The Tax Disputes and Litigation Review

Eleventh Edition

Editor
David Pickstone

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THE TAX DISPUTES AND LITIGATION REVIEW

ELEVENTH EDITION

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David Pickstone

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PREFACE

It is increasingly common for tax practitioners to be involved in disputes that span multiple jurisdictions. We operate in a global economy. Supply chains cross continents, and the increasing role of technology accelerates the pace at which economic activity becomes divorced from the structures intended to tax it. The pace of economic and technological change potentially increases the gap between the reality of commerce and that of taxation.

Although supranational agencies, such as the European Commission and the Organisation for Economic Co-operation and Development, work hard to keep pace with change, there is an inevitable lag between intention and action. Of late we have seen individual countries start to take unilateral actions, with digital taxation being a prime example. In coming years, a combination of economic developments and unilateral actions by individual countries is likely further to emphasise the importance of double tax treaties and the OECD multilateral instrument.

Hot on the heels of the economic impact of the covid pandemic, tax authorities face the compounding impact of the war in Ukraine and hugely increased energy prices. Pressure on government budgets, particularly in the UK, is increasing. In response, the UK and EU have introduced windfall taxes, and the US government has threatened an equivalent. Both the UK and EU are looking closely at compliance as a way to close the tax gap. The UK has increased compliance focus on individuals, and the EU has proposed VAT measures, including a move to real-time reporting and e-invoicing for cross-border businesses, and a single VAT registration across the EU.

Regardless of whether tax authorities increase in cooperation or increase in competition, one thing is certain: they will not stand still. Tax, and particularly the international approach to tax, is a permanent fixture on the political agenda. The resulting frequent (and sometimes abrupt) changes in key elements of tax law inevitably lead to high-value and complex disputes, which often take many years to resolve.

The purpose of this book is to provide insight into the issues that give rise to tax disputes in different jurisdictions, the procedures for resolving those disputes and the powers and approach of local tax authorities. It is hoped that it will provide valuable insight into the process, timescale and cost of resolving complex difficulties when they arise across more than one jurisdiction.

We are lucky to have contributions from many leading and impressive tax practitioners across a wide range of jurisdictions. Each provides an up-to-date insight into dealing with contentious tax issues in their jurisdiction. I have enjoyed and learned from reading their contributions and I hope you will do, too.

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I would like to thank my friends and colleagues Victor Cramer, Lee Ellis and Anastasia Nourescu for their valuable assistance in compiling this and previous editions.

David Pickstone
Stewarts Law LLP
London
February 2023

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Chapter 21

SWITZERLAND

Robert Desax, Fouad G Sayegh and Yacine Rezki[1]

I INTRODUCTION

Switzerland has often been considered as a low-tax country when it was not accused of being a tax haven. The reader of this contribution will realise that, when it comes to tax litigation, the Swiss tax system is probably closer to purgatory than heaven.

Swiss authorities have an important arsenal of anti-abuse measures alongside a sophisticated system repressing tax offences. Furthermore, recent studies show that Switzerland is one of the OECD countries in which success in tax litigation for taxpayers is most rare. Swiss taxpayers may face parallel or consecutive proceedings at both cantonal and federal levels involving different authorities with each following distinct laws, circulars, and case law. Regarding case law, although Switzerland is a country with a positive law tradition, it is noteworthy that in the field of tax litigation, the most important theories relating to the burden of proof or anti-abuse are almost all rooted in aggregates of case law.

However, despite its difficulties, Swiss tax litigation can also be seen under a better light: a passionate area of practice where uncertainty and difficulty constrain the litigant to go to the edge of its knowledge and creativity.

II COMMENCING DISPUTES

i Initiation of the tax assessment procedure

Swiss individual resident taxpayers must submit an annual tax return in which they report their annual income and wealth. The tax return for year n is normally due within the first months of the year n+1. During year n, taxpayers are already expected to pay taxes on a provisional (estimated) basis for the current year. For individuals, the tax year corresponds to the calendar year. Legal persons must submit a tax return after the end of their financial year. The tax return is based on the financial statements and includes the taxable income and capital of the company. Partnerships and sole proprietorships are disregarded for Swiss tax purposes. Their income and capital are directly attributed to the owners or partners. Spontaneous tax declarations must be filed in the case of real estate sales, gifts, and inheritance distributions. In all these cases, the taxpayers are not required to compute the taxes due (this is left to the tax administration, see below).

1 Robert Desax and Fouad G Sayegh are partners and Yacine Rezki is a managing associate at Walder Wyss.

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Taxpayers are required to collaborate and to share all relevant facts with the tax administration to ensure that the taxation is complete and accurate. They must especially provide additional information if the tax administration has additional questions. If the taxpayer fails to comply with this obligation, they may be subject to fines and may especially also have to accept detrimental tax consequences.

Unlike income and wealth or capital taxes, the systems of withholding tax, stamp duties and VAT rely on the principle of self-assessment (i.e., the taxpayer must not only report the relevant transactions, but also compute the taxes due).

ii Issuance of the tax assessment decision

The tax administration determines the taxes due based on the return filed by way of a formal tax assessment. For income and wealth/capital taxes (and real estate gains taxes, gift taxes, inheritance taxes), it is the cantonal (and sometime the municipal) tax administration that is in charge. Withholding tax, stamp duties and VAT are levied by the Swiss Federal Tax Administration (SFTA).

In its tax assessment, the tax administration may depart from the tax return and make certain adjustments, disallow deductions and reclassify income.

The tax authorities can carry out targeted or random audits of taxpayers. Audits regarding income and capital taxes are carried out by the cantonal tax authorities. They frequently lead to tax adjustments and therefore to disputes. Arguably the most frequent topics of discussions in audits are the following: Disallowed deductions for items that are potentially not commercially justified, deemed or constructive dividend payments to the shareholder and transactions with related entities, such as sister companies. VAT and withholding tax audits, are carried out by the SFTA. The cantonal and federal authorities exchange information found in audits. Thus, for example, a VAT audit may lead to a corporate income tax audit, which may ultimately also have an impact on the individual shareholder's tax position.

A tax assessment formally establishes the tax base (e.g., the taxable income and taxable wealth or capital). On that basis, the tax rate will be applied, and the tax amount will also be invoiced to the taxpayer.

If the taxpayer omits to submit a tax return, even after they received a formal reminder by registered mail, then the tax administration must establish the taxable income and wealth (or capital) on the basis of its own discretion. The tax administration must aspire to establish a taxable income and wealth as close to reality as possible. It may not determine those factors completely arbitrarily and must rely on the facts and circumstances known to it, but it may draw its own conclusions (for example based on statistical evidence). Once a discretionary assessment has been issued, it may only be challenged on limited grounds.

iii Initiation of tax disputes

Once the tax assessment was received, and if the taxpayer disagrees with it, they may challenge it within a (non-extendable) 30-day deadline by filing a formal opposition. This will force the tax administration to reconsider, and either confirm or amend its initial assessment. If no opposition is filed, then the assessment enters into force and can only be amended under very limited conditions.

In the opposition procedure, both the taxpayer and the tax administration are free to, inter alia, provide or use new information, make amendments or adjustments and introduce new claims. The opposition must be filed in writing. At this stage, the taxpayer may also

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request a personal meeting with the tax inspector. Upon receipt of an opposition, the tax administration will re-examine the case and eventually issue a new decision. That new decision may be more detrimental to the taxpayer than the original decision. For example, if in the course of the opposition procedure the tax administration learns of new facts or reaches new conclusions, then it is free to use them against the taxpayer.

If the taxpayer disagrees with the new decision, they may file an appeal (again within 30 days, non-extendable). In cases concerning income and wealth or capital taxes, the appeal is filed with a cantonal court (often a dedicated tax court). Frequently, there is also a second cantonal court that could review subsequent appeals against the first court's judgments. If withholding tax, stamp duties and VAT are concerned, then the authority issuing the decision is the SFTA, and an appeal maybe filed with the Federal Administrative Court. The Swiss Federal Tribunal has ultimate jurisdiction in all tax matters (see Section III).

iv Time limits

The right of the tax administration to issue a tax assessment expires five years after the end of the tax year in question. The statute of limitation is, however, suspended under certain circumstances, for example, during appeal procedures. The five-year period starts all over again whenever the tax administration takes measures that show its determination in levying the tax. There is an absolute statute of limitation of 15 years to issue an assessment. The right to collect a tax is limited to five years after the tax assessment entered into force. This time period can also be suspended or restarted. There is an absolute statute of limitation of 10 years after the assessment entered into force.

v Revision and reassessment

Tax assessments that have entered into force are in principle final. If subsequently relevant facts appear that should have been taken into account at the moment of the assessments, then a revision (to the benefit of the taxpayer) or a reassessment (to the detriment of the taxpayer) may be initiated. This can happen at the request of the taxpayer or because the tax administration becomes aware of the new relevant facts. A revision is, however, not possible if the taxpayer should have mentioned the facts in question during the ordinary assessment procedure, had they applied the appropriate due diligence. The taxpayer must request a revision within 90 days as of the moment they become aware of the new fact. If there are sufficient new facts for a reassessment then the tax administration may issue new revised assessments and include late interest (and potentially open a tax evasion procedure with penalties). The revision and reassessment are subject to a statute of limitation of 10 years (e.g., if the procedure is initiated in 2023, it can cover the years back to 2013).

vi Voluntary self-disclosure

Swiss law allows taxpayers to regularise their tax situation if they had undeclared items of income or wealth in the past 10 years (earlier years are time-barred). The conditions to apply for a voluntary self-disclosure are that the tax authorities must be unaware of the undeclared items (and they were not about to find out), that the application is filed for the first time in the taxpayer's lifetime and that the taxpayer applies on his or her own initiative. The taxpayer must fully cooperate and endeavour to pay the full taxes due. If the conditions are met, then the taxpayer will have to pay back taxes for the previous 10 years, including interest. No penalties are levied. The taxpayers are not required to appear in person at the tax administration.

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If a deceased person had undeclared wealth or income and if an heir informs the tax authorities accordingly, then the regularisation period is limited to the three years prior to death.

The tax authorities consider that disclosures relating to assets held in jurisdictions that are part of the Common Reporting Standard (CRS) are no longer possible as such cases would fail the 'own initiative' test.

vii Release of information

Taxpayers have a constitutional and legal right to access all documents that concern them. The tax authorities may withhold certain files while the facts are still in the process of being established (they may do that for example for tactical reasons). Once the facts are clear, however, the taxpayer has a right to access all those files, in principle including internal notes. Upon request, the tax authorities either provide copies of the documents or invite the taxpayer or their representative to consult them (and make copies) on site.

In an international administrative assistance context, the Swiss tax authorities (and the Swiss Federal Tribunal) have adopted a position that is generally very favourable to international exchange of information. The general tendency is that taxpayers who want to prevent the Swiss authorities from providing information to foreign authorities prevail only in rather exceptional cases.

III THE COURTS AND TRIBUNALS

i Cantonal courts

Any decision from the cantonal tax administration can be challenged before an independent tribunal, generally within 30 days. Each canton is free to decide how to organise its tax courts, including whether one or two instances are available, but most of them have a dedicated tax tribunal and a court of appeal.

In Geneva for instance, the Administrative Tribunal of First Instance receives all appeals against decisions from the Geneva tax administration. It is composed of one professional judge and two associate judges, who also are tax experts in the private sector. Professional and associated judges are all elected by the cantonal parliament. Decisions rendered by the Administrative Tribunal can be challenged by either the taxpayer or the tax administration, or sometimes both. The appeal is lodged before the Court of Justice, which is a more generalist court, composed of three professional judges.

Cantonal courts can generally review all facts and provide a full review of the case. In some instances, it can even render a decision placing the appellant in a worse position than if there had been no appeal (*reformatio in pejus*).

ii Federal courts

Decisions made by the SFTA are subject to a potential appeal before the Federal Administrative Court, which is based in St Gallen. The Court is classically composed of three judges, although it can exceptionally be five for important matters or only one for simple ones (e.g., an obviously inadmissible appeal). All judges are elected by the federal parliament.

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iii Federal Tribunal

The Federal Tribunal receives appeals against decisions issued by the last cantonal court or the Federal Administrative Court. It is the highest court of the country. It generally rules with three judges, or exceptionally five. The scope of review is limited. It does not reexamine the facts, unless they are considered to have been arbitrarily established. Hence the Federal Tribunal essentially concentrates on legal aspects of tax matters. On rare occasions, its decisions can be challenged before the European Court of Human Rights.

IV PENALTIES AND REMEDIES

i Authors and other parties

The taxpayer is the foreseeable author of tax offences. Alongside the taxpayer, the instigation, complicity, or any form of participation may be prosecuted. During the prosecution, complicity is often used by the administrations to make liable the board or executive directors or any de facto organs of a corporation prosecuted for tax offences.

ii Penalties: pecuniary

The Direct Federal Tax Act (DFTA) establishes a scale of penalties for the various tax offences that goes gradually in the severity of the offence. The gradation is tinged with the concepts of criminal law, and the taxpayer risks a fine for the violation of the duty to cooperate, a pecuniary penalty for evasion and a custodial sentence for the use of forgery. In addition to these basic offences, there are also aggravating elements that justify the intervention of the Federal Criminal Affairs and Investigations Division, namely serious tax offences. Although the penalty is not more serious as such, the investigative means available to the authorities are more extensive for this type of offence.

Violation of the procedural obligations is punishable by a fine of up to 1,000 Swiss francs in simple cases and up to 10,000 Swiss francs in serious and repeated cases. The relevant behaviours punished by this offence have the characteristic that they are omissions: the filing of the declaration or the annexes that must accompany it, as to the transmission of the certificates, is information that the taxpayer is obliged to give. The legal text itself provides for the sanctioning of both intentional and negligent fault. The threatening penalty provided by this provision is a fine, while the violation of procedural obligations is a 'contravention', a petty offence. Thus, attempt, complicity and instigation are only punishable if the law so provides, which is not the case for the violation of procedural obligations.

Evasion is a classic offence in tax law. It punishes the taxpayer who causes a tax assessment to be incomplete (or not carried out) or who does not withhold amounts corresponding to a withholding tax or who obtains an illegal or unjustified tax remission. This is typically a taxpayer who does not declare taxable items and, as a result, evades taxes normally due to the state.

The evasion is punishable by a fine and therefore constitutes, like the violation of procedural obligations, a petty offence. The fines set following the evasion of taxes can constitute notable exceptions since they are set according to the amount evaded without any ceiling. They can range from one third of the amount of the tax evaded if the fault is slight, to three times this amount if the fault is serious. The sentencing principles of the Swiss Penal Code are fully applicable.

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Lastly, tax fraud is an offence that can only be committed intentionally. However, according to the jurisprudence, the notion of intentional behaviour must be understood broadly since it is sufficient for the taxpayer to be aware that the information they give is erroneous or incomplete to presume that they voluntarily wanted to deceive the tax authorities, at least by possible fraud, in order to obtain a lower taxation. The Federal Tribunal added that this presumption is difficult to rebut because it is hard to imagine what other motive could lead a taxpayer to provide the tax authorities with information that he knows to be incorrect or incomplete.

The characteristic elements of fraud are the use of a false, falsified or inaccurate document with the aim of tax evasion. This provision provides for a prison sentence of up to three years or a monetary penalty and is therefore a criminal offence.

The pecuniary penalty is fixed in terms of a day fine (i.e., a certain number of days during which the convicted person has to pay a certain amount of money). The pecuniary penalty is at least three days fines and may not exceed 180 days fines, and the day fine is at least 30 Swiss francs and at most 3,000 Swiss francs. Thus, the maximum amount of the pecuniary penalty is 540,000 Swiss francs, even though the fines imposed for tax evasion can be substantially higher.

The DFTA also introduces the concept of serious tax offences. This norm does not constitute a real substantive offence. It corresponds in reality to evasion or offences to which specific prosecution rules apply. The notion of serious offence is not defined by the law. As a general rule, it is accepted that tax evasion exceeding the threshold of one million francs is considered as serious. With the entry into force of the laundering of money derived from tax offences (see below), one may wonder whether the threshold allowing to define a serious offence will be harmonised by the jurisprudence with the threshold defining the notion of tax offence prior to money laundering (i.e., 300,000 Swiss francs).

The DFTA expressly provides that the use of forgeries ideally coincides with tax evasion, which means that these two offences are punishable separately. The same applies to the offence of violation of procedural obligations, which applies in parallel to the above-mentioned offences. Fines and penalties are also imposed separately insofar as they concern direct federal or cantonal taxes. Finally, the offence of money laundering also applies simultaneously to the prior tax offences.

As for indirect taxes, each one has its own set of offences that punish non-compliance with the provisions relevant to its collection. For the sake of brevity, we will address the offences inherent to the most important tax in terms of revenues and taxpayers, namely VAT. In a nutshell, the VAT Act follows a logic similar to that of direct taxes with a gradation of the severity of the offences; from the violation of procedural obligations, to the qualified tax evasion, through the simple tax evasion.

iii Remedies

The decisions of the authorities and the judicial bodies regarding tax penalties are considered as tax decisions, and the appeal process is therefore identical to the challenge of administrative decisions (see Section V.ii).

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V TAX CLAIMS

i Recovering overpaid tax

As mentioned above, taxpayers are expected to pay taxes on a provisional basis during the current year. In other words, they must make estimates of the taxes that will ultimately be due. Once a tax assessment has entered into force and, therefore, once the taxes due have been established, the remaining amounts are invoiced, or excess payments are refunded (or carried forward to the next year). Claims for repayments of overpaid taxes must be filed within five years of the end of the calendar year in which the payment was made.

ii Challenging administrative decisions

If an administrative authority has created legitimate expectations, for example, by giving an assurance to a specific person in its own field of competence, and if the person has effectively acted in reliance on that assurance, then that person's good faith is legally protected. This means that the authority is bound by its assurance and the person who relied on its in good faith can enforce it in court. The entire Swiss advance tax ruling system is based on that principle: it is common practice to ask a tax authority to confirm a certain legal treatment in advance.

It is, however, not possible to challenge advance tax rulings, because they lack the characterisation of a formal decision: an advance tax ruling is merely a promise given to the taxpayer as to how a future set of facts will be treated. It is also not possible to challenge general guidelines issued by the authorities on specific legal problems.

iii Claimants and related parties

The taxpayer to whom the assessment has been notified is entitled to challenge it. Depending on the facts and circumstances, other persons or organisations may be able to file an appeal as well (e.g., other cantonal tax authorities or the SFTA, heirs, spouses, board members). Third parties may be allowed under certain circumstances to participate in the procedure (for example board members, if their potential liability is engaged).

VI COSTS

When the claim is filed with the administration, the taxpayer bears their own representation costs, if any. In principle, there are no additional costs to the taxpayer for the administration's decision.

Judicial costs must be advanced by the claimant (taxpayer). In the event the taxpayer is successful, the judicial fees are reimbursed, and procedural indemnity is rewarded. However, this procedural indemnity does not match the effective costs of representation. In practice, the amounts rewarded are so low compared to the effective costs that they must be considered as symbolic.

VII ALTERNATIVE DISPUTE RESOLUTION

i Ruling

Although not a dispute resolution process as such, the tax ruling procedure offers taxpayers an efficient and helpful way to seek legal clarity and avoid unnecessary litigation. Even if there is no express legal basis, Swiss tax authorities are willing to take anticipated positions on fact

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patterns described by taxpayers beforehand. Requests filed by taxpayers typically include a detailed description of the relevant facts, a legal analysis and the conclusions that are asked to be confirmed. They aim at obtaining intelligibility on the tax administration's interpretation of the applicable legal framework, and hence a confirmation of the tax treatment that the authorities will apply to a specific situation, which proves to be very useful in complex matters.

When the authorities concur with the analysis and the conclusions provided by the taxpayers, they simply validate the requests. The advance tax rulings are binding on the administration and protect the taxpayers should they decide to take action, for instance by implementing the described transaction or reorganisation. Such a protection is based on the good faith principle guaranteed by the Federal Constitution and is conditioned to the fact that all relevant information has been duly disclosed. Both the SFTA and the cantonal authorities issue such rulings.

In the event where the authorities disagree with a request, they may partially or totally reject it. If so, there is no legal way of challenging such a position. The taxpayer's sole recourse is either to renounce the contemplated action, or to move forward as planned and challenge the tax assessment that will be issued subsequently using the ordinary means of initiating a formal dispute.

ii Mediation

A taxpayer may seek extrajudicial ways and call upon a mediator to help finding a solution when facing a possible dispute with the tax administration. This option is, however, not used very often in tax matters and is only available in some cantons.

In Geneva for instance, the canton provides for an independent structure that aims at preventing and resolving conflicts between individuals and the administration, including the tax administration. When the tax administration agrees, a meeting can be organised by the mediator. All discussions remain confidential and the procedure is free of charge. In the event of a positive outcome, the agreement can be formalised in a written form. The mediator can also issue recommendations to the authorities and propose modifying procedures.

The number of mediation matters is steadily increasing. In 2021, the cantonal mediator in Geneva was solicited on 419 occasions. Among the 149 files formally opened, 11 per cent involved the Geneva tax administration.

iii Mutual agreement procedure

In situations of international double taxation, Swiss resident taxpayers may request the SFTA starts a mutual agreement procedure (MAP) whereby Switzerland would reach out to the foreign state with which a double tax agreement has been concluded with a view to eliminate any double taxation. Such a request must generally be filed within three years of the first notification of the action resulting in double taxation.

The MAP is a procedure between states exclusively, based on the applicable double taxation agreement, and does not directly involve the taxpayer who is not a party. The taxpayer is informed of the procedure's outcome and may accept it within 30 days. If so, the taxpayer renounces any recourse to judicial remedies and has no means to challenge the agreement reached by the authorities. Whereas the authorities have an obligation to strive to find a positive outcome eliminating double taxation, they do not have an obligation to achieve a result. If the taxpayer is not satisfied, their only option is to refuse the proposed agreement

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and to rely on the ordinary dispute procedures to challenge any Swiss tax assessment. Modern treaties frequently foresee an arbitration clause which allows the taxpayer to bring the matter to arbitration.

Switzerland has made important efforts to achieve efficient and speedy procedures in view of improving legal certainty and eliminating double taxation. In 2020, 321 MAP cases were initiated.

VIII ANTI-AVOIDANCE

i General tax avoidance theory

Swiss tax legislation does not include an explicit general anti-avoidance rule. However, Swiss laws are governed by the general principle that a manifest abuse of a right is not protected by law. The Federal Constitution requires that government institutions and private persons shall act in good faith. On the basis of these principles, the Federal Tribunal has developed the criteria of tax avoidance. Tax avoidance is constituted if:

a the legal structure or transaction chosen is unusual, inappropriate or inadequate to its economic purpose (objective element);

b tax motives are the only reason for the structure or transaction chosen (subjective element); and

c were it accepted by the authorities, the legal structure or transaction would lead to significant tax savings (effective element).

The above criteria are reviewed on a case-by-case basis. Tax avoidance should be constituted only in very exceptional situations. It is generally accepted that taxpayers take tax planning into account and select tax-optimised structures or transactions in their business operations. If the conditions of tax avoidance are met, then the tax authorities may rely on the economic substance rather than the legal structure of a given situation (substance over form). Pursuant to the Swiss Federal Tribunal's case law, the prohibition of abuse of law is also an unwritten concept of Switzerland's double tax treaties.

ii Transfer pricing

Switzerland has no specific transfer pricing legislation. Generally, the OECD's transfer pricing guidelines are followed by the tax authorities. The arm's-length standards is used to determine whether transactions between related entities can be recognised from a tax perspective (e.g., whether deductions can be admitted). If the arm's-length principle is violated, the consequence is that the tax authority may not only disallow deductions, but it may consider that a deemed dividend was paid, with potential significant withholding and income tax consequences to the shareholder.

iii Interest rates between related parties and thin capitalisation

Interest rates used between related parties should reflect fair market rates (i.e., be at arm's length). The SFTA issues annual guidelines on safe haven interest rates. Interest payments that are deemed non-compliant with the arm's-length principle (or that exceed acceptable thresholds) will be reclassified into deemed dividend payments. As such they will not be deductible and may be subject to dividend withholding tax.

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The SFTA has also issued safe haven rules on thin capitalisation establishing the percentages with which different assets of the company may be debt-financed for tax purposes. Related party debt that exceeds the allowable debts may be characterised as equity for tax purposes (i.e., 'hidden equity'). Interest paid on that part of the equity will not be deductible and may be treated as a dividend payment subject to withholding tax.

IX DOUBLE TAXATION TREATIES

Although most decisions of the Federal Tribunal in recent years covered administrative exchange of information issues, the most important rulings on double taxation treaties addressed treaty benefits entitlement, most particularly beneficial ownership. The Federal Tribunal notably held that all double taxation agreements included an implicit anti-abuse rule. This was in November 2005, well before the implementation of the Base Erosion and Profit Shifting (BEPS) minimum standards. Since then, the SFTA has continued to focus on the subject and to develop new doctrines aimed at fighting against abusive schemes or structures lacking beneficial ownership, which are regularly tested before the courts. In July 2021, the Federal Tribunal confirmed the SFTA's decision to find abusive, based on the 'old reserves doctrine', the sale to a party entitled to an enhanced right to claim a withholding tax refund of a Swiss company with unnecessary assets that could have been distributed beforehand. Yet our High Court emphasised that such a doctrine shall not be automatically applied and that anti-abusive behaviours shall not be objectivised but must rather call for an actual assessment of the economic motives for a transaction.

X AREAS OF FOCUS

i Burden of proof

Regarding tax proceedings, it is well-established that the tax authorities are subject to the burden of proof for any cause increasing the tax debt of the taxpayer while the taxpayer must prove any cause that may reduce it. This seemingly simple rule gives rise to numerous disputes, due to the many nuances of procedural law.

First, this rule of allocation of the burden of proof does not relieve the authority of its duty to investigate. This duty constitutes a pillar of administrative procedure, governed by the inquisitorial maxim. Thus, the authority cannot discharge its duty by requiring the taxpayer to ascertain the facts of the case in or by requiring the taxpayer to participate in this process to a greater extent than is permitted by law or good faith.

Second, in practice, it appears that the burden of proof on the tax authority is much lower than that on the taxpayer. On one hand, case law provides that circumstantial evidence is enough to prove any increase of the tax debt. On the other hand, the taxpayers are often required to provide documented and accurate evidence. Hardly any case law ever accepted a bundle of evidence in favour of the taxpayer or gave the benefit of the doubt when the taxpayer presented evidence that was concordant but not conclusive as such.

Third, the burden of proof allocation may conflict with the presumption of innocence. For administrative sanctions, the burden of proof lies with the administration. Article 6 ECHR, which is applicable to sanctions under the tax evasion procedure, also enshrines the principle of the presumption of innocence, according to which the burden of proof lies with the prosecution. In particular, the presumption of innocence is violated when the burden of proof is reversed from the prosecution to the defence.

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To this day, the questions raised above remain unanswered, with no satisfactory answer from the courts, and the outcome of criminal tax procedures may vary depending in front of which court it is raised.

ii Taxation of foreign companies

A greater focus tends to be made on foreign companies having any sort of presence in Switzerland, as the Swiss tax authorities have numerous means to attract them to Swiss taxation. Among other things, the Swiss tax authorities may consider that a foreign company is effectively managed from Switzerland and thus a Swiss tax resident. In some exceptional cases, the tax administration can even disregard the corporate structure and follow a look-through approach.

When it comes to effective management, a foreign entity can be subject to an unlimited liability to Swiss direct taxes despite its registered office being located abroad. The notion of effective management should generally be understood as the day-to-day business (i.e., 'common management') of an entity, as opposed to basic administrative functions or activities of the entity's supreme bodies that are limited either by fundamental principle decision-making of a strategic nature, or by the monitoring of day-to-day management per se. The place of effective management is generally located where the entity has its effective and economic centre of existence, where the management is carried out, and where the operations that, as a whole, are necessary in order to pursue the entity's statutory goals, are performed (i.e., 'centre of gravity'). The place of effective management is determined by Swiss tax authorities based upon various criteria, including the location of the entity's managing bodies, the place where the day-to-day operations are carried out and possibly where the corporate documents are stored. Finally, neither the place where meetings of the board or the general assembly of the members take place, nor the residence of the relevant members, are necessarily relevant.

There are no 'controlled foreign corporation' rules per se in Switzerland. However, the tax authorities can adopt a 'look through' approach to reach taxable profits made by group companies abroad. When the corporate structure is deemed to be abusive, the tax administration is authorised to disregard it. Such a transparent approach, however, requires the fulfilment of the following conditions:

a the form in which the taxpayer entered into a transaction is unusual, inadequate, abnormal or, at the very least, unsuitable for the economic purposes;

b the choice of this form is abusive and is only intended to save taxes that would have been collected if a normal form had been used; and

c it would allow for a significant tax saving if the tax authorities admitted it.

In practice, a transparent approach can also apply to offshore companies with no commercial activities, the purpose of which is to passively hold banking or similar assets.

iii Criminal tax procedure

Criminal tax law is a conflicting field, even in its terminology. Historically conceived as a means of enforcing administrative law, its inclusion in criminal law has long been a matter of controversy. Far from being a simple semantic debate, the classification of criminal tax law is a real procedural issue for both the taxpayer and the administration.

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The categorisation of criminal tax law within criminal law opens – in theory – the way to a panoply of conventional and constitutional rights for the taxpayer as well as to increased means of constraint for the administration.

Although it now seems to be accepted that criminal tax law belongs to the first of these epithets, criminal tax law has been built in a disparate manner according to the reforms and within a logic of tax debt collection. Consequently, it offers – in its current state – neither the procedural guarantees nor the means of constraint proper to criminal law. Moreover, it sometimes contradicts the constitutional and conventional principles governing criminal law. In addition, the dichotomy between the logic of recovery in the elaboration of the provisions of tax law and the requirements of criminal law, leads to a lack of coherence and uniformity in the conditions of repression and the severity of sanctions.

For example, it is theoretically possible that the use of forgeries in direct tax matters involving relatively small amounts is punishable by a custodial sentence, whereas a 'clever' evasion involving large amounts is punishable only by a fine. However, even if the criminal nature of tax offences cannot be denied, from a theoretical point of view, the fact remains that the conditions for the application of such offences fall under tax law. Therefore, the prevention, prosecution and punishment of tax offences seem destined to fall – at least in part – to the authorities responsible for tax collection.

Aware of these various issues, the Swiss Government attempted to reform the criminal law in 2013. This reform was aborted due to strong political opposition to the means of coercion that would have been made available to the tax authorities, including the lifting of banking secrecy. In addition to issues relating to banking secrecy, the project has also generated controversy in judicial circles insofar as some believe that the prosecution of tax offences should be the exclusive responsibility of the criminal prosecution authorities. While the criticisms of the draft may appear to be partly justified, the reform of tax law is necessary not so much to increase the authorities' means of coercion but mainly to comply with conventional and constitutional requirements regarding the right of defence.

XI OUTLOOK AND CONCLUSIONS

Commentators often discuss the taxpayers' relative chances of success in litigation. It is estimated that the Federal Tribunal rules in favor of the taxpayers only 15 per cent of the time. Although many reasons are put forward to mitigate or explain this apparent discrepancy, a recurrent observation is the absence of a dedicated tax court or a lack of specialised tax judges within the Federal Tribunal. In that regard, the Federal Tribunal's recent internal reorganisation must be favourably welcomed. As from 1 January 2023, all tax matters will be moved from Lausanne to Luzern and be handled by a more specialised section of the Federal Tribunal. Many perceive this to be a positive sign towards a further increase of the quality of Swiss tax case law.

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Appendix 1

ABOUT THE AUTHORS

ROBERT DESAX

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Robert Desax is a partner in the tax team. He works in the fields of national and international taxation. He represents clients in controversial tax matters and assists private clients regarding the tax aspects of estate and wealth planning. He regularly advises on cross-border implications of international taxation, especially on the application of double tax treaties, on issues in connection with the refund of Swiss withholding taxes in international structures, on the Swiss tax treatment of trusts and on the redomiciliation of individuals and businesses to Switzerland. In addition, he also advises and represents clients on corporate tax matters, especially in negotiations with tax authorities during transfer pricing audits and regarding reorganisations. Robert Desax is a frequent speaker on tax matters and is a regular author of contributions for tax publications.

Born in 1978, Robert Desax graduated from the University of Fribourg, Faculty of Law, in 2002 (*lic. iur.* 2002 including special mention Bilingual Licentiate). In 2005, he passed the Zurich bar exam and obtained an LLM in international tax law from the Vienna University of Economics and Business in 2006. After that, he worked in the international tax department of one of the Big Four audit firms. In 2010 he earned the Swiss certified tax expert diploma. Prior to joining Walder Wyss in 2016, he was a senior associate in a large international law firm, where he had been a member of the tax team for more than five years. He is a member of the International Fiscal Association (IFA), of EXPERTsuisse and of the Swiss/French Chamber of Commerce.

Robert Desax speaks French, German (as first and second native languages) and English. He is registered with the Zurich Bar and is admitted to practice in all Switzerland.

FOUAD G SAYEGH

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Fouad Sayegh is a partner in the tax team. His expertise covers most aspects of domestic and international taxation. He regularly advises high net worth families in their relocation, wealth reorganisation, asset protection, estate planning and charitable projects, which often includes tax advice in relation to trusts, private foundations and investment vehicles. In the field of corporate tax, his practice includes advising on M&A transactions, corporate reorganisations, double tax treaty applications and employee incentive plans, where negotiations with tax authorities may be required to secure tax rulings. He frequently represents clients in tax litigation and criminal tax proceedings.

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Fouad Sayegh is a regular lecturer on various tax matters. He is listed by Chambers and Partners, The Legal 500, Best Lawyers and Who's Who Legal as a Tax and Private Client leading practitioner. Clients and market commentators praise him: 'Fouad Sayegh is a very bright, smart tax lawyer, who has sound knowledge of the Swiss tax law and is very creative'.

Fouad Sayegh holds a law degree from the Geneva Law School and an LLM in international taxation from New York University (NYU). Prior to joining Walder Wyss, he was a partner in another leading Swiss law firm. His work experience also includes positions in New York and Hong Kong. Fouad Sayegh served as an associate judge at the Administrative Tribunal of First Instance of Geneva (tax section).

Fouad Sayegh is fluent in French and English. He is registered with the Geneva Bar, and admitted to practise in all Switzerland, as well as in New York. He is a member of the Swiss Bar Association, the Geneva Bar Association, the American Bar Association, the International Fiscal Association and the Swiss–China Chamber of Commerce.

YACINE REZKI

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Yacine Rezki's main areas of practice include most aspects of domestic and international taxation as well as white collar crime proceedings. He advises his clients, in particular, in their relocation, estate planning, transactions and crowdfunding. He handles criminal and administrative proceedings at both cantonal and federal levels. In addition to his areas of specialisation, Yacine Rezki is interested in the legal issues raised by disruptive technologies.

Yacine Rezki studied at the University of Geneva where he obtained a bachelor of law (2012), a master of law in economic law (2014), and a certificate of advanced studies in legal professions the same year. He has worked as a research and teaching assistant at the University of Geneva. Before joining Walder Wyss, he worked as an associate in another major law firm in Geneva.

Yacine Rezki speaks French and English. He also has a fair knowledge of Arabic. He is registered with the Geneva Bar Registry and a member of the Geneva and the Swiss Bar Association.

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