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Tax Controversy 2025

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Switzerland: Law and Practice
Trends and Developments

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SWITZERLAND



Law and Practice

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Tax Partner AG is focused on Swiss and international tax law and is recognised as a leading independent tax boutique. With currently 11 partners and counsel and a total of approximately 50 tax experts including attorneys, legal experts and economists, the firm advises multinational and national corporate clients as well as individuals in all tax areas. A central focus is tax controversy and dispute resolution, including transfer pricing issues. Tax Partner AG also provides support regarding transfer pricing studies and the preparation of transfer pricing documentation. Other key areas include M&A, restructuring, real estate transactions, financial products, VAT and customs. Tax Partner AG is independent and collaborates with various leading tax law firms globally. In 2005 the firm was a co-founder of Taxand, the world's largest independent organisation of highly qualified tax experts.

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1. Tax Controversies

1.1 Tax Controversies in This Jurisdiction

In Switzerland, taxes are levied at three levels:

- federal;
- cantonal; and
- municipal.

In addition, the cantons have a high degree of autonomy in tax matters, which results in different handling of tax disputes, even between the different cantons and the Swiss Federal Tax Administration (SFTA).

Tax controversies can arise from a variety of sources, including:

- tax audits;
- tax assessments;
- tax self-assessments or reassessments;
- withholding of tax; and
- other administrative decisions.

The most common types of tax disputes in Switzerland are tax assessments, where the tax authorities review and issue assessments based on their findings, which may differ from the tax return (mostly self-assessment), or tax audits. In cases where the tax authorities identify discrepancies or errors in a taxpayer's tax returns, this may lead to disputes over the amount of tax owed.

1.2 Causes of Tax Controversies

Tax controversies can arise from any type of tax matter. The tax amount at stake fluctuates considerably and is highly dependent on individual cases.

According to SFTA statistics, tax disputes in the area of corporate and individual income tax generated more than CHF400 million in additional federal tax revenue in 2022 (latest data available). As can be seen, the number of new and completed criminal cases varies considerably from year to year.

On the other hand, in 2023, VAT audits conducted by the SFTA increased VAT revenues by CHF172 million. Revenue from withholding tax and stamp duty inspections amounted to about CHF244 million.

1.3 Avoidance of Tax Controversies

Co-operation between the authorities on the one hand and tax advisers or taxpayers on the other works well in Switzerland. For instance, before an assessment takes place, the tax authorities are quite open to discussions with taxpayers, which helps to avoid disputes at an early stage.

In addition, the Swiss tax authorities provide taxpayers with clear guidelines and safe harbour rules, which helps to ensure that taxpayers are aware of their obligations and can comply with the rules.

One of the most important ways of avoiding tax disputes is, however, through tax rulings. A tax ruling is a binding confirmation from the competent tax authority – at the taxpayer's request – that the tax consequences expected by the taxpayer regarding a specific issue or transaction are correct. This provides certainty and clarity to the taxpayer before the transaction takes place.

Furthermore, Switzerland has signed more than 100 double taxation treaties (DTTs) to prevent double taxation and ensure co-operation between tax authorities, which helps to reduce the likelihood of disputes between taxpayers and tax authorities in different countries. If the taxpayer and the tax authorities in cross-border

disputes cannot reach a common solution, a dispute resolution mechanism is available.

1.4 Efforts to Combat Tax Avoidance

Switzerland has taken steps to implement the OECD's BEPS recommendations. The BEPS project aims to combat tax avoidance by multinational enterprises (MNEs) through measures such as country-by-country reporting or transfer pricing rules, etc.

Switzerland has implemented many of the proposed recommendations, including country-by-country reporting requirements and new transfer pricing rules. Furthermore, Switzerland has amended its double tax treaties and domestic legislation in response to the BEPS recommendations and EU measures.

In response to increased scrutiny from the EU and other international bodies in recent years, Switzerland has taken these measures, due to concerns about tax avoidance and tax evasion. However, the measures taken to implement the BEPS recommendations have also led to some controversy and negotiations between Switzerland and other countries or international bodies, and it remains to be seen how effective they will be in the long term.

Currently, the tax administrations – at cantonal and federal level – seem to focus their attention and scrutiny on offshore structures. As can be seen in practice and recent case law, the tax administration tries – in many cases successfully – to tackle such structures by questioning the place of effective management and/or by applying transfer pricing rules.

1.5 Additional Tax Assessments

In Switzerland, taxpayers are generally required to pay any additional tax, be it for direct or indirect taxes or assessments issued by the tax authorities, even if they choose to contest the assessment. This means that the obligation to pay the assessed tax is not suspended or waived by lodging an administrative or judicial claim. However, in general, the tax owed cannot be enforced until the tax is determined and legally binding. Late payment interest should be taken into account. Nevertheless, by paying the tax (with reservations), negative interest consequences can be avoided.

A formal complaint can be lodged regardless of payment.

2. Tax Audits

2.1 Main Rules Determining Tax Audits

In Switzerland, tax audits are carried out by the Swiss Federal Tax Administration and the cantonal tax authorities. The main purpose of a tax audit is to ensure that taxpayers are complying with their tax obligations and to detect any tax evasion. It is important to note that the criteria for determining a tax audit may vary depending on the canton and the specific tax authority involved. However, some of the main factors that may trigger a tax audit in Switzerland are high-risk companies, companies that have not been audited for a longer period, and also random selection. Subsequent audits are usually carried out on the basis of certain criteria, such as the size of the company or the type of business.

2.2 Initiation and Duration of a Tax Audit

Duration

The tax authorities in Switzerland may initiate a tax audit at any time and, apart from the general rules on statutes of limitation, there is no specific time limit within which they must do so (however, statutes of limitations have to be observed). The

length of a tax audit varies – depending on the complexity of the taxpayer's affairs – between a couple of days to even years, if the result of the audit is challenged in front of the courts. Except for VAT audits, there is also no specific time limit within which it must be completed.

Statute of Limitations Rules

Switzerland has statute of limitations rules that limit the period during which the tax authorities can assess and collect taxes. The statute of limitations for corporate and income taxes is generally up to 15 years from the end of the relevant tax period. For cantonal taxes, the statute of limitations may vary, typically ranging between five and ten years. For withholding tax and stamp duty, the statute of limitations is five years from the end of the relevant tax period. For VAT, the absolute limitation period is ten years. However, the five-year limitation period for withholding tax is not absolute and can theoretically be extended for as long as required if a corresponding interruption is performed. However, a limitation period of seven years must be observed in the case of criminal offences regarding withholding tax.

Although statutes of limitations do not prevent a tax audit from being initiated, they do restrict the period during which the tax authorities can make assessments and collect taxes. Once the limitation period has expired, the tax authorities can no longer assess or collect taxes for that period.

2.3 Location and Procedure of Tax Audits

In Switzerland, tax audits can take place either at the tax authority's headquarters or on the taxpayer's premises. The choice of location depends on various factors, such as the size and complexity of the taxpayer's affairs, the amount of information to be reviewed, and the preferences of the taxpayer and the tax authorities.

During a tax audit, tax authorities typically review various types of documents and data to assess the accuracy of the taxpayer's tax returns. This can include documents such as accounting records, financial statements and invoices, as well as electronic data such as emails and computer files. Taxpayers are by law required to co-operate with the tax authorities and provide access to any relevant documents and data upon request.

In some cases, taxpayers may also be required to provide additional information or explanations to support their tax returns. This can include answering questions about their business activities, providing details about specific transactions, or clarifying any discrepancies found during the audit.

2.4 Areas of Special Attention in Tax Audits

During a tax audit, the tax authorities have a wide range of interests. With regard to corporate income tax, one of the most important aspects for tax auditors is the compliance of the company's accounts with both accounting and tax regulations. Tax auditors also examine substantive issues relating to the taxpayer's income, expenses and deductions. This includes assessing whether the taxpayer has correctly calculated its taxable income, whether it has claimed all allowable deductions and credits, and whether it has properly reported any capital gains or losses.

Overall, tax auditors in Switzerland are primarily concerned with ensuring that taxpayers comply with all legal requirements and that their tax returns are accurate and complete.

2.5 Impact of Rules Concerning Cross-Border Exchanges of Information and Mutual Assistance Between Tax Authorities on Tax Audits

Switzerland has experienced an increase in the number of tax audits due to the increasing prevalence of rules on cross-border exchange of information and mutual assistance between tax authorities. Switzerland has signed several international agreements, including the Multilateral Convention on Mutual Administrative Assistance in Tax Matters, which facilitates the exchange of information between tax authorities. This has led to an increase in the number of tax audits in Switzerland, as the tax authorities are now better equipped to identify potential cases of tax evasion and non-compliance.

2.6 Strategic Points for Consideration During Tax Audits

The key points to consider from a strategic perspective during a tax audit in Switzerland are the following.

- Preparation – prior to the audit, it is important to review and organise all relevant documents and records. Obviously, in view of a possible tax audit, this should be a recurring task.
- Scope – understanding the scope of the audit and the issues on which the tax authorities will focus, will help to identify potential areas of concern and ensure that all relevant information is provided.
- Co-operation – full co-operation with the tax authorities and providing all the requested information in a timely and complete manner can help to build trust and credibility with the tax authorities and may lead to a more favourable outcome.
- Communication – maintain open and transparent communication with the tax authorities throughout the audit process.
- Review – carefully review the results of the audit and seek professional advice if necessary, to help identify potential problems or areas of concern and ensure that any necessary corrective action is taken.

In addition, the administrative procedure should be used to gather and produce all the documentary evidence that might be needed in the judicial tax proceedings, should they be initiated by the taxpayer. This is due to the fact that the timeframe to lodge appeals is limited (see **4.1 Initiation of Judicial Tax Litigation**).

3. Administrative Litigation

3.1 Administrative Claim Phase

The administrative tax procedure in Switzerland typically starts with the tax authorities informing the taxpayer of their decision to perform an additional tax assessment. Within 30 days of receiving this notice, the taxpayer has the possibility to file a formal complaint with the tax authorities. The competent tax authority is required to re-examine and, if necessary, modify the initial decision partially or in full, or reject the complaint entirely. It should be noted that the same tax commissioners may be involved in the subsequent re-examination of the case, or a different department may handle it. In some cantons the taxpayer will be notified by the tax administration if the administration intends to deviate from the tax return. In these cases, the taxpayer may submit a statement before the final decision is taken.

If the taxpayer does not agree with the outcome of the re-examination, an appeal to the court can be lodged.

3.2 Deadline for Administrative Claims

In Switzerland, there is no fixed time limit for tax authorities to respond to an administrative claim lodged by a taxpayer. However, the tax authorities generally respond within a reasonable timeframe. If the tax authorities do not respond within a reasonable timeframe, the taxpayer can lodge a hierarchical appeal or a judicial claim.

4. Judicial Litigation: First Instance

4.1 Initiation of Judicial Tax Litigation

Once a tax administration has decided on an administrative claim and the taxpayer has been notified of the final decision, the taxpayer may initiate judicial tax litigation by lodging an appeal.

If the cantonal tax administration is competent for the administrative claim, the appeal must be lodged with the cantonal court of first instance. In matters falling under the authority of the SFTA, the appeal must be lodged with the Swiss Federal Administrative Court.

In both cases, the time limit for lodging an appeal is 30 days as from the day of notification of the contested decision. The appeal must be filed in writing and it must contain a request as to how the appealed decision should be changed, as well as a statement of reasons.

4.2 Procedure for Judicial Tax Litigation

General procedure

Once an appeal has been lodged at the competent court, the court will generally request an advance payment for the presumed costs of the proceedings. Upon receipt of the payment, the court will forward the appeal to the competent tax administration for its opinion and a request for the file. The taxpayer can then file a response to the tax administration's opinion. This is an unconditional right of the taxpayer – ie, the taxpayer may file an answer even if the court has not requested it.

Since the Swiss procedural rules in administrative matters provide for an essentially written procedure, in principle, no investigative acts, hearings or oral proceedings will be conducted. However, the courts – as an exception – may order oral hearings if this appears necessary to the court in question.

GloBE Minimum Tax

For litigations in connection with the GloBE minimum tax, the federal ordinance covering the implementation of the GloBE minimum tax in Switzerland (MindStV) implemented a separate procedure for litigations. Within 30 days of receiving the assessment, a written objection must be submitted to the cantonal authority which has assessed the top-up tax (ie, QDMTT, IIR and (when introduced) the UTPR; based on the applicable law, only one cantonal authority is responsible for assessing the top-up tax even if the MNE has presences in more than one canton (*"lead canton concept"*)). The constituent entity liable for the top-up tax has the opportunity to challenge any decision issued by the competent cantonal authority. However, if the taxpayer, the cantonal authority responsible for the top-up tax and the SFTA all agree, an expedited appeal may be made directly to the Federal Administrative Court without involving the cantonal authority. Only one cantonal instance is available (contrary to the ordinary procedure).

4.3 Relevance of Evidence in Judicial Tax Litigation

In general, documentary evidence must be submitted to the court at the time of lodging the appeal, which is particularly important due to the burden of proof in Swiss tax litigation (see **4.4**

Burden of Proof in Judicial Tax Litigation). If, for whatever reason, certain documentary evidence is not available at the time of filing the appeal, the evidence can be submitted later, if it was specified in the complaint. Witness hearings and on-site inspections are possible, but very rare in practice.

Producing evidence during the early stages of proceedings is generally more efficient and strategically more effective, although it is still possible to produce new documents, evidence or even expert reports during judicial proceedings (except before the Federal Supreme Court).

4.4 Burden of Proof in Judicial Tax Litigation

As a general rule in tax law, the tax authority has to prove facts that constitute a tax liability or increase a tax burden. The taxpayer, on the other hand, must prove facts that eliminate a tax liability or reduce a tax burden.

If the tax authority has sufficient circumstantial evidence to reasonably believe that a certain taxable event has occurred, the taxpayer bears the burden of providing evidence to show the opposite.

4.5 Strategic Options in Judicial Tax Litigation

In general, the legal arguments and documentary evidence, including expert opinions supporting that position, should already be prepared so as to be comprehensive and complete during the administrative proceedings. Based on this, it is important to analyse the final decision of the tax administration and, if necessary, for the taxpayer to adjust its own legal reasoning to the arguments of the tax administration. It should be noted, however, that the courts are not bound by the tax administration's reasoning, which means that they can base their decision on new legal reasoning. Consequently, the taxpayer must also independently examine alternative approaches to the tax administration's reasoning, and it must be assessed in each individual case whether such approaches should be proactively addressed in the appeal. It should be noted that the courts do not have to inform the taxpayer if they choose to follow a different legal reasoning in their judgment compared to the tax administration.

Once the judicial litigation proceedings have started, the tax administration will be reluctant to discuss the possibility of a settlement or amicable solution, although the tax administration can still reconsider and issue a new decision. In practice, however, the chances that the tax administration will reconsider its decision are very limited, as the tax administrations sometimes try to have their own practice confirmed by the courts.

Last but not least, timing can, in some cases, be a viable strategy. However, this strategy is more relevant in the case of indirect taxes, namely VAT, as the statute of limitations is generally shorter than in the case of direct taxes. In the case of direct taxes, however, timing can also play a relevant role in the case of back taxes.

4.6 Relevance of Jurisprudence and Guidelines to Judicial Tax Litigation

As a civil law jurisdiction, in Switzerland the most important sources for the courts are the statutes and also local case law. The ECHR's case law is, in particular, taken into account in criminal tax proceedings.

In addition, international guidelines are also an important source for Swiss courts. This is especially true of the OECD's transfer pricing

guidelines. However, the courts consider the guidelines in general as merely interpretational guidance and, thus, not as binding rules. Finally, of course, doctrine is also a source of interpretation.

5. Judicial Litigation: Appeals

5.1 System for Appealing Judicial Tax Litigation

General Remarks

As set out in **4.1 Initiation of Judicial Litigation**, regarding the appeal proceedings, there is a distinction between appeals concerning tax matters for which the cantonal tax administration is the competent authority (eg, individual income and wealth, as well as corporate income and capital taxes) and for which the SFTA is the competent authority (eg, withholding tax, stamp duty and VAT).

Appeal Before a Second-Instance Court

For tax matters that fall within the competence of the cantonal tax administrations, the cantonal appeals process must be followed. First of all, the appeal against the tax administration's decision has (in general) to be lodged with the designated tax court (court of first instance). An appeal against that court's decision must then be directed to the cantonal (higher) administrative court (if provided by cantonal rules), where both the taxpayer and the tax administration can lodge an appeal. In both cases, the appeal period is 30 days.

The cantonal courts can review all the facts and assess the case comprehensively. This can also result in the court making a decision that puts the appellant in a worse position than if no appeal had been filed (so-called reformatio in peius).

Judgments of a second-instance court may be appealed to the Federal Supreme Court.

Appeal Before the Swiss Federal Administrative Court

The Swiss Federal Administrative Court is responsible for reviewing the legality of decisions made by federal administrative authorities in Switzerland. The lower instances are the federal departments and subordinate federal offices. The court has the jurisdiction to hear appeals against decisions made by federal authorities in various areas, including withholding tax, stamp duty and VAT.

If a party is not satisfied with the decision made by the first-instance court, an appeal to the second-instance court can be lodged within 30 days. The appeal can be lodged by either the taxpayer or the tax authority, or both, depending on the circumstances. Judgments of the Federal Administrative Court can be appealed directly to the Federal Supreme Court.

Appeal Before the Swiss Federal Supreme Court

The Federal Supreme Court is the highest judicial authority in Switzerland. It is the last instance court for appeals in tax matters. The deadline for appealing to the Federal Supreme Court is in general 30 days from the date of the lower court's decision. Appeals regarding international exchange of information in tax matters have to be lodged within ten days. The Federal Supreme Court has the power to review legal questions and ensure the uniform application of tax law throughout Switzerland. Its decisions are in general binding on lower courts and administrative authorities. Appeals to the Federal Supreme Court are generally limited to questions of law, and the court does not review the factual findings of lower courts or administrative authorities.

In contrast to the cantonal courts, the Federal Supreme Court does not re-establish the relevant facts of the case. Rather, it is bound by the findings of facts determined by the lower courts. The Federal Supreme Court can only correct these facts if it finds that they have been established by a lower court in an obviously incorrect manner or they are based on a violation of the law. This means that the Federal Supreme Court makes its decisions exclusively by applying the law to facts that have already been established.

GloBE Minimum Tax

Based on the MindStV, a separate appeal procedure has been implemented for litigations in connection with the GloBE minimum tax. A constituent entity subject to the top-up tax may appeal the objection decision issued by the competent cantonal authority before the Federal Administrative Court. Both the top-up tax-liable constituent entity and the SFTA, as well as the cantonal authority responsible for the top-up tax, have standing to appeal. The affected constituent entity must file an appeal within 30 days after the decision of the lower administrative authority (see **4.2 Procedure for Judicial Tax Litigation**), while the cantonal authority or the SFTA have either 30 days or, in specific cases, 60 days to do so. Cantons that are not designated as the lead canton do not have the right to appeal. The judgment of the federal administrative court can be referred to the federal Supreme Court.

5.2 Stages in the Tax Appeal Procedure

For initiation and procedure, see **4.1. Initiation of Judicial Tax Litigation** and **4.2 Procedure for Judicial Tax Litigation**. The appeals system is outlined in **5.1 System for Appealing Judicial Tax Litigation**.

5.3 Judges and Decisions in Tax Appeals

In Switzerland, tax cases are usually heard jointly by three judges, with one judge presiding, at all levels of court – from the first cantonal instance court to the last cantonal instance court. However, the composition of the judges in cantonal courts may differ.

Single-judge cases in tax matters are typically reserved for minor issues that do not involve complex legal or factual matters. For example, disputes related to small amounts of tax or procedural matters may be handled by a single judge. For more complex cases or those with significant financial implications, a panel of three judges is typically formed.

In the Federal Administrative Court and the Federal Supreme Court, panels of five judges may be formed in cases concerning significant legal issues or public interest.

In all the courts, clerks are involved in addition to judges. The number of clerks depends on the size of the court and can vary from case to case. However, as a rule, there is at least one court clerk who is responsible for recording the hearing and documenting the decision.

6. Alternative Dispute Resolution (ADR) Mechanisms

6.1 Mechanisms for Tax-Related ADR in This Jurisdiction

While there are no national mediation or arbitration procedures for tax disputes in Switzerland, there is an Alternative Dispute Resolution (ADR) mechanism available on an international level: the Mutual Agreement Procedure (MAP). MAP is part of most tax treaties Switzerland has

concluded with other countries to avoid double taxation.

However, the two procedures operate independently of each other. This means that requesting a MAP does not suspend the deadline to file a claim against a tax assessment decision. To protect their rights under Swiss tax law, taxpayers should therefore additionally file a complaint against the tax authority where applicable.

6.2 Settlement of Tax Disputes by Means of ADR

As mentioned in **6.1 Mechanisms for Tax-Related ADR in This Jurisdiction**, Switzerland does not have a national ADR mechanism. The following describes the procedure at an international level with regard to a MAP.

A MAP is generally initiated based on a request by the taxpayer in the country of residence. Certain DTTs also provide the possibility to address the MAP request in the other contracting state involved. The competent authority in Switzerland is the State Secretariat for International Finance (SIF). The request must generally be filed within three years of the first notification of the measure which could lead to double taxation.

In case of a MAP procedure, the SIF informs the Swiss tax authorities concerned. The taxpayer itself is not a party to the MAP and does not have the right to be heard nor to have access to its file in the course of the procedure. In practice, however, the SIF keeps the taxpayer informed on the status of the procedure and takes account of the taxpayer's suggestions.

If the SIF and the foreign competent authorities reach a mutual agreement, the taxpayer usually has 30 days to agree to the proposed outcome of the mutual agreement. If the agreement is approved, it becomes binding for the taxpayer, the cantonal tax authorities and the SFTA. If no mutual agreement is reached within a reasonable period of time (usually three years), newer DTTs often contain the possibility of an arbitration procedure (to be requested by the taxpayer).

If the competent authorities reach a mutual agreement on issues that have not yet been subject to final taxation in Switzerland, the cantonal tax authority is obliged to implement the content of the mutual agreement in the tax assessments without delay, with a corresponding adjustment by correcting the taxpayer's tax base. If the taxation is final, the SIF will issue an execution order. This ensures that the mutual agreement is implemented at national level.

Furthermore, there is no appeal against the result of a MAP or arbitration.

6.3 Agreements to Reduce Tax Assessments, Interest or Penalties

There are no national mediation or arbitration procedures for tax disputes.

6.4 Avoiding Disputes by Means of Binding Advance Information and Ruling Requests

In Switzerland, taxpayers can obtain binding advance information and rulings from the tax authorities to ensure tax certainty and prevent disputes. These rulings provide taxpayers with a binding decision from the tax authorities on the tax implications of a particular transaction or situation. To request a ruling, taxpayers must submit a written request to the relevant tax authority, including a detailed but succinct description of the relevant facts and a corresponding request regarding the fiscal assessment of the facts described. The ruling will, thus, only apply to the specified facts and taxes.

It is important to note that the tax authorities in Switzerland are not obliged to issue a ruling and will only do so if the request concerns a legal question that is not yet settled or if the case involves complex or unusual circumstances. Furthermore, there is no legal entitlement for taxpayers to receive a binding ruling, and, if a request is denied, taxpayers cannot contest the decision. In this case, taxpayers must assess whether they want to implement the planned action or transaction and thus take the chance of having to enter tax proceedings or whether they want to forego implementation.

6.5 Further Particulars Concerning Tax ADR Mechanisms

There is no domestic ADR mechanism under Swiss tax law. For the international ADR mechanism applicable to Switzerland, refer to **6.1 Mechanisms for Tax-Related ADR in This Jurisdiction**.

6.6 Use of ADR in Transfer Pricing and Cases of Indirect Determination of Tax

ADR mechanisms may be used to resolve transfer pricing disputes that could lead to double taxation (see **6.1 Mechanisms for Tax-Related ADR in This Jurisdiction**).

7. Administrative and Criminal Tax Offences

7.1 Interaction of Tax Assessments With Tax Infringements

General Remarks

In principle, it should be noted that the ordinary tax assessment procedure and – if the tax has already been assessed – the supplementary tax assessment procedure are conducted separately from any criminal proceedings, whether in temporal or organisational terms. However, administrative and criminal proceedings are sometimes intertwined, which can be problematic due to the different rights (eg, prohibition of self-incrimination according to criminal procedural law) and obligations in the different proceedings.

In addition to criminal proceedings resulting from an incomplete assessment, pure breaches of procedural duty, such as failing to file the tax return on time or at all, must also be taken into account. For such violations of procedural obligations, the tax administration may – after issuing a warning – impose a fine of up to CHF10,000.

Additional Tax Assessments – Back-Taxes Procedure

If a tax return is found to be incomplete or incorrect during the tax assessment procedure, the additional tax may be assessed without a separate procedure in the same tax assessment. However, if the tax assessment is already final, the additional tax must be assessed in a separate procedure: the so-called back-tax procedure. This procedure is of pure administrative nature and only aims at the correct taxation. In general, back-tax proceedings may only be conducted if new facts or evidence show that an assessment was erroneously not issued at all or that the final assessment is incomplete. The right to initiate back-tax proceedings expires ten years after the end of the tax period concerned.

In relation to indirect taxes, where the principle of spontaneous taxation applies, the SFTA has the authority to issue supplementary tax assessments if there is evidence of tax evasion, tax jeopardy, or failure to comply with legal obligations (eg, not submitting reports within the deadline specified by law).

Criminal Tax Evasion Procedure

As a preliminary remark, it should be noted that the Swiss Federal Supreme Court has established that a taxpayer can structure its affairs in such a way that it incurs as few taxes as possible. However, as soon as *"improper means"* are used, the limit of what is permissible is crossed and – in the absence of specific anti-abuse provisions – the taxpayer finds itself in a grey area.

Once the tax administration becomes aware that a final tax assessment may be incomplete, administrative and criminal proceedings are initiated and the taxpayer will be notified. If the incompleteness of the assessment is established during the ordinary assessment procedure, the correction can be made in the course of the current procedure, which means that no separate administrative procedure is required.

Tax Fraud and Embezzlement

Tax fraud and withholding tax-at-source embezzlement are the most severe tax offences concerning direct taxes. Tax fraud is committed when fraudulent documents (eg, false financial statements or salary certificates) cause a tax assessment to be incomplete and this is a qualified tax offence with a maximum penalty of imprisonment for up to three years or a fine. Embezzlement of withholding tax at source is committed when a person required to collect tax at source misappropriates the amounts collected for their own benefit or for that of a third party. Embezzlement of withholding tax at source is also a qualified tax offence with a maximum penalty of imprisonment for up to three years or a fine.

Tax Evasion

Tax evasion is an offence and occurs when the taxpayer (without using forged documents), with intent or through negligence, omits certain items in their tax return or deliberately submits an incomplete tax assessment. Tax evasion is sanctioned by imposing a fine (no imprisonment), whereas the fine is usually equal to one times the evaded tax (the statute of limitations is ten years). The fine may be reduced by up to one third in the case of a minor fault and may be increased by up to three times in the event of serious wrongdoing. Where the incompleteness of the tax return was discovered prior to the final assessment (attempted tax evasion), the fine will be reduced by two thirds (the statute of limitations is six years).

Withholding Tax and Stamp Duty Offences

For withholding tax and stamp duty purposes, in general, fines can be imposed up to a maximum of CHF30,000. However, the maximum fine can be increased to up to three times the amount of evaded tax if that amount is higher than the mentioned threshold of CHF30,000. With regards to VAT, tax evasion can lead to a maximum fine of up to CHF800,000, which can be increased to twice the amount of evaded tax. In the event of aggravating circumstances, the maximum amount of the threatened fine may be increased by half along with a prison sentence of up to two years.

7.2 Relationship Between Administrative and Criminal Processes

Tax Misdemeanours

In the case of tax misdemeanours (eg, violation of procedural obligations or tax evasion), the competent cantonal or federal tax administration is the same as for the back-taxes procedure (if such procedure is required) and for the criminal procedure. This accumulation of competence can be problematic in view of the protection of constitutional rights. For instance, in criminal proceedings, the taxpayer has the right to remain silent (eg, prohibition of self-incrimina-

tion), whereas, in the administrative back-taxes proceedings, the taxpayer is obliged to co-operate. In addition, the principle of in dubio pro reo applies in criminal proceedings – in contrast to administrative proceedings – which means that different rules of evidence apply. In light of this, whenever possible, criminal proceedings should (upon request) be conducted first, before the administrative back-tax proceedings can be processed. In practice, however, these proceedings are often conducted simultaneously.

Tax Offences

For tax offences (eg, tax fraud and embezzlement of withholding tax at source) the public prosecutor is competent. If the competent tax administration is of the opinion that the taxpayer committed a tax offence, a charge is filed with the public prosecutor's office, which is then responsible for further proceedings, which are governed by the Code of Criminal Procedure. The public prosecutor's office will then – using coercive measures, if necessary – investigate the relevant facts and, depending on the findings, close the case, issue a penalty order or refer the case to the court for judgment. Due to the fact that the public prosecutor's proceedings are governed by the Swiss Code of Criminal Procedure, the procedure is generally more elaborate than the tax (evasion) procedure and leaves more room for investigative and even coercive acts.

7.3 Initiation of Administrative Processes and Criminal Cases

The tax authorities generally initiate administrative and criminal proceedings if they have reason to believe that a tax return or a final assessment is incomplete or that self-reporting obligations are incomplete or missing (under the spontaneous declaration procedure). As mentioned (see **7.1 Interaction of Tax Assessments With Tax Infringements**), a back-tax procedure generally entails a tax-evasion procedure, which is of a criminal nature.

7.4 Stages of Administrative Processes and Criminal Cases

Back Taxes

The administrative procedure to determine back-taxes follows the same procedural principles as the ordinary tax assessment procedure. Once the additional administrative procedure has been opened, the tax administration will present its findings proving the incompleteness of the tax assessment to the taxpayer and give the taxpayer the opportunity to comment on them. If the taxpayer cannot refute the allegations raised, the tax administration will issue an additional tax assessment.

Tax Misdemeanours

The procedure concerning tax misdemeanours varies from canton to canton. In general, however, the procedure is kept very simple. As in the additional administrative procedure, the taxpayer will have the opportunity to comment on the allegations before the administration renders a decision. In some cantons, the tax administration has an obligation to hear the taxpayer in person.

Tax Offences

Tax offences are not prosecuted by the tax administration but rather by the public prosecutor's office. This procedure is governed by the Code of Criminal Procedure and is, hence, more regulated than the procedure regarding tax misdemeanours. The public prosecutor's competence is limited to the criminal side of the case; thus, the back-taxes procedure will still be dealt with by the tax authority or the relevant administrative court.

7.5 Possibility of Fine Reductions

Co-Operation

The tax amount unlawfully evaded must, in any case, be paid in full. The fine itself is generally equal to the evaded tax, but can be reduced through co-operation by up to one third of the tax amount. In practice, however, the effects of co-operation are rather limited (see **7.1 Interaction of Tax Assessments With Tax Infringements**).

Voluntary Disclosure Procedure

In order to avoid fines altogether, the taxpayer can voluntarily disclose a committed tax evasion or a tax fraud to the tax administration within the framework of a voluntary disclosure procedure. This possibility exists only once in a lifetime and the notification must be made spontaneously. If the taxpayer assists in the determination of the tax owed and also pays the tax, no fine will be imposed. However, if the tax authorities already suspect an offence, the right to a voluntary disclosure without penalty is forfeited.

7.6 Possibility of Agreements to Prevent Trial

With the exception of voluntary disclosure (see **7.5 Possibility of Fine Reductions**), it is generally not possible to avoid criminal proceedings by paying the evaded tax. However, in certain cases it might be possible to reach an amicable solution with the tax administration, whereby the tax administration waives the criminal prosecution and the taxpayer in return accepts the additional tax without appealing to the courts. However, this is limited to cases in which the facts or the legal situation are not absolutely clear.

Tax offences are exclusively handled by the criminal courts. The public prosecutor is responsible for prosecuting tax offences, and simply paying the tax owed does not prevent the procedure from continuing. Upon request, an accelerated procedure – and to avoid court proceedings – may be available before the public prosecutor provided the accused admits the matters essential to the legal appraisal of the case and recognises, if only in principle, the civil claims. However, the accelerated procedure is not eligible in cases where the public prosecutor requests a custodial sentence of more than five years. If an accelerated procedure is conducted, the public prosecutor will prepare an indictment, which the taxpayer may either accept or reject.

7.7 Appeals Against Criminal Tax Decisions

For tax misdemeanours, the possibility of appeal is the same as outlined in **7.4 Stages of Administrative Processes and Criminal Cases**.

For tax offences, an appeal to the second-instance court and then to the Swiss Federal Supreme Court is possible, if specific deadlines are observed.

7.8 Rules Challenging Transactions and Operations in This Jurisdiction

In recent years, tax administrations in Switzerland have increased their scrutiny of transfer pricing. In principle, if the tax administration increases the transfer prices and adjusts them to the taxpayer's disadvantage, this constitutes tax evasion.

However, as is well known, transfer prices are considered appropriate if they lie, within a certain range, which means that there is no one exact transfer price. Since there is a certain discretion in setting transfer prices, transfer pricing adjustment by the tax administration, in general, does not lead to criminal consequences. Nevertheless, in cases where the basic principles of transfer pricing have been grossly neglected

and, thus, violation of the arm's length principle was not only recognisable to the company or the persons in charge respectively, but downright obvious, criminal penalties may be imposed.

8. Cross-Border Tax Disputes

8.1 Mechanisms to Deal With Double Taxation

In Switzerland, taxpayers can use both domestic litigation and the mechanism available under double tax treaties to resolve double taxation that arises from additional tax assessments or adjustments in cross-border situations. The available mechanism to resolve such tax disputes under double tax treaties is MAP or arbitration (if provided for in the tax treaty).

The MLI

In this context, Switzerland has signed the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (MLI), which includes provisions for dispute resolution to avoid double taxation through a MAP and mandatory binding arbitration. The adoption of these new dispute resolution mechanisms will require amendments to be made to existing double tax treaties. Switzerland follows the amending view, which means that changes to the interpretation of tax treaties must be incorporated through treaty amendments, following internal procedures.

Currently, Switzerland is still in the process of adapting its double tax agreements to include the provisions for MAPs and arbitration under the MLI. The impact of the introduction of the arbitration clauses to resolve cross-border tax disputes in Switzerland is not yet apparent.

8.2 Application of GAAR/SAAR to Cross-Border Situations

At the international level, Switzerland has incorporated anti-avoidance provisions, such as the Principal Purpose Test, in its recent double tax treaties. However, there is no specific legislation or regulations at the national level on anti-avoidance rules. Instead, the Swiss Federal Supreme Court has established general anti-avoidance rules which apply to all Swiss taxes. This general principle also applies to Swiss double tax treaties, in the absence of other specific anti-avoidance provisions in such treaties. It should be noted, however, that if a MAP application is found to violate national or treaty anti-abuse provisions, such as the taxpayer's lack of good faith, the SFTA and the foreign tax authorities may consider such a MAP application as abusive and may not seek a mutual agreement.

8.3 Challenges to International Transfer Pricing Adjustments

In Switzerland, transfer pricing adjustments are typically challenged under the existing double tax treaties mechanism, specifically through the MAP or arbitration provisions in the relevant tax treaty.

Nevertheless, the first step is always to appeal to the national courts. In this context, it is worth mentioning that Switzerland does not have any specific transfer pricing provisions, but still applies the OECD Guideline.

8.4 Unilateral/Bilateral Advance Pricing Agreements

An advance pricing agreement (APA) aims to align taxation for future years. In Switzerland, APAs are considered to be a specific type of MAP that generally follow the same rules as a MAP but might differ in some aspects of the procedure.

An APA can be concluded unilaterally (between a taxpayer and the competent Swiss tax authority), bilaterally or multilaterally. It is to be noted that unilateral APAs are subject to the spontaneous exchange of information to the same extent as a transfer pricing ruling with cross-border implications concluded with the SFTA.

8.5 Litigation Relating to Cross-Border Situations

It has been observed that tax disputes in cross-border situations have increased. In Switzerland, transfer pricing disputes have emerged as one of the most common cross-border situations that result in litigation. Similarly, the issue of withholding tax in cross-border transactions can also lead to disputes, particularly due to the high withholding tax rate of 35% and varying tax administration practices. Furthermore, the determination of tax residency for high net worth individuals and companies can also result in cross-border-related disputes, particularly if there are disagreements over whether a taxpayer is a tax resident in Switzerland or another country.

9. State Aid Disputes

9.1 State Aid Disputes Involving Taxes

As Switzerland is not an EU member, in principle this issue does not arise.

The European Union's foreign subsidies regulation (FSR) targets external state aid that distorts competition within the Single Market. Swiss companies should therefore review whether they receive subsidies that are considered as harmful under the FSR. The FSR may also heighten pressure on Switzerland to align its policies with EU standards.

9.2 Procedures Used to Recover Unlawful/Incompatible Fiscal State Aid

As Switzerland is not an EU member, this issue does not arise.

9.3 Challenges by Taxpayers

As Switzerland is not an EU member, this issue does not arise.

9.4 Refunds Invoking Extra-Contractual Civil Liability

As Switzerland is not an EU member, this issue does not arise.

10. International Tax Arbitration Options and Procedures

10.1 Application of Part VI of the Multilateral Instrument (MLI) to Covered Tax Agreements (CTAs)

Switzerland signed the MLI in June 2017 and subsequently ratified it in September 2019. Switzerland has initiated the process of incorporating arbitration clauses into its existing DTTs, although a significant number of its DTTs are still without such clauses.

10.2 Types of Matters That Can Be Submitted to Arbitration

Switzerland's arbitration clause in its DTTs differs from the OECD Model Tax Convention on Income and on Capital in two ways: it has a three-year waiting period instead of two, and it allows for arbitration even if a court or administrative tribunal has already made a decision on the matter.

10.3 Application of Baseball Arbitration or the Independent Opinion Procedure

Switzerland has opted for final offer arbitration in the arbitration clauses in its tax treaties. Under

this method, also known as *"baseball arbitration"*, the competent authority of each state involved submits a proposal to the arbitration panel. The panel must then choose between the two proposals.

10.4 Implementation of the EU Directive on Arbitration and/or the MLI

Switzerland is not a member of the European Union, but it has followed the current trends in international arbitration proposed by the OECD, of which it is a founding member.

The impact can be seen in the fact that Switzerland has signed the MLI and is including arbitration clauses in its DTTs (see **8.1 Mechanisms to Deal With Double Taxation**).

10.5 Existing Use of Recent International and EU Legal Instruments

As already mentioned, Switzerland is not a member of the EU, but it follows international developments. Thus, as mentioned, the MLI has been signed and the minimum standard is being implemented.

10.6 New Procedures for New Developments Under Pillars One and Two

Pillar Two is aimed at establishing a global minimum tax rate of 15% for multinational companies with a turnover of at least EUR750 million. Switzerland has expressed its support for this initiative.

On 18 June 2023, the Swiss electorate voted on the implementation of the OECD/G20 minimum taxation (and the creation of the constitutional basis for the introduction of Pillar One), with the proposal being approved by 78.5%. The referendum was necessary as the introduction of the OECD/G20 minimum taxation required an amendment to the Federal Constitution. This was because the OECD/G20 minimum taxation would have contradicted the constitutional principle of equal treatment of taxpayers. With the approval of the constitutional amendment, which came into force on 1 January 2024, the Federal Council enacted the ordinance on minimum taxation at federal level on the same day. At the same time, some cantons also decided to increase tax rates for companies.

It is to be noted, though, that the minimum taxation in Switzerland was limited to the national supplementary tax (Qualified Domestic Minimum Top-up Tax, QDMTT) in 2024. As from 1 January 2025, the Income Inclusion Rule (IIR) entered into force. The Federal Council has refrained from applying the Undertaxed Profit Rule (UTPR) for the time being, but could implement it with an update of the ordinance. The partial introduction of the minimum taxation results in a tax increase for Swiss corporate groups and in particular US corporate groups with directly held Swiss constituent entities, provided the GloBE ETR in Switzerland is below 15% (and no corresponding substance-based income exclusion applies).

10.7 Publication of Decisions

In Switzerland, decisions related to the resolution of international tax disputes are not made public by the competent authorities.

10.8 Most Common Legal Instruments to Settle Tax Disputes

DTTs play a significant role in promoting international economic activities by preventing the double taxation of private individuals and legal entities with an international connection in the area of taxes on income and capital. Switzerland has an extensive network of DTTs with more than 100 countries and is striving to expand it further. In addition, Switzerland has currently entered into eight agreements to avoid double

taxation with regard to inheritance and estate taxes. Hence, the competent Swiss authorities rely mainly on this network of agreements to resolve international tax disputes.

10.9 Involvements of Lawyers, Barristers and Practitioners in International Tax Arbitration to Settle Tax Disputes

As mentioned in **6.2 Settlement of Tax Disputes by Means of ADR**, the taxpayer is not a party to a MAP and therefore the tax representatives are not involved in the proceedings. However, the tax administration is willing to co-ordinate with a tax representative to accept material inputs that can be used in the negotiations.

11. Costs/Fees

11.1 Costs/Fees Relating to Administrative Litigation

No fees, etc, are charged for litigation at the administrative level.

However, even if a formal administrative complaint is lodged with the tax administration, the disputed taxes are still due. Hence, up until payment of the disputed taxes, late interest of up to 5% will accrue. Therefore, the taxpayer should always consider paying the disputed tax – with reservations – in order to avoid being charged late interest.

11.2 Judicial Court Fees

Cantonal court fees vary between instance and canton. In 2021, for example, according to the first-instance tax court of the Canton of Zurich, the judicial court fees amounted on average to CHF4,000. By comparison, the average court fees of the administrative court of the Canton of Zurich amounted to CHF7,000. However, it should be noted that the court fees are calculated based on the amount of disputed tax and the complexity of the case. Individual fees may therefore differ substantially, but they may only exceed CHF50,000 in particularly complex cases.

As at the cantonal level, before the Federal Administrative Court and the Federal Supreme Court, the fees are calculated based on the challenged amount, the scale and complexity of the case, the parties involved in the procedure and their financial situation. The fee cannot exceed CHF100,000.

In general, the court fees are borne by the unsuccessful party. If the taxpayer succeeds, the tax administration will be obliged to reimburse part of the legal costs incurred for representing the taxpayer (see **11.3 Indemnities**).

With regard to the court fees, the courts usually request an advance payment. If the requested advance payment is not paid in time, the courts will not proceed with the appeal and will close the case.

11.3 Indemnities

If the court decides that the initial tax assessment is absolutely null and void, no compensation will be paid. The taxpayer can, however, claim a partial reimbursement of the costs incurred for legal representation. It should be noted that standard hourly rates are applied and that the amount of time deemed reasonable by the court is often less than the actual time incurred. Hence, the compensation for representation costs usually does not cover the actual costs.

Of course, any amount already paid by the taxpayer will have to be reimbursed with potential interest in the taxpayer's favour.

11.4 Costs of ADR

The MAP, including the arbitration procedure, is free of charge. However, the taxpayer bears the fees for any legal advice and there will be no reimbursement if a settlement can be reached.

12. Statistics

12.1 Pending Tax Court Cases

The first-instance tax court of the Canton of Zurich registered 528 new cases for 2023 (latest data available). Considering the cases already pending (362 from 2022), the court was able to settle 521 cases (521 in 2022). On average, the duration of the proceedings is around eight months.

The Administrative Court of the Canton of Zurich, as the second cantonal instance, registered around 1,410 new cases in 2023 (latest data available), with tax disputes accounting for 229 cases. Of the total pending tax proceedings of 229 cases, 158 cases were closed in 2023.

The latest report available from the Federal Administrative Court indicates that, during 2024, this court processed 109 cases in tax matters (excluding cases concerning exchange of information). The Federal Supreme Court processed 282 cases in the same period. With regard to the pending cases for the different tax types, no data is available, neither for the Federal Administrative Court nor for the Federal Supreme Court.

Additional statistics on values dealt with are not available for either the cantonal or federal courts.

12.2 Cases Relating to Different Taxes

First-Instance Tax Court of the Canton of Zurich

For the year 2023, the first-instance tax court of the Canton of Zurich reported 528 new cases, of which around 456 (86% (85% in 2022)) relate to income and wealth tax for individuals as well as corporate income and capital tax. The administrative court of the Canton of Zurich does not provide any details on the different taxes concerned – however, it appears reasonable to assume that the ratio of the taxes concerned is similar to that of the first instance court.

Federal Administrative Court

In 2024, the Federal Administrative Court processed five cases for subsidies (compared to 13 cases in 2023), 35 cases for customs (compared to 45 in 2023), four cases for stamp duties (four in 2023), no cases for direct taxes (three in 2023), 92 for VAT (47 in 2023), one for various indirect taxes (six in 2023), 15 for withholding tax (16 in 2023), none for double taxation (none in 2023) and one for miscellaneous finance (two in 2023). The total value at stake of these proceedings is not available.

With regard to the newly initiated cases for the different tax types, there is no data available for the Federal Administrative Court.

Federal Supreme Court

In 2024, the Federal Supreme Court processed 223 cases for direct taxes (224 cases in 2023), two for stamp duties (one in 2023), 30 for indirect taxes (17 in 2023), eight for withholding tax (five in 2023), 17 for military service exemption tax (three in 2023), two for double taxation (five in 2023), 42 for other levies (51 in 2023), 17 for customs (16 in 2023) and 15 for tax exemption (nine in 2023).

With regard to the newly initiated cases for the different tax types, there is no data available for the Federal Supreme Court.

12.3 Parties Succeeding in Litigation

According to the statistics of the first instance tax court of the Canton of Zurich, the success rate from the taxpayer's point of view is around 28%. In cases before the administrative court of the Canton of Zurich, this success rate drops to around 16%.

The statistical data provided by the Federal Administrative Court and the Federal Supreme Court in their annual reports does not include any information on the outcome of tax-related proceedings. However, according to a private study and on the basis of Federal Supreme Court data for the past ten years, the success rate – again from the taxpayer's point of view – is only 14%.

This data underlines the importance of the administrative procedure and confirms that, whenever possible, an attempt should be made to resolve the disputed matter with the tax administration.

13. Strategies

13.1 Strategic Guidelines in Tax Controversies

In Switzerland, there are comparatively few tax litigations (see **12.1 Pending Tax Court Cases** and **12.2 Cases Relating to Different Taxes**). One possible explanation for this is the common use of tax rulings (see **1.3 Avoidance of Tax Controversies** and **6.4 Avoiding Disputes by Means of Binding Advance Information and Ruling Requests**). Tax rulings provide taxpayers with a binding decision from the tax authorities on the tax implications of a particular transaction or situation.

If there is still disagreement between the taxpayer and the tax authority, the tax authority is, in complex cases, usually open to discuss an amicable solution. The administrative procedure allows the parties to discuss the facts and try to reach an agreement.

Nevertheless, careful advance planning is essential to avoid unexpected surprises. Particularly in the case of complex issues, it is necessary to analyse the situation in advance and, if necessary, enter into dialogue with the tax authorities at an early stage to seek a tax ruling in order to create legal certainty and avoid unexpected conflict.

Trends and Developments

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Tax Partner AG is focused on Swiss and international tax law and is recognised as a leading independent tax boutique. With currently 11 partners and counsel and a total of approximately 50 tax experts including attorneys, legal experts and economists, the firm advises multinational and national corporate clients as well as individuals in all tax areas. A central focus is tax controversy and dispute resolution, including transfer pricing issues. Tax Partner AG also provides support regarding transfer pricing studies and the preparation of transfer pricing documentation. Other key areas include M&A, restructuring, real estate transactions, financial products, VAT and customs. Tax Partner AG is independent and collaborates with various leading tax law firms globally. In 2005 the firm was a co-founder of Taxand, the world's largest independent organisation of highly qualified tax experts.

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Introduction

This chapter of the guide will focus on the criminal liabilities of persons involved in the tax compliance/consulting process, the topic of beneficial ownership and treaty abuse, and the introduction of the OECD GloBE minimum tax and the corresponding litigation consequences.

The criminal liability of directors, advisers and controllers is increasingly being taken up by tax authorities during audits. This leads to additional risks for the persons involved. The impact of this tightening of practice will be illustrated based on recent court rulings.

The topics of beneficial ownership and treaty abuse are recurring issues in legal disputes, whether in connection with management and control or the refund of withholding tax (WHT). A recent court ruling has now provided some clarity in this context.

The introduction of the GloBE minimum tax has so far had little impact on court practice, as no final assessment has yet been made for any fiscal year and the rules are still being developed. Nevertheless, numerous legal disputes are expected in the future in connection with the introduction of the GloBE minimum tax, which will be examined in more detail.

Criminal Liability of Board Members, Accountants and Tax Advisers

If a company fails to meet its tax obligations, it will be liable to pay the unpaid tax and interest on late payments, and may be fined by the relevant tax authority.

In recent years, it has been observed that increasing numbers of proceedings are also being brought against third parties involved in the tax compliance/consulting process, particularly after audits. On the one hand, this may affect the person responsible for tax matters (or for the concrete compliance step) within an organisation, ie a controller. On the other hand, third parties such as the board members or consultants may also be held criminally liable. This criminal liability, for example, applies to the board members in addition to personal liability for financial WHT liability.

In a recent landmark decision (two connected cases, BGer 6B_90/2024 and 6B_93/2024 (both dated 3 February 2025)), the Federal Supreme Court had to deal with the question of whether a controller and a consultant can be held criminally liable for the non-declaration of WHT.

In the criminal proceedings, the company's controller was accused of having failed to declare the hidden dividend distribution for tax year

2014, despite having known by early 2015, based on an audit agreement with the cantonal tax authorities, that the applied interest rate on an intragroup loan was not at arm's length (ie, 3.15% instead of the safe haven rate of 2.5%). The SFTA argued before the court that, through his role and the overall course of events, he must have recognised that the interest payments constituted a hidden dividend distribution, triggering a WHT liability that required timely self-declaration by mid 2015 (30 days after the approval of the 2014 financial statements). Ultimately, the declaration has been made in 2016 due to the results of an independent audit by the SFTA. The Federal Supreme Court held that the controller was aware — or at least accepted the possibility — in early 2015 that the applied interest rate was not at arm's length. The lower court's conviction was therefore upheld.

The adviser was acquitted of the incitement charge. According to the Federal Supreme Court, he had merely fulfilled his professional mandate by defending the contested interest rate before the tax authorities and assessing potential tax risks in a memo — without actively prompting or inducing the controller to omit the WHT declaration. The consultant's argument was strengthened by two points. First, the memo labelling the WHT risk as high was issued only after the controller had committed the offence. Second, his recommendation to forego an additional tax provision in the absence of an SFTA tax audit was not deemed inciting in this case.

Based on a transfer pricing study for the cantonal audit, the determined interest rate ranged from 3.07% to 4.69%, meaning the taxpayer's rate of 3.15% fell within this range. However, the cantonal authority rejected the study's results because it did not properly take into account the characteristics of the loan. During the audit, the taxpayer and the cantonal authorities agreed to apply a safe haven interest rate of 2.5%. For WHT purposes, the SFTA can independently assess cases and is not bound by the cantonal corporate income tax assessment. It could be argued that the SFTA, as an independent authority, could have come to a different conclusion and that, for WHT purposes, the cantonal agreement could not be determinative of prosecution in relation to WHT. However, the court in the case at hand decided differently, which as a consequence increases the risk for taxpayers.

Under the current legal framework, the court ruling may lead to challenging WHT refund scenarios. Under the Swiss WHT Act, a refund claim expires if the application is not submitted within three years from the end of the calendar year when the taxable dividend was due. If a hidden dividend distribution is later assessed by a cantonal authority, the right to a refund may have lapsed. The law stipulates that a new 60-day refund claim period for WHT purposes begins only when the SFTA assesses the hidden dividend distribution, not a cantonal authority. This legal situation, even if criticised in legal doctrine, can lead to a situation in which the hidden profit distribution is not proactively declared, but the risk of criminal prosecution is increased. Consequently, it is advisable in these cases to proactively approach the SFTA to determine the appropriate procedure and to ensure compliance in all areas of taxation.

As regards the criminal proceedings, several topics should be considered for persons responsible for tax matters. First, it is important to properly allocate responsibilities within an organisation. In a second step, the individuals responsible for the specific task have to be made aware of the legal risks they may face if compliance obligations are not met, whether

deliberately or through negligence. With regard to criminal liability, knowledge in connection with one type of tax (ie, regarding corporate income tax) is attributed to knowledge in connection with another type of tax (ie, WHT), even if the taxes are levied by different authorities.

Advisers must base their advice on the applicable laws. As outlined in the above case, recommendations not to declare taxable benefits may result in inciting a criminal offence for which the adviser is personally liable to prosecution.

New Landmark Decision Regarding Beneficial Ownership and Treaty Abuse

As Switzerland has an extensive treaty network and a comparably high WHT, the issue of treaty abuse is a recurring theme in court cases. It is also the subject of intensive discussion in literature. A new landmark decision by the Federal Supreme Court (BGer 9C_635/2023 dated 3 October 2024) now provides additional clarifications with regard to the terms of beneficial ownership and treaty abuse.

In the relevant court case, the appellant, a specialised bank based in Denmark, acquired Swiss government bonds in several tranches. For each bond purchase, it simultaneously entered into cross currency rate swap agreements to hedge against exchange rate risk while also obtaining financing advantages. The interest payments arising from the bonds were subject to Swiss WHT. Owing to the particularities of the overall transaction – ie, the close linkage between the bond and swap transactions – the SFTA denied the refund of the WHT.

The federal administrative court had refused the refund because it did not consider the appellant to be the *"beneficial owner"* of the interest income – given that a reciprocal dependency between the income from the bonds and the payment obligations arising from the swaps was assumed – and there were also doubts regarding the appellant's duty to co-operate.

The central question before the Federal Supreme Court was whether the appellant qualifies as the *"beneficial owner"* of the interest payments – in other words, whether it can fully utilise the income despite the close interlinkage between the bond purchases and the swap transactions, without being hindered by contractual or statutory forwarding obligations. Furthermore, the issue is whether the overall structure – the combination of bond acquisitions and swaps – should be regarded as an abusive arrangement. It has to be examined if the transaction was primarily conducted to secure tax savings and treaty benefits, even though a properly structured transaction would not have entitled the appellant to a refund of the WHT.

The Federal Supreme Court generally confirms the appellant's beneficial ownership if it is not contractually or statutorily obligated to forward the interest income. This narrow interpretation means that purely economic or factual forwarding incentives are not sufficient to deny the claim. Although the swap agreements link the interest flows to the bond payments, a detailed review of the contractual documentation and the risk allocation (eg, hedging of exchange rate risks) led to the conclusion that no harmful contractual forwarding obligation exists. It was also considered not harmful that the default risk of the bonds was rather low and, as a result, it was rather certain that income would be generated.

As per the decision of the Federal Supreme Court, treaty abuse is examined through the lens of economic substance and purpose. The court scrutinised whether the structure was pri-

marily motivated by tax savings and deviated from normal economic practices. It emphasised that even if beneficial ownership is satisfied, the arrangement must not yield treaty-based advantages that defeat the purpose of avoiding double taxation. The court requires evidence of genuine economic risk transfer and market conditions. If the transaction is engineered to exploit treaty benefits, the potential for abuse may clearly justify denying tax relief so that tax advantages reflect real economic activity rather than contrived arrangements. The topic of treaty abuse required further, detailed investigations (eg, regarding market conditions for the swaps, the actual economic motivation and the forwarding of payment streams) and was therefore passed down to the federal administrative court.

The judgment clarifies that, for tax relief under the Switzerland–Denmark tax treaty, only an explicit contractual or statutory forwarding obligation leads to the loss of treaty benefits. The decision indicates that integrated financial transactions, such as those combining bond purchases with associated hedging transactions, do not automatically result in a denial of WHT refunds, provided the true economic substance and risk allocation justify it. At the same time, the judgment underscores that in complex structures the risk of abuse (treaty shopping) must always be examined. It remains to be seen, on the lower court's ruling (and a possible further appeal to the Federal Supreme Court), whether the facts of the case will be construed in a way that constitutes an abuse of the agreement.

GloBE Minimum Tax Litigation

Switzerland has introduced the Qualified Domestic Minimum Top-up Tax (QDMTT) for tax years beginning on or after 1 January 2024, and the Income Inclusion Rule (IIR) came into effect for tax years starting on or after 1 January 2025. For now, Switzerland will not implement the Undertaxed Profit Rule (UTPR), largely due to concerns about its compatibility with existing tax treaties.

When it comes to litigation, the current focus is the legal basis of the UTPR. For example, in Belgium a US organisation filed a submission with the Belgian Constitutional Court in 2024 seeking the annulment of the Belgium Pillar 2 UTPR. One argument is that the Belgium UTPR adversely impacts the financial position of affected entities by taxing Belgian companies on income earned by entities in other jurisdictions.

Even if Switzerland continues to refrain from introducing the UTPR, litigation in Swiss courts is expected in connection with the levying of Swiss top-up taxes. The main focus of the disputes is likely to be in connection with the application of the administrative guidance issued by the OECD, which is binding for the international recognition of the Swiss top-up taxes. Another focus may be the treaty compatibility of the IIR. Taxpayers may challenge the legal basis for implementing the IIR in Switzerland and therefore claim that the IIR is not in line with the obligations under a double tax treaty. Potentially different interpretations of the GloBE Model Rules by the different countries involved may also lead to litigations and conflicts and, potentially, to double taxation.

Application of the QDMTT and the relevance of administrative guidance

It is expected that the main litigation focus in connection with the introduction of GloBE minimum taxation will be the implications of administrative guidance in Switzerland. Several administrative guidances have been published by the OECD following the publication of the GloBE Model Rules. They serve as instruments to better understand the model rules, ensure consistent application, facilitate compliance and enhance

transparency. From an internal Swiss perspective, the GloBE Model Rules form the basis for implementing the GloBE minimum tax (for the time being the QDMTT and the IIR) and the published administrative guidances serve as instruments for interpretation. In general, administrative guidance cannot overrule the GloBE Model Rules or provide the taxpayer with additional instruments that were not part of the GloBE Model Rules.

Based on an administrative guidance published in February 2023, the Equity Investment Inclusion Election (EIIE) has been introduced, enabling taxpayers to include revaluation losses and gains on investments in the GloBE calculation. This approach contradicts the GloBE Model Rules and, as a result, it was initially unclear whether Swiss taxpayers could apply the election. However, the current understanding is that Swiss taxpayers may indeed apply this election.

In the context of legal disputes, the administrative guidance for applying Article 9.1 of the GloBE Model Rules is of greater relevance. Based on Article 9.1.1, a Multinational Enterprise Group (MNE Group) shall take into account all of the deferred tax assets (DTA) and deferred tax liabilities reflected or disclosed in the financial accounts of all of the constituent entities in a jurisdiction for the transition year when determining the effective tax rate (ETR) for a jurisdiction in a transition year and for each subsequent year. However, special rules apply to DTAs arising from transactions occurring after 30 November 2021.

On 15 January 2025, the OECD/G20 Inclusive Framework issued Administrative Guidance for applying Article 9.1 of the GloBE Model Rules. This guidance focuses on *"arrangements"* and *"similar events"* (such as the subsequent exercise of elections) that resulted in the recognition of DTAs. The guidance describes three types of transaction that give rise to an excluded DTA, two of which are relevant to Switzerland: those arising from amended governmental arrangements and those resulting from retroactive elections. Additionally, a temporary grace period allows up to 20% of harmful DTAs to be considered in the GloBE calculation.

Tax benefits as per the administrative guidance which led to the recognition of DTAs typically disqualify the local DMTT. However, the transitional qualification of both the QDMTT and the QDMTT Safe Harbour will be maintained if countries offset the resulting deferred tax effects. Conversely, if the necessary adjustments are not implemented, such as failing to neutralise deferred tax effects during the assessment process, an MNE will not be eligible to claim the QDMTT Safe Harbour for that country (switch-off rule).

From an internal Swiss perspective, taxpayers may challenge the application of the administrative guidance, as the guidance adds additional anti-avoidance measures to the GloBE Model Rules, thereby broadening its scope. If taxpayers prevail before the Swiss courts and the administrative guidance is not applied in Switzerland, there is a risk, especially from 2025, that other countries will tax the Swiss tax base using UTPR, since the administrative guidance is relevant for the application of the GloBE Model Rules. Taxpayers would then have to challenge the application of the administrative guidance, respectively the UTPR in the other countries as well, leading to higher compliance costs.

Compatibility of the IIR with double tax treaties

In the OECD's view, neither the IIR nor the UTPR conflict with existing tax treaties, allowing them to be seamlessly incorporated into national tax systems without requiring additional modifications. This position is based on the OECD's analogy with controlled foreign corporation (CFC) measures and is underpinned by the saving clause, which affirms the principle that countries can tax their tax residents.

However, this view has been subject to significant criticism in literature. Critics argue that the IIR is fundamentally different from traditional CFC measures because it directly taxes foreign corporate profits rather than addressing domestic tax base erosion. They contend that the arguments used to justify the IIR's compatibility with existing tax treaties are flawed. Specifically, the IIR's extraterritorial taxation approach appears to conflict with Article 7 of the OECD Model Convention, which allocates taxing rights based on where economic activities occur and where value is created. This means that the principle behind Pillar Two – to create a level playing field in corporate taxation – is not reflected in the current double tax treaties.

As a result, a country imposing the IIR might lack the legal authority to tax foreign profits if such taxation contravenes established treaty provisions. For instance, an MNE headquartered in Switzerland or an intermediate holding company with low-taxed entities abroad could potentially challenge the extraterritorial application of the IIR in court. Such legal challenges could undermine the collection of the IIR.

The UTPR is at the centre of international debate as regards its compatibility with double tax treaties. As Switzerland has implemented the QDMTT, it is not expected that Swiss profits are subject to the UTPR. Therefore, based on the current state of legislation, this topic is of limited relevance for Switzerland.

Conclusion regarding the implementation of the GloBE minimum tax

The introduction of the GloBE minimum tax will give rise to a large number of court cases. These cases may be brought either on the legal basis of the top-up tax (such as the IIR or the UTPR) or on the interpretation of the relevant rules or published administrative guidance. As these cases will usually involve different countries, different outcomes are also possible. It will therefore be important to put in place an effective dispute resolution mechanism.

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