



TAX DISPUTES AND LITIGATION IN LUXEMBOURG¹

I.	COMMENCING DISPUTES	2
A.	Direct tax.....	2
B.	Indirect tax.....	3
C.	VAT.....	3
II.	THE COURTS AND TRIBUNALS	4
A.	Direct tax.....	4
B.	Indirect tax.....	5
C.	VAT.....	6
III.	PENALTIES AND REMEDIES	6
IV.	TAX CLAIMS.....	7
A.	Recovering overpaid tax	7
B.	Challenging unconstitutional decisions	7
C.	Claimants	8
V.	COSTS.....	8
VI.	ALTERNATIVE DISPUTE RESOLUTION	8
A.	Arbitration	8
B.	Conciliation	9
C.	Mediation	9
VII.	ANTI-AVOIDANCE	9
VIII.	DOUBLE TAXATION TREATIES.....	10
IX.	AREAS OF FOCUS	10
X.	OUTLOOK AND CONCLUSIONS	11

Introduction

Luxembourg tax litigation proceedings are governed by a dualism of jurisdiction. Tax claims related to direct taxes, such as personal income tax, corporate income tax, municipal business tax and net wealth tax, must be brought before the administrative courts (the Administrative Tribunal and the Administrative Court), while tax claims related to indirect taxes, such as VAT, gift or inheritance taxes, and subscription tax for Luxembourg

¹ Ed. Simon Whitehead, Law Business Research, 2015.

funds, must be lodged with the civil courts (the district courts, the Court of Appeal and the Court of Cassation). In both cases, an appeal is possible before the higher relevant court (the Court of Appeal or Administrative Court). There is no appeal in cassation against the decision of the Administrative Court, whereas appeals in cassation against decisions of the Court of Appeal can be lodged with the Court of Cassation.

Since proceedings before the administrative and the civil courts are written, and therefore time-consuming and costly, taxpayers and the tax authorities generally prefer to resolve disputes outside the courts. As Luxembourg is a small jurisdiction with limited case law and legal doctrine, the tax authorities are relatively accessible, which facilitates discussion and dispute resolution outside the courts.

In tax matters, the competence of the Luxembourg courts depends on the tax subject matter and the amounts involved in the dispute.

Cases that require formal litigation typically concern, inter alia:

- a) the determination of the taxable basis;
- b) the amount of tax advances to be paid;
- c) the outcome of administrative appeals and issues surrounding such appeals;
- d) the collection of taxes; or
- e) the interpretation of the tax law.

I. COMMENCING DISPUTES

A. DIRECT TAX

Direct tax returns can be amended until a tax assessment is issued and until the statute of limitation runs out (i.e., in principle five years, but up to 10 years in specific cases, such as an incomplete or incorrect tax return, or when the taxpayer omits to file a tax return) ⁽²⁾.

Proceedings for claims or demands towards the Luxembourg direct tax administration are governed by the General Tax Law.

Regarding tax collection, the tax authorities can, at their discretion, grant a respite from payment, according to which no interest for late payment would apply during a certain period, or respite from execution. During such a grace period, the obligation to pay the tax due is postponed until a future date subject to the condition that an immediate payment would entail excessive negative consequences for the taxpayer. Finally, in certain exceptional cases, the director of the direct tax authorities may grant, upon request of the taxpayer, a gracious reduction or waiver ⁽³⁾ for the payment of tax and related interest, if any (fine excluded), if the collection of tax would lead to unfairness. If the director does not agree to grant such a gracious reduction, the administrative courts can grant the gracious reduction or waiver based on fairness, without need for legal arguments.

² Section 144 General Tax Law.

³ Section 131 General Tax Law.

There are generally two types of actions that can be brought forward by taxpayers against direct tax assessments, and more generally against administrative decisions on direct tax matters.

First, the taxpayer can request an amended tax assessment directly from the tax authorities by way of an informal request to the author of the administrative decision, or his or her superior (i.e., the director of the direct tax authorities). However, such an informal request does not interrupt the statute of limitations for a formal administrative appeal or a formal and explicit claim, nor does it excuse the taxpayer from the obligation to pay the tax.

The taxpayer can also apply to make a formal and explicit claim to the director of the direct tax authorities. This formal appeal must be lodged within the three months following the notification of the tax assessment to the taxpayer⁽⁴⁾. The claim does not have to follow a specific format and does not have to be motivated. However, the taxpayer must have the capacity and an interest to file the claim with the direct tax authorities.

Such an interest exists only if an amount of tax is to be paid.

The director will review the case on the basis of the claim. He or she has the power to ask the relevant taxation office to withdraw or amend the tax assessment⁽⁵⁾ (in melius or in peius)⁽⁶⁾. In the event of a negative answer (e.g., a refusal to change the tax assessment or a decision increasing the amount of tax due), or in the event that the director does not respond within six months of the filing of the claim, the taxpayer is allowed to bring an action against the initial tax assessment before the competent Luxembourg court. It should be noted that a formal and explicit claim is possible not only against tax assessments, but also against notifications that fix the tax advance to be paid by the taxpayer⁽⁷⁾.

A formal and explicit claim, as well as providing a respite from payment, adjourns the statute of limitations.

B. INDIRECT TAX

The legal framework for filing claims before the indirect tax authorities is laid down in the Law dated 1 December 1978 (the 1978 Law)⁽⁸⁾ and the Grand-Ducal Regulation dated 8 June 1979⁽⁹⁾. The principal aim of these regulations is to avoid court proceedings where possible and solve disputes on individual administrative decisions. As for the General Tax Law for direct taxes, the 1978 Law is governed by the general rights of defence and expressly lays down the principle of an adversarial process, the right to have access to the file, the right to be informed of any available form of appeal and the related statute of limitations. This general procedure applies where no other proceedings with at least similar guarantees exist.

C. VAT

The filing of claims against the Luxembourg VAT authorities is governed by a specific administrative procedure as prescribed by the Luxembourg VAT legislation. VAT disputes usually start:

⁴ Section 228 General Tax Law.

⁵ Section 299(3) General Tax Law.

⁶ Section 243 General Tax Law.

⁷ CA 14/07/09 (25437C).

⁸ Loi du 1 décembre 1978 réglant la procédure administrative non contentieuse.

⁹ Règlement grand-ducal du 8 juin 1979 relatif à la procédure à suivre par les administrations relevant de l'Etat et des communes.

- a) either at the stage when the VAT authorities are conducting audits of the returns filed by a taxpayer prior to the issuance of an assessment; or
- b) subsequent to the issuance of an assessment, when the VAT authorities close a formal audit procedure, or impose a penalty for the non-filing of a return, an incorrect filing or a lack of invoicing.

As there generally is no advance tax agreement procedure available, reporting positions have to be taken in the VAT returns (e.g., application of an exemption). In the event of an audit and prior to the issuance of any closing assessment, meetings can be held on request with the VAT authorities to discuss any issue. An amended VAT return can be filed until the statute of limitations runs out (i.e., until 31 December of the fifth year following the year in which the taxable event occurred) ⁽¹⁰⁾ and prior to the assessment being issued.

In practice, taxpayers can request a respite from payment, which can be granted by the VAT authorities on a discretionary basis.

As for direct taxes, administrative appeals or formal claims in the field of VAT adjourn the statute of limitations.

II. THE COURTS AND TRIBUNALS

A. DIRECT TAX

For direct taxes, the formal claim made to the director of the direct tax authorities is a preliminary and mandatory step before the taxpayer can take his or her claim to the courts.

The courts competent for direct tax matters are the administrative courts ⁽¹¹⁾.

No threshold exists to initial proceedings before the Administrative Tribunal, but the action must be brought forward within the three months following the date of notification of the administrative decision or of the tax assessment. In the absence of an answer from the director during the six months following the claim, no deadline for the Administrative Tribunal action against the initial administrative decision applies.

An appeal against the judgment of the Administrative Tribunal can thereafter be lodged before the Administrative Court within 40 days.

As mentioned above, no appeal in cassation is available. However, the competence of the administrative courts does not include the collection of tax by force ⁽¹²⁾, which is the exclusive prerogative of the civil courts.

No extended deadline is available for parties abroad before the administrative courts ⁽¹³⁾. In addition, apart from direct tax-related legal proceedings before the Administrative Tribunal, for which the law allows taxpayers to be represented by an attorney (*avocat*) ⁽¹⁴⁾, a chartered accountant or an auditor ⁽¹⁵⁾,

¹⁰ Article 81 loi TVA.

¹¹ Article 8(3) loi du 7 novembre 1996 portant organisation des juridictions de l'ordre administratif.

¹² TA 4/06/03 (15706)–TA 18/11/03 (16634C).

¹³ Articles 5 (6) and 46(3) du règlement d'exécution du 21 juin 1999.

¹⁴ During their traineeship and before passing their final bar exam to become *avocats à la Cour*, *avocats* are deemed admitted attorneys.

¹⁵ Article 2(2) loi du 10 août 1991 réglementant la profession d'*avocat*.

procedural acts before the administrative courts shall in principle be exclusively carried out by an *avocat à la Cour* ⁽¹⁶⁾.

The procedure before the administrative courts is almost exclusively a written procedure.

As expressly provided by law, the administrative courts have the power to analyse the substance of the case and to hand down a judgment that may replace the director's challenged administrative decision ⁽¹⁷⁾.

There is a second possible legal proceeding, which consists of a demand for annulment of administrative decisions (mainly for detached or preparatory decisions). In such a proceeding, the administrative courts will verify the legality of the administrative decision at stake. Should the challenged decision be deemed illegal, the administrative courts will annul it. However, the decision of the Administrative Tribunal or of the Administrative Court is limited to the annulment of the administrative decision, and no additional order is given against the tax administration. Nevertheless, the tax administration will have to make a new decision and, because of the court's order, view the matter at hand from a different perspective.

In both cases, the annulment of an administrative decision must be based on one of the five following grounds of illegality:

- a) lack of competence;
- b) breach of law;
- c) abuse of power;
- d) misuse of power; or
- e) infringement of an essential procedural requirement.

During the course of the administrative proceedings, strict deadlines shall be followed, and a final decision of the Administrative Court can be expected in about 15 or 16 months from the notification of the application lodged with the Administrative Tribunal.

B. INDIRECT TAX

Legal proceedings on tax matters other than direct taxes (including VAT and gift or inheritance tax) must be submitted to the civil courts, and the rules of civil proceedings must be followed. The latter contain three levels: first instance, appeal and appeal in cassation.

There are two district courts in Luxembourg. The district courts sitting in civil matters have an exclusive competence for indirect tax matters introduced at first instance ⁽¹⁸⁾. Civil disputes brought before the district courts are introduced by a writ of summons served on the defendant by a bailiff. The defendant is given notice to instruct an *avocat à la Cour* within 15 days (extended on account of distance, if applicable) from the service of the writ of summons. The defendant's lawyer must inform the claimant's lawyer of his or her appointment. The parties will then exchange written submissions and evidence supporting their arguments, and discuss the opposing party's arguments under the supervision of an appointed judge. After the completion of this process, the file is ready to be judged and the examination of the file will be closed. Oral hearings will be scheduled, and after the pleadings, the court will consider the case and hand down a judgment.

¹⁶ Article 1(1) loi du 21 juin 1999 portant règlement de procédure devant les juridictions administratives.

¹⁷ Article 8(3) loi du 7 novembre 1996 portant organisation des juridictions de l'ordre administratif.

¹⁸ Article 1 loi du 4 mars 1896 concernant l'introduction de la procédure ordinaire et de la faculté d'appel en matière fiscale et domaniale.

If a party intends to challenge a decision handed down by a district court, an appeal can be lodged with the Court of Appeal within 40 days (extended on account of distance, if applicable) of the date on which the bailiff has effected service of the targeted judgment. The procedure before the Court of Appeal is rather similar to the above civil proceedings before the district courts. A litigant can challenge an appeal decision rendered by the Court of Appeal by submitting it to the Court of Cassation in cases of wrongful application of the law (e.g., a violation or misinterpretation of the law).

The Court of Cassation will not analyse the facts of the case but solely the submitted decision on pure legal issues, and decide either to confirm the submitted decision, or to annul and return it to the Court of Appeal.

C. VAT

As is the case for filings against the VAT administration, specific proceedings for claims filed with the courts are provided for by the Luxembourg VAT Law ⁽¹⁹⁾.

To challenge an assessment issued by the VAT authorities, the taxpayer must, in the three months following the notification date of the assessment, send a written claim to the VAT office in charge of the company. This claim is a mandatory step to go before the civil courts. If the claim is partly or completely dismissed by the relevant VAT office, it is transferred to the director of the VAT authorities for further verification. His or her decision will either replace or confirm the assessment of the VAT office. Subsequently, the taxpayer has a period of three months as from the notification date of the decision to launch an action against the director of the VAT authorities before the district court, through a writ of summons served by a bailiff. In the absence of an answer from the director of the VAT authorities during the six months following the claim, no deadline to launch an action before the district court needs to be respected. In the case of the district court, the procedure is the same as that for indirect taxes.

Unless decided otherwise by the judge (in very specific cases), legal proceedings before the administrative courts or the civil courts will as a general rule not protect the taxpayer from the obligation to pay the direct or indirect taxes due.

III. PENALTIES AND REMEDIES

In direct tax matters, the administrative courts cannot consider the case *in peius* (i.e., the administrative courts cannot increase the tax due by the taxpayer in the position taken by the tax authorities).

In the field of direct taxes, tax evasion ⁽²⁰⁾ is generally defined as a case where the taxpayer grants him or herself, or somebody else, an unjustified tax advantage or where an intentional act by the taxpayer entails the reduction of the amount of tax due. Tax evasion is punished by an administrative fine of up to four times the amount of the eluded taxes.

Tax fraud ⁽²¹⁾ is defined as a significant amount of tax being evaded, and is performed through the systematic use of simulated transactions with the aim of hiding the reality.

Tax fraud may be punished by a criminal fine of no less than €1,293.47 and up to 10 times the eluded taxes, and a sentence of up to five years in prison.

¹⁹ Article 79 loi TVA.

²⁰ Section 396 al.1 General Tax Law.

²¹ Section 396 al.5 General Tax Law.

In the field of VAT, penalties mainly consist of fines:

- a) from €50 to €5,000 for failing to comply with the filing and accounting obligations set by Chapter IX of the VAT Law;
- b) in cases of default in the payment of the VAT balance due, the fine can amount to up to 10 per cent of the past VAT due; and
- c) a failure to provide to the VAT authorities information, documents and invoices received upon the purchase of a good or service can be subject to a fine of between €50 to €1,000 per day of delay.

In addition, criminal sentences of up to two years' imprisonment can be imposed for fraud and forgery.

IV. TAX CLAIMS

A. RECOVERING OVERPAID TAX

Reimbursement of unjustified payments made to the direct tax authorities (e.g., the same tax paid twice or a payment without legal basis) must be requested from the tax authorities via a simple letter no later than 31 December of the year following the year in which the right to repayment occurs ⁽²²⁾. However, no interest can be obtained by the taxpayer on the amount of overpaid tax ⁽²³⁾.

Any VAT receivable balance is carried forward to the following period. The reimbursement can be requested by the taxpayer for any balance exceeding €1,200, or for any balance, even below €1,200 but exceeding €2.40, remaining at the end of a calendar year. Specific VAT refund rules exist for non-VAT-registered foreign taxpayers.

Since 1 January 2010, a claim for reimbursement of the VAT incurred by an EU business in a Member State other than the one in which it is established must be submitted together with the supporting documentation through an electronic portal set up by its Member State of establishment. The deadline for such a claim, which must cover a period from three months up to a year, is 30 September of the calendar year following the refund period.

For non-EU established businesses, the claim for the reimbursement of any VAT incurred in Luxembourg must be submitted to the VAT authorities before 30 June of the year following the calendar year in which the tax was incurred. Claims must be submitted in English, French or German.

B. CHALLENGING UNCONSTITUTIONAL DECISIONS

When a party considers that a tax law is unconstitutional (e.g., because such a tax law would be contrary to the constitutional principle of equality before taxes) ⁽²⁴⁾, he or she has to bring legal proceedings before the competent civil or administrative court, which must transfer the question of the constitutionality of the law to the Constitutional Court unless:

- a) the answer to this question is not required to render its judgment;
- b) the question is unfounded; or

²² Section 152(1) General Tax Law.

²³ Section 20 (3) SteuerAnpassungsGesetz + TA 11/05/09 (24871).

²⁴ Article 11 of the Constitution.

c) the Constitutional Court has already answered a question having the same object ⁽²⁵⁾.

C. CLAIMANTS

As the claim is made against a specific assessment, only the taxpayer can challenge the assessment, even if the final burden has been shifted to another party by contract. The clauses of such an agreement can be grounds for a claim before the civil courts.

Where, in debt collection procedures, the VAT authorities are holding the other party to the transaction as jointly liable, that party can be discharged of the joint liability if it can prove that it has paid the price and the related VAT, except in cases of bad faith.

A third-party claim against a judgment rendered in tax matters is theoretically available ⁽²⁶⁾. However, the law requires that the judgment entails adverse consequences for the third party. Third-party claims are therefore almost never used in tax matters.

V. COSTS

Any court has the power to adjudicate the costs related to the legal proceedings to one or other party, or to both. As a general rule, the legal costs are generally borne by the party against whom the judgment has been rendered. However, the court is entitled to decide that costs shall be borne (partially) by the other party ⁽²⁷⁾. Lawyers' fees are not included in the legal costs. However, the court may order a party (generally the losing party) to pay an additional sum that generally corresponds to a portion of the lawyers' fees incurred when it appears unfair that the other party would bear such fees ⁽²⁸⁾. This remains, however, a discretionary decision of the court, and the additional sum is generally significantly lower than the actual lawyers' fees.

VI. ALTERNATIVE DISPUTE RESOLUTION

Advance tax agreements are to a certain extent available in direct tax matters.

Alternative dispute resolutions, such as arbitration, mediation and conciliation, exist in Luxembourg, but they are not common in tax matters.

A. ARBITRATION

Arbitration is an important mechanism for the resolution of disputes outside the courts. The parties thereby commit themselves to submit their dispute to one or several arbitrators that will return a final and binding decision (an arbitral award) on the parties.

²⁵ Article 6 loi du 27 juillet 1997 portant organisation de la Cour Constitutionnelle (the Constitutional Court).

²⁶ Article 43 loi 21 juin 1999 portant règlement de procédure devant les juridictions administratives and Articles 612 et suivants du Nouveau Code de Procédure civile.

²⁷ Article 32 loi du 21 juin 1999 portant règlement de procédure devant les juridictions administratives and Article 138 du Nouveau Code de Procédure civile.

²⁸ Article 33 loi du 21 juin 1999 portant règlement de procédure devant les juridictions administratives and Article 240 Nouveau Code de Procédure civile.

As an alternative dispute resolution method, arbitration seems to be helpful and appropriate to resolve technical issues. Nevertheless, arbitration could be expensive because of the fact that arbitrators must be paid by the parties, whereas judicial dispute resolution is, in principle, free of charge.

B. CONCILIATION

Conciliation is a particular conflict resolution method where a third party (the conciliator) is in charge of assisting the parties in an independent and impartial manner to reach an amicable settlement of their dispute. The conciliator may, at any stage of the conciliation proceedings, make proposals for a settlement of the dispute.

C. MEDIATION

Mediation differs from both the arbitration and conciliation methods. First, as in arbitration, a third person is appointed to resolve the dispute, but the mediator has no power to issue a binding decision. Secondly, as in conciliation, the role of the mediator is limited to open or improve communication between parties, which negotiate their own settlement measures. However, the mediator is not vested with the role of actively encouraging the parties to reach a resolution by initiating proposals to settle the dispute.

In addition, the Ombudsman shall handle private claims against the state and local administrations through mediation or by providing non-binding recommendations.

VII. ANTI-AVOIDANCE

As a rule, a taxpayer in Luxembourg is generally free to choose the method by which he or she structures his or her affairs, even with a view to minimising his or her tax liability.

Traditionally, Luxembourg tax law does not contain many specific anti-abuse provisions.

In Luxembourg, 'abuse' or 'avoidance' in tax matters is therefore generally a matter of the general anti-abuse provisions and principles.

Luxembourg's general tax rules contain two types of general anti-abuse provision:

- a) the 'simulation' or 'sham transaction' ⁽²⁹⁾ doctrine; and
- b) the 'abuse of law' or 'abuse of legal form' ⁽³⁰⁾ doctrine.

A sham transaction can be defined as a situation where parties have concluded a legal act or series of legal acts but do not as such respect the legal (and economic) consequences of such an act or series of acts.

Luxembourg case law has steadily reinforced the fact that simulation or a sham implies a fraud and a lie, and therefore imposes a restrictive interpretation of the concept of simulation ⁽³¹⁾.

²⁹ The sham transaction doctrine is laid down in several legal provisions, such as Paragraph 5 of the Tax Adaptation Law (SteuerAnpassungsGesetz) as regards direct taxes; the Law of 28 January 1948 as regards certain matters of registration and estate duties; and also in the relevant provisions of the Civil Law Code (i.e., Article 1321 CC).

³⁰ Section 6 SteuerAnpassungsGesetz.

³¹ CA, 9 mai 2001, Pas., 32, p. 116.

Under Luxembourg tax law, ‘abuse of law’ or ‘abuse of legal form’ can be defined as a situation where a taxpayer wishes to obtain a certain economic result, but organises him or herself not by using the legal forms that are generally used to obtain or achieve such a given goal, but rather through legal forms that are generally not aimed at achieving such a given economic goal, and this with a purpose (intention) of avoiding or minimizing tax.

If applied successfully, the general anti-abuse provision under Paragraph 6 of the Tax Adaptation Law will thus result in a ‘recharacterisation’ of a given transaction for tax purposes. Such a recharacterisation would imply drawing a parallel between the tax charge effectively borne by the taxpayer abusing the legal form or law and the one he or she would normally have borne using the typical legal form.

VIII. DOUBLE TAXATION TREATIES

Double taxation treaties are generally interpreted in accordance with the OECD Guidelines, but only to the extent the text of the convention is not clear.

Recent court cases on the application of tax treaty provisions mostly relate to issues concerning exchange of information between treaty partners, for example:

- a) In a decision of 9 February 2012, the Administrative Court stated that the protocol of 3 June 2009 to the Luxembourg–France tax treaty of 1 April 1958 introducing the 2005 OECD exchange of information standards and the Law of 31 March 2010 ratifying the protocol are applicable insofar as the requested information concerns the period after which the protocol has entered into force.
- b) In addition, the Administrative Court ruled that the chief tax inspector was not competent to issue the injunction to provide the requested information. The only competent authority in this matter is the director of the direct tax authorities, who can delegate this competence only to the head of the ‘exchange of information’ division of the Central Tax Administration or any other member of the Central Tax Administration.

A recent decision of the Administrative Court dated 12 July 2012 ⁽³²⁾ recognized that an exchange of information requested by the French tax authorities and transferred as such by the Luxembourg tax authorities to the taxpayer was partially a fishing expedition. Consequently, according to the Administrative Court, the Luxembourg tax authorities should have requested further details from the French tax authorities before requesting the information from the Luxembourg taxpayer.

IX. AREAS OF FOCUS

Most tax cases in Luxembourg involving corporate taxpayers concern the deduction of expenses (and potentially transfer pricing related to that), and issues such as the application of the tax consolidation rules and of tax treaties. Recent case law also includes issues regarding the application of the participation exemption, and questions about the definition of ownership for tax purposes (predominantly based on economic ownership).

More recent case law has related to the treatment of debt waivers. As tax cases are relatively rare, the courts are generally not in a position to influence tax policy. Most tax cases are limited to an analysis of technical issues. The decisions made are relatively neutral, without any tendency, and may be in favour of as well as against taxpayers.

³²

CA 12 juillet 2012 No. 29869C du rôle.

X. OUTLOOK AND CONCLUSIONS

In the context of the economic downturn, the VAT authorities are keen to combat tax avoidance and fraud more efficiently. The reorganisation in 2011 of the VAT offices and the creation of four specialised VAT offices have contributed to an increase in the amount and depth of controls carried out on taxpayers. Stricter rules have also been implemented to support such goals: for instance, as from 1 January 2013, the VAT Law has been amended to explicitly make the holding of a valid invoice a requirement for input VAT deduction.

In a similar effort to increase revenue, the direct tax authorities have also stepped up their efforts to clear the backlog in their treatment of tax returns, and the issuing of tax assessments and tax collection resulting therefrom. For both individuals and corporate taxpayers, we expect that more discussions will arise with the tax authorities (typically, but not limited to, the deductibility of certain expenses, etc.). Hence, it is generally expected that disputes and legal proceedings related to direct tax matters will increase.

Luxembourg, le 18 septembre 2015



Guy PERROT

Avocat à la Cour

Président de la Commission
de procédure civile du barreau de Luxembourg
guy.perrot@harvey.lu