
THE TAX DISPUTES AND LITIGATION REVIEW

THIRD EDITION

EDITOR
SIMON WHITEHEAD

LAW BUSINESS RESEARCH

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This article was first published in The Tax Disputes and Litigation Review - Edition 3
(published in February 2015 – editor Simon Whitehead).

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THE TAX
DISPUTES AND
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REVIEW

Third Edition

Editor
SIMON WHITEHEAD

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Published in the United Kingdom
by Law Business Research Ltd, London
87 Lancaster Road, London, W11 1QQ, UK
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www.TheLawReviews.co.uk

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ISBN 978-1-909830-38-7

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: 0844 2480 112

ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following law firms for their learned assistance throughout the preparation of this book:

BAKER & MCKENZIE LLP

BOWMAN GILFILLAN

CUATRECASAS, GONÇALVES PEREIRA

DANNY DARUSSALAM TAX CENTER

DLA PIPER WEISS-TESSBACH RECHTSANWÄLTE GMBH

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CONTENTS

Editor's Prefacevii
	<i>Simon Whitehead</i>
Chapter 1	TAX APPEALS TO THE EUROPEAN COURT OF JUSTICE 1
	<i>Paul Farmer</i>
Chapter 2	ARGENTINA 11
	<i>Juan Pablo McEwan and Agustín José Lacoste</i>
Chapter 3	AUSTRALIA 19
	<i>Tony Frost and Cameron Hanson</i>
Chapter 4	AUSTRIA 30
	<i>Franz Althuber and Marco Thorbauer</i>
Chapter 5	BELGIUM 41
	<i>Caroline P Docclo</i>
Chapter 6	BRAZIL 56
	<i>Celso Grisi, Thaís Azevedo and Caio Luz</i>
Chapter 7	CANADA 70
	<i>Jacques Bernier and Mark Tonkovich</i>
Chapter 8	CHINA 90
	<i>Liu Tianyong</i>
Chapter 9	ECUADOR 102
	<i>Juan Gabriel Reyes-Varea and Alejandro Páez-Vallejo</i>

Chapter 10	FINLAND.....	112
	<i>Ossi Haapaniemi, Lauri Lehmusjoja and Meeri Tauriainen</i>	
Chapter 11	FRANCE.....	125
	<i>Eric Ginter and Julien Bellet</i>	
Chapter 12	GERMANY.....	140
	<i>Michael Hendricks</i>	
Chapter 13	GREECE.....	155
	<i>Panagiotis Pothos and Nina Kakali</i>	
Chapter 14	HUNGARY.....	167
	<i>Anna-Mária Veres and Balázs Kutasi</i>	
Chapter 15	INDIA.....	179
	<i>Aseem Chawla</i>	
Chapter 16	INDONESIA.....	192
	<i>David Hamzah Damian</i>	
Chapter 17	IRELAND.....	201
	<i>John Gulliver and Robert Henson</i>	
Chapter 18	ITALY.....	213
	<i>Guglielmo Maisto</i>	
Chapter 19	JAPAN.....	227
	<i>Akihiro Hironaka, Michito Kitamura and Masaki Noda</i>	
Chapter 20	LIECHTENSTEIN.....	240
	<i>Heinz Frommelt and Angelo Trebo</i>	
Chapter 21	LUXEMBOURG	253
	<i>Frédéric Feyten and Guy Perrot</i>	

Chapter 22	PHILIPPINES.....	264
	<i>Carina C Laforteza and Mark Xavier D Oyales</i>	
Chapter 23	POLAND.....	275
	<i>Dariusz Wasylkowski</i>	
Chapter 24	PORTUGAL.....	287
	<i>Francisco de Sousa da Câmara and António Lobo Xavier</i>	
Chapter 25	RUSSIA.....	300
	<i>Yana Proskurina</i>	
Chapter 26	SOUTH AFRICA.....	319
	<i>Johan Kotze</i>	
Chapter 27	SPAIN.....	332
	<i>Miró Ayats Vergés and Jaume Bonet León</i>	
Chapter 28	SWEDEN.....	349
	<i>Daniel Jilkén and Ulrika Grip</i>	
Chapter 29	UNITED KINGDOM.....	358
	<i>Simon Whitehead</i>	
Chapter 30	UNITED STATES.....	386
	<i>Edward L Froelich</i>	
Appendix 1	ABOUT THE AUTHORS.....	417
Appendix 2	CONTRIBUTING LAW FIRMS' CONTACT DETAILS..	437

EDITOR'S PREFACE

The objective of this book is to provide tax professionals involved in disputes with revenue authorities in multiple jurisdictions with an outline of the principal issues arising in those jurisdictions. In this, the third edition, we have continued to concentrate on the key jurisdictions where disputes are likely to occur for multinational businesses.

Each chapter provides an overview of the procedural rules that govern tax appeals and highlights the pitfalls of which taxpayers need to be most aware. Aspects that are particularly relevant to multinationals, such as transfer pricing, are also considered. In particular, we have asked the authors to address an area where we have always found worrying and subtle variations in approach between courts in different jurisdictions, namely the differing ways in which double tax conventions can be interpreted and applied.

It is noticeable in this third edition that the past year has seen a general increase in litigation as tax authorities in a number of jurisdictions take a more aggressive approach to the collection of tax; in response, no doubt, to political pressure to address tax avoidance. In the UK alone we have seen the tax authority vested with broad new powers not only of disclosure but even to require tax to be paid in advance of any determination by a court that it is due. The provisions empower the revenue authority, an administrative body, to compel payment of a sum, the subject of a genuine dispute, without any form of judicial control or appeal. A further announcement has just been made to introduce a 'diverted profits tax' to impose an additional tax in the UK when it is felt that a multinational is subject to too little corporation tax. These are, perhaps, extreme examples, reflective of the parliamentary cycle, yet a general toughening of stance seems to be felt. In that light, this book provides an overview of each jurisdiction's anti-avoidance rules and any alternative mechanisms for resolving tax disputes, such as mediation, arbitration or restitution claims.

We have attempted to give readers a flavour of the tax litigation landscape in each jurisdiction. The authors have looked to the future and have summarised the policies and approaches of the revenue authorities regarding contentious matters, addressing

important questions such as how long cases take and situations in which some form of settlement might be available.

We have been lucky to obtain contributions from the leading tax litigation practitioners in their jurisdictions. Many of the authors are members of the EU Tax Group, a collection of independent law firms, of which we are members, involved particularly in challenges to the compatibility of national tax laws with EU and EEA rights. We hope that you will find this book informative and useful.

Finally, I would like to acknowledge the hard work of my colleague Alice McDonald in the editing and compilation of this book.

Simon Whitehead

Joseph Hage Aaronson LLP

London

February 2015

Chapter 9

ECUADOR

Juan Gabriel Reyes-Varea and Alejandro Páez-Vallejo¹

I INTRODUCTION

In Ecuador, the administration of justice in tax and customs matters is in the charge of the District Court of Tax Disputes (TDCT), a jurisdictional entity with sectional competence and the Special Tax Litigation Chamber of the National Court of Justice (CNJ) as the appellate body with national jurisdiction, based in Quito.

Tax dispute jurisdiction consists of the public authority to consider and resolve disputes arising between tax administrations and taxpayers or those responsible for acts that determine tax obligations or establish responsibilities, or for the consequences of legal relations arising from the application of laws, regulations or resolutions related to tax matters.

Litigation in tax and customs matters has been gradually increasing, with the main defendant in this area being the Internal Revenue Service (SRI), the institution responsible for the collection of the principal taxes, such as income tax and value added tax. This institution has modified the tax culture in Ecuador by turning tax collection into the main income for the state.

In 1998 a deep restructuring process of the aforementioned tax authority in Ecuador was initiated, as well as a modernisation of auditing and tax control systems, which resulted in an increase in tax assessment acts and accordingly an increase in the lawsuits brought by taxpayers against these acts.

Because of the backlog of court cases in taxation, litigation in tax matters (i.e., the procedure of challenging an administrative act for determining a tax liability in the courts,) can last between four and seven years and the cost of this process can be significant.

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One of the factors that increases the cost of litigation in tax matters is the condition that must be met by any person who intends to bring an action against an act in which a tax liability is determined: a bond or security equivalent to 10 per cent of the contested obligation must be paid. If this bond is not paid (which may be satisfied through a cash payment, a bank or insurance guarantee, or similar), the claim must be set aside by the judges hearing it. In the event of a judgment in favour of the taxpayer, the amount lodged as a guarantee must be returned to the taxpayer and, in the case of an unfavourable decision, the amount is charged to the total demanded by the tax administration.

In the event of an appeal, heard before the CNJ's Special Tax Litigation Chamber, and to suspend the effect of the trial court judgment, the law requires the taxpayer to pay a second bond, which rather than a specific fee is usually set between 5 per cent and 10 per cent of the contested amount.

In addition to the costs of bringing of lawsuits or appeals in tax matters, should the judgment go against the taxpayer, the Tax Code (COT) requires the payment of interest at a rate equivalent to 1.5 times the current reference lending rate determined by the Central Bank of Ecuador (i.e., approximately 13 per cent per annum; interest accrues notwithstanding the duration of the contestation process).

Furthermore, in addition to the costs of contesting tax determination acts through court proceedings, the tax administration has the legal obligation to impose a 20 per cent sanction or surcharge on any tax liability that is determined. The taxpayer has no option to reduce or avoid this surcharge; if the tax liability is confirmed by a judge, this confirmation necessarily brings with it the obligation of paying the 20 per cent surcharge.

To summarise, and as will subsequently be explained, non-payment of taxes in Ecuador and the initiation of legal proceedings before the courts can be a costly business for taxpayers.

II COMMENCING DISPUTES

Legal actions on tax matters can only be initiated by the taxpayer, and the TDCT has jurisdiction to hear challenges to legislative acts on tax matters and against acts that determine taxes, penalties or other charges that are exclusively related to tax matters. The TDCT also has jurisdiction over direct actions that seek the recovery of that which was unduly paid.

Once the tax required by a particular tax administration has been determined, taxpayers have two alternatives: (1) file a complaint with the tax administration responsible for the act (a claim that must be resolved within 120 days), or (2) bring a suit before the TDCT. As a rule, the taxpayer has 20 business days from the day following the notification of the contested act to choose either of these alternatives. After said term, the obligation determined takes force and therefore is enforceable through a compulsory collection proceeding.

In exceptional cases, and only for issues restrictively identified in the COT, the taxpayer or the tax authority has three years counted from the notification of an administrative act, to bring an appeal for review to the highest administrative authority. This appeal does not have an answer term and does not suspend the effects of the

contested measure. If the appeal decision goes against the taxpayer, the taxpayer may challenge it before the TDCT within the same 20 working days specified above.

The entitlement of the tax administration to determine a tax liability expires in: (1) six years, counted from the date that the return filing deadline lapsed, when not declared in whole or in part, (2) three years counted from the date of the tax return for which the law requires determination by the taxpayer, or (3) one year in the case of verification of a determination act undertaken by the taxing agency or in a mixed manner, counted from the notification date of such acts.

The term of the tax administration's entitlement to determine a tax liability is interrupted with the notification of the 'order of determination' to the taxpayer (i.e., the tax authority's decision to initiate a formal examination process that concludes with the determination of a tax liability).

i Determination process before the SRI

The tax determination process begins with notice of the determination order, which may be given to the taxpayer within three years following the date when the relevant tax return was filed. Once notification has been given of the determination order, the tax administration is allowed one additional year to request the necessary information and to issue a tax determination act. In other words, in general terms the SRI is allowed approximately four years to exercise its powers in order to determine and demand payment of the relevant taxes.

Once notice of the determination order has been given, the verification process (cross-checking information) begins. This process is completed when a draft determination certificate is issued. A draft determination has no legal effect because it is a preparatory act, but the purpose is to inform the taxpayer of the audit results and the differences that have been found regarding the audited tax.

The taxpayer then has 20 working days to exercise its right to object and to file its objections and justifications against this draft determination certificate, presenting all the necessary documentation to justify the differences found by the authority. In this instance both legal issues and documentary support and accounting matters are discussed.

After these 20 days, the SRI verifies and analyses the documents and arguments submitted by the taxpayer and issues the final determination, which is a purely administrative act.

Once given notice of the tax determination certificate, the taxpayer has 20 working days to challenge (to appeal) it either in court or before the tax administration that issued the determination act.

III THE COURTS AND TRIBUNALS

The TDCT is the competent entity to resolve conflicts in tax and customs matters, and above this entity is the CNJ's Special Tax Litigation Chamber, the highest jurisdictional body.

There is reiterated case law stating that an appeal heard by the CNJ does not act as a second instance, but rather that it is exclusively limited to analysing defects of procedure

of law committed by the TDCT, whether in a ruling or while the process was being prosecuted at that level. Therefore, such reiterated case law indicates that the appeal of cassation is an extraordinary remedy that does not allow the assessment of evidence, nor is it a dispute process (there is no lawsuit, nor answer to the suit or litigation). Since it is an extraordinary remedy, its invocation is extremely formal and is appropriate only in cases exhaustively specified by law as listed below:

- a* undue application, lack of application or mistaken application of provisions of the law, including mandatory case law precedents;
- b* undue application, lack of application or mistaken interpretation of procedural rules when they have vitiated the process with an insurmountable nullity or have given rise to defencelessness;
- c* undue application, lack of application or mistaken interpretation of juridical precepts applicable to valuation of proofs;
- d* a resolution in the ruling or writ regarding matters not pertaining to the litigation, or omission to resolve all items in litigation; and
- e* when the ruling or writ do not include the requirements stated in the law, or if the resolutions adopt contradictory or incompatible decisions.

Notwithstanding the aforementioned, the Constitution in force in Ecuador since 2008 established an extraordinary action in constitutional matters for the protection of constitutional rights and due process in court decisions, final orders and resolutions with the force of judgments where rights recognised in the Constitution have been violated by action or omission.

This action, therefore, may be lodged against judgments handed down by the highest court in tax dispute matters (CNJ), even when its scope is very limited.

i Internal review

We have already stated that the tax authorities have the power to initiate a review of their own actions through an extraordinary review procedure. Parallel to this, the tax administration is empowered, after giving notice of the final determination act to the taxpayer, to issue a second determination act voiding the first one. The foregoing is applicable as long as the tax administration is within the period allowed to make the relevant tax determination, and provided that the first tax determination act has not been challenged before the litigious-tax jurisdiction. In this regard, in an interesting judgment, the CNJ determined that this latter power – of verifying determination acts – is appropriate only to the extent that the original act of determination has not been ruled by the taxpayer before the TDCT. If there has been an objection lodged against the original act of determination, the tax authorities will not have jurisdiction to verify that act.

Detailed below is part of a relevant ruling issued by the CNJ in appeal of cassation No. 282-2010:

6.1.4. The initial effects of the legal challenge of the first certificates of determination, as stated above, do not suspend the exercise of the administration's determinative capacity, as it is not the issue that is in question when there is a judicial challenge, but it does create a suspensive effect on

the enforceability of the certificate, which is why the tax authorities must consequently wait for the pronouncement of the judge to act [...]. 6.1.6. This action of the tax administration obstructs the administration of justice on contested acts, goes against the principles governing the judicial process, as the system or means of the administration of justice, that of the effective judicial protection of rights, that of the obligation to administer justice, and that of the contestability of administrative acts in this court.

ii Establishment of courts and appellate levels

Five TDCTs existed by October 2014, each with respective chambers and each comprising three judges and a secretary. However, after an internal restructuring process ordered by the Judiciary Council (which regulates all matters relating to justice in Ecuador), the chambers of the various TDCTs were eliminated and new judges were appointed for each proceeding. According to this measure, the TDCT currently comprises several judges, and in each lawsuit already commenced or to be commenced the three judges corresponding to it will be designated through the computer system.

The judges of the different TDCTs are independent and act as judicial officers. However, it is common that TDCT or CNJ judges are former tax administration officials, mainly from the SRI.

It is always the taxpayer who initiates the legal process before the TDCT. Nevertheless, an appeal of cassation to the CNJ may be brought by either the taxpayer or the tax administration; however, as a formal appeal, this can be rejected through a writ of prohibition. If a partial judgment is issued by the TDCT (partly in favour of the taxpayer and in part for the tax authorities), it may be the case that two appeals are made against the same judgment, each with different arguments.

This appeal of cassation must be filed before the same TDCT judges that issued the judgment. Those judges must consider whether the appeal meets all the formal requirements established by law. If applicable, the TDCT judges must deliver the process to the CNJ for the latter to rule on the admissibility of the action or alternatively to reject it.

IV PENALTIES AND REMEDIES

i What to expect from a tax dispute

If the respondent tax authority is the SRI, we can expect a neat and well-structured defence (the tax authority has a legal obligation to defend itself in a contestation process, with no option to acquiesce to the lawsuit or compromise in any circumstances).

We can also expect the issue to be dealt with by judges who are just starting their work as administrators of justice (since more than half of the judges of the TDCT have less than five years' experience as judges) and we must expect a long and costly process.

Recently two out of three judges of the CNJ's Special Tax Litigation Chamber were temporarily suspended from their duties following allegations by the SRI's director general that one of their decisions – favourable to the taxpayer – was damaging to the interests of the state. We believe that this could motivate TDCT and CNJ judges to be more cautious regarding the economic impact of their decisions on the state.

ii Criminal penalties

With regard to criminal sanctions, the COT was in force from 1975 until August 2014 and contains an entire chapter on tax illegality. However, after the Integral Criminal Code (COIP) came into effect in August 2014, the chapter in the COT regarding tax illegality was expressly repealed and new specific chapters regarding tax illegality were included.

This change in the legal framework regarding tax illegality raised substantial questions on this subject. The main one, in our opinion, is elimination of intent (fraud) in tax defrauding offences. In other words, currently a fraudulent action does not require intent in order to be penalised as such; having merely perpetrated the action (culpable offense) suffices. According to the COIP, tax defrauding is understood to be any act of simulation, concealment, omission, misrepresentation or deception leading to an error in the determination of the tax liability, or acts that result in a failure to pay all or part of the taxes actually due, for the taxpayer's own benefit or that of a third party, as well as any fraudulent conduct that contravenes or impedes the work of control, determination and sanction exerted by the tax administration.

In cases of fraud, the following are the most frequent: (1) providing false or adulterated information or declarations on goods, figures, facts, circumstances or backgrounds that influence the determination of tax liability, (false, incomplete or disfigured data); (2) the wilful omission of income, the inclusion of costs, deductions, rebates or withholdings that are non-existent or in excess of that legally due; (3) the wilful alteration of computerised accounting records or books of accounts, notes, entries or operations related to the economic activity as well as false accounting records of accounts, names, quantities or data; (4) deliberately undertaking double accounting; (5) simulating one or more acts or contracts to obtain or grant a benefit of a subsidy, reduction, exemption or fiscal stimulus; (6) undue and wilful recognition or appropriation of a refund of taxes, interest or penalties, so established by a firm or enforceable act of the tax administration or competent court; (7) if the tax return includes false, incomplete, distorted or adulterated data; (8) other items.

Depending on the type of fraud that is committed, prison sentences can range from five to seven years.

With regard to financial penalties, these are divided into regulatory violations and offences. Violations are punishable for lack of compliance with the tax laws and are sanctioned monetarily with fines from US\$30 to US\$1,500, while regulatory offences are punishable for lack of compliance with tax regulations and are sanctioned monetarily with fines from US\$30 to US\$1,000.

Additionally, legislation provides for penalties such as closure of the establishment or business, suspension of activities, confiscation, definitive seizure, suspension or cancellation of entries in public registers, suspension or cancellation of patents and licences, and suspension or removal from public positions. However, the most common penalty used is the suspension of activities and closure of the establishment.

V TAX CLAIMS

i Recovering overpaid tax

Cases where for some reason (error in the tax return, accumulated tax credits, etc.) taxpayers have overpaid the amount of due tax (payment in excess) or, alternatively, have paid taxes that were not due (overpayment) are frequent.

Therefore, if a taxpayer has paid taxes in excess of that required by law, it has the right to request the return of the overpaid or wrongly paid amounts. This taxpayer action (claim) lapses in three years counted from when the payment is made and must be answered by the tax authorities through a resolution within a period not to exceed 120 working days.

If the decision is negative for the taxpayer, it may challenge said decision before the TDCT in what is called a contestation action for undue payment or overpayment.

Notwithstanding the aforementioned, there may be a case where a taxpayer has initiated proceedings before the TDCT regarding an administrative act that requires the payment of a tax but during the course of the judicial process, and to avoid the accrual of interest and reduce any relevant risks, decides to pay the said tax liability. In such a specific case, two alternatives are open to the taxpayer: (1) to discontinue the trial, and be liable for an order for court costs; or (2) pursue the contestation action as a challenge for improper payment or overpayment.

The latter is increasingly used by taxpayers and in cases of a favourable decision for the taxpayer the tax administration must return the amount paid by the taxpayer with the corresponding legal interest. The tax administration must pay the same interest that would arise if the taxpayer were the debtor, (i.e., about 13 per cent annually).

ii Challenging administrative decisions

If the tax administration issues an administrative act with general legal effects (regulations) that violates any of the rights and principles enshrined in the Constitution, it may be the subject of a public action challenging its constitutionality; such an action aims to declare the resolution unconstitutional and thus remove it from the legal system generally. This action must be brought before the Constitutional Court.

On the other hand, if the tax administration issues an administrative act with general legal effects that violates any of the provisions of the Internal Tax Law (LORTI) or COT (statutory rules), it may be challenged through a contestation action before the TDCT. This action seeks to declare the illegality of the administrative act and, therefore, remove it from the legal system.

If the tax administration issues an administrative act with individual legal effects (a tax assessment certificate) that violates any of the rights and principles enshrined in the Constitution, it can be challenged through a protective action, which aims to suspend the effects of the administrative act.

Finally, if the tax administration issues an administrative act with individual legal effects that violates any provisions of the LORTI or COT, it can be challenged through a contestation lawsuit before the TDCT. This lawsuit is the one typically used by taxpayers against tax assessment acts.

iii Claimants

In Ecuador, any taxpayer may make requests or complaints to the tax administration. Faced with an unfavourable resolution of the complaint, the taxpayer, as we have seen, may file a complaint with the tax administration itself or initiate legal proceedings before the TDCT (subject to the penalty of court costs).

In the event that there is shared involvement by several taxpayers or if the same administrative decision generates legal effects for several taxpayers, even though current tax legislation does not provide for joint actions, procedurally, under the principle of judicial economy and speed, we see that there is no conflict in this.

Ecuadorean tax legislation (COT) explicitly prohibits the recipients of tax exemptions from taking over the duties, established by law, of a taxable person; as well as extending, in whole or in part, the benefit of exemption in any way to non-exempt taxpayers. It is not feasible, therefore, for the right to claim an overpayment to be transferred from one taxpayer to another. Notwithstanding this, it is possible, in the trial stage, for a taxpayer to transfer to another taxpayer its litigation rights over the judicial process it has begun.

VI COSTS

In Ecuador, the court costs regime is regulated by tax legislation, especially when the taxpayer drops the court case or it is declared abandoned due to lack of momentum. According to the COT, any lawsuit being heard at the TDCT will be declared abandoned if it has not been processed within 60 days. This measure is being applied more frequently by the TDCT judges.

Before the CNJ's Special Tax Litigation Chamber, the court costs will be paid by the claimant whenever the appeal has been declared void or it is manifestly apparent it was brought without legal basis or for the purpose of delaying the execution of the judgment. In these cases a fine of up to the equivalent of 15 minimum wages may also be imposed depending on the importance of the case.

VII ALTERNATIVE DISPUTE RESOLUTION

Conflicts in tax matters are not susceptible to being resolved through an alternative dispute resolution method therefore there can be no compromises or negotiations over them.

Notwithstanding this, the only way to reach some sort of agreement with the tax authority on a tax liability is in respect of the payment facilities, (i.e., a term given to the taxpayer for the payment of the obligation, during which the interest referred to previously accrues).

VIII ANTI-AVOIDANCE

Since 2008, Ecuador has pursued a strict tax policy aimed at preventing tax evasion, mostly limiting unjustified enrichment and the use of tax havens or lower tax regimes.

Thus, as of said fiscal year, legislation was implemented that would restrict the deductibility of a series of costs paid abroad, and the application of transfer pricing for any kinds of transaction with related parties.

Currently, the National Assembly is discussing a new draft tax amendment designated as the Organic Law on Incentives to Production and Prevention of Tax Fraud, that will supposedly become effective as of 1 January 2015. Its principal objective is to eliminate tax shields that have the purpose of evading and eluding tax payments through tax havens. In the same vein, together with the implementation of rules that limit transactions and expense deductions, forms of coercion to enforce compliance and the payment of tax obligations required by the tax administration have also been strengthened, especially the use of precautionary measures as well as increased penalties.

Precautionary measures are frequently used by tax administrations, especially the SRI. The most controversial case during fiscal year 2013 was the seizure and auction of goods from one of the country's largest banana companies due to a tax liability of US\$45 million, which, when interest was added, exceeded US\$90 million.

IX DOUBLE TAXATION TREATIES

Ecuador currently has double taxation treaties (DTTs) with the following 15 countries: Mexico, Brazil, Argentina, Italy, Spain, Korea, Chile, Germany, Canada, France, Romania, Belgium, Switzerland, Uruguay and China; and one subregional agreement to prevent tax evasion with the Andean Community (Peru and Colombia).

In practice these treaties are not frequently used by taxpayers, despite the fact that in public international law they have a sup ra-constitutional hierarchy; in Ecuador the applicability of these treaties is restricted by procedural requirements contained in the Regulations for the Implementation of the Internal Tax Regime Law (RLRTI).

Therefore, the RLRTI has set the following requirements or conditions for the use of DTTs: (1) a certificate of tax residence of the foreign taxpayer and beneficiary of payments made from Ecuador, and (2) an independent auditors' report on the taxation of said income abroad. These two requirements added by the RLRTI have greatly limited the use of said agreements.

X AREAS OF FOCUS

One of the more recent cases that has been the subject of discussion and controversy within the tax field relates to the decision issued by the CNJ regarding appeal of cassation No. 282-2010 (see Section III, *supra*) on the deductibility of expenditure on interest payments for external credits to related companies abroad.

According to the tax authorities' criteria (SRI), external credits granted to taxpayers in Ecuador by related parties abroad do not constitute actual loans but are equity contributions or provision of funds.

To put this in context, in Ecuador before fiscal year 2008, interest payments abroad paid on foreign loans were not subject to withholding and were therefore deductible, provided this was registered with the Central Bank of Ecuador and the interest rate did not exceed that set by that institution. Nevertheless, due to high utilisation of said tax

benefit, the SRI began to challenge the deductibility of these payments on the basis that, in essence, this relationship was not a true external credit but an equity contribution or provision of funds from abroad (i.e., the taxpayer was using a legal instrument – foreign loans – to send money abroad without paying the accompanying tax by using a tax benefit – payment of interest without withholding at source).

This criterion was accepted by the CNJ's Special Tax Litigation Chamber in six different judgments; except in the judgment for appeal No. 282-2010, wherein it accepted the deductibility of expenditure for the payment of interest for external credits to related parties.

In said ruling, it was indicated that the case of the taxpayer (an Ecuadorean company that had several foreign companies as shareholders and creditors) was different from the cases already considered by the CNJ, as in that specific case the foreign credit was real by virtue of having provided much of the capital and also because said credit was provided for in a contract signed by that company and the Ecuadorean state.

The SRI requested an action for protection to the Constitutional Court against a ruling (see Section III, *supra*) that was admitted by the Constitutional Court. They instructed that the ruling be made void, and ordered the CNJ to issue a new ruling on the same matter.

XI OUTLOOK AND CONCLUSIONS

Currently, the Ecuadorean system for administration of justice is the object of constant and radical changes. With this in mind, despite efforts to increase the number of judges at the TDCT so that the justice administration in tax matters may be more efficient, rulings are currently issued quite slowly.

In addition to the foregoing is the elimination of TDCT chambers and the new judges designated for lawsuits that have already begun. These facts will presumably delay further the issuance of rulings, because the new judges will have to examine once more all the proceedings in order to rule in each case.

We hope that these modifications have the rights of taxpayers as their ultimate goal, primarily the right to defence and to effective judicial protection.

Appendix 1

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