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Tax Controversy

Introduction

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COVID-19

The preparation and publication of this second edition of the Tax Controversy Guide coincides with the state of emergency or state of alert all over the world provoked by the COVID-19 pandemic. As stressed by all reports, governments have adopted unprecedented measures, along similar lines, to protect the health of individuals and to sustain their economies, whilst supporting families and companies to enable them to resist the economic slowdown. Strict quarantine requirements were applied everywhere: closed borders, travel bans, shuttered businesses and restrictions on the right to go out. Teleworking, whenever possible, became the norm almost globally, with a few exceptions. Courts were closed or not, depending on the countries in question, but deadlines and terms related to pending or new cases were suspended – at least for a while – in countries ranging from Austria, to Spain, UK, Italy, Columbia, Greece, the Philippines, Ukraine, etc. Unfortunately, this year's edition does not contain a chapter from China.

For the time being, governments have been assisting individuals and companies in need with measures that postpone payments or embrace flexible approaches towards compliance with specific obligations due in the second quarter of 2020. However, public spending has increased substantially, and it is expected that the pandemic crisis will leave the world deeply in debt. The situation is naturally different in each country, as a perusal of the different chapters in this Guide will immediately elucidate. However, many chapters emphasise this fact and if some authors cannot yet predict whether this will have effects on pending or upcoming tax controversies (like Austria or Belgium), others fear new taxes will be created and at the same time predict that the tax authorities will be inclined to be stricter or/and carry out more extensive audits (US, Israel, Spain, Portugal, Greece, Mexico, Ukraine, etc.).

More than ever, the management and control of tax risks is a primary goal for both tax authorities and taxpayers. For the former, it is disastrous if the State is unable to collect the expected level of revenue. For the latter, tax is a significant cost for business and an incorrect estimate can jeopardise a company's level of profitability and damage its reputation, not to mention cause egregious disadvantages and losses. However, now it is almost certain that debt and public expenses will increase while tax collection levels will drop in the short term due to the economic contraction.

It might be debatable whether, as some have argued, taxes are a prime mover of history. One cannot ignore facts, however. The US chapter calls our attention to the American experience after the 2008 crisis and relates how both tax authorities and MNEs were in need of revenue and neither was prepared to compromise easily.

Anticipated Increases in Tax Litigation

Inevitably, no one can anticipate and eliminate entirely the potential adverse situations that lead to disputes. Although disagreements may emerge suddenly and in relation to all type of taxes, the majority of reports refer to the many international, complex and controversial substantive tax matters around the BEPS Recommendations and the legislation created afterwards, MLI, digital taxation and the use of the general anti-abuse rule (GAAR) to challenge cross-border transactions, although many of them cannot ascertain whether these have so far contributed to an increase in the level of tax controversies. But there are already many authors anticipating more litigation. Some, like the Dutch report, emphasise that substance is no longer an absolute safe harbour and that legal certainty has decreased. On the other hand, in the UK chapter it is stressed that the subject of tax litigation may be expected to shift gradually from avoidance schemes to questions arising from the inevitable uncertainty over the interpretation and application of tax litigation and procedural issues. This seems clear given the amount of new legislation and open concepts applied worldwide. Moreover, new international instruments such as the MLI are expected to have significant impact on how anti-abuse rules will be applied, which will probably increase litigation.

The tax authorities of each jurisdiction might have different perspectives and approaches on how to combat non-compliance with tax obligations or tax avoidance. Nevertheless, they are all undoubtedly better equipped and prepared, with substantial information at their disposal about taxpayers, as well as their own activity, and they are much more integrated internationally.

Audit Strategy and the Road Ahead

Perusing the reports, we notice that taxpayers, even multinational enterprises (MNEs) and high net worth individuals (HNWIs), are often caught in the crossfire created by the competition between states for capital and investment, and suffer from a changing and uncertain compliance landscape. It is therefore extremely valuable to know how to anticipate, prepare

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for and manage possible audits or to verify whether it is possible to eliminate or mitigate tax risks, either before or during a specific controversy.

This Guide presents an excellent overview of the main aspects of the tax controversies that are common and distinct in 20 jurisdictions, but also provides a very interesting global analysis of trends:

- the origin and causes of tax controversies;
- the continuous efforts to combat tax avoidance and evasion;
- the means to mitigate and manage tax risks and to stay up to date with the best ways to settle cases; and
- the strategies to employ in the context of administrative or judicial litigation.

The reader will also be able to gather comparative information on all the phases of tax litigation in each jurisdiction, either in domestic or cross-border disputes, and will be able to garner an idea of costs and statistics in the area of tax litigation, including the number of cases and the likelihood of a successful outcome for either the tax authorities or taxpayers.

International Tax Authority Co-operation

It is clear from all the chapters that tax authorities are collecting more and more information concerning taxpayers, and their businesses and cross-border activities (either through exchanges of information and mutual assistance or through the CbC reports, CRS or other mechanisms or groups – JITSIC). Soon the reporting obligations foreseen in DAC 6 will also be automatically exchanged in the EU. Whether one is in the UK, Japan or Brazil, the tax authorities now know more than in previous years. However, given the specific circumstances, culture and approaches in each jurisdiction, there is no unanimity as to whether this has been leading, or will lead, to an increase in tax controversies.

Litigation and Tax Authority Approaches

According to the country reports, it seems that some tax authorities are investing in minimising tax disputes, either helping taxpayers effectively via direct contact or through the use of alternative dispute resolution mechanisms. It seems that this open approach pays off, considering that when litigation occurs the tax authorities claim a higher success rate before the tax tribunals or higher courts, as emphasised by New Zealand and Switzerland reports.

In countries where the tax authorities seem more reluctant to invest in assisting taxpayers dealing with complex legislation and ambiguous matters, additional tax assessments grow significantly, which also gives rise to an increase in the number of

controversies. Unsurprisingly, this reflects negatively on how investors evaluate the “tax element” when researching the different aspects of doing business in that specific jurisdiction, as the Brazilian report suggests. In these countries it is more common for courts to rule in favour of taxpayers.

The tax legislation and the tax authorities’ approach in some other countries, meanwhile, seem to occupy a middle ground between the types of patterns described above. Statistics regarding the success of the tax authorities in litigation seem to be in line with this, for instance in Portugal and Spain.

Efficient ADR mechanisms may also be very helpful in preventing/reducing disputes, or at least resolving them quickly, as the Portuguese domestic arbitration system shows. But the administrative attitude and the taxpayer culture still seem to be the crucial elements, ie, without a willingness on the part of both the authorities and taxpayers to work collaboratively, and with reasonable alacrity, ADR mechanisms may not be sufficient.

Criminal Tax Controversies

This Guide also illustrates the way tensions may be avoided as they arise and may evolve from tax audits up to the higher tribunals, either through administrative and civil discussions where anti-avoidance rules, including transfer pricing, still play an important role; or in the context of tax evasion or fraud – involving, for example, dishonest conduct and false accounting – when such matters will usually be treated as crimes, and where the proceedings and the investigations are conceptually separate and evolve independently. The Guide explains the differences, the possible interactions between tax assessments and tax infringements and the possibilities to reduce fines and/or to initiate and conclude settlements. In some countries we notice that there is an increased risk of criminal liability, not only for the taxpayers themselves but also for the so-called facilitators.

Litigation Strategy

At the same time, the reader is guided by each author through different geographies along the administrative and judicial routes, from the first to the final stages (that is, considering administrative hierarchical or judicial appeals), considering deadlines, intricate proceedings and rules and principles that reveal how disputes may be settled in the most appropriate manner.

Despite the existence of absolutely different procedural rules and ways to settle tax disputes, we observe several important common features that contribute to taxpayers’ best interests, which are stressed by the majority of authors.

These include:

- the importance of being prepared before an audit has even started and of being assisted by a legal adviser from the first hour;
- the need to be fully conversant with all the relevant facts around the potential controversy and to evaluate the risks and associated contingencies in order to minimise them;
- supporting the facts and bolstering the substance of the case, disclosing documentation and engaging expert assistance, or any other necessary support;
- verifying if the dispute may be narrowed, either by settling or abandoning any of the issues, but making wise use of all procedural and material rights; and
- the importance of an awareness of previous case law, even in civil law jurisdictions where precedent does not have the same strength as in common law systems, an importance that increases with the need to know international jurisprudence from the ECJ or the ECHR and even being aware of comparative jurisprudence or doctrine.

Naturally, in-depth analysis of a case, its facts and the applicable rules of law, are crucial to mastering tailor-made strategies for individual cases, as the reports emphasise. The reader will certainly understand that, in spite of globalisation and of similar concepts/substantive tax issues (such as transfer pricing matters, hybrid mismatches, recharacterisation issues or cross-border disputes after BEPS) or procedural rules and principles, the way disputes may best be settled in each country is still part of the expertise and art of practitioners in the respective jurisdictions.

International Issues

The different reports also emphasise the use of domestic or international tools such as the mutual agreement procedure to solve cross-border disputes, indicating how they usually interact. Some of the reports allude to the Multilateral Instrument (MLI), considering that it is already in force in several countries and provide an idea of the crucial matters (eg, the Netherlands).

It is also interesting to observe that GAAR and SAAR (Specific Anti-Abuse Rule) application in a treaty context have already been challenged in several court cases, for instance, in New Zealand and Italy, and that several other reports observe that confidence in the compatibility that the tax authorities and states seem to stress (these days, along with the OECD Model Tax Convention commentaries) is not shared by many taxpayers and is still not applied worldwide. However, the MLI may change the course of things, in particular considering the "saving clause" (Article 11).

The fight for income from international taxation ignites intense discussion, with taxpayers but also among different tax authorities and states. The appearance of so many new tools and weapons to combat tax avoidance allows us to predict that tax disputes will increase, unless a great investment is made in assisting taxpayers on a daily basis and in creating ADR mechanisms.

Conclusion

Although authors from several jurisdictions predict stricter audits and possibly additional tax assessments, and even more taxes, after this first phase of moderation due to COVID-19 elapses, one should bear in mind the judicious views expressed by the New Zealand contributor, stating that the authorities will have to reconsider the approach to "recovery" when the nation will want to preserve the business sector considering the need for a long-term economic recovery.

Considering that every move takes time and that the state of the art in each jurisdiction is at a different stage of development, the present guide is an excellent tool for professionals – tax lawyers, barristers, and in-house lawyers, but also company CFOs and members of their departments, tax consultants, judges, or other professionals – to provide a compass in finding the right path when preparing and handling a tax audit or controversy; either to assist in managing a good settlement or, if this proves unworkable, conducting a successful dispute.

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Morais Leitão, Galvão Teles, Soares da Silva & Associados has the largest tax group of any Portuguese firm, with ten partners and more than 30 other lawyers. Tax litigation is the main focus of this group, involving all types of tax controversies and para-fiscal duties, and the different teams for each project include partners and associates with experience and skills in processual and court cases, and others with particular knowledge in business and substantive tax matters, acting for some of

the largest national and foreign corporate groups from a wide range of sectors, including energy, oil and gas, mining, banking and finance, private equity funds, media, telecommunications and construction. The firm's tax lawyers work closely with colleagues in the transaction and corporate department of the firm, on matters relating to banking and finance, group reorganisations, M&A (both domestic and international) and real estate, among others.

Contributing Editor



Francisco de Sousa da Câmara is a senior partner who has headed the tax teams in Lisbon and Madeira for more than two decades. He specialises in complex tax litigation involving domestic and international tax issues, and focuses on handling files in all type of courts. He is

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