

# Tax Litigation

**Jurisdictional comparisons**

**First edition 2013**

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Miller Thomson LLP**



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# Contents

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<b>Foreword</b>	Gerald J. Rip, The Honourable Chief Justice, Tax Court of Canada	v
<b>Acknowledgements</b>	David W. Chodikoff, Miller Thomson LLP	vii
<b>Preface</b>	David W. Chodikoff, Miller Thomson LLP	ix
<b>Australia</b>	Stewart Grieve, Kathryn Bertram, Bridie Andriske, Shinasa Wasimi & Daniel Davids, Corrs Chambers Westgarth	1
<b>Austria</b>	Dr Jürgen Brandstätter & Victoria Rosengren, LLM, BMA Brandstätter Rechtsanwälte GmbH	25
<b>Belgium</b>	Christian Chéruy, Loyens & Loeff Advocaten-Avocats	43
<b>Bolivia</b>	Alejandra Bernal, C. R. & F. Rojas – Abogados	65
<b>Brazil</b>	Glauca Lauletta Frascino & Maria Isabel Tostes Bueno, Mattos Filho, Veiga Filho, Marrey Jr. e Quiroga Advogados	77
<b>Canada</b>	David W. Chodikoff & Laura Etherington, Miller Thomson LLP	91
<b>China</b>	Caroline Berube with contributions from Brad Alexander & Donfil Wong, HJM Asia Law	115
<b>Colombia</b>	Juan Esteban Sanín Gómez & Alvaro Parra Gómez, Parra Rodríguez Sanín	127
<b>Costa Rica</b>	Luis Chacón Camacho & Giuliana Alvarado Chacón, BLP Legal	139
<b>France</b>	Nicolas Jacquot & Roland Schneider, Arsene Taxand	151
<b>Germany</b>	Dr Axel Bödefeld & Dr Gunnar Knorr, Oppenhoff & Partner	167
<b>Greece</b>	Athanasios Kyriakopoulos, Kelemenis & Co.	181
<b>Hungary</b>	Péter Köves & István Keményfy, Lakatos, Köves and Partners	201
<b>India</b>	Manoj K. Singh, Singh & Associates, Advocates & Solicitors	217
<b>Italy</b>	Massimo Antonini, Marco Di Siena & Irene Pellecchia, Chiomenti Studio Legale	231
<b>Luxembourg</b>	Jean-Pierre Winandy, Nadège Le Gouellec & Georges Simon, Loyens & Loeff	247
<b>Malta</b>	Nicolette Spiteri Bailey, Aequitas Legal	263
<b>Mexico</b>	Luis Ortiz, Jose Juan Delgado, Juan Carlos Manrique & Francisco Javier Matus, Basham, Ringe y Correa	279
<b>The Netherlands</b>	Dr J. Arnaud Booij & Charlotte A. H. Bikkers, Spigt Litigators	291
<b>Nigeria</b>	Oluwatoyin Ajoke Bashorun, Churchfields Solicitors	305
<b>The Philippines</b>	Rolando V. Medalla, Jr & Maria Christina C. Ortua SyCip Salazar Hernandez & Gatmaitan	321

<b>Portugal</b>	Pedro Pais de Almeida & Sara Soares, Abreu Advogados	337
<b>Republic of Ireland</b>	Fergus Doorly & Sonya Manzor, William Fry	349
<b>Russia</b>	Maxim Rovinskiy & Dmitriy Manuilov, YUST Law Firm	367
<b>South Africa</b>	Dr Beric Croome and Mmangaliso Nzimande, Edward Nathan Sonnenbergs Inc.	379
<b>Switzerland</b>	Prof Dr Andrea Opel & Barbara Stillhart, Meyerlustenberger Lachenal	395
<b>Turkey</b>	Dr Z. Ertunç Şirin, Istanbul University, Faculty of Law E. Benan Arseven, Moroğlu Arseven	413
<b>United Kingdom</b>	Liesl Fichardt, Clifford Chance	429
<b>USA</b>	Hope P. Krebs & Thomas W. Ostrander, Duane Morris LLP	445
<b>Contacts</b>		463

# Foreword

**Gerald J. Rip**

The Honourable Chief Justice, Tax Court of Canada

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Litigation of tax disputes may vary from country to country but the common goal is the same: to put finality to a tax dispute between the Government and a taxpayer. Tax litigation, unlike most other litigation, puts the resources of a state against the means of a taxpayer and the taxpayer's means may be very modest or quite substantial. But in all cases, the procedures in litigation should serve to put the parties in equal balance. *Tax Litigation* is a successful effort to describe how several countries attain equal balance between tax litigants.

Tax procedure is an evolving process. A country's tax litigation procedures are influenced by the country's legal, social and economic history and development.

A lawyer with clients residing or carrying on business in a foreign country will want an authoritative and readable text to understand the often different tax litigation process in a foreign country if called upon by a client. *Tax Litigation* is the tool that will serve the tax professional in giving immediate first aid assistance to a client who has a tax problem in another jurisdiction before consulting with a lawyer in that country. The book is timely given the international conduct of business places the shadow of tax collectors over even the simplest transaction in a foreign country.

Leading tax lawyers from 29 countries have joined in contributing to *Tax Litigation*, each providing a clear, concise and full description of the tax litigation process in their country. The reader will learn of processes in both the civil and criminal areas of tax litigation.

*Tax Litigation* comprises 29 chapters, one for each country represented in the book. Each chapter is divided into sections that permit the reader to zero in on what may be his or her interest at the moment: an overview, the pre-court process that includes possible resolution of the dispute before trial, the trial process in first instance: the trial itself and whether it emphasises the examination and cross-examination of witnesses or the review of the documentary evidence that was before the tax officials, for example; how evidence may vary in a civil trial or a criminal trial; expert witness evidence that may include new procedures such as 'hot-tubbing'<sup>1</sup>; are argument and submissions to the court or tribunal in writing only or orally?; the decision; what must the trier consider; the burning issue of costs and expenses of

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<sup>1</sup> This practice is also sometimes referred to by the less flamboyant label 'concurrent evidence'. In short, 'hot-tubbing' describes the process where in a complex, technical trial expert witnesses confer with one another before the hearing in order to narrow the issues and identify the points on which their views differ or testify together in court on a panel rather than one expert testifying after another on the witness stand.

going to trial; appeals from judgment of the decision in the appeal in first instance and an optional discussion of 'hot' areas of tax interest in the country, such as tax evasion, transfer pricing and anti-avoidance rules.

At times the reader will recognise procedures in another country that are quite similar to those he or she is familiar with. At other times the reader will be quite surprised at the differences: the arena where the tax appeal is heard may be a specialised court dealing only with tax matters, a general court of law where a judge may hear a motor vehicle accident in the morning and a tax appeal during the afternoon, or a tribunal or administrative board; the person presiding at the trial may or may not be a judge or a person trained in tax law; some countries may prefer documentary over oral evidence and others the opposite; the burden of proof may vary from country to country; the decision maker may be required to provide detailed reasons for the decision in some jurisdictions, while a few simple sentences may suffice elsewhere. All this and more serve to fascinate the tax professional who has an interest in litigation.

It will not only be tax practitioners who will realise the value of *Tax Litigation* but so will judges, court administrators and even officials of taxation agencies: *Tax Litigation* offers them an inexpensive opportunity to compare domestic practice and procedure to those of other countries and perhaps readers in position to do so may want to consider adopting processes from other countries in the continuing evolution of their country's tax litigation process.

The 29 authors and co-authors and the editors of *Tax Litigation* have provided a valued service to the international tax community and I wish to thank them for the time and energy they have invested in this project.

*Gerald J. Rip*  
*August 2013*

# Acknowledgements

**David W. Chodikoff** Partner, Miller Thomson LLP

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In order to bring a book of this type to print it requires the involvement and commitment of many people. On my personal homefront, my wife, Tanya and son, Daniel, have endured my almost daily reports on the progress of the project. I am pretty sure that both of them felt that they actually worked on this project too. Thank you, Tanya and Daniel, for your patience and endurance. Love knows no bounds!

If not for my meeting with Katie Burrington (Commercial Director, *European Lawyer*, Thomson Reuters) in Dublin, Ireland in October of 2012 at the International Bar Association Conference, this project would not have been born. Thank you, Katie, for your consistent support, hard work and good cheer. Even when the project seemed to veer off course, Katie was always looking at the 'bright side of life'.

I owe a great deal to my law partner, James ('Jim') M. Klotz. Jim is a recognised world leader in Anti-Corruption and International Governance as well as International Business Transactions. Thanks to Jim's support and contacts, we were able to recruit a number of contributors for this project. Thanks, Jim. I also want to thank my tax partners for their encouragement and support, specifically, James ('Jim') Hutchinson, John Campbell and Martin Rochweg. There were others in my law firm who offered support in one form or another as well. My thanks to Emily Cole, Peter Auvinen, Michael Kerr, Mark Frederick and Michael Pace. I also thank Sheldon Silver, Q.C. who had a hand in the design of the template.

In Canada, my editorial team consisted of senior assistant editor, Jamie Walker, and assistant editors Sarah Virani, Shaun Parekh and Victoria Rodrigues. These second year law students working for the summer at Miller Thomson LLP demonstrated a keen interest in both the subject matter and the work. I look forward to watching each one of these young persons develop in their respective legal careers as they are all superstars in my estimation!

Coordinating all of the production work and pretty much responsible for everything that involves my practice of law is my 'Chief of Staff' (a monicker that she has well earned over eight years of work with me), Filomena ('Fil') Mendonca. As I often freely admit, any success that I may have in the private practice of law or that is law related can be directly attributable to Fil's support and help. Thank you, Fil.

I want to thank the Honourable Chief Justice of the Tax Court of Canada, Gerald Rip, for agreeing to prepare a foreword for this enterprise. Thank you, Chief Justice.

My thanks, as well, to all of those individuals who took the time from

their incredibly busy schedules to write an endorsement for this book. Thank you!

I cannot say enough about the good humour and hard work of all of the contributors. Given the tight timelines, their individual efforts were simply extraordinary. Thank you!

Finally, this project would not have reached completion without the capable efforts of the Thomson Reuters UK team lead by Emily Kyriacou and Magda Wika with no less effort and support from Caroline Pearce and Dawn McGovern. Thank you!

*David W. Chodikoff*  
*August 2013*



# Preface

**David W. Chodikoff** Partner, Miller Thomson LLP

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In October 2012, I attended the annual conference of the International Bar Association in Dublin, Ireland. The conference was held at the relatively new conference centre in downtown Dublin. From this visitor's point of view, the centre is a beautiful building. Upon entering the conference centre, the first thing you could not help but to encounter was the Thomson Reuters booth. As the saying goes, this booth was 'front and centre'. There were bookcases full of Thomson Reuters' published works. As I examined the books on display, it was not long before a series of books caught my eye. The series entitled '*The European Lawyer Reference Series*' had plenty of titles ranging from Arbitration World to Gaming Law to Private Client Tax. Each book was a jurisdictional comparison of a particular subject. I was impressed by the concept and the titles that were covered by the series.

One of the Thomson Reuters people working at the booth was Katie Burrington. I made some enquiries about the series. 'Yes', Katie explained: 'the General Editor is responsible for designing the template that every participating law firm follows'. Katie told me that the General Editor was also responsible for the recruitment of the participating law firms. My interest was palpable. I asked Katie if there was a book in the series on the subject of tax litigation. 'No', she replied. 'Would Thomson Reuters be interested in a book on the subject for the series?' I asked. 'Yes', replied Katie. It was then that I said: 'I am your man!'

I had only two conditions. First, this book had to cover both the common law/civil code context of tax litigation and it also had to cover the criminal side or the defence of tax prosecutions and related offences. The second condition was that I could not commence the project until 2013. Katie said 'no problem' to these two conditions.

This book project started in earnest in February of 2013. It is fair to say that it is a remarkable achievement by any measure to have a book of this nature and quality reach the global market in such a short period of time. The credit goes to so many people and they are recognised in the acknowledgment.

In this book, there are 29 chapters. Twenty-nine leading law firms in the field of tax litigation provide their respective analysis of the process and procedure for challenging tax assessments and authorities within their respective country. The approach for each chapter has been standardised. The contributors have provided an overview of both the common law/civil code context of tax litigation and the defence of tax prosecutions and related offences. Because of this defined structure, this book is arguably unique in the tax publishing world. Each contributor has attempted to canvass

the following topics within their jurisdiction: significant subjects of tax litigation, the pre-court process, the trial process, documentary evidence, witness evidence, expert evidence, argument, the decision, costs, appeals and hot areas of interest.

It is our collective wish that readers and users of this book find it a useful source of information regarding the subject of tax litigation around the globe.

*David W. Chodikoff*  
*August 2013*

# Austria

## **BMA Brandstätter Rechtsanwälte GmbH**

Dr Jürgen Brandstätter & Victoria Rosengren, LL.M.

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### **1. OVERVIEW**

The publication of this book comes at a time where Austria is facing basic reform of its administrative procedural law. As Austrian taxes are part of public administration, the process of tax litigation will be affected. Starting 1 January, 2014, new administrative trial courts will start hearing tax cases, which until now were only dealt with by the *Unabhängige Finanzsenat* (Independent Finance Senate, independent administrative bodies entitled to hear tax cases). The newly-created Federal Court of Finance (*Bundesfinanzgericht*) will take over all pending cases from the *Unabhängige Finanzsenat*. One can challenge a tax assessment up to three times, with the first being within the Internal Revenue Service (the IRS), and then followed by two court appearances.

Public institutions in Austria raise money in different formats. Tax law knows three kinds. ‘Taxes’, in a narrow sense, comprise payments made to government entities where the taxpayer does not receive a service in return. The term ‘fees’ covers those payments charged to somebody who has a special interest in the establishment and the up keeping of a public institution. ‘Dues’ are public charges requested from citizens for making direct use of the services of an administrative body.

This publication only covers taxes, and is based on the legal environment in Austria that will be in place as of 1 January, 2014. The most significant taxes, such as personal income tax, corporate income tax and turnover tax (also known as value added tax or sales tax), will form the basis of this analysis.

#### **1.1 Significant subjects of tax litigation**

##### **1.1.1 Residency**

There are many contentious points that give rise to tax litigation in Austria. However, the most contested issue is a question of whether a specific individual or company is subject to Austrian taxation at all.

Section 1 of *Einkommensteuergesetz* (Austrian Federal Income Tax Code, abbreviated as *EStG*) distinguishes between unlimited and limited tax liability. Individuals who are resident or have a habitual abode in Austria are subject to unlimited tax liability, and are taxed on all worldwide sources of income. Natural persons who do not have their residence nor their habitual abode in Austria are only subject to limited tax liability. Therefore, they are only taxed on income originating in Austria. In these cases, double taxation

treaties have to be taken into consideration (see Annex at the end for a list of all Austrian double taxation treaties).

For tax purposes, a natural person has his or her residence in Austria if he or she maintains and uses a place of residence in Austria.<sup>1</sup> In a marriage, this will generally be the marital home.<sup>2</sup> The place of residence does not have to be constantly occupied, but there must be the opportunity to access or make use of it.<sup>3</sup> Working abroad or frequent visits abroad do not exclude a domicile from being a residence and several places of residency are possible.<sup>4</sup> A temporary stay in Austria does not give rise to residency status.<sup>5</sup> Whether a place is actually a person's residence has to be determined according to the facts in question.<sup>6</sup> However, in cases where a person's regular stay in Austria exceeds six months, he or she is subject to unlimited tax liability, regardless of the factual circumstances.<sup>7</sup>

According to Section 1, Paragraph 2 and 3 of *Körperschaftsteuergesetz* (Austrian Corporate Income Tax Code, abbreviated as *KStG*), legal entities are subject to unlimited taxation with regard to their worldwide income if they have their seat or place of management in Austria. In many cases, counsel must therefore determine where the decision-making process actually takes place. According to prevailing case law, a place of management is assumed to be where high level executives are situated, ie, where the management board makes necessary decisions for the company.<sup>8</sup> On the other hand, the seat of a company is the place determined by statute, agreement, by-laws and the other governing documents.

An important issue in corporate tax law is group taxation, which is regulated under section 9f of *KStG*. Group taxation takes legally independent companies belonging to a group, and regards them as a single unit for tax purposes, with the result that profits and losses are compensated within the group. The main principle of the group taxation system is that it applies to domestic and foreign companies. In the case of an Austrian parent company and an Austrian subsidiary, the scheme provides for the attribution of 100 per cent of the losses/profits of a domestic group member to the group parent, even if participation is lower. In the case of an Austrian parent company and a foreign subsidiary, foreign losses are attributable to the parent company according to the percentage of participation.<sup>9</sup>

According to Section 2 of *Umsatzsteuergesetz* (Value Added Tax Code, abbreviated as *UStG*), Business enterprises which have their seat, habitual abode or place of production in Austria are liable for value added tax on goods and services under Section 1 of the *UStG*. The reverse charge principle may apply to foreign companies, where tax liability for goods and services can be passed on to the Austrian recipient.

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<sup>1</sup> Section 26 Paragraph 1 BAO

<sup>2</sup> VwGH, 19.12.2006, 2005/15/0127

<sup>3</sup> VwGH, 23.02.2010, 2007/15/0292

<sup>4</sup> VwGH, 03.06.2003, 99/15/0104

<sup>5</sup> VwGH, 14.11.1996, 94/16/0033

<sup>6</sup> VwGH, 26.11.1991, 91/14/0041

<sup>7</sup> Section 26 Paragraph 2 BAO

<sup>8</sup> VwGH, 24.05.2012, 2008/15/0211

<sup>9</sup> For details see Section 9f *KStG* and the corporate income tax directive by the Federal Ministry of Finance, GZ BMF-010216/0009-VI/6/2013

## 1.2 Identification of legislative framework

The legal foundation for the imposition of taxes, the definition of income, and the tax rate are found in the Austrian Income Tax Code, *Einkommensteuergesetz* 1988 (*ESTG*), BGBl 1988/400 in its current version, the Corporate Income Tax Code, *Körperschaftsteuergesetz* 1988 (*KStG*), BGBl 1988/401 in its current version, and the Sales Tax Code, *Umsatzsteuergesetz* 1994 (*UStG*), BGBl 1994/663 in its current version.

Procedural questions regarding tax liability, as well as legal remedies against a tax assessment, may be found in the Austrian Federal Fiscal Code, *Bundesabgabenordnung* (*BAO*), BGBl 1991/194 in its current version, the Code Governing Fiscal Executions, *Abgabenexekutionsordnung*, BGBl 1949/104 in its current version, the new Law Governing Administrative Courts, *Verwaltungsgerichtsbarkeits-Ausführungsgesetz* 2013, BGBl I 33/2013, and the new Law Governing the Fiscal Courts, *Finanzverwaltungsgerichtsbarkeitsgesetz* 2012, BGBl I 14/2013.

### 1.2.1 Common law and/or Civil Code context

Austria is a civil law country. This means that substantive law on tax, as well as procedural law, is governed by the spirit and structure of a civil law country. However, case law is also starting to play a role. This is due to the European Union's strong emphasis on case law, which eventually becomes national law through treaties, and also to its application on existing legal practice.

### 1.2.2 Tax evasion and other criminal tax offences

Tax evasion is a criminal offence in Austria, whether it is intentional or negligent. It is prosecuted by the criminal courts, but also by the IRS in minor cases (see below). The criminality of tax evasion is founded in the Austrian Criminal Code for Fiscal Matters, *Finanzstrafgesetz* (*FinStrG*), BGBl 1958/129 in its current version, and secondarily by the Criminal Code, *Strafgesetzbuch*, (*StGB*), BGBl. 1974, 60 in its current version.

Counsel advising clients always have to consider one of the most important areas of criminal tax evasion, the possibility to make a voluntary disclosure of tax evasion pursuant to Section 29 of the *FinStrG*. Voluntary disclosure is a complete exemption, and therefore, according to Austria's Supreme Court, *Oberster Gerichtshof*<sup>10</sup> and the Administrative Court of Appeals, *Verwaltungsgerichtshof*<sup>11</sup>, is applied only in narrow circumstances. No specific form or statement is required for disclosure<sup>12</sup>, nevertheless, merely admitting to tax evasion when one is questioned is not sufficient.<sup>13</sup> In determining whether disclosure has been sufficient, one has to look at what would have been required originally to determine the taxes due. It is insufficient to merely give the authorities the opportunity to determine the basis for raising taxes<sup>14</sup> and then to bring up disclosure. There are many situations where disclosure has been 'too late':

- when authorities have already initiated investigative steps under Section

<sup>10</sup> OGH, 28.02.1985, 12 Os 169/84

<sup>11</sup> VwGH, 27.02.2002, 2001/13/0297

<sup>12</sup> VwGH, 14.04.1993, 92/13/0278

<sup>13</sup> OGH, 10.09.2002, 14 Os 6/02

<sup>14</sup> UFS, 10.12.2009, FSRV/0048-L/09

14 paragraph 3 of the FinStrG with regard to anybody involved in an evasion, regardless whether the person making the disclosure was aware of it. This is only the case if the specific tax evasion is public, so that it might not be confused with another file;<sup>15</sup> or

- when all or some elements of the crime have been discovered at the time of disclosure and the taxpayer was aware of the discovery;<sup>16</sup> or
- where in cases the tax authority has already requested access to the accounting records, ordered an inspection by customs, requested access to customs documentation, or started the external audit process and disclosure is not made at the commencement of such investigations. Therefore, if disclosure is made before the tax authority requests accounting records, files etc., then it has been made in a timely manner.<sup>17</sup>

The degree of disclosure and possibility of disclosure must be determined on the facts. Even if given too late, disclosure might still lead to partial immunity or be considered for sentencing purposes.<sup>18</sup>

## 2. THE PRE-COURT PROCESS

### 2.1 Common law and/or Civil Code: assessments, reassessments and administrative determinations

The Federal Ministry for Finance is responsible for raising the federal taxes of personal and corporate income tax, as well as sales tax. Collection is done through the IRS. The applicable IRS Office is determined by the residency of the individual or the seat of the company (the details are regulated in the Revenue Administration Code, *Abgabenverwaltungsorganisationsgesetz*). The taxpayer has the duty to make tax declarations to the responsible tax office at the time determined by law.<sup>19</sup> The IRS has established a web-based system (Finanz-Online) where the taxpayer may make his tax declaration online or access his tax file. The taxpayer may file his declaration himself, through his lawyer, or accountant.

The determination of tax liability has to be done *ex officio*.<sup>20</sup> The kind of evidence used by the IRS, and which may be offered by the taxpayer, is not limited, and the IRS cannot restrict its assessment of the evidence.<sup>21</sup> In principle, this means that different forms of evidence carry the same weight and that there are no specific governing rules. Rules of probability may be considered,<sup>22</sup> and the taxpayer has a right to be heard.<sup>23</sup> However, the taxpayer has to provide evidence to establish the facts ('duty to cooperate')<sup>24</sup>, and is also subject to the duty of disclosure and truthfulness.<sup>25</sup>

The IRS has to admit all evidence, including evidence submitted by

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<sup>15</sup> OGH, 25.08.2011 13 Os 26/11i; as well as VwGH, 24.09.2007, 2007/15/0094

<sup>16</sup> VwGH, 16.03.1995, 95/16/0065

<sup>17</sup> VwGH, 15.12.1998, 93/14/0178

<sup>18</sup> OGH, 14.10.1997, 11 Os 51/97

<sup>19</sup> Sections 133, 134 BAO

<sup>20</sup> Section 115 BAO

<sup>21</sup> Section 167 Paragraph 2 BAO

<sup>22</sup> UFS, 19.10.2005; ZRV/0148-Z3K/04

<sup>23</sup> Section 115 Paragraph 2 BAO

<sup>24</sup> Section 115 BAO

<sup>25</sup> Section 119 BAO

a party.<sup>26</sup> It is entitled to request information with regard to facts and circumstances leading to tax liability, and everyone has a duty to provide such information. The taxpayer himself may be questioned, which in corporate income tax scenarios, is the responsible person of the legal entity.<sup>27</sup> Witnesses may claim the right to remain silent,<sup>28</sup> or otherwise may be questioned under oath.<sup>29</sup> In order to determine taxes, the IRS may request access to company books and records, which every company is required to keep.<sup>30</sup> There is no ‘fruit of the poisonous tree doctrine’ and illegally obtained evidence is not necessarily prohibited.<sup>31</sup>

Banking secrecy, as regulated under Section 38 of the Austrian Banking Code, *Bankwesengesetz (BWG)*, protects the taxpayer from inquiries by tax authorities. However, banking secrecy no longer applies if the account holder is charged with an intentional fiscal crime.<sup>32</sup> This entitles the IRS to make inquiries at the bank where the person or company under investigation might have an account.

Procedures in front of the IRS are non-public and the principle of tax secrecy has to be observed.<sup>33</sup> A violation is punishable by up to three years in prison (Section 310 *Strafgesetzbuch*, abbreviated as *StGB*). The procedure is mainly conducted in writing and the IRS and the taxpayer are each responsible for their own costs.<sup>34</sup> As far as taxes cannot be calculated, due to objective reasons, the IRS may estimate taxes.<sup>35</sup> This may be done for all or part of the taxes due.<sup>36</sup> The goal is to estimate taxes as closely as possible on the factual basis<sup>37</sup> without imposing punitive costs.<sup>38</sup>

The procedure at the IRS ends with the issuance of a tax bill (*Steuerbescheid*), but may be challenged with a complaint (named a *Bescheidbeschwerde* according to Section 243 BAO). The complaint must be filed within one month at the competent office,<sup>39</sup> but time extensions can be granted repeatedly. The complaint does not suspend the original tax bill and IRS may therefore still demand payment.<sup>40</sup> However, a request to have payment suspended may be made. After considering the case, the IRS must come to a preliminary decision with regard to the legality of the tax bill.<sup>41</sup> It does not have to pass a preliminary decision if it submits the case to the Federal Court of Finance (*Bundesfinanzgericht*) within three months.<sup>42</sup>

Even before a taxpayer files a tax declaration, he may request an advanced ruling from the IRS (*Auskunftsbescheid*) about questions of his potential tax liability with regard to corporate reorganisation, corporate tax groups and

<sup>26</sup> Section 183 Paragraph 3 BAO

<sup>27</sup> Section 143 BAO

<sup>28</sup> Section 171 BAO

<sup>29</sup> Section 175 BAO

<sup>30</sup> Section 163f BAO

<sup>31</sup> VwGH, 25.11.1992, 91/13/0030

<sup>32</sup> Section 38 Paragraph 2 BWG

<sup>33</sup> Section 48a BAO

<sup>34</sup> Section 313 BAO

<sup>35</sup> Section 184 BAO

<sup>36</sup> VwGH, 31.07.2012, 2009/13/0052

<sup>37</sup> VwGH, 28.06.2012, 2009/15/0201

<sup>38</sup> VwGH, 11.12.1987, 86/17/0101

<sup>39</sup> Section 245 BAO; Section 249 BAO

<sup>40</sup> Section 254 BAO

<sup>41</sup> Section 262 BAO

<sup>42</sup> Section 262 Paragraph 2 BAO

transfer pricing.<sup>43</sup> The taxpayer must outline the specific facts he wishes to rely on, and the advance ruling will only apply to the specific scenario.<sup>44</sup>

### 2.1.1 Resolving disputes before court

A preliminary decision may be challenged by submitting an appeal to the *Bundesfinanzgericht* within one month.<sup>45</sup> When appealing to the *Bundesfinanzgericht*, there is no restriction on new pleadings or new evidence.<sup>46</sup> Oral hearings will be performed only if requested by a party or seen as necessary by the court.<sup>47</sup> If held, the hearings are public unless the parties request otherwise.<sup>48</sup> The *Bundesfinanzgericht* makes its ruling in the form of *Erkenntnis* or *Beschluss*. A *Beschluss*, according to Section 278 BAO, is passed if the court does not make a decision with regard to the merits of the case, and an *Erkenntnis* is passed with regard to substantive law.<sup>49</sup> The court may replace the findings of the IRS, as well as the reasons, and thus amend the tax bill as it sees fit or reject the appeal as being without merit. If the tax bill is revoked, the tax assessment must start over again (Paragraph 2). However, the IRS is bound by the legal view expressed in the decision of the *Bundesfinanzgericht* (Paragraph 3).

The IRS has to use all means at its disposal to comply with the ruling by the *Bundesfinanzgericht*.<sup>50</sup> If the taxpayer has objections against the actual means applied by the IRS, he may file a *Maßnahmenbeschwerde*, which targets the methods used by the IRS.<sup>51</sup>

If at any point of the procedure the IRS does not act at all, the taxpayer may file for a notice of delay (*Säumnisbeschwerde*) at the *Bundesfinanzgericht*.<sup>52</sup>

### 2.1.2 The criminal context – elements of the offence (laying of the charge)

The general principles of Austrian criminal law also apply to criminal fiscal proceedings according to the *Finanzstrafgesetz*. These are:

- no penalty without law;<sup>53</sup>
- culpability;<sup>54</sup>
- intent, negligence;<sup>55</sup>
- error;<sup>56</sup>
- duress;<sup>57</sup>
- perpetrator, associate;<sup>58</sup>
- attempt.<sup>59</sup>

Only offences committed in Austria may be prosecuted.<sup>60</sup> This is the case

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<sup>43</sup> Section 118 BAO

<sup>44</sup> Section 118 Paragraph 7 BAO

<sup>45</sup> Section 264 BAO

<sup>46</sup> Section 270 BAO

<sup>47</sup> Section 274 BAO

<sup>48</sup> Section 275 Paragraph 3 BAO

<sup>49</sup> Section 279 BAO

<sup>50</sup> Section 282 BAO

<sup>51</sup> Section 283 BAO

<sup>52</sup> Section 284 BAO

<sup>53</sup> Section 4 FinStrG

<sup>54</sup> Sections 6,7 FinStrG

<sup>55</sup> Section 8 FinStrG

<sup>56</sup> Section 9 FinStrG

<sup>57</sup> Section 10 FinStrG

<sup>58</sup> Section 11 FinStrG

<sup>59</sup> Section 13 FinStrG

<sup>60</sup> Section 5 FinStrG



where the perpetrator acted or should have acted in Austria.

The main offences include: (intentional) tax fraud,<sup>61</sup> negligent tax fraud<sup>62</sup> and fiscal misdemeanour.<sup>63</sup> Intentional tax fraud is committed by an intentional breach of the duty to notify, disclose and give truthful information. The same applies for sales tax matters, or includes when tax deductions are claimed but the deduction is used for a different purpose. If committed negligently, this may be prosecuted according to Section 34 *FinStrG*. A fiscal misdemeanour is committed when taxes that the taxpayer calculates himself are not paid in time, or if he obtains tax credit which he has no right to (the latter mainly applies to sales taxes).

### 2.1.3 Early resolution (plea bargain)

Austria does not have a system where plea bargains are allowed but an 'absolute suspension of sentence' doctrine exists. If there is evidence of an offence, discovered in the course of an investigation, the authorities may increase the taxes determined by the investigation by 10 per cent.<sup>64</sup> The amount may not exceed €10,000 per year and €33,000 in total. The taxpayer must accept this within 14 days and waive his right to an appeal. This course of action is not available if criminal investigations are ongoing, self-disclosure has occurred, or if the taxpayer has to be sentenced to avoid future violations.<sup>65</sup>

Plea bargains during a trial are opposed due to the truth discovering purpose of Austrian criminal proceedings.<sup>66</sup> However, the judge may, in the course of determining the trial schedule with the parties, advise the taxpayer to confess and guarantee a lower sentence.<sup>67</sup> This is not considered a plea bargain.

## 3. THE TRIAL PROCESS: FROM COMMENCEMENT TO JUDGMENT

### 3.1 The role of the trier of fact (judge)

The *Bundesfinanzgericht* passes its decisions either through a sole judge or through a *Senat* (Section 12 Federal Fiscal Court Organizational Code, *Bundesfinanzgerichtsgesetz*, abbreviated as *BFGG*). The *Senat* is composed of two professional and two lay judges. A party may object to a judge by claiming he or she is not impartial.<sup>68</sup> He may also object by claiming that disclosure to a lay judge would disclose trade secrets to the competition.<sup>69</sup> Lay judges do not only conduct proceedings, but they are also responsible as the trier of fact.

### 3.1.1 Commencing proceedings in the common law and/or civil court systems

Proceedings at the *Bundesfinanzgericht* are commenced by the taxpayer,

<sup>61</sup> Section 33 *FinStrG*

<sup>62</sup> Section 34 *FinStrG*

<sup>63</sup> Section 49 *FinStrG*

<sup>64</sup> Section 30a *FinStrG*

<sup>65</sup> Section 30a Para 6 *FinStrG*

<sup>66</sup> VwGH, 29.04.2010, 2009/15/0030

<sup>67</sup> OGH, 04.03.2010, 13 Os 1/10m

<sup>68</sup> Section 268 Paragraph 1 BAO

<sup>69</sup> Section 268 Paragraph 2 BAO

who has one month to file an appeal with a *Bescheidbeschwerde*.<sup>70</sup> This has to be done in writing<sup>71</sup> but no reasons for the appeal need to be provided.<sup>72</sup> According to Section 265 BAO the appeal may also be filed by the IRS. The *Bescheidbeschwerde* does not suspend the original tax bill unless requested by the taxpayer.<sup>73</sup> Suspension must be granted unless the appeal is without merit.<sup>74</sup>

### 3.1.2 The Government response

If the IRS files an appeal, it must include a filing report (*Vorlagebericht*), detailing the facts, naming the evidence, and the agency's reasoning.<sup>75</sup> The IRS has to inform the parties when the filing took place, send a copy of the filing report,<sup>76</sup> and send an index of the entire file to the parties.<sup>77</sup> It also has to concurrently submit the entire file with the index to the *Bundesfinanzgericht*.

### 3.1.3 The burden of proof

In procedures related to administrative appeals, it is up to the parties to provide evidence favourable to their case. Only in cases where the *Bundesfinanzgericht* has doubts justified by objective concerns, can the court investigate the truth independently. This is based on the principle that all taxpayers must receive the same treatment.<sup>78</sup> The court is not restricted to looking at issues raised in the appeal, but can look at the tax bill from all possible angles.<sup>79</sup> To determine the facts, the court may conduct a preliminary investigation by a revenue office,<sup>80</sup> and may conduct a pre-trial hearing with the parties.<sup>81</sup> The taxpayer may also submit new evidence and new pleadings until the conclusion of the final hearing.<sup>82</sup>

#### (i) Common law and/or Civil Code

The burden of proof is the same as in the preceding administrative procedure. The court has a duty to discover the facts and the taxpayer has a duty to cooperate. If this leads to facts that would justify a duty to pay taxes, these facts have to be proven by the IRS.<sup>83</sup> The taxpayer in turn has to provide proof for all facts, benefits, reductions, etc. that would decrease or nullify his tax liability<sup>84</sup> or reverse a legal presumption.<sup>85</sup>

#### (ii) Criminal cases

Fiscal criminal authorities have to determine the facts *ex officio*, and criminal

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<sup>70</sup> Section 264 BAO

<sup>71</sup> compare section 85 BAO

<sup>72</sup> VwGH, 28.11.1995, 93/16/0030

<sup>73</sup> Section 212a BAO

<sup>74</sup> Section 212 a BAO

<sup>75</sup> Section 265 Paragraph 3 BAO

<sup>76</sup> Section 265 Paragraph 4 BAO

<sup>77</sup> Section 266 Paragraph 1 BAO

<sup>78</sup> UFS, 08.09.2008 RV/1854-W/08, UFSjournal 2008, 19

<sup>79</sup> VwGH,04.03.2987, 85/13/0195

<sup>80</sup> Section 269 Paragraph 2 BAO

<sup>81</sup> Section 269 Paragraph 3 BAO

<sup>82</sup> compare VwGH, 21.5.1992, 88/17/216

<sup>83</sup> VwGH,04.09.1986, 86/16/0114

<sup>84</sup> VwGH, 28.02.1995, 95/14/0016

<sup>85</sup> VwGH, 29.09.1992, 89/17/0181

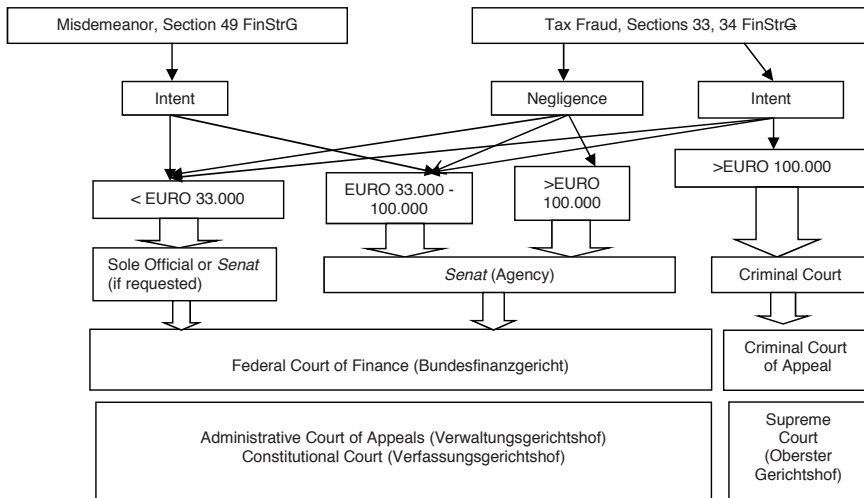
investigations are not bound by any determinations of facts made by the IRS. When determining tax evasion, the presumption of innocence has to be applied and since the authorities have the burden of proof, doubts are in favour of the taxpayer.<sup>86</sup> The prosecution has to provide proof with regard to all elements of the offence,<sup>87</sup> and is prohibited from using illegally obtained evidence to the detriment of the taxpayer.<sup>88</sup>

### 3.1.4 The trial timetable

There is no timetable that guides the length of litigation; therefore, the duration of a given tax case depends on the complexity of the case.

## 3.2 The criminal process – how it begins

If the IRS gains knowledge of an offence in the course of its duties, it must notify the competent authorities.<sup>89</sup> However, it may refrain from notifying the authorities if the offence is minor and there is no danger of far-reaching consequences.<sup>90</sup> In order to start an investigation, there needs to be sufficient grounds to suggest that an individual is potentially evading taxes. This conclusion may only be drawn on the basis of facts.<sup>91</sup> The criminal investigations must be filed,<sup>92</sup> naming the relevant statutory provision.<sup>93</sup> Moreover, the taxpayer must be given the opportunity to exculpate himself.<sup>94</sup> What follows next is the procedure described in the chart below:



<sup>86</sup> VwGH, 28.06.2012, 2009/16/0076; VwGH, 04.03.1999, 98/16/0389

<sup>87</sup> VwGH, 17.10.2012, 2009/16/0190

<sup>88</sup> Section 98 Paragraph 4 FinStrG

<sup>89</sup> Section 80 FinStrG

<sup>90</sup> Section 25 Paragraph 2 FinStrG

<sup>91</sup> VwGH, 17.09.1992, 91/16/0099

<sup>92</sup> Section 83 FinStrG

<sup>93</sup> Section 117 FinStrG

<sup>94</sup> Section 116 FinStrG

## 4. DOCUMENTARY EVIDENCE

### 4.1 Pre-trial exchange of documentary evidence

As already mentioned, the taxpayer has a duty to cooperate. For instance, in cases where he has a number of cross-border transactions, he must be able to document his business relations if authorities request him to do so.<sup>95</sup> The duty of disclosure, truthfulness, and notification<sup>96</sup> is not restricted by the general prohibition against self-incrimination, if the illegal activities do not constitute an offence.<sup>97</sup> The parties have the right to access the fiscal files,<sup>98</sup> which includes the right to make copies.<sup>99</sup> The right of access does not include internal memos or documents incriminating third parties.

#### 4.1.1 Examinations for discovery before trial

Austria does not have a formal discovery process. As stated, the taxpayer has the right to access the files,<sup>100</sup> and may, in preparation of the ensuing proceedings, request to submit new evidence and new pleadings.<sup>101</sup> The IRS may request the taxpayer to submit further documents and name additional witnesses.<sup>102</sup>

#### 4.1.2 Special rules: special considerations

As previously pointed out, the IRS has to make inquiries *ex officio* (lawfulness of the administration etc.) and the taxpayer has a duty to cooperate.

### 4.2 Criminal context: disclosure

Austrian criminal procedure does not have a discovery process. In criminal procedures, all evidence is equal and unrestricted, and the court is free in weighing the evidence.<sup>103</sup> The court also has to give the parties access to files and the opportunity to make copies if needed.<sup>104</sup> If access is denied, this may only be challenged with the final decision.<sup>105</sup> The authorities have extensive powers under Section 99 *FinStrG*, for example, the right to call witnesses and third parties. Except in unusual circumstances, the taxpayer has the right to be present when evidence is gathered.<sup>106</sup> In a criminal procedure, the taxpayer does not have the duty to disclose and tell the truth. The taxpayer is protected from answering questions and is protected from self-incrimination.<sup>107</sup>

#### 4.2.1 Special considerations

In cases where the criminal proceedings are based on a prior administrative proceeding, the protection against self-incrimination of Section 84 *FinStrG* will have very little effect.

<sup>95</sup> VwGH, 01.06.2006, 2004/15/0066

<sup>96</sup> Section 119 BAO

<sup>97</sup> OGH, 29.08.2000, 14 Os 33/00

<sup>98</sup> Section 90 BAO

<sup>99</sup> VwGH, 12.01.1971, 386/70

<sup>100</sup> Section 90 BAO

<sup>101</sup> Section 280 BAO

<sup>102</sup> Section 119 BAO

<sup>103</sup> Section 98 *FinStrG*

<sup>104</sup> Section 79 *FinStrG*

<sup>105</sup> VwGH, 19.03.2003, 2000/16/0064

<sup>106</sup> Section 78 *FinStrG*

<sup>107</sup> Section 84 *FinStrG*

## 5. WITNESS EVIDENCE

### 5.1 Common law and/or Civil Code: trial considerations

In tax litigation there is no right to a lineup or to cross-examine a witness.<sup>108</sup> The judge may base his ruling only on evidence which he has gathered himself, and also does not have to hear new witnesses.<sup>109</sup> The *Bundesfinanzgericht* may therefore base its ruling on evidence solely gathered by the IRS.

#### 5.1.1 Witness preparation

A witness should be prepared by counsel before the trial begins. Counsel can ensure that the witness knows the facts of the case and, if necessary, can produce the required documentation. If a witness can support a taxpayer's legal point of view, counsel may request his testimony. It is the taxpayer's duty to make former business partners and other witnesses living abroad to appear in court.<sup>110</sup>

### 5.2 Criminal context – hearsay evidence

Austrian criminal law has no prohibition against hearsay evidence.<sup>111</sup> Courts will give such hearsay evidence the respective significance, as it is treated very cautiously, and only used if no other evidence is available.<sup>112</sup>

## 6. EXPERT EVIDENCE

### 6.1 Common law and/or Civil Code – the expert report

Apart from the cases where administrative regulation requires the consultation of an expert, the court has to request an expert's analysis or report if the court cannot discover the truth using its own expertise.<sup>113</sup> The court may appoint anyone who is registered or who practices the required science, art, business, or has a licence to do so.<sup>114</sup> The parties may not claim an error of procedure if the court has the experience or expertise to determine the facts without an expert.<sup>115</sup>

#### 6.1.1 Expert evidence at trial

The parties can challenge an expert's opinion with their own private expert opinion if it deals with the same methods conducted by the public expert.<sup>116</sup> The determination of facts cannot be done by an expert, and is the responsibility of the administrative body or court.<sup>117</sup>

### 6.2 Criminal context – the expert

When an expert is called in, the court has to appoint him or her to the required area of expertise.<sup>118</sup> As in purely administrative or fiscal cases,

<sup>108</sup> VwGH, 31.03.2011, 2009/15/0199

<sup>109</sup> compare VwGH, 31.03.2011, 2009/15/0199

<sup>110</sup> VwGH, 22.04.2009, 2004/15/0144

<sup>111</sup> prevailing case law: OGH, 11.02.1970, 12 Os 177/69; last OGH, 05.10.2004, 14 Os 107/04

<sup>112</sup> OGH, 14.02.2001, 7 Ob 301/00s

<sup>113</sup> Section 177 BAO

<sup>114</sup> VwGH, 21.02.2007, 2003/06/0083

<sup>115</sup> VwGH, 14.12.2011, 2010/17/0167

<sup>116</sup> VwGH, 05.11.2009, 2009/16/0169

<sup>117</sup> VwGH, 08.06.1994, 92/13/0155

<sup>118</sup> Section 109 FinStrG

an expert has to be appointed if the court does not have the experience or expertise to gather the evidence. In cases where the court does have enough expertise, the appointment of an expert is unnecessary.<sup>119</sup>

### **6.2.1 Special considerations**

The *Oberster Gerichtshof* has recently confirmed that the use of private experts is contrary to the concept of fiscal criminal law. The selection of an expert is up to the court and the purpose of private experts is to inform the parties and their counsel. Hence, there is no statutory basis which would allow these 'private reports' to be included in the court files (section 258 Abs 1 of the Criminal Procedure Code, *Strafprozessordnung (StPO)*). If a private report is included in the file, the finding may be questionable.<sup>120</sup> Drawing factual conclusions is left to court appointed experts. Since procedural law only knows court appointed experts, private experts are considered to be mere witnesses.<sup>121</sup>

## **7. ARGUMENT**

### **7.1 Common law and/or Civil Code: closing the case**

Austrian civil law does not know anything like the Anglo-American final or closing argument. The parties are free to summarise their case before the judge closes but there is no official requirement to do so.

### **7.2 Criminal context – closing the case**

In criminal proceedings the defendant always has the right of 'the last word' (section 130 FinStrG, section 255 StPO) where he can summarise the arguments for his case and even request the taking of new evidence.

## **8. THE DECISION**

### **8.1 Common law and/or Civil Code context**

The court's decision may grant the appeal, turn down the appeal, change the original tax bill or overturn the tax bill. The decision has to contain the reasons in order to make judicial review by the *Verwaltungsgerichtshof* and the *Verfassungsgerichtshof* possible. The decision may also contain a *reformatio in peius*.<sup>122</sup>

### **8.2 Criminal context**

The necessary elements of the decision are regulated in Section 137 *FinStrG*. It is essential that it contains a verdict, reasons, and instructions on the right to appeal.

## **9. COSTS**

### **9.1 Common law and/or Civil Code**

The parties have to bear their own costs.<sup>123</sup> If a proceeding is found to

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<sup>119</sup> VwGH, 25.10.1995, 93/15/0119

<sup>120</sup> Section 281 para 1 ciff 5a StPO

<sup>121</sup> OGH, 17.02.2011, 13 Os 12/10d; OGH, 14.01.2004, 13 Os 170/03; OGH, 26.09.2001, 13 Os 34/01

<sup>122</sup> Section 279 Paragraph 1 BAO

<sup>123</sup> Section 313 BAO

be entirely without merit, there is a possibility to sue the governmental authority for damages.

## 9.2 Criminal context

The taxpayer has to bear part of the costs if found guilty.<sup>124</sup> It is composed of a lump sum of no more than €500. The calculation is as follows: 10 per cent of the fine, and in the case of prison sentences, €5 for each day of imprisonment. The costs incurred by the court for the taking of evidence, as well as the costs for seizures, custody, confinement etc are also included. No costs are due if there is no sentence, or if only a warning is issued.<sup>125</sup> The parties have to pay costs for their attorneys unless counsel was appointed for them by the court.<sup>126</sup>

## 10. APPEALS

### 10.1 Common law and/or Civil Code – the right to appeal

The decision may finally be appealed to the *Verwaltungsgerichtshof*, if it requires the clarification of a point of law, in particular, if the tax bill follows a different reasoning than prevailing case law, if there is no case law, or if case law is contradictory.<sup>127</sup> In its decision, the *Bundesfinanzgericht* must make a pronouncement as to whether the case may be appealed, and if not, the appeal has to show that the *Bundesfinanzgericht* was wrong in not allowing the appeal. The IRS may also file for an appeal.<sup>128</sup>

#### 10.1.1 Basic procedure to appeal

The appeal to the *Verwaltungsgerichtshof* has to name the tax bill in question, the competent tax office responsible for the tax bill, the facts and the legal provisions which the appellant assumes to have been violated, the request for legal remedy, and facts supporting a finding that the appeal is not time barred (section 28 of the Administrative Court of Appeals Procedure Code, *Verwaltungsgerichtshofgesetz*, abbreviated as *VwGG*).

The period of time for an appeal to the *Verwaltungsgerichtshof* is six weeks.<sup>129</sup> Decisions where the fine is no more than €750 and no prison sentence is involved may not be appealed.<sup>130</sup> The *Verwaltungsgerichtshof* only reviews cases that dispute points of law, and not findings of fact determined by *Bundesfinanzgericht*.<sup>131</sup> There is a prohibition against the gathering of new facts and pleadings. The weighing of evidence is only reviewed with regard to soundness.<sup>132</sup>

In any case, be it criminal or administrative, if the taxpayer can make a claim that the court's decision has been passed in violation of his constitutional rights, he may appeal to the *Verfassungsgerichtshof*.

Even if a decision has become legally binding, the taxpayer and the IRS

<sup>124</sup> Section 185 FinStrG

<sup>125</sup> Section 25 FinStrG

<sup>126</sup> Section 77 FinStrG

<sup>127</sup> Article 133 Paragraph 4 B-VG

<sup>128</sup> Section 292 BAO

<sup>129</sup> Section 26 VwGG

<sup>130</sup> Section 25 Paragraph 4 VwGG

<sup>131</sup> Section 41 Paragraph 1 VwGG

<sup>132</sup> VwGH, 20.12.2012, 2009/15/0146

may request for the case to be reopened.<sup>133</sup> There are a few situations where this would arise:

- the tax bill was obtained by a criminal act, (eg, fraud); or
- new facts or evidence have been discovered after the end of the proceedings; or
- the tax bill depended on the answering of preliminary questions<sup>134</sup> which were decided differently afterwards by a court or an administrative body;

and as a result of any one of the above, the court would grant a different finding. The reopening procedure is not intended for the revision of wrong legal reasoning in the original case.<sup>135</sup> The party requesting a reopening of the case has the burden of proving that the conditions are fulfilled.<sup>136</sup>

## 10.2 Criminal context – the right to appeal

As shown above, according to Criminal Fiscal Procedural law, the taxpayer has the possibility of an appeal on legal grounds to the *Verwaltungsgerichtshof* or an appeal and a nullity appeal to the *Oberster Gerichtshof*. The IRS may also appeal to the *Verwaltungsgerichtshof*.<sup>137</sup> The office of the district attorney may also file a nullity appeal.<sup>138</sup>

The reasons for reopening a case are basically those shown for administrative procedures.<sup>139</sup> If the inculcating effect of disclosure pursuant to Section 29 *FinStrG* is nullified, then a case may be reopened.<sup>140</sup>

### 10.2.1 Basic procedure to appeal

Austrian fiscal criminal procedure is divided into a system with the IRS and the administrative courts on one hand, and the criminal courts on the other (view the chart under section 3 above). A misdemeanour, negligent, or intentional offence involving less than €100,000, is prosecuted by the IRS. In these cases, a final appeal might be filed to the *Verwaltungsgerichtshof*. For all other intentional offences involving more than €100,000, a final appeal might be filed to the *Oberster Gerichtshof*.

## 11. HOT AREAS OF INTEREST

### 11.1 Common law and/or Civil Code

#### 11.1.1 Transfer pricing

The delivery of goods and services within the internal network of a company is regularly reviewed by the IRS as to whether prices charged are those which would be charged to third parties (arms-length-principle).<sup>141</sup> Based on the OECD transfer pricing principles, the Federal Ministry for Finance passed the Transfer Pricing Directive 2010. This is only intended as an interpretation guideline and not the basis for further rights. However, the OECD

<sup>133</sup> Sections 303ff. BAO

<sup>134</sup> Section 116 BAO

<sup>135</sup> VwGH, 21.12.2012, 2009/17/0199

<sup>136</sup> VwGH, 23.09.2010, 2010/15/0144

<sup>137</sup> Section 169 *FinStrG*

<sup>138</sup> Section 282 *FinStrG*

<sup>139</sup> Section 165 *FinStrG*

<sup>140</sup> Section 165 Paragraph 1 (ciff e) *FinStrG*

<sup>141</sup> Section 6 Paragraph 6 *EStG*



recommendations gain legal relevance as an interpretive aid when dealing with double taxation agreements.<sup>142</sup> The taxpayer is entitled to start a mutual agreement procedure in his country of residence if he is of the opinion that one or both parties to a double taxation treaty set laws violating the treaty.<sup>143</sup> The request may be filed the moment the taxpayer becomes aware that the IRS is considering a profit adjustment. The taxpayer may also start arbitration under the Convention on the Elimination of Double Taxation in Connection with the Adjustment of Profits of Associated Enterprises.<sup>144</sup>

### 11.1.2 GAAR (General Anti-Avoidance Rules)

The main provisions against tax avoidance in Austria are contained in Sections 21ff BAO. Fictitious transactions are irrelevant for tax liability ('substance over form'). Concurring with the European Court of Justice, the *Verwaltungsgerichtshof*<sup>145</sup> assumes an abuse of form under Section 22 BAO in cases where the financial motives for the transaction are unusual or inappropriate, and may only be explained by the avoidance of taxes. However, if there is evidence that the transaction was taken for other purposes than to avoid tax, the transaction may not be considered as a misuse of form.<sup>146</sup> According to Section 23 BAO, fictitious deeds or transactions are legal actions that are not seriously intended and are only completed for superficial reasons, but have a different legal content.<sup>147</sup> Contracts between family members are regularly screened by the IRS as to whether they are fictitious<sup>148</sup> (with special consideration of the 'arms-length-principle')<sup>149</sup>; as well as contractual agreements between shareholders<sup>150</sup> and between directors and their company.<sup>151</sup> Hidden dividends are also screened by the IRS.<sup>152</sup> The main feature of a hidden payment of dividends is that payment is not an obvious distribution of profits, but has its origin in the corporation. Again, the arms-length-principle is applied.<sup>153</sup> Whether the agreement would have been concluded between independent third parties is a question of fact determined on the evidence.<sup>154</sup> However, a fictitious agreement has full legal effect under civil law even if its intent was to evade taxes.<sup>155</sup>

### 11.1.3 Director's liability

A corporation's individuals are responsible for the payment of taxes. They may not claim that third parties actually controlled the legal entity when trying to justify their own negligence.<sup>156</sup> A director who is not responsible for the payment of taxes, according to the by-laws of the legal entity, will

<sup>142</sup> VwGH, 24.11.1999, 94/13/0233

<sup>143</sup> Article 25 of the OECD Model Convention regarding double taxation

<sup>144</sup> 90/436/EEC

<sup>145</sup> VwGH, 20.05.2010, 2006/15/0005

<sup>146</sup> VwGH, 18.10.2012, 2010/15/0010

<sup>147</sup> VwGH, 23.01.2013, 2009/15/0017

<sup>148</sup> VwGH, 22.11.2012, 2008/15/0265

<sup>149</sup> VwGH, 31.07.2012, 2008/13/0193

<sup>150</sup> VwGH, 05.09.2012, 2010/15/001

<sup>151</sup> VwGH 26.04.2012, 2008/15/0315

<sup>152</sup> VwGH, 05.09.2012, 2010/15/0018; VwGH, 26.04.2012, 2008/15/0315; VwGH, 29.03.2012, 2008/15/0170

<sup>153</sup> VwGH, 24.02.2011, 2008/15/0185

<sup>154</sup> VwGH, 20.10.2004, 2000/14/0114

<sup>155</sup> OGH, 16.12.2008, 8 Ob 148/08k

<sup>156</sup> VwGH, 24.01.2013, 2012/16/0100

usually not be charged. However, if he violates his duty of care by not acting in cases of irregularities, he shall be liable, unless there are good reasons for his inability to supervise the other directors. The duty to supervise a co-director only arises if there are indications that place doubt on the care used by the co-director.<sup>157</sup> If appointed or hired, a director has to make sure that he knows whether the company has paid its taxes. If the company is in default with tax payments, it is a director's duty to ensure that the company complies with its legal duties.<sup>158</sup>

#### **11.1.4 Trust cases**

Trusts are not considered to be fictitious transactions.<sup>159</sup> In corporate law, the trustee becomes the shareholder; however, for tax purposes, the settlor may be considered as being the shareholder.<sup>160</sup>

#### **11.1.5 Tax shelters**

There are no tax shelters in Austria. The territory of the Republic of Austria is a uniform tax area with no free trade zones or similar regions.

### **11.2 Criminal context**

#### **11.2.1 Tax evasion**

A company's tax liability may be altered insofar that it discovers internal tax violations. Income from criminal transactions is not *per se* tax exempt, but it must be looked at to determine whether it fulfils any of the criteria leading to taxable income.<sup>161</sup> Tax evasion is committed if the company receives a permanent profit or a temporary profit.<sup>162</sup> Money does not need to be permanently irrecoverable to the IRS to constitute tax evasion, as delinquent payments are enough to give rise to an offence of tax evasion.<sup>163</sup>

#### **11.2.2 Law office searches**

Section 89 Paragraph 4 of the *FinStrG* gives authorities certain search and seizure rights with regard to law offices. However, attorney-client privilege applies to documents, unless the attorney himself was involved in the offence.

#### **11.2.3 Sentencing**

Sentencing is done according to Section 21 of the *FinStrG*, where the sentence is premised on the most severe offence. The sentence is based on the perpetrators culpability<sup>164</sup> and subsequent payment of taxes is considered a mitigating circumstance.<sup>165</sup> According to prevailing case law, sentencing is up to the court or discretion of the IRS, and is only subject to review if the court or the IRS have used its powers contrary to the spirit of the law.<sup>166</sup>

<sup>157</sup> VwGH, 28.6.2012, 2009/16/0244; VwGH, 22.12.2011, 2009/16/0109

<sup>158</sup> VwGH, 09.11.2011, 2011/16/0079

<sup>159</sup> VwGH, 25.01.2006, 2002/13/0027

<sup>160</sup> VwGH, 23.11.2005, 2005/16/0040

<sup>161</sup> OGH, 29.08.2000, 14 Os 33/00

<sup>162</sup> VwGH, 03.05.2000, 98/13/0242

<sup>163</sup> OGH, 15.03.2000, 13 Os 172/99

<sup>164</sup> Section 23 *FinstrG*

<sup>165</sup> OGH, 21.09.1988 14 Os 82/88

<sup>166</sup> VwGH, 28.10.2009, 2008/15/0172

**Annex: List of countries with which Austria has double taxation treaties**

Albania, Algeria, Argentina, Armenia, Azerbaijan, Australia, Bahrain, Barbados, Belarus, Belgium, Belize, Bosnia Herzegovina, Brazil, Bulgaria, Canada, China, (former) CSSR, Croatia, Cuba, Cyprus, Czech Republic, Denmark, Egypt, Estonia, Finland, France, Georgia, Germany, Great Britain, Greece, Hong Kong, Hungary, India, Indonesia, Iran, Israel, Italy, Japan, Kazakhstan, Kuwait, Kyrgyzstan, Latvia, Liechtenstein, Lithuania, Luxembourg, Macedonia, Malaysia, Malta, Morocco, Mexico, Moldavia, Mongolia, Nepal, Netherlands, New Zealand, Norway, Pakistan, Philippines, Poland, Portugal, Qatar, Republic of Ireland, Romania, Russia, San Marino, Saudi Arabia, Serbia, Singapore, Slovakia, Slovenia, South Africa, South Korea, Spain, Sweden, Switzerland, Tadzhikistan, Thailand, Tunisia, Turkey, Turkmenistan, (former) USSR (Soviet Union), Ukraine, United Arab Emirates, United States of America, Uzbekistan, Venezuela, Vietnam.

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