who lacks the authority to impose a decision. A settlement reached by the parties through mediation will not be legally binding on (or otherwise control) the parties for tax years not covered by the agreement.

8. Can tax authorities impose criminal liability on taxpayers?

Tax evasion is one of the most severe tax crimes in the US. It includes the basic elements of (1) existence of a tax deficiency (ie an additional tax due and owing), (2) an affirmative act constituting an evasion or attempted evasion of the tax, and (3) wilfulness. Even if an affirmative act of fraudulent concealment is established, a defendant cannot be convicted of tax evasion unless a tax deficiency has either been assessed or is due. In the corporate context, this could take the form of directing subordinates to commit acts which constitute tax crimes or the deliberate avoidance of facts that would make one aware of the commission of a tax crime.

The most frequently charged criminal tax violation in the US is subscribing to false tax returns or aiding and abetting in the preparation of false tax returns. This occurs when a person wilfully submits any document under tax laws that they do not believe to be true and correct and when a person wilfully aids or assists in the preparation of a document under tax laws that is fraudulent or false. Other offences include wilful failure to collect or pay over tax and wilful failure to file tax returns or supply information.

The IRS's burden of proof in criminal cases (ie beyond a reasonable doubt) is higher than in civil cases (ie preponderance of the evidence). This means that if a person is convicted of criminal tax offences, they may be prevented from challenging analogous civil tax offences.

The likelihood of prosecution for a potential tax crime depends on the amount of tax in question as well as whether the policy goals of the IRS and US Department of Justice make the case high priority (eg the UBS foreign bank account prosecutions).

9. How do tax authorities interact with their foreign counterparts and other agencies or authorities?

US tax treaties and tax information exchange agreements are some of the primary means that the IRS uses to exchange information with its counterparts in other countries. Tax information exchange agreements are negotiated with other countries by representatives from the IRS, the US Treasury Department, and the US Department of Justice. The IRS can use these means to obtain information such as tax returns, bank and brokerage records, business records, public records, witness interviews, and property ownership information.

A typical information exchange provision in a treaty might authorize an exchange in order to comply with treaty provisions, prevent fraud, or administer statutory provisions designed to prevent fiscal evasion. Some treaties distinguish between information that a treaty partner requests and information that the treaty partners exchange on a routine basis. Most treaties contain procedural or substantive limitations on the nature of the information that can be exchanged and requirements for confidentiality of the information. The IRS also instructs its examiners to first exhaust domestic means of acquiring information before making cross-border requests.

The US and its foreign treaty partners may also collaborate in joint audits to examine a taxpayer or related taxpayers. During a joint audit, representatives of the IRS and the foreign treaty partners coordinate strategies to focus on certain tax issues. Unlike simultaneous examinations, joint audits involve two or more treaty countries forming a single audit team to examine transactions of one or more related taxpayers with cross-border business activities.

Related to the above, US companies are increasingly receiving requests for information from foreign tax authorities, whether in the form of direct information requests or the IRS issuing an information document request to the company on behalf of the foreign tax authority.

10. Is there anything else taxpayers should know about taking a tax dispute to court?

All reports of the Tax Court and all evidence received by the Tax Court (including a transcript of the stenographic report of the hearings), are public records open to the inspection of the public. However, after the Tax Court's decision has become final, the taxpayer or IRS may motion the court to withdraw the originals of books, documents, records, models, diagrams, and other exhibits introduced in evidence before the Tax Court.

The Tax Court typically issues a notice setting the case for trial anywhere from six to 12 months after a petition is filed. The notice is issued approximately 45 days before the beginning of the trial session. After the trial, the parties file briefs, and once the briefing is completed, the court can take more than a year before issuing an opinion.

Taxpayers may be eligible to recover reasonable litigation costs if they (i) are the prevailing party, (ii) have exhausted available administrative remedies within the IRS, (iii) have not unreasonably protracted the proceedings, and (iv) show that the IRS's position was not substantially justified.

Taxpayers may be represented in Tax Court by a private attorney or other person admitted to practice before the Tax Court.

Checklist

In addition to helping you understand the contentious tax framework in the key jurisdictions discussed on the previous pages of this guide, we want to give you some guidance should you need to build a similar picture of the rules in other jurisdictions. Please see below a checklist of initial questions you might want to explore with local tax advisors to help achieve this.

Question	✓
What type of tax disputes are most common and are there any trends taxpayers should be aware of?	
What powers do the tax authorities have to require disclosure of information from taxpayers? In particular:	
Are requests for information usually made formally or informally?	
What are the limits on tax authorities' power to compel the disclosure of information? Can privileged or commercially sensitive information be redacted or withheld? What softcopy data can tax authorities compel the disclosure of?	
Can tax authorities enter and inspect business premises (via dawn raids or otherwise)?	
Can tax authorities conduct witness interviews?	
Do different rules apply in relation to criminal tax investigations?	
In addition to filing tax returns, do any proactive disclosure requirements exist?	
Are there any other mandatory disclosure regimes under which tax authorities may obtain information about taxpayers?	
What are the relevant applicable time limits for tax audits/enquiries to be opened and appeals to be made? In particular:	
What time limits apply in relation to tax authorities reviewing tax returns?	
What time limits apply in relation to taxpayers bringing a judicial appeal of tax authorities' decisions?	
Do different rules apply in relation to different taxes?	
What processes must be followed before a tax dispute reaches court? In particular:	
Who must taxpayers make their judicial appeal to? Does any other entity need to be notified of such an appeal being made?	
Are there any tax authority-led review processes that must be completed before a judicial appeal can proceed?	
Are the parties able or obliged to seek to reach agreement themselves before a judicial appeal can proceed?	
Does the taxpayer have to pay the disputed tax (or any other amount) to bring a judicial appeal (a so-called 'pay to play' system)?	
Are there any disclosure requirements on the taxpayer and/or the tax authorities in relation to judicial appeals?	
Which courts are relevant to tax disputes? In particular:	
For civil tax disputes, please provide details of the relevant first instance and appeal courts.	
For criminal tax disputes, please provide details of the relevant first instance and appeal courts.	
Are there any other courts which may have a role in certain tax disputes? (eg constitutional courts)	

Question	✓
Can the tax authorities impose penalties and if so how are these calculated? In particular:	
Are tax penalties civil or criminal in nature?	
How are tax penalties calculated? What factors are relevant in determining their quantum?	
Are taxpayers able to mitigate tax penalties (via co-operating with the tax authorities or otherwise)?	
Can tax penalties be suspended in any circumstances?	
Can taxpayers reach an out-of-court settlement with the tax authorities? In particular,	
If taxpayers and tax authorities can agree an out-of-court settlement, please provide an overview of the process for doing so.	
Are alternative dispute resolution mechanisms (eg mediation) available to support this process?	
Is this a common way to resolve tax disputes in practice?	
Can tax authorities impose criminal liability on taxpayers? In particular:	
What is the interaction between criminal and civil tax investigations and disputes? Are different bodies responsible for criminal matters? Can information obtained in a civil context be used in a criminal context (and vice versa)?	
What are the key criminal offences for which taxpayers may be prosecuted? What are the possible sanctions for each of these?	
Can entities be vicariously liable for the criminal acts of employees, agents or other persons?	
How common is the imposition of criminal liability in practice?	
How do tax authorities interact with their foreign counterparts and other agencies or authorities? In particular:	
How do tax authorities work with other domestic authorities and agencies?	
How do tax authorities work with their foreign counterparts? Can they share information about taxpayers? Can they co-operate on joint tax audits?	
How common is it for tax authorities to interact with their foreign counterparts and other agencies or authorities in this way?	
How are disputes between tax authorities and their foreign counterparts resolved?	
Is there anything else taxpayers should know about taking a tax dispute to court? In particular:	
How long does it typically take for tax litigation to reach a conclusion?	
What are the rules around cost recovery? If cost recovery is possible, what proportion of incurred costs can taxpayers realistically expect to recover?	
Who can represent taxpayers and tax authorities in court? What is common in practice?	
Are court proceedings public? Are judgments published (and, if so, is this on a named or anonymised basis)?	

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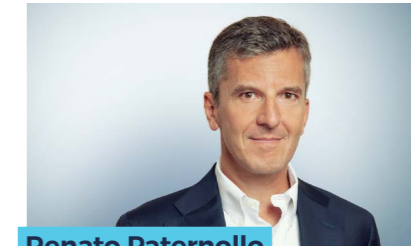
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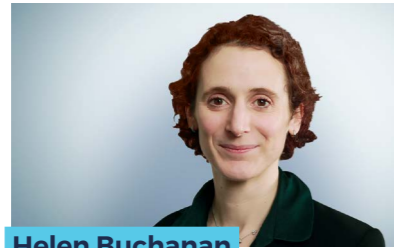
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