

General Communication with Tax Authorities in friendly or unfriendly ways

Tax Commission – of course...!

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National Report of Brazil

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1. Introduction

Tax authorities – surely each one of us had the pleasure to deal with one: as taxpayer at least with the tax authority of the country you are resident of, as a lawyer helping others in tax matters you might have had the chance to deal with the tax authorities of other countries as well. If the latter is the case you might have seen some differences in the behaviour of the different tax authorities. You might have realized that the tax authorities in some or even the majority of the countries do treat the taxpayers not as their customers or clients but rather as subordinates. In such cases the communications tends to be rather hierarchical and often results in administrative proceedings against the tax authorities with more or less success.

Other countries have realized that treating the taxpayer in ways like we know from the tale of Robin Hood and the Sheriff of Nottingham only results in the tax payers trying to circumvent their tax obligations. Some countries, thus, have not only reduced the taxes in their countries. They also made their tax authorities treat the taxpayers as their clients e.g. in offering the taxpayers the possibilities for tax rulings and trying to take a more tailored approach towards their taxpayers .

These – sometimes very significant – differences are what we are focusing on in this year's tax report: We want to show that there are big distinctions in the behaviour of and the dealing with the tax authorities in different countries both in the stage of an advance agreement on a tax position as well as in an objection or litigation phase. For this reason AIJA members from several countries around the globe were so kind to volunteer as national reporters for this report which is crucial for such a comparative topic.

The General Reporters would like to thank you all in advance for your contributions and are already very interested in the results of this year's annual congress session of the AIJA Tax Commission.

2. Questionnaire

Note: General assumption is discussions with the tax authorities regarding (corporate) income tax or indirect taxes. If a difference would apply in the treatment between either of these, please indicate in your report. Also, if there are different levels of tax authorities for different taxes or issues, please mark that in your report.

2.1 Communication general

How does the General Communication with the Tax Authorities take place?

- a. Is a direct contact in between the tax payer and the Tax Authorities possible/common/advisable?

Direct contact is both possible and common, although the means for contacting the authorities are not consistent. The access varies according to the branches of the Brazilian Federal Revenue Service, or State Revenues Service. Some Revenue Offices permit contact via telephone with tax authorities. Others will only communicate with the taxpayer in person (in this case, it is possible that an appointment is required). It is impossible to determine whether direct contact is advisable since it will depend on the tax authority.

Moreover, the Federal Revenue Service has a Website in which taxpayers can either check or solve some ordinary tax issues.

- b. If not, does the communication only take place via tax counsels?

Not applicable.

- c. How can the communication regarding special matters be described?

It is very common that matters are discussed in person (although some exceptions may apply, depending on the Revenue Office) – still, all formalization of the discussed content takes place in written form. A petition is usually filed by the taxpayer, to which the tax authority gives a formal answer.

- d. Does it take place only in a written form or are meetings possible?

Meetings are usually possible.

- e. Can the behaviour of the Tax Authorities in your country be described as all dominant, cooperative, customer-oriented or otherwise?

Although the general impression may be described as “dominant” (particularly regarding tax authorities of low-level hierarchy), personal

behaviour may obviously vary from one person to another. Some higher-rank authorities are rather cooperative (especially when negotiating special tax regimes – if the taxpayer will possibly generate employment and revenues, tax authorities will be cooperative).

2.2 Agreements between tax payers and tax authority

- a. Is there the possibility of a tax ruling and, if so, which costs can be expected?

Yes, tax rulings can be required by tax payers. At Federal branch the possibility of a tax ruling is set forth by Law No. 9.430/1996 (Article 48). As a rule, Taxpayers have no fixed costs and may require a tax ruling without the assistance of a lawyer or a specialist. Nevertheless, depending on the complexity of the issue lawyers, and sometimes accountants are hired by the taxpayers, at their own cost.

- b. What is the average time frame to get a tax ruling done?

The time frame varies in accordance to the complexity of the matter, ranging from 6 months, for a simple issue, to up to 1 year, for more complex cases.

- c. Are these consultations binding and, if so, which possible remedies do exist?

Historically consultations were only binding to the taxpayer which requested the tax ruling. As from 1 September/2013, however, Normative Ruling No. 1396/2013 established that some rulings, issued by a higher level division of the Federal Revenue Service, shall be binding for any prospective consultation. A remedy may be obtained via judicial suit.

- d. Once a tax ruling between all the parties concerned has been achieved, can one rely on it?

Yes. An answer from a tax ruling is binding and may be only overruled by a judicial decision or, in very specific situations, by an administrative decision (e.g. to solve a conflict between previous decisions). Still, it is important to mention that tax rulings in Brazil are not negotiations – the taxpayer will present the situation giving rise to the uncertainty and the tax authority will present his/her understanding without elaborate discussions with the taxpayer.

- e. What is the exact legal status of a tax ruling?

According to the Tax Code, a tax ruling does not enjoy the formal status of Law, but rather that of a secondary rule.

- f. Is it common in order to get a tax ruling that the tax payer has to give up certain rights or explicitly agree to e.g. information exchange?

That is not common.

- g. Is a tax ruling a public document or will it be treated confidentially by the tax authority? Does the taxpayer have an obligation to keep it confidential?

The content of the answers are public (since they are binding to all taxpayers), although the original taxpayer who requested the ruling will remain anonymous.

An exception to this rule are 1st instance decisions issued in administrative procedures, which are commonly kept confidential, being up to the taxpayer to grant public access to these documents.

2.3 Remedies against decisions of the Tax Authorities

- a. Is it common that one has to litigate if a decision has been made by the Tax Authorities and which remedies do exist?

It is very common. On the Federal administrative level, Appeals may be filed before the administrative taxpayers court (CARF), which will reevaluate the original decision. In case of conflict between decisions issued by the same court (e.g. CARF) on similar cases a Special Appeal may be filed before a Superior Chamber of CARF.

All decisions issued unfavorably to taxpayers can be subject to tax litigation before court and overruled by a judicial decision. Administrative decisions of the CARF in favor of taxpayers are final and binding.

- b. Is there the possibility of addressing a court or is this an administrative procedure?

Both possibilities exist. The decision may be challenged administratively and/or on court.

- c. Which costs are to be expected in such a case?

- d. *Generally, on the administrative level there are no fixed costs – although some may apply depending of the nature of the case. For example, in complex issues, where an expert opinion is deemed necessary; then its cost must be borne by the taxpayer. In Federal Courts (judicial level), as a general rule, a deposit of 0.5% on the discussed amount is necessary, plus 0.5% for an Appeal, limited to approximately BRL5.000,00*

- e. Is it compulsory to have a lawyer in case of any remedy?

On the administrative level it is not compulsory to have a lawyer. On the other hand, in judicial procedures, as a general rule, the taxpayer must be represented by a lawyer.

- f. What timeframe can be expected in case of a remedy/litigation?

The timeframe will vary depending on the complexity of the case, although one to two years are usually expected for a first instance decision (administrative or judicial). In case of appeal, another two years are necessary (this apply regardless of the nature of the appeal, judicial or administrative).

- g. Is it possible to postpone the payment of the tax debt as assessed by the tax authority until the end of a pending litigation with the tax authority? Will the tax authorities require guarantees for the postponement (Bank guarantees, mortgages etc.)?

Yes. The mere filing of an administrative defense/appeal suspends the enforceability of the debt until a final decision is reached by the administrative court.

In Judicial Courts the judge is more likely to request a guarantee before suspending the enforceability of a tax debt.

- h. Is it possible that the tax authorities submit a report to the public prosecutor to investigate on possible criminal tax offences and under what circumstances?

Yes. Usually such report would only be submitted if evidence of a criminal offence is found during the investigative phase of the administrative procedure.

However, in some cases, a report can be submitted to the public prosecutor as a mean to coerce the tax payer to collect overdue taxes.

- i. Is it possible to include a clause in an agreement to automatically amend this agreement in accordance with the outcome of a discussion or litigation with the tax authority (e.g. if an “at arms length payment” is not accepted as such by the tax authority or if interests are held to be dividends or a loan is seen to be a gift)?

Theoretically, yes. Still, private agreements regarding taxes are only enforceable among the parties of such agreement, and never before the tax authorities. For example: (i) “the price of the product includes taxes which will be determined in the administrative decision” – such clause is valid, and will only affect the private parties; (ii) “Party A will bear the tax burden of the operation” – If the tax authorities determine that Part B is responsible for the taxes, the agreement may not be used against the them – still, Part B may pay the taxes and then demand the value from Part A in a civil suit.

2.4 Sanctions

- a. What is the statute of limitations for tax related matters?

As a general rule, under the statute of limitations the enforceability of a tax debt is of 5 years. Still, the beginning of this period varies depending on the situation and the tax. For example, it is possible to count the 5 years period from: (i) the day the tax obligation was created; (ii) the first day of the year following the one in which the tax could have been originally assessed; or (iii) the day in which a decision declaring a tax assessment null due to formal reasons becomes final.

- b. What is the typical sanction/amount of fines in your jurisdiction? Is there a different fine level for direct or indirect taxes?

On the Federal Sphere, the general fine is of 75% (which can be raised under aggravating circumstances) on the due tax not declared by the taxpayer, or a late-payment fine of 0,33% per day, limited at 20%, on overdue taxes, that were declared but not collected by the taxpayer. Interest is also calculated by a specific index. As for indirect taxes collected by the States (e.g. VAT), each Brazilian State has its own Law, however, some penalties can reach over 150% of the amount in controversy

- c. Is it possible for a taxpayer to prevent tax penalties to be imposed should he/she be able to prove her good faith or reasonable interpretation of the law?

It is not possible to prevent/reduce penalties in the administrative instance by simply showing good faith or reasonable interpretation of the law. On the other hand, the opposite may happen should the tax authority demonstrate that the taxpayer acted in bad faith, then penalties may be considerably increased and criminal prosecution might follow.

- d. Is it possible to regularize your tax situation with reduced or no fines/sanctions?

Yes, by means of special payment and amnesty programs (generally called at Federal branch as "REFIS"). Such programs encourage taxpayers to pay their debts in installments, usually with reduced fines and interests.

Another possibility would be to inform the Tax Authority of overdue or unpaid taxes by means of a voluntary disclosure, which would prevent the imposition of fines/sanctions. It is important to remind that this procedure is only possible when the taxpayer is not under investigation by the Tax Authority, otherwise the disclosure of information would not be understood as voluntary, and fines/sanctions would apply.

- e. May tax advisors/tax lawyers be held responsible by the tax authority for their advice to taxpayers?

There is a lot of controversy surrounding this topic. There is no specific rule designed to have advisors/lawyers held responsible by tax

authorities for a tax advice. Nonetheless, it is certain that if an advisor/lawyer knowingly advises his/her client to act against the law or acts beyond his/her power of attorney he/she may be ultimately held responsible before the taxpayer (client) and/or the authorities, as the case may be.

2.5 Tax information exchange

- a. Does a tax information exchange on the EU level or OECD level happen and how does it take place?

Brazil is not a part of the EU nor of the OECD, so information is not exchanged on those levels.

- b. Does your country enter into tax treaties that oblige to exchange information spontaneously, automatically and/or upon request?

It does. The most recent agreement has been signed by Brazil and the USA. Still, the treaty is still pending the USA acceptance.

- c. Is the tax payer notified in case information is exchanged with foreign tax authorities?

Such notification is not mandatory unless it is grounds for a tax assessment in Brazil.

- d. Can the tax payer object against an exchange of information?

Yes, but only by means of a judicial claim. Yet, such claim is unlikely to succeed. In theory the Federal Revenue Service should only exchange information that is already on its database. In order to be strictly compliant with Brazilian bank secrecy law the Revenue Service should request prior authorization to Courts to have full access to taxpayers' bank data.