



INTERNATIONAL ASSOCIATION
OF YOUNG LAWYERS

General Communication with Tax Authorities in friendly or unfriendly ways

Tax Commission – of course...!

Prague, 2014 – Working Session 9

National Report of Estonia

Egon Talur

Attorneys at law Borenius
Kawe Plaza, Pärnu mnt 15
10141 Tallinn, Estonia
+372 665 1888

borenius@borenius.ee

General Reporters:

Dr. Christian Presoly
Batliner Gasser Rechtsanwälte
Marktgass 21
FL 9490 Vaduz

T: +423 236 0480
presoly@batlinergasser.com

Gustavo Yanes Hernández
Monereo Meyer
Marinel-lo Abogados
Alfonso XII, 30, 5º
E 28014 Madrid
T: +34.913 199 686
gyanes@mhhh.es

31 March 2014

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?

As a general rule, most of the communication with Estonian tax authorities (principally with Estonian Tax and Customs Board) takes place as electronic communication. Estonia is using its innovative capacity and has improved country's public administration flexibility and responsiveness. There are several simplifications introduced in terms of taxation and most of the communication takes place over the Internet based tax authority system (e-Tax Board / e-Customs).

Consequently, often there is no need for direct vis-à-vis contact with tax authority; however, it is possible to contact by means of e-mail or telephone as well as to visit the tax office. Moreover, in cases regarding taxation of natural persons, it is also common to contact the tax authority via Skype or Facebook.

Complicated taxation questions may also be discussed on special meetings between the taxpayer representative (e.g. tax counsel) and authorized officials. Often the tax authority is in favour of constructive negotiations in order to reach a mutually satisfactory outcome.

Everyday communication in the form of meetings is also possible on the taxpayer's request.

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

The involvement of tax counsels is advisable for the complex tax cases and there is no need for professional tax advice in everyday communication with Estonian Tax and Customs Board.

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

The style of interaction depends largely on particular official and the matter in consideration. In case tax counsels are involved, communication can be practical and constructive. On the other hand, it is evident that in some cases where tax counsels (usually attorneys) are present, the officials tend to be more careful with their oral and written statements as they consider their legal position in a potential dispute. This makes process of discussions and negotiations more difficult, but in case the parties reach a mutual understanding, the outcome tends to be more reliable for the taxpayer.

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

Communication regarding the special matters is commonly held in written form; however, meetings are also possible. Usually the communication in special cases is a combination of meetings and exchange of written statements, while the latter is to document either agreement with or dissenting opinion of the other party.

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

The behaviour of Estonian Tax and Customs Board largely depend on the type of proceedings. During the tax audits the behaviour of the tax authority is mostly dominant (oral communication seems to be preferred, as the officials will be recording the minutes of the meeting); however, in cases related to binding preliminary decisions the behaviour of officials seems to be slightly more customer-oriented.

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?

Estonian Taxation Act provides a specific procedure to request a binding preliminary decision (tax ruling). By a tax ruling the Estonian Tax and Customs Board provides a binding assessment of taxation of an act or set of acts (transaction) that the taxpayer describes and intends to perform in the future. However, the tax authority can refuse to issue a tax ruling if they find the described transaction to be hypothetical, the transaction is aimed at tax evasion or if they find that the applicable legal provisions are sufficiently clear under the provided circumstances.

Tax rulings are generally used for bringing legal clarity in complicated situations or in cases of complex structured arrangements. Occasionally, tax authority is also interested in finding a mutual understanding in a particular case if a taxpayer will present strong arguments and evidence supporting its arguments. Unfortunately,

the tax authority's motivation to issue a favourable ruling does not appear to be very strong and there seems to be no direct benefit for the authorities, only risks of issuing a wrong ruling beneficial to taxpayer and waiving future tax assessment rights for this transaction.

The law explicitly provides that no tax rulings are issued in relation to pricing arrangements of related party transactions.

Legal entities have to pay state fee in the amount of EUR 766.93 for the review of the application for a tax ruling. Individuals have to pay a significantly smaller state fee – EUR 191.73.

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

The tax authority shall make a preliminary decision within 60 days as of the date of receipt of the application. However, the term may be extended by 30 days under specific circumstances.

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

The prior decision consultations are not binding to the tax authority to form a preliminary decision. The aim of the consultations could be only to give a comprehensive overview about the planned transaction that the tax authority could reach to a legitimate solution.

Mere consultations without requesting a tax ruling and consultations prior to and during the proceedings of requesting a tax ruling are not binding to the tax authority in any way. The issued tax ruling itself is binding for the tax authority. The taxpayer is required to immediately notify the tax authority of the transaction described in the application requesting the tax ruling.

Upon refusal to review the application and to issue tax ruling, the applicant can file a challenge to the tax authority itself or to file a legal action with an administrative court. There is no right to take the unfavourable tax ruling to court upon disagreement with the assessment provided by the tax authority in the tax ruling.

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

The tax ruling on the taxation of the specific transaction is binding for tax authority and the taxable person can rely on it if the following conditions are fulfilled:

- the transaction took place during the term specified in the preliminary decision;
- the transaction conforms to the description provided in the preliminary decision in all circumstances significant in terms of taxation;
- the legal provisions relevant for taxation purposes have not been substantially amended before performance of the act.

The decision, however, is not compulsory for the taxpayer and one can act contrary to the ruling. The ruling itself cannot be challenged in court and if the taxpayer decides to ignore it, one can challenge the notice of assessment (that is likely to follow).

The tax ruling can be relied on only by persons who submitted the request for a ruling.

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

According to the law, the decision is a binding assessment of taxation of an act or set of acts to be performed in the future. The tax liability arises directly from the tax law and taxpayer does not have to follow the decision. Since the decision is binding to the tax authority in terms of taxation of a specific transaction, the preliminary decision could be regarded as an administrative act.

The taxpayer does not have the right to recourse upon disagreement with the assessment provided by the tax authority in the preliminary decision.

However, a refusal to review the application for a binding preliminary decision is an administrative act (more precisely “resolution”), which is issued by an administrative authority, and the applicant has the right to file a challenge to the tax authority itself or to file an action with an administrative court.

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?

The taxpayer does not have to give up any rights or explicitly agree to any other direct adverse consequences in order to get a tax ruling.

However, in order to get a binding ruling from Estonian Tax and Customs Board, one has to include exhaustive description of the intended transaction and analysis of the circumstances significant for taxation purposes as well as its own opinion on taxation of the transaction. At the request of the tax authority, taxpayer has to submit all the documents relevant for the performance of the transaction and therefore, the taxpayer must take into consideration that it needs to disclose a lot more information to the tax authority than it normally would. The taxpayer must

consider the possibility of getting audited if it decides not to proceed with and withdraw the preliminary ruling request or decides not to follow the tax authority's unfavourable assessment in the issued tax ruling.

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?

Tax authority is required to treat a tax ruling confidential within the limits of tax secrecy and is not allowed to disclose information which enables identification of persons involved. Nevertheless, the authority has the right to disclose the summary of tax ruling on taxation of matters of general importance and of the transactions for which rulings are repeatedly applied for. Applicant may identify the information in its application that they reasonably would like to keep undisclosed. From the taxpayer point of view, there is no obligation to keep the tax ruling confidential.

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?

Estonian tax authorities have the right to issue a notification of assessment in order to notify the taxpayer of the amount of tax for which one is liable. If the taxpayer does not agree with the notice of assessment, one has either a right to file a challenge to the particular tax authority or to file an action with the administrative court.

The challenge proceedings

If the taxable person or another participant in tax proceedings finds their rights have been violated or freedom of the person has been restricted by a notice of assessment or any other administrative act, issued by the tax authority, the person can file a challenge to the tax authority to demand the repeal or amendment of the administrative act or the issue of a new administrative act. To be more specific, the taxpayer can challenge a delay, an omission, and refusal to remove an official or expert, the return of an application for the issue of an administrative act, other measures taken by a tax authority.

Upon the review of a challenge, the lawfulness and purposefulness of the issue of an administrative act shall be verified. More precisely, an administrative authority which reviews the challenge has the right to:

- satisfy the challenge in full or in part and repeal an administrative act either in full or in part and to eliminate the consequences of the administrative act;
- issue an administrative act, take a measure or make a new decision on the merits of the matter;
- issue a precept to the administrative authority concerned to issue an administrative act, to take a measure or pass a new resolution of the matter; or
- restore the situation prior to the measure being taken or assign such task to the structural unit of the tax authority concerned.

The court proceedings

The taxpayer can contest any administrative act or a measure of the tax authority or officials of the tax authority in court. The taxpayers may file a complaint to the administrative court only for the protection of their own rights. When granting an action, the court may:

- annul the administrative act of the tax authority;
- order that an administrative act be made or an administrative measure be taken;
- prohibit the issue of an administrative act or the taking of an administrative measure;
- award compensation for harm caused by the tax authority;
- ascertain that the administrative act is null and void, that the administrative act or measure is unlawful.

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

Taxable person has the right to choose between filing a challenge to the tax authority and filing an action with an administrative court. The taxpayer or another participant in tax proceedings may file a complaint to the court at any stage of the challenge proceedings. A person also has the right of filing a claim to a court without filing a challenge.

In practice, it is common that the taxpayer first files a challenge and if a challenge is not satisfied, action with the administrative court is being filed. Usually the taxpayer is able to file a challenge on its own (without using a tax counsel) in hope of getting a positive outcome without filing action to court. However, challenges are rarely successful and quite often attorneys advise taxpayers not to challenge the assessment but to file an action to court directly to save time and

keep the level of legal fees lower (unlike legal costs in court proceedings, legal costs of a challenge cannot be recovered, if successful).

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

The anticipated costs depend both on the selected proceeding and the complexity of the case.

In administrative procedure acts, a state fee of three per cent of the contested amount, but not less than EUR 15 and not more than EUR 750, has to be paid upon filing of a complaint against the action of a tax authority. The filing of a challenge to the tax authority is free from state fee. On the other hand, the legal costs in challenge proceedings are not recoverable, even if the challenge will be successful.

As a general rule, costs of the court proceedings (reasonable legal costs, state fee and other costs on proceedings) are to be borne by the party against whom judgment is given in the matter. It is, however, quite unlikely for the court to order the taxpayer to bear the legal costs of a tax authority. Therefore, even if the judgment is not beneficial to the taxpayer, the taxpayers usually have to bear their own costs only.

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

It is not compulsory to have a lawyer for administrative court or challenge proceedings. In complex cases, however, the assistance of a tax lawyer is recommended.

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

Normally, a challenge shall be reviewed within thirty days, which makes it much faster procedure than the court proceedings. The timeframe of court proceedings depends on the complexity of the case and can take several years to reach to a final judgment.

f. 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.)?

The payment of the tax debt is not automatically postponed until the end of a pending litigation. However, taxpayer can submit an application for interim relief during the administrative proceedings to postpone the payments until the final decision is reached. The court may, at any stage of the proceedings, on the basis

of an application of the applicant which states its reasons, or of its own motion, enter a ruling ordering a measure of interim relief to give provisional protection to the applicant's rights if, in the contrary case the protection of the applicant's rights by the judgment may be rendered significantly more difficult or impossible. A ruling ordering interim relief may suspend the validity or enforcement of the contested administrative act (tax assessment notification). Consequently, it is possible to submit an application to postpone the payment of the tax debt until the end of a pending litigation or to suspend validity of enforcement of the administrative act contested.

In case of interim relief, no guarantees are usually required.

Additionally, in accordance with general procedure prescribed by the Taxation Act and at the request of the taxable person, the tax authority permits tax arrears to be paid in instalments. This is a mitigating measure outlined in the Taxation Act for the situation when the tax arrears are collectible, but the taxpayer is not able to pay the debt at once. In case of payment of tax arrears in instalments, the tax authority has the right to request a security from the taxpayer.

g. 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?

Investigation Department of the Estonian Tax and Customs Board as well as Prosecutor's Office may initiate criminal proceedings in case there are sufficient grounds to do so. In practice, however, the criminal proceedings are not commenced very often and usually the tax authority rather collects the payable tax with statutory tax interest by a notice of assessment.

h. 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 arm's 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)?

It is possible to include a clause in an agreement to automatically amend the agreement, or to provide some other remedies, in accordance with the outcome of a discussion or litigation with the tax authority. The tax liability, however, strictly derives from the law and the discussion or litigation with the tax authority could only specify such liability, and therefore, the effect of such agreement would be a party's right of recourse against the other party to the agreement, it usually does not have any consequences to the tax authority.

2.4 Sanctions

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

The limitation period for making an assessment of tax is three years. In the event of intentional failure to pay or withhold a tax, the limitation period for making an assessment of tax is five years. A limitation period commences on the due date for the submission of the tax return which was not submitted or which contained information that caused the amount of tax to be calculated incorrectly.

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

In Estonia, the main adverse consequence lies with the tax interest payable by taxable person. If a taxable person fails to pay tax by the date prescribed by law, the interest at the rate of 0.06 per cent per day is due on the amount of tax outstanding by the due date.

Other penalties and fines are also applied, although not very often. There are criminal sanctions foreseen in the law with the maximum amount of a criminal fine (pecuniary punishment) of EUR 16,000,000 for legal persons and 500 daily rates for natural persons. The daily rate of a pecuniary punishment for natural person is calculated on the basis of the average daily income of the person. The maximum amount of a misdemeanour fine is EUR 32,000 for legal persons and EUR 1,200 for natural persons.

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?

In general, tax interest is due regardless the reasons of late payment. The only way to reduce the interest risk is to make a prepayment to the tax authorities' account in the disputable amount. With all the other (pecuniary) penalties, there are almost no possibilities to prevent any penalties in a legally binding way for a taxpayer.

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

There is a mitigating measure outlined in the Taxation Act for when the tax arrears are collectible but the taxpayer is not able to pay the debt at once. If the tax authority agrees to it, the tax payer can make the payment of arrears in instalments, as agreed with the tax authority. In such a case, the tax authority is entitled to cut the tax interest by 50%. Another option of tax interest risk management is to keep a reasonable prepayment with the tax authorities' account

and have it cover and offset any smaller tax and interest liabilities. There are no other means to regularize reduced or no fines upfront.

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

Usually, taxpayer is personally responsible for all data submitted in a tax return or other declaration, regardless of the underlying advice or assistance with calculations. In the rare event of a tax lawyer's advice being aimed at committing a tax fraud (or any other criminal offence for that matter), an advisor giving such advice can be held responsible on their own.

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?

A tax information exchange takes place in accordance with EU directives and regulations and tax treaties. The information exchange could occur upon application in any particular case, but within the European Union there is also an automatic and spontaneous information exchange without the request from another party.

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

All tax treaties signed by Estonia contain only an obligation to exchange information on request. Estonian Taxation Act provides that the Estonian Tax and Customs Board may refuse to provide international assistance if:

- the requested information is impossible to acquire;
- forwarding the requested information would harm the business, production or professional secrecy of a taxable person;
- forwarding the requested information would pose a threat to the security of the state of Estonia;
- the total amount of the claims in the request remains below EUR 1,500.

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

The Taxation Act does not foresee any obligations for the tax authority to notify the taxpayer about information exchange. Furthermore, there is an automatic and

spontaneous information exchange within the tax authorities of the member states of European Union.

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

In general, Estonian Tax and Customs Board may forward the information collected in tax proceedings to a competent authority concerned of a foreign state on its own initiative in order to ensure determination of the correct tax liability in a foreign state. The Taxation Act does not foresee explicit right of the taxpayer to object to exchange of information and in majority of cases the taxpayer may not even find out that the information has been forwarded. In case there is a need for additional information collection, the taxpayers have the right to contest the administrative act or measure if their rights have been violated. Also, if the taxpayers find out about information exchange, they may contest it on general grounds (infringement of their rights) and to seek for protection by way of requesting the evidence and information to be declared inadmissible for taxation purposes.