Chapter 27

SWITZERLAND

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I INTRODUCTION

As a preliminary remark, it should be emphasised that the Swiss tax dispute environment reflects the allocation rules of the fiscal powers between the federal power, referred to as the Confederation and the federal states called cantons. Switzerland has 26 cantons and approximately 2,600 municipalities. In Switzerland, taxes are levied at three different levels: federal, cantonal and municipal. According to Article 3 of the Federal Constitution, the cantons are sovereign insofar as their sovereignty is not limited by the Federal Constitution. This means that each canton independently generates income by levying taxes, unless the Federal Constitution gives the Confederation the exclusive right to levy a particular type of tax. At the cantonal and municipal levels, the tax laws vary depending on the canton and the municipality. The cantons are mainly responsible for the assessment, collection and general administration of their own taxes (e.g., income and equity taxes, inheritance and gift taxes, real estate capital gains and real estate transfer taxes). They also support the administration of federal direct taxes (federal income taxes in particular). Due to the fact that the cantons still have much independence, this can result in significant differences from one canton to another. The municipalities may only levy the taxes that their canton’s constitution empowers them to levy.

With regard to the resolution of tax disputes, Switzerland has a well-established and efficient practice. When confronted with an unlawful tax assessment, the taxpayer is generally not obliged to immediately challenge said assessment in court. Rather, he or she may turn to the tax authority, which issued the tax assessment decision being challenged, to force it to make a new decision. For the purposes of this chapter, this procedure will be called a formal complaint. A formal complaint is a quick and efficient procedure that allows numerous questions to be resolved with little cost, the majority of these being

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technical questions. This formal complaint procedure thus eliminates the need for court proceedings and generally takes a few months. However, for complicated issues, this way of appeal offers limited solutions. In such cases, tax authorities usually prefer to wait for a binding judgment made by a higher independent body (i.e., a tribunal). It is very common for taxpayers to exercise their right to challenge the tax assessment decision of a tax authority. Tax authorities then issue a decision on formal complaint.

If the taxpayer does not agree with this decision, he or she may start judicial proceedings before the competent administrative court. From an organisational point of view, administrative courts are fully independent from tax authorities. Judicial proceedings may take between one and two years before judgment, generally depending on the workload of the tribunals and the complexity of the matter. There are two levels of administrative courts (i.e., the lower administrative court and the second instance administrative court) before appealing to the Federal Supreme Court.

Contrary to the formal complaint procedure before tax authorities, proceedings before the lower administrative court, the second instance court and the Federal Supreme Court are subject to court fees depending on the amount in dispute. Those fees are only to be borne by the taxpayer if he or she loses. In the case where the taxpayer partially wins, he or she will have to pay part of the court fees. To the extent that the taxpayer wins in court, his or her adviser’s costs may be partially borne by the state.

II COMMENCING DISPUTES

i Initiation of the tax assessment procedure
Each individual subject to tax in Switzerland needs to file a tax return each year in relation to income and wealth taxes on a self-assessment basis normally within three months of the end of the tax period, corresponding to the calendar year. Most cantons allow at least a deadline extension. The same applies to legal entities subject to corporate tax in Switzerland.

With regard to partnerships (sole or collective proprietorship), income is attributed to each partner and is apportioned according to the investment in the partnership. Each partner is responsible for filing his or her own personal tax return and tax is paid at personal income tax rates. Wealth tax is moreover paid on the company’s assets.

Regarding withholding tax, stamp tax and VAT, the principle of ‘spontaneous taxation’ applies, meaning that the taxpayer must determine himself the amount of tax due, declare it and pay said amount to tax authorities.

In the field of taxes related to possession (e.g., cars, boats, dogs) and property transfer tax, taxation takes place by way of an administrative decision generally following the announcement from the taxpayer. The latter then has to pay the tax.

ii Issuance of the tax assessment decision
After the filing of the tax return, the same is reviewed by the responsible tax commissioner and an assessment decision issued by the tax authority follows. In this respect, it should be noted that the cantonal tax authorities can assess cantonal income taxes in respect of
individuals and legal entities, as well as direct federal tax, which includes income tax. Other taxes (e.g., withholding tax, stamp tax and VAT) are assessed by the Federal Tax Administration only.

The assessment decision determines the tax base, the applicable tax rate and the tax amount. This decision is an administrative decision, notified in writing to the taxpayer and jointly to the spouses. In the absence of an objection, it constitutes a final binding decision.

In the presence of indicators showing that the tax return would not be accurate, the tax authorities may deviate from it after investigation. In that regard, it should be noted that the taxpayer has additional duties relating to his or her general duty to collaborate with tax authorities for ensuring that the taxation is complete and accurate. On request, he or she must provide additional information, documents, accounting documents, etc.

In the case where the taxpayer does not comply with his or her obligation to file a tax return or if the taxable elements cannot be sufficiently determined, the tax authority is entitled to assess the tax due at its own discretion with regard to the factual elements at its disposal and empirical figures.

### iii Initiation of tax disputes

Tax disputes usually start by way of an appeal by the taxpayer against a tax assessment decision rendered by a tax authority. At this early stage, the taxpayer has to file a formal complaint before the same tax authority that made the assessment decision. In the fields of withholding tax, stamp tax and VAT, disputes usually arise as a result of a tax audit conducted by the Federal Tax Administration.

### iv Time limits

In situations where the taxpayer does not comply with his or her obligation to file a tax return or if the taxable elements cannot be sufficiently determined, the tax authority is entitled to assess the tax due at its own discretion with regard to the factual elements at its disposal and empirical figures.

As a general rule, the right to tax expires five years after the end of the accounting period. This time period is suspended during appeal proceedings. A new five-year time limit starts every time the competent authority takes measures aiming at determining or getting the payment of the tax due and informs the taxpayer.

### v Voluntary disclosure

An important element of the Swiss tax disputes is the voluntary disclosure system. Under Swiss tax law, taxpayers are offered a voluntary disclosure programme for undeclared assets and income, which are subject to taxation in Switzerland. The voluntary disclosure programme is also available to heirs in the case of succession.

For both voluntary disclosure in succession cases and ordinary voluntary disclosure, there is no criminal prosecution (no penalties). The taxpayer thus only has to pay the due taxes and default interests for the past ten years or the past three years before the decedent’s death.

To benefit from the voluntary disclosure programme, the application must be filed for the first time in the taxpayer's lifetime and deemed voluntary. The taxpayer has
to disclose all relevant information of the last 10 years and has to cooperate with tax authorities. Heirs only need to regularise the last three years before the testator passed away. The taxpayer must endeavour to clear the total tax burden eventually and act proactively in case of financial difficulties.

The duration of the procedure depends on the canton involved and mainly on the complexity of the case.

vi Revision
In the cases where the taxpayer was not aware of materially incorrect facts taken into account by the tax authority during the assessment or the audit, he or she may claim that the authorities have made an error of assessment based on the incorrect facts (petition for revision). Said petition for revision is only considered if important new facts or evidence are discovered and could not have been known during the ordinary proceedings, if the tax authority failed to consider important facts that were or should have been known, in case of significant violation of procedural principles, or if a crime or criminal offence influenced the tax assessment or decision.

vii Release of information
According to the Federal Constitution, all taxpayers, within a certain time and factual limits, have the right to access their tax files. This may be a useful tool for taxpayers.

III THE COURTS AND TRIBUNALS

i Formal complaint with the tax authority
When the taxpayer objects the assessment decision made by the tax authority, he or she may file a formal complaint with the same tax authority which issued the assessment decision, within 30 days as from notification. The formal complaint procedure is an official appeal procedure which forces the tax authority to issue a new decision.

This procedure is at the taxpayer’s disposal regarding decisions issued in the fields of income tax (corporate income tax), wealth tax (capital tax), withholding tax, stamp tax and VAT for individuals and legal entities.

As to the form and content of the formal complaint, it must be filed in writing. With regard to federal income tax, the complaint does not need, in principle, to be substantially motivated. The taxpayer only has to express his or her unquestionable disagreement with the assessment decision. However, formal complaint against an assessment decision made at the tax authority’s own discretion must be well motivated. In that case, the taxpayer has to demonstrate that the assessment decision is obviously inaccurate. For the taxes levied by the Federal Tax Administration, the form requirements are stricter.

If the formal requirements are met, the tax authority has to re-examine the tax assessment decision and may either modify in whole or in part the decision or reject the taxpayer’s formal complaint.
ii  Appeal before a first instance court (cantonal appeal commission)

As a preliminary remark, the proper delimitation of taxation remedies is rather complex because it depends on the tax type in question, the jurisdiction of the tax authority and the precise characterisation of the contested decision. Moreover, due to the growing complexity of the tax area, various specialised commissions of appeal have been created, both at the cantonal and federal levels.

An appeal before the cantonal appeal commission is open on decisions rendered in direct tax matters. In Geneva, the first instance administrative court is the competent court and is composed of one judge who acts as president and two other judges, specialised in tax matters.

As for formal complaint, the appeal must contain a presentation of the facts, conclusions and evidences. The deadline for appeal is 30 days as from notification of the contested decision on formal complaint. The appeal can be filed by either the tax authority or the taxpayer. The court's decision on appeal must be substantiated and communicated in writing to the appellant and to the authorities participating in the proceedings. Contrary to the formal complaint procedure, appealing before a cantonal appeal commission is not free of charge.

iii  Appeal before the second instance cantonal court

A decision of a first instance court can be appealed to a second instance cantonal court within 30 days of service of the first instance court's decision. The appeal can as well be filed either by the tax authority or the taxpayer.

The same procedural principles are the same as those applying before the first instance court.

iv  Appeal before the Federal Administrative Court

The Federal Administrative Court is the ordinary administrative tribunal of the Swiss Confederation. The main role of the Federal Administrative Court is to examine the legality of decisions in matters falling under the authority of the Federal Administration. Lower instances are mainly the federal departments and subordinate federal offices.

The Federal Administrative Court hears appeals against decisions of federal authorities, in the fields of withholding tax, stamp tax and VAT in particular. As a general rule, submissions should be made in an official language of Switzerland (French, German and Italian). Its judgments may be appealed before the Federal Supreme Court.

Generally speaking, fees are charged for proceedings before the Federal Administrative Court. Procedural costs are usually paid by the unsuccessful party. For pecuniary disputes, they may not exceed 50,000 Swiss francs.

v  Appeal before the Federal Supreme Court (Second Public Law Division)

If the taxpayer considers that the final decision of the second instance cantonal court or of the Federal Administrative Court violates his or her rights, he or she may file an appeal in front of the Federal Supreme Court. Such appeal must be filed within 30 days after notification of said contested decision.

The Federal Supreme Court is the highest judicial authority within the federal state. It issues final rulings in tax matters.
It should be noted that the work of the Federal Supreme Court varies considerably from the cantonal and federal courts of first instance. This court actually does not re-establish the facts of the case. These facts may only be corrected by the Federal Supreme Court if it finds that they have been incorrectly established in a flagrant manner by the lower court, or that they have been based on a violation of law. This means that the Federal Supreme Court only takes its decisions applying the law on already determined facts.

In general, the Federal Supreme Court renders its rulings in the language of the decision being contested.

IV PENALTIES AND REMEDIES

i Criminal penalties

As a preliminary remark, it should be underlined that regarding direct taxes, the fact that the taxpayer seeks to save taxes is not punishable. In Swiss tax law, offences and sanctions are designed as follows.

Negligent failure to carry out procedural duties refers to situations, for example, where the taxpayer fails to file a tax return or does not with a duty to provide information. Regarding the sanction, for income and equity taxes, the penalty is limited to 10,000 Swiss francs. For other types of taxes, the limit differs.

The unlawful reduction of the amount of the tax due may be penalised on two main grounds. On the one hand, tax evasion (i.e., where the taxpayer negligently omits certain items in his or her tax return, or generally causes a final assessment to be incomplete) belongs to the lowest category of criminal offences and is only subject to a fine. The fine may vary from one-third to three times the amount of tax evaded (Article 175(2) of the Federal Income Tax Act and corresponding cantonal provisions), with the statute of limitation of 10 years, possibly extended to a maximum of 15 years depending on the situation (Article 184 of the Federal Income Tax Act). For attempted tax evasion, the fine amounts to two-thirds of the amount have been determined for complete tax evasion. On the other hand, tax fraud is a qualified offence that required the use of fraudulent documents (e.g., a balance sheet not showing the correct assets and liabilities. Inexact salary certificates are considered a more serious criminal offence. Indeed, Article 186 of the Federal Income Tax Act provides that the maximal penalties for this offence are imprisonment and a fine of up to 30,000 Swiss francs.

In that regard, it should be noted that criminal tax law legislation is currently in the process of being reviewed, in order to update the existing provisions.

V TAX CLAIMS

i Recovering overpaid tax

Regarding income tax, in the situation where the taxpayer paid a too high portion of provisional taxes, meaning that the amount of tax actually due is lower than the amount provisionally paid, the overpayment is refunded. This procedure occurs automatically. In the case of overpaid taxes, these are refunded or set off against other liabilities due to the tax authority upon request. For federal income tax, the refund claim can be made up
to five years after the year when the overpayment was made (Article 168 of the Federal Income Tax Act). In Geneva, however, the limitation period starts from the moment when the taxpayer becomes aware of the overpayment. In any case, the overpaid amounts bear interest in favour of the taxpayer.

ii Challenging administrative decisions

Administrative decisions may be challenged on the grounds that they are unlawful, by lodging a formal complaint or an appeal (see Section II, supra). This would also be the case where administrative decisions would be contrary to legitimate expectation or to the Federal Constitution. In specific cases, the unlawfulness may also result from the taxpayer in question being discriminated in relation with another taxpayer.

iii Claimants

Generally speaking, the rule is that only the taxpayer to whom the tax assessment has been noticed is entitled to bring a tax claim against the authorities. Depending on the case and the circumstances, other persons or entities may have the right to lodge appeal (e.g., another tax authority in intercantonal double taxation cases, legal representative, heirs, management of the bankrupt’s assets). With regard to direct income tax, it should be underlined that the competent cantonal tax authority as well as the Federal Tax Administration has the right to lodge appeals against tax assessment decisions, without prior duty to lodge a formal complaint.

Regarding VAT, entities having their seat or a permanent establishment on the Confederation territory and that are united under a single direction may apply to be treated as a single taxable person (tax group). To be noted that entities that do not exploit a business as well as individuals may be part of a group (Article 13 VAT Act). In the case of such tax group, the group representative lodges the VAT return consolidating the VAT accounting of each group entities. This entity will therefore be the addressee of the tax assessment decision. All entities are, however, severally responsible for the tax due (Article 15 VAT Act).

With regard to withholding tax, the liable person is not the same as the one that has a right, under Swiss law or treaty law, to a partial or full refund of the withholding tax. Any person applying for a partial or a full refund has the right to lodge a formal complaint against the authorities.

In the field of tax at source, a formal complaint may be lodged by any interested person, meaning the taxpayer and the debtor of the taxable benefit.

VI COSTS

As a general rule, each party bears its own costs. The taxpayer may, however, recover from the state part of the costs in case of success in front of the court. Even in the cases involving substantial costs, the taxpayer will only recover a small part of them.

Regarding the procedural costs, they shall be partially or fully borne by the losing party. Nevertheless, these costs may also be borne by the successful appellant if his or her behaviour caused or significantly delayed the investigation. Moreover, all or part of
the costs incurred because of inquiry measures may be charged to the taxpayer or any other person who is required to provide information, in the situation where these inquiry measures have been made necessary by a breach of procedural duties.

VII ALTERNATIVE DISPUTE RESOLUTION

i Tax ruling procedure

Given the overall complexity of taxation in Switzerland, taxpayers have an interest in discussing the more complex cases with the tax authorities at an early stage, prior to the implementations of any actions. Prospective taxpayers, such as international corporations considering moving to Switzerland, can obtain confirmation of their future taxation. The same is true for individuals.

In that regard, tax rulings are commonly used in the Swiss tax practice, although Swiss tax law does not expressly refer to rulings. It should be noted that a tax ruling does not provide for any more preferential taxation than the applicable law does. This constitutes a quick and efficient way to provide for clarity in regard to taxation. In order to obtain a ruling, the taxpayer has to disclose all relevant information, usually in the form of a letter.

As recently confirmed by the Federal Supreme Court, cantonal tax authorities are the competent authorities to accept tax rulings. If the competent tax authority agrees with the taxpayer, the ruling request is sent back to the taxpayer, which provides the taxpayer with confirmation from the state on the tax treatment of a transaction or a situation. Tax rulings are not public.

Regarding the binding effect of such rulings, the taxpayer is protected by the constitutional principle of good faith insofar as he relies on the information received by the competent tax authority. Swiss case law also especially emphasised the importance of implementing the facts precisely described in the ruling.

There is no legal entitlement for a taxpayer to obtain a binding ruling, even though tax authorities are most of the time willing to deal with ruling requests. This means that a denial or a refusal of a ruling request cannot be contested by taxpayers.

ii Alternative dispute resolution means

With regards to alternative dispute resolution means, double taxation treaties concluded by Switzerland usually refer to mutual agreement procedure. This type of procedure is independent of Swiss domestic law procedures. Thus, the time limits provided for by domestic law have no influence on the mutual agreement procedure and vice versa. In particular, the 30-day deadline to file a claim against a tax assessment decision is not suspended by a request for mutual agreement procedure. In order, to save his or her rights according to Swiss tax law, the taxpayer will generally file a complaint against the tax authority, which will be suspended during the mutual agreement procedure. Depending on various conditions, recently revised double taxation treaties also provide for arbitration if the taxpayer requests the opening of an arbitration procedure, generally in transfer pricing cases.
VIII ANTI-AVOIDANCE

In Switzerland, anti-avoidance rules are not contained in a specific act. They actually take different forms.

i General tax avoidance theory
The Federal Supreme Court developed through the years a general tax avoidance theory, in principle applicable to all Swiss taxes. The application of this theory, applied by all Swiss courts and tax authorities, has for consequence that tax authorities get the right to tax the taxpayer’s legal structure based on its economic substance if the following conditions are met:

a the taxpayer's legal structure is unusual, inappropriate or inadequate to its economic purpose;

b tax considerations are deemed to be the only motive for the transaction; and

c the transaction effectively leads to significant tax savings to the extent that it would be accepted by tax authorities.

ii Transfer pricing
Even though Switzerland does not have a formal transfer pricing legislation, all related party transactions with Swiss entities must respect the arm’s length principle. Generally speaking, Swiss tax authorities follow the OECD transfer pricing guidelines. Where the transfer price does not correspond to the arm’s length price, a hidden profit distribution is assumed and taxable income is adjusted (Article 58 of the Federal Income Tax Act). The arm’s length principle is also applicable in choosing the method of determination of mark-ups.

iii Thin capitalisation
In Switzerland, the thin capitalisation rules are embodied in a circular letter issued by the Federal Tax Administration (circular letter No. 6 of 6 June 1997). This circular letter sets out safe harbour rules that require a minimum equity ratio for each asset class. Any excess amount of debt is recharacterised as dividend subject to withholding tax and interests paid for excessive debt are not deductible (Article 65 of the Federal Income Tax Act).

iv Controlled foreign companies
There is no CFC regime in Switzerland.

IX DOUBLE TAXATION TREATIES

Generally speaking, Switzerland’s tax treaty network is undergoing extensive renewal in accordance with the OECD standard. Regarding the interpretation of international tax treaties, it is accepted that they must be interpreted in accordance with the rules of public international law. Section 3 – Interpretation of Treaties of the Vienna Convention on the Law of Treaties, which entered into force in Switzerland in 1990, thus applies for the interpretation of DTTs.
In a recent cross-border case relating to total return swap agreements and other derivatives, the Federal Supreme Court denied the refund of withholding tax on the banks’ declared dividend income for the main reason that the banks were not beneficial owners of the income, as the banks acted as a sort of intermediary companies which were legally, economically or factually forced to transfer the dividend income to their counterparties. Therefore, the banks could not claim the benefit of the double tax treaty (Switzerland – Denmark in this case). In that regard, the Court also answered the question left open by the Swiss Federal Administrative Tribunal regarding the interpretation of double tax treaties drafted and signed before 1977, which do not contain the beneficial ownership requirement. In this respect, the majority of federal judges stated that the beneficial ownership criterion is an implicit requirement in all ‘old’ tax treaties. Thus, even if the double tax treaty Switzerland – Denmark did not contain an explicit reference to this requirement, tax authorities are entitled to apply the beneficial ownership requirement. The Federal Tax Administration will continue to apply its strict administrative practice and refuse refund of withholding tax in situations where it is assumed that the beneficial ownership is affected due to derivatives strategies.

X AREAS OF FOCUS

In two recent cases, the Federal Supreme Court removed uncertainties surrounding tax rulings and offshore structures. In that regard, the Federal Supreme Court confirmed that the tax authorities should be more severe when dealing with exotic offshore structures. Moreover, the roles between the cantonal and federal tax authorities have been clarified, meaning that only cantonal tax authorities have the power to grant tax rulings.

In recent years, following a decision of the Federal Supreme Court, Swiss tax authorities have also significantly changed their practice with regard to the withholding tax, taking a more formalistic view on notification deadlines to be respected in order to avoid the retaining of withholding tax (dividend notification procedure). The 30-day deadline for notification becomes a forfeiture deadline rather than an indicative deadline. Consequently, in case of non-respect of such notification deadline, withholding tax is immediately due on any dividends that were not declared in the notification procedure and interests on late payment are to be paid on the withholding tax due.

More generally, Swiss tax authorities also pay more attention to transfer pricing issues and take a stricter approach with regard to structures and intra-group transactions involving offshore entities and locations. The Swiss tax authorities are supposed to follow the OECD Guidelines, and therefore the methods said guidelines propose. It is, however, recommended to request a tax ruling depending on the complexity of the case.

XI OUTLOOK AND CONCLUSIONS

Regarding the main prospective legislative changes, Switzerland is undertaking a major reform of the corporate tax system, the Swiss Corporate Tax Reform III (the CTR III). The CTR III aims to enhance the attractiveness of Switzerland for companies at the international level while consolidating international acceptance of Switzerland as a business location. At the same time, the Swiss government proposes a package of
additional measures in order to improve the Swiss corporate tax system and to safeguard the financial performance of income tax for the Confederation, cantons and communes. In many aspects, these different goals are in contradiction. The key points of the reform are to abolish the special cantonal tax regimes (i.e., holding companies regime, as well as domiciliary and auxiliary or mixed companies regimes) along with a step-up of hidden reserves (including goodwill) for tax purposes allowing substantial depreciation allowances in the years after the abolishment, and the special federal tax treatment of the Swiss principal companies and Swiss finance branches. According to the reform, the above-mentioned regimes would be replaced by measures with increased international acceptance, meaning, for example, the patent box at cantonal level, enhanced tax deductions on expenses incurred for R&D and tax relief for taxation of equity, lower cantonal tax rates for corporate income tax and other measures aiming to increase the systematic nature of Swiss tax law. If accepted by the parliament, the proposed changes are expected to enter into force between 2018 and 2020.

More generally, as mentioned above, it should be remembered that Swiss tax authorities take a stricter approach in many areas, such as in transfer pricing cases, and that many practices that have previously been accepted, in the field of offshore structures for instance, are being challenged more and more by Swiss tax administrations.

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