

General Communication with Tax Authorities in friendly or unfriendly ways

Tax Commission – of course...!

Prague, 2014 – [Working Session (VMWT-9200017)]

National Report of Spain

Guadalupe Díaz-Súnico

Cuatrecasas Gonçalves Pereira
Paseo de Gracia 111
08008 Barcelona (Spain)
+34 932 905 500

guadalupe.diaz@cuatrecasas.com

General Reporters:

<p>Dr. Christian Presoly Batliner Gasser Rechtsanwälte Marktgass 21 FL 9490 Vaduz</p> <p>T: +423 236 0480 presoly@batlinergasser.com</p>	<p>Gustavo Yanes Hernández Monereo Meyer Marinel-lo Abogados Alfonso XII, 30, 5º E 28014 Madrid T: +34.913 199 686 gyanes@mmmm.es</p>
--	---

20th February 2014



INTERNATIONAL ASSOCIATION
OF YOUNG LAWYERS

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?

Tax payers can contact Tax Authorities in different ways: from general information numbers, arranging meetings to filing binding rulings' requests.

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

No, any tax payer can directly approach the tax authorities, there is no need (although, of course, highly advisable to have one) that a tax counsel does it on your behalf.

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

Regarding special matters, tax payers can communicate with tax authorities through tax rulings requests. In some cases, it is possible to have an informal approach to the matter via meetings with the authorities, but this is not an standardized procedure

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

The procedure is written. In some cases, it is possible to have an informal approach to the matter via meetings with the authorities, but this is not a standardized procedure

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

Generally speaking, the tax authorities behavior, outside audit procedures, can be described as cooperative if tax payers provide the Tax Authorities with the required documentation.

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?**

There is a possibility of a tax ruling. Entering into a binding ruling request is free for tax payers.

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

The legal term and also average time frame to get a binding tax ruling is approximately six months.

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

A consultation is binding for the tax authorities unless the relevant case law or the applicable legislation is modified afterwards.

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

Once a tax ruling has been issued, the tax payers who requested the ruling can rely on its application unless there is a change in the applicable law or the applicable case-law and provided that identity exists between the tax payer's circumstances and the background included in the tax ruling request.

The content of the binding rulings is public and other tax payers can use it to support their position against the tax authorities, although this criteria will not bind the authorities but only in the case of the consultant (i.e. tax payer that requested the ruling).

Tax authorities can change the criteria at any time by issuing a new tax ruling, although the tax payer who has obtained a binding ruling under

the previous criteria will in no case be subject to penalties in the event of an audit. The change of criteria is not rare in practice.

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

The exact legal status of a tax ruling is administrative doctrine. Since 2004, all rulings are binding for the tax authorities as explained before.

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?

In order to get a tax ruling, a tax payer does not have to give up certain rights or explicitly agree to anything, as the rulings are not negotiated with the authorities, although this sometimes happens in practice.

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?

A tax ruling is a public document and the tax payer does not have an obligation to keep it confidential. All tax rulings are available in the webpage of Tax Authorities.

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?

Tax payers can litigate against Tax Authorities decisions. First, they can appeal the resolution before the same tax administration that issued it.

Against the resolution to the previous remedy, the tax payer can appeal at the administrative courts (still inside the tax administration).

With the administrative court's resolution, administrative procedure is ended. Then, the tax payer can appeal to the Regional Courts or National High Court (both jurisdictional courts) depending on the amount and the tax administration that issued the administrative act. The Supreme Court has the final decision on the matter.

Only if the resolution has breached the legislation of a harmonized

European tax (i.e. VAT), could the tax payer report to the Court of Justice of the European Union (CJEU).

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

First, the tax payer has to go through all the way on the administrative procedure so to have access to the courts.

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

It depends on the administrative procedure. If the tax payer is appealing against tax authorities and administrative courts, the appeal is free.

But if the tax payer is in judicial procedure, it is necessary to have a solicitor for filing the claim.

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

It is not necessary to have a lawyer in the administrative procedure. However, tax payer needs a solicitor in judicial litigation.

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

For administrative remedies, General Tax Act establishes one month after the following day of appeal presentation. However, currently, they can take from three to six months.

In the administrative courts, the General Tax Act establishes a one-year term but, in practice, tax administration takes more time (around 3 years).

In jurisdictional courts (i.e Regional Courts, National High Court and Supreme Court) take around three years each.

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 tax payer can request suspension of payment when a guarantee is provided in voluntary payment period. There are different kinds of guarantees, such as bank guarantees or deposit certificates. In this case there is an automatic suspension of the payment.

If the tax payer can justify the impossibility of obtaining previous guarantees because doing so could seriously harm the viability of the company, other guarantees may be provided as mortgages or pledges.

Finally, tax administration could excuse the tax payers from constitution of guarantees if the latter lacks sufficient assets to secure the debt and the execution of its assets could substantially affect the maintenance of productive capacity and employment levels of the economical activity.

The payment of penalties is automatically suspended without the need of guarantees when the tax payer is litigating.

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?

Tax authorities may submit a report to the public prosecutor to investigate on possible criminal tax offences when the case amount (tax due on a certain tax and a certain year) exceeds €120,000.

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 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)?

It could be possible to include a clause in an agreement if both parties are willing, although not always advisable tax wise.

2.4 Sanctions

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

The statute of limitations is four years for tax related matters (five/ten years for criminal tax offences).

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

The Spanish General Tax Act establishes different kinds of infringements of the tax laws with different penalties for each of them.

Every infraction has its specific penalty and there is not a different fine level for direct or indirect taxes.

If an audit turns into tax due, average penalties are 50% of such tax due, plus interests.

- 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?**

According to Spanish General Tax Act it is possible for a taxpayer to prevent tax penalties being imposed by, proving reasonable interpretation of the law, when he/she acted relying on a reasonable interpretation of the rule or when the taxpayer has adjusted their action to the criteria established by the competent tax authorities.

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

Besides extraordinary tax amnesty procedures such as the one undergone in Spain in 2012, the tax payer can always regularize his/her tax position by the ordinary procedure of the supplementary tax returns provided this is without previous requirement of the tax administration. In such case, the tax payer only pays the late payments surcharge and interests to the date of filing the return/settlements besides the corresponding tax due, but no penalties are imposed.

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

Tax advisors only have civil and penal responsibility for their advice to taxpayers.

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?**

On the OCDE level, Spain has signed several specific Tax Information Exchange Agreements (TIEAs), besides the information exchange clause contained in the broad Spanish tax treaty network. The purpose of this Agreement is to promote international co-operation in tax matters through exchange of information.

Spain has currently in force specific information exchange agreements with Andorra, Aruba, Bahamas, Curacao, St. Maarten and San Marino.

There are currently negotiations to exchange information with Bermuda, Guernsey, Cayman Islands, Cook Islands, Isle of Man, Jersey, Macau, Monaco, Saint Vincent and the Grenadines and St. Lucia.

Additionally, on the EU level there is the VIES, it is VAT Information Exchange System. Under the new VAT system intra-Community supplies of goods are exempt from VAT in the Member State of dispatch when they are made to a taxable person in another Member State who will account for the VAT on arrival.

Therefore any taxable person making such supplies must be able to check quickly and easily that their customers in another Member State are taxable persons and do hold a valid VAT identification number. For that purpose, *inter alia*, each tax administration maintains an electronic database containing the VAT registration data of its traders. Such information includes the VAT identification number, the date of issue, the trader's name, the trader's address and, where applicable, the date of cessation of validity of a VAT number.

A computerized VAT Information Exchange System (V.I.E.S.) was set up to allow for the flow of the data held across the internal frontiers which enables companies to obtain rapidly confirmation of the VAT numbers of their trading partners and enables VAT administrations to monitor and control the flow of intra-Community trade to detect all kinds of irregularities.

The unit responsible for the control of intra-Community trade in each Member State, the Central Liaison Office (CLO), has a direct access through VIES to the VAT registration database of the other Member States.

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

Spain has entered into tax treaties that oblige to exchange information with other countries' tax administrations. Depending on treaty there could be different kinds of exchange information systems.

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

Tax payer will not be specifically notified in case of information exchanged with foreign tax authorities and, according to Spanish Tax legislation, to require information to foreign tax authorities does not constitute an unjustified interruption of the inspection procedure. All this information

must be though entered in the tax file which tax payer is entitled to access.

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

Tax payer cannot object to an exchange of information because it is a right of the Spanish Tax Authorities to require tax information to other tax authorities providing that a Tax Information Exchange Agreement between the requiring country and the other country where the information has been required has been signed.