The Tax Disputes and Litigation Review

Fifth Edition

Editor
Simon Whitehead

Law Business Research

The Tax Disputes and Litigation Review

Fifth Edition

Editor
Simon Whitehead

Law Business Research Ltd

PUBLISHER
Gideon Roberton

SENIOR BUSINESS DEVELOPMENT MANAGER
Nick Barette

BUSINESS DEVELOPMENT MANAGERS
Thomas Lee, Felicity Bown

SENIOR ACCOUNT MANAGERS
Joel Woods

ACCOUNT MANAGERS
Pere Aspinall, Jack Bagnall, Sophie Emberson, Sian Jones, Laura Lynas

MARKETING AND READERSHIP COORDINATOR
Rebecca Mogridge

EDITORIAL COORDINATOR
Gavin Jordan

HEAD OF PRODUCTION
Adam Myers

PRODUCTION EDITOR
Anne Borthwick

SUBEDITOR
Claire Ancell

CHIEF EXECUTIVE OFFICER
Paul Howarth

Published in the United Kingdom
by Law Business Research Ltd, London
87 Lancaster Road, London, W11 1QQ, UK

www.TheLawReviews.co.uk

ISBN 978-1-910813-54-6

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

THE LAW REVIEWS

THE MERGERS AND ACQUISITIONS REVIEW

THE RESTRUCTURING REVIEW

THE PRIVATE COMPETITION ENFORCEMENT REVIEW

THE DISPUTE RESOLUTION REVIEW

THE EMPLOYMENT LAW REVIEW

THE PUBLIC COMPETITION ENFORCEMENT REVIEW

THE BANKING REGULATION REVIEW

THE INTERNATIONAL ARBITRATION REVIEW

THE MERGER CONTROL REVIEW

THE TECHNOLOGY, MEDIA AND
TELECOMMUNICATIONS REVIEW

THE INWARD INVESTMENT AND
INTERNATIONAL TAXATION REVIEW

THE CORPORATE GOVERNANCE REVIEW

THE CORPORATE IMMIGRATION REVIEW

THE INTERNATIONAL INVESTIGATIONS REVIEW

THE PROJECTS AND CONSTRUCTION REVIEW

THE INTERNATIONAL CAPITAL MARKETS REVIEW

THE REAL ESTATE LAW REVIEW

THE PRIVATE EQUITY REVIEW

THE ENERGY REGULATION AND MARKETS REVIEW

THE INTELLECTUAL PROPERTY REVIEW

THE ASSET MANAGEMENT REVIEW

THE PRIVATE WEALTH AND PRIVATE CLIENT REVIEW

THE MINING LAW REVIEW

THE EXECUTIVE REMUNERATION REVIEW

THE ANTI-BRIBERY AND ANTI-CORRUPTION REVIEW

THE CARTELS AND LENIENCY REVIEW

THE TAX DISPUTES AND LITIGATION REVIEW

THE LIFE SCIENCES LAW REVIEW

THE INSURANCE AND REINSURANCE LAW REVIEW

THE GOVERNMENT PROCUREMENT REVIEW

THE DOMINANCE AND MONOPOLIES REVIEW

THE AVIATION LAW REVIEW

THE FOREIGN INVESTMENT REGULATION REVIEW

THE ASSET TRACING AND RECOVERY REVIEW

THE INSOLVENCY REVIEW

THE OIL AND GAS LAW REVIEW

THE FRANCHISE LAW REVIEW

THE PRODUCT REGULATION AND LIABILITY REVIEW

THE SHIPPING LAW REVIEW

THE ACQUISITION AND LEVERAGED FINANCE REVIEW

THE PRIVACY, DATA PROTECTION AND CYBERSECURITY LAW REVIEW

THE PUBLIC-PRIVATE PARTNERSHIP LAW REVIEW

THE TRANSPORT FINANCE LAW REVIEW

THE SECURITIES LITIGATION REVIEW

THE LENDING AND SECURED FINANCE REVIEW

THE INTERNATIONAL TRADE LAW REVIEW

THE SPORTS LAW REVIEW

THE INVESTMENT TREATY ARBITRATION REVIEW

THE GAMBLING LAW REVIEW

THE INTELLECTUAL PROPERTY AND ANTITRUST REVIEW

THE REAL ESTATE, M&A AND PRIVATE EQUITY REVIEW

THE SHAREHOLDER RIGHTS AND ACTIVISM REVIEW

THE ISLAMIC FINANCE AND MARKETS LAW REVIEW

www.TheLawReviews.co.uk

ACKNOWLEDGEMENTS

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

ASC LEGAL SOLICITORS & ADVOCATES

BAKER & McKENZIE AMSTERDAM NV

BECH-BRUUN

CHEVEZ RUIZ ZAMARRIPA Y CIA, SC

CUATRECASAS, GONÇALVES PEREIRA

DDTC CONSULTING

DLA PIPER

FLICK GOCKE SCHAUMBURG

GARRIGUES PORTUGAL, SLP

GUZMÁN ARIZA, ATTORNEYS AT LAW

HERGÜNER BILGEN ÖZEKE ATTORNEY PARTNERSHIP

HWUASON LAW FIRM

JOSEPH HAGE AARONSON LLP

KROGERUS ATTORNEYS LTD

LENZ & STAEHELIN

LOYENS & LOEFF

MACHADO, MEYER, SENDACZ E OPICE ADVOGADOS

MAISTO E ASSOCIATI

MASON HAYES & CURRAN

MORRISON & FOERSTER LLP

NORTON ROSE FULBRIGHT CANADA LLP

PÉREZ BUSTAMANTE & PONCE, ABOGADOS

PHILIPPE DEROUIN

PHILIPPI PRIETOCARRIZOSA FERRERO DU & URÍA

PWC LEGAL

SELE FROMMELT & PARTNER ATTORNEYS AT LAW LTD

SOŁTYSIŃSKI KAWECKI & SZLĘZAK

STAVROPOULOS & PARTNERS LAW OFFICE

SYCIP SALAZAR HERNANDEZ & GATMAITAN

WITHERS KHATTARWONG

CONTENTS

Editor's Preface vii
Simon Whitehead

Chapter 1 TAX APPEALS TO THE EUROPEAN COURT OF JUSTICE... 1
Paul Farmer

Chapter 2 AUSTRIA..... 13
Franz Althuber and Stefan Holzer

Chapter 3 BELGIUM 24
Caroline P Docclo

Chapter 4 BRAZIL 39
Daniella Zagari and Maria Eugênia Doin Vieira

Chapter 5 CANADA 48
Dominic C Belley

Chapter 6 CHILE..... 61
Patricio Silva-Riesco Ojeda and Arturo Selman Nahum

Chapter 7 CHINA..... 72
Liu Tianyong

Chapter 8 DENMARK 86
Kaspar Bastian

Chapter 9 DOMINICAN REPUBLIC 97
Christoph Sieger and Fabio J Guzmán-Ariza

Chapter 10 ECUADOR..... 103
Juan Gabriel Reyes-Varea and Alejandro Páez-Vallejo

Chapter 11 FINLAND 114
Jouni Weckström

Chapter 12 FRANCE 125
Philippe Derouin

Chapter 13 GERMANY 135
Michael Hendricks

Chapter 14 GREECE 149
Ioannis Stavropoulos and Elina Stavropoulou

Chapter 15 INDIA 160
Aseem Chawla

Chapter 16 INDONESIA 174
David Hamzah Damian

Chapter 17 IRELAND 186
John Gulliver and Robert Henson

Chapter 18 ITALY 199
Guglielmo Maisto

Chapter 19 LIECHTENSTEIN 213
Heinz Frommelt and Angelo Trebo

Chapter 20 MEXICO 226
Manuel Sáinz Orantes and Claudio F Cárdenas Salomon

Chapter 21 NETHERLANDS 236
Paul Halprin and Megan Ruigrok

Chapter 22 PHILIPPINES 244
Carina C Laforteza and Mark Xavier D Oyales

Chapter 23 POLAND 256
Sławomir Łuczak and Karolina Gotfryd

Chapter 24 PORTUGAL 271
Pedro Miguel Braz

Chapter 25 RUSSIA 282
Yana Proskurina and Maria Mikhaylova

Chapter 26 SINGAPORE 300
Joanna Yap

Chapter 27 SPAIN 313
Miró Ayats Vergés and Jaume Bonet León

Chapter 28 SWITZERLAND 329
Jean-Blaise Eckert

Chapter 29 TURKEY 339
Ayşe Hergüner Bilgen and Ahmet Karahan

Chapter 30 UNITED KINGDOM 352
Simon Whitehead

Chapter 31 UNITED STATES 383
Edward L Froelich

Appendix 1 ABOUT THE AUTHORS 413

Appendix 2 CONTRIBUTING LAW FIRMS' CONTACT DETAILS 429

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 fifth edition, we have continued to add to 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.

The idea behind this book commenced in 2013 with the general increase in litigation as tax authorities in a number of jurisdictions took 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.

Over the past year the focus on perceived cross-border abuses has continued with action by the European Commission on past tax rulings in Ireland, Luxembourg and Belgium, and the BEPS reaching a crescendo in the announcement of 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 even in an EU context. The general targeting of cross-border tax avoidance now has European legislation in the Anti-Tax Avoidance Directive, which came into force in June 2016 with promises of more to follow. The absence of much European legislation in direct tax has always been put down to the need for unanimity and the way in which Member States closely guard their taxing rights. The relatively speedy passage of this legislation (the Parent–Subsidiary Directive before it took some 10 years to pass) and its restriction of attractive tax regimes indicates the general political disrepute with which such practices are now viewed.

These are, perhaps, extreme examples, reflective of the parliamentary cycle, yet a general toughening of stance seems to be being 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 a member, 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 Ramsey Chagoury in the editing and compilation of this book.

Simon Whitehead
Joseph Hage Aaronson LLP
London
February 2017

Chapter 10

ECUADOR

Juan Gabriel Reyes-Varea and Alejandro Páez-Vallejo[1]

I INTRODUCTION

In Ecuador, the administration of justice in tax and customs matters is in charge of the district court of tax disputes (TDCT), a jurisdictional entity with sectoral 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, and 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 collection of the principal taxes such as income tax and value added tax. The SRI 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 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 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) used to last between four and seven years under the former Procedural Code.

However, upon the enforcement of the new Procedural Code (COGEP) in May 2016, it is expected that the lawsuits heard by the TDCT will last no more than four to six months, because litigation on tax matters is reduced to two hearings only. The first is known as the

1 Juan Gabriel Reyes-Varea is a partner and Alejandro Páez-Vallejo is an associate at Pérez Bustamante & Ponce, Abogados.

'preliminary hearing', where the parties submit their arguments for their claim and answer the claim, and announce the proofs to be submitted at the proceeding. Within 30 days after the preliminary hearing, the 'hearing to pronounce judgment' takes place, where the parties submit the evidence announced previously and once again present the arguments for their defence. During this hearing, the TDCT is empowered to pronounce judgment orally or to give written notice of its judgment to the parties within 10 days after the hearing.

One factor 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 sum 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 is usually set between 5 and 10 per cent of the contested amount rather than a specific fee.

In addition to the costs of bringing lawsuits or appeals in tax matters, should the judgment be 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, even under the COGEP and its principles of oral procedures and expeditiousness.

II COMMENCING DISPUTES

Legal actions on tax matters can only be initiated by the taxpayer, and the TDCT has jurisdiction to hear challenges against 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 an amount unduly paid.

Once the tax required by a particular tax administration has been determined, taxpayers have two alternatives: file a complaint with the tax administration responsible for the act (a claim that must be resolved within 120 days) or bring a suit before the TDCT. As a rule, the taxpayer has 20 business days to file a complaint with the tax administration or 60 business days to bring a suit before the TDCT. After said term, the obligation determined takes effect 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 a term to answer and does not suspend the effects of the contested measure. If the decision is against the taxpayer, the taxpayer may challenge it before the TDCT within the same 60 business days specified above.

The entitlement of the tax administration to determine a tax liability expires in six years counted from the date that the deadline to file the tax return lapsed, when not declared in whole or in part; three years counted from the date of the tax return for which the law requires determination by the taxpayer; or 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 of the determination order has been given, 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 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 business days to exercise its right to object and to file its objections and justifications against this draft determination certificate by 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 business 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 final tax determination certificate, the taxpayer has 20 business days to challenge (to appeal) before the tax administration that issued the determination act or 60 business days to bring a suit before the TDCT.

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 or 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 an 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 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 does not include the requirements stated in the law, or if the resolutions adopt contradictory or incompatible decisions.

Notwithstanding the foregoing, the Constitution in force in Ecuador since 2008 establishes an extraordinary action in constitutional matters for the protection of constitutional rights and the 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 for 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 partly in favour of 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 used to consider whether the appeal met all formal requirements established by law; however, after the entry into force of the COGEP, they must only verify if the appeal was filed within 10 business days after notice of the judgment was served, and then 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 SRI is the respondent tax authority, we can expect a 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 it is likely to be a long and costly process.

During 2014, 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 the elimination of intent (fraud) in tax

defrauding offences. In other words, currently a fraudulent action does not require intent to be penalised as such; having merely perpetrated the action (culpable offence) 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 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:

a 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);

b the wilful omission of income, and the inclusion of costs, deductions, rebates or withholdings that are non-existent or in excess of that legally due;

c 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;

d deliberately undertaking double accounting;

e simulating one or more acts or contracts to obtain or grant a benefit of a subsidy, reduction, exemption or fiscal stimulus;

f 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;

g if the tax return includes false, incomplete, distorted or adulterated data; and

h 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, the 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 commonly used penalty is the suspension of activities and closure of an establishment.

Furthermore, a tax reform was enacted as of 2015 whereby 'any income received by corporations and individuals residing in Ecuador, including non-justified equity increment' is considered to be income deriving from an Ecuadorian source. Non-justified equity increment is understood to occur when any income – whether subject to taxation or exempted – is lower with respect to the consumptions, expenditures, savings and investments of one person in one or several fiscal periods.

Initial and final balances of the fiscal periods determined will be taken into account to verify the existence of such non-justified increment. Taxpayers will have the opportunity to justify any non-justified differences greater than 10 basic fractions not subject to taxation (US$111,700 in 2016) through revenues obtained during the performance of the economic

activity; transfers of goods or services gratuitously or deriving from inheritances or legacies; and adjustments and corrections due to currency devaluation or appreciation, inflation, or impairment or depreciation of assets.

Proof must be provided through any evidentiary means admitted in tax matters (documentary evidence, testimonial evidence and, generally, all evidentiary proofs, with the exception of judicial confession by a public official). If the non-justified patrimonial increment cannot be justified through any of the above means, the Tax Administration may give notice to the Public Prosecutor so that it may commence a criminal proceeding based on the unjustified private enrichment offence, which is penalised with three to five years' imprisonment.

V TAX CLAIMS

i Recovering overpaid tax

Cases where for some reason (error in a tax return, accumulated tax credits, etc.) taxpayers have overpaid the amount of the tax due (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 after three years counted from the date when payment is made and must be answered by the tax authorities through a resolution within a period not to exceed 120 business days.

Currently, the tax authority is undergoing liquidity problems. Therefore, although many taxpayers obtain favourable resolutions regarding return of their taxes, the tax authority usually delays the transfer of those funds to the taxpayers' accounts. That is why, during the past two years, taxpayers as well as the tax authority have opted for the issuance of credit vouchers. Credit vouchers are used for paying any taxes administered by the tax authority and may be freely transferred to other taxpayers for that same purpose. With them, taxpayers who have obtained favourable decisions regarding the return of their taxes quickly obtain liquidity by selling the credit vouchers.

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

Notwithstanding the above, 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 said tax liability. In such a specific case, two alternatives are open to the taxpayer: to discontinue the trial, and be liable for an order for court costs; or to 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 plus 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 Regime Law (LORTI) or the 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, to 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 before the Constitutional Court, 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 the 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 among several taxpayers or if the same administrative decision generates legal effects for several taxpayers, even though the 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.

The 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 possible, therefore, 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 a taxpayer drops a court case or it is declared abandoned due to lack of momentum. According to the COGEP, which came into effect in May 2016, any lawsuit being heard at the TDCT will be declared abandoned if it has not been processed within 80 business days. This measure is being applied more frequently by the TDCT judges.

Before the CNJ's Special Tax Litigation Chamber, court costs will be paid by the claimant whenever the appeal has been declared void or if it is manifestly apparent that it was brought without legal basis or for the purpose of delaying the enforcement of the judgment.

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.

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

Notwithstanding the foregoing, the Organic Law for the Remission of Interest, Penalties and Surcharges was published on 5 May 2015 with the main purpose of collecting taxes through remission of interest, penalties and surcharges deriving from internal tax and fiscal obligations whose administration or collection is solely in charge of the SRI, as long as taxpayers pay their pending tax liabilities (principal only). Therefore, although the publication of that Law is not, by itself, an alternative solution to resolve disputes, it is used by many taxpayers as a mechanism to 'clean up' their pending tax liabilities or by those undergoing a lawsuit. The Law was welcomed by taxpayers who had disputes with the litigious tax jurisdiction because, in many cases, interest either exceeded or doubled the tax (principal). Therefore, actual savings were obtained through the application of the law. The final result of this Law was the dismissal of a great number of tax lawsuits involving substantial amounts, as well as collection of approximately US$971.69 million by the tax authority.

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 fiscal year 2008, 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.

The Organic Law on Incentives to Production and Prevention of Tax Fraud came into effect on 1 January 2015, with the principal objective 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. This Law has further restricted the use of tax elusion or evasion mechanisms by penalising, through a substantial tax load, the use of foreign fiscal vehicles or tax planning or patrimonial structures abroad. In keeping with the foregoing, on 23 October 2015, the executive branch submitted a new bill on inheritances, legacies and donations setting forth a number of restrictions and legal presumptions against trusts established abroad.

Precautionary measures are frequently used by tax administrations, especially the SRI. The most controversial case is still 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 (DTTs)

Ecuador currently has DTTs with the following 15 countries: Argentina, Belgium, Brazil, Canada, Chile, China, France, Germany, Italy, Korea, Mexico, Romania, Spain, Switzerland and Uruguay. It also has 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 *supra*-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: a certificate of tax residence of the foreign taxpayer and beneficiary of payments made from Ecuador, and 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 treaties.

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 SRI's criteria, 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 the rate 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 Ecuadorian 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 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 Ecuadorian system for administration of justice is the object of constant and radical changes. With this in mind, after a substantial number of suits of considerable quantum having been dismissed upon application of the Organic Law for the Remission of Interest, Penalties and Surcharges, we believe that the litigious tax jurisdiction has cut down the number of cases being heard and, therefore, we consider that justice in such matters will be quicker and more expeditious.

COGEP has included substantial changes in matters relating to prosecution (including litigious tax jurisdiction), and has implemented basic constitutional principles of procedural law such as procedural expeditiousness, immediacy and economy. As already mentioned, COGEP seeks to transform the old judicial system, which is basically written, into one where the oral procedure is highlighted.

It is evident that those changes will prevent delays in litigious proceedings involving tax matters, which were inherent to the old model. It is, therefore, expected that the judges will be able to efficiently perform their functions, mainly by guaranteeing the right to an effective judicial protection to all taxpayers.

Appendix 1

ABOUT THE AUTHORS

JUAN GABRIEL REYES-VAREA

Pérez Bustamante & Ponce, Abogados

Juan Gabriel Reyes-Varea graduated as an attorney from the Pontifical Catholic University of Ecuador in 2002, from the Academy of American and International Law, Dallas in 2007 and holds an LLM from Northwestern University, Chicago, Illinois (2015). He leads the tax practice at Pérez Bustamante & Ponce, and his experience includes advising clients in tax planning, risk mitigation, analysis of structures for mergers and acquisitions, tax effects of acts and contracts, tax advisory services for commercial operations and tax contingencies arising from labour practices. He is professor of tax law at Universidad Internacional del Ecuador and professor in the tax management programme at Universidad San Francisco de Quito. He was also a member of the board of directors and executive committee of the Chamber of Industry and Production (2012–March 2014), and an international lecturer and speaker. He was a specialist in tax studies and international taxation at the Internal Revenue Service of Ecuador from 2001 to 2003, and president of the Law School Students' Association at the Pontifical Catholic University of Ecuador from 2000 to 2002. His publications include 'Precios de transferencia en Ecuador', 'Libro Jurídico Ruptura' No. 47; 'El Ecuador ante los problemas de doble tributación', 'Libro Jurídico Ruptura' No. 44. Law; 'Tax in Cross Border Deals', *Latin Lawyer* (November 2013) (latinlawyer.com/reference/topics/75/jurisdictions/32/ecuador); and *The Tax Disputes and Litigation Review* (co-authored with Alejandro Páez-Vallejo), Ecuador chapter, second edition, 2014.

ALEJANDRO PÁEZ-VALLEJO

Pérez Bustamante & Ponce, Abogados

Alejandro Páez-Vallejo graduated as an attorney from Universidad San Francisco de Quito, from the American University, Washington College of Law, Legal English Institute in 2013, and from the Academy of American and International Law, Dallas in 2015. His practice is focused on tax. He participates in the team that advises national and foreign companies on the application and optimisation of tax matters in the development of their businesses. Furthermore, he has participated in the implementation of efficient corporate structures,

optimisation of tax burdens and tax planning, the application of conventions to avoid double taxation, estate planning and probate, due diligence in tax matters, compliance with formal obligations held with different tax administrations, handling administrative procedures for information requests, administrative challenges, tax rebate applications and all types of litigations in tax litigation courts. He is also experienced in customs matters and contract manufacturing (*maquila*) activities. His publications include *The Tax Disputes and Litigation Review* (co-authored with Juan Gabriel Reyes), Ecuador chapter, second edition, 2014.

PÉREZ BUSTAMANTE & PONCE, ABOGADOS
Av República de El Salvador N36–140
Edificio Mansión Blanca
Quito
Ecuador
Tel: +593 2 382 7640 to 649
Fax: +593 2 224 4462
jreyes@pbplaw.com
apaez@pbplaw.com
www.pbplaw.com