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# Tax Controversy

**Austria**

Gerald Schachner, Kornelia Wittmann,  
Nicolas D Wolski and Lucas Hora  
bpv Huegel

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# AUSTRIA

## Law and Practice

Contributed by:

Gerald Schachner, Kornelia Wittmann,

Nicolas D Wolski and Lucas Hora

bpv Huegel see p.15



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## 1. Tax Controversies

### 1.1 Tax Controversies in this Jurisdiction

To begin with, the Austrian system of tax procedures is in principle assessment-based. Therefore, taxpayers are usually required to file tax returns. Tax controversies may arise any time that an assessment by the Austrian tax authorities deviates from the corresponding return filed by the taxpayer. However, in certain cases tax controversies can even arise if the tax authorities make an assessment fully compliant with the tax return filed by the taxpayer or if no tax return has been filed.

#### **Tax Controversies following a Tax Return**

Any tax return that is filed with the Austrian tax authorities is subjected to a (in practice: plausibility) check before a tax decree is issued. Generally, the information provided by the taxpayer in the tax return is reviewed in more detail only if certain aspects are unclear and if and to the extent that no tax decree can be issued without further investigation. However, the tax authorities may investigate the facts and/or disagree with the taxpayer and issue a tax decree determining and/or assessing the due tax deviating from the tax return.

In practice, the Austrian tax authorities do not review tax returns in detail before issuing the tax decree. Rather, Austrian procedural law allows the Austrian tax authorities to correct any tax decree without further reasoning within one year of the issuance of the tax decree. Therefore, the tax authorities may issue an amended tax decree within this period that may deviate from the tax return filed by the taxpayer.

#### **Tax Controversies following a Tax Audit**

Tax controversies may further arise from the reassessment/amendment of a tax decree as a consequence of a tax audit. Such reassessments may happen within the statute of limitations, which generally is six years after the year for which the tax return was filed (this results from a standard five years plus one year for the investigative actions performed by the tax authorities). In the case of tax evasion, the statute of limitation is extended to ten years. If the Austrian tax authorities undertake investigative actions within the respective last year, the statute of limitation is extended by one year. In any case, the statute of limitation bars the tax authorities from any tax (re)assessments at the latest ten years after the tax claim arises.

#### **Other**

Additionally, tax controversies commonly arise in refund procedures regarding withholding taxes or self-assessed taxes (eg, real estate transfer tax or stamp duty).

### 1.2 Causes of Tax Controversies

Tax controversies may arise from all kinds of tax matters. Although it is not possible to exactly allocate the disputes to the different types of tax matters, it is possible to derive ballpark trends from the number of cases decided by the Federal Fiscal Court (the court of first instance in tax matters).

### 1.3 Avoidance of Tax Controversies

As possible mitigations of future tax controversy, there is also the possibility for informal answers and rulings in tax matters and in some cases even for binding advance rulings (reorganizations, tax groups, international tax law, VAT law or abuse of law). Furthermore, since September 2019 there has been a dispute settlement mechanism regarding the interpretation and application of double taxation treaties in effect. In this respect, taxpayers facing intra-EU tax disputes may submit a request to initiate a dispute settlement procedure (for further details, see below).

Recently Austria introduced a horizontal monitoring regime for large companies (for details, please see below).

### 1.4 Efforts to Combat Tax Avoidance

In recent years Austrian tax legislation has been heavily influenced by international developments and foremost by the OECD's efforts to combat base erosion and profit shifting (BEPS). This equalised inter-state tax competition has to a certain extent prevented a "race to the bottom". On the other hand, this contributed to a greatly expanded range of applicable rules. As it is with every substantial extension of the legal basis, also in this event, it has most likely led to an increase in the number of tax controversies.

In the following are two examples of Austrian reactions to OECD BEPS Actions or the ATAD (Anti-Tax Avoidance Directive) on EU level respectively that may have an impact on the number of tax controversies.

With regard to BEPS Action 3 (Controlled Foreign Companies, or CFC), Austria has implemented CFC rules, which entered into force on 1 January 2019. These rules provide for an allocation of non-distributed low-taxed passive income of foreign subsidiaries to the Austrian parent company corresponding to the percentage of the shares directly and indirectly held in the foreign subsidiary. The CFC rules apply if the Austrian parent company holds – directly or indirectly, alone or together with associated companies – more than 50% of the nominal share capital, voting rights or profit participating rights of a foreign corporation, and if the foreign corporation is low-taxed (effective tax rate of 12.5% or below) and earns passive income. The regime also applies to non-Austrian permanent establishments.

BEPS Action 12 (mandatory disclosure rules) has been implemented by the Austrian legislator in September 2019. Within the framework of this regulation, certain cross-border structures and transactions must be reported to the tax authorities starting from 1 July 2020 on an ad hoc basis within 30 days after the triggering event. These events that are (conditionally or unconditionally) subject to reporting are defined based on certain hallmarks. In this respect, transactions potentially reportable comprise, for example, cross-border intra-group transfers of hard-to-value intangibles, debt-equity swaps or transfer pricing arrangements using unilateral safe harbour rules.

## 1.5 Additional Tax Assessments

In Austria, appeals against tax decrees generally do not have a suspending effect, which means that the disputed amount must be paid, even if an appeal is filed.

There is, however, the possibility of an application for suspension of execution regarding the whole disputed amount or parts of it. Such a suspension has to be granted unless (i) the appeal appears to be certainly unsuccessful, or (ii) the appealed decree does in principle not deviate from the tax return or other requests made by the taxpayer, or (iii) the taxpayer's conduct is aimed at jeopardising the tax collectability.

If a suspension of execution was granted and the appeal finally turns out to be unsuccessful, interest at a rate of 2% over the base interest rate (currently resulting in 1.38%) is due for the period of suspension. In contrast, if the taxpayer initially decided to pay the disputed amount and consequently the appeal is successful, the taxpayer is also entitled to interest at a rate of 2% over the base interest rate.

A suspension of execution may not be requested before an administrative appeal has been filed.

Further, there is also the possibility of an application for a deferral of tax payment before an appeal might be filed, if the immediate full payment of the tax would result in considerable hardship for the taxpayer and if the collectability of the tax is not jeopardised by the deferral. For deferred taxes exceeding the total amount of EUR750, interest at a rate of 4% over the base interest rate (currently resulting in 3.38%) is payable.

If an additional tax is assessed against the taxpayer, this may result in fiscal criminal proceedings being introduced against the taxpayer if there is an indication that the taxpayer wilfully or negligently did not (fully) comply with his obligation to disclose all facts relevant for the tax assessment.

## 1.6 Possible Impact of COVID-19 on Tax Controversies

The Austrian legislator has implemented several tax (controversy) related regulations regarding targeting the impacts of COVID-19.

- In order to improve liquidity, companies may apply for a reduction in or waiver of advance payments for income or corporate income tax for the calendar year 2020.
- Taxpayers may request deferral of tax payments or payments in instalments if they are actually economically affected.
- Several deadlines in both tax procedural law and fiscal criminal matters have been suspended in the period between 16 March and 16 April 2020. This most importantly relates to deadlines for administrative and judicial appeals, as well as for appeals to the Austrian Supreme Administrative Court and the Austrian Constitutional Court.

Finally, due to the COVID-19 pandemic the EU Commission has proposed to postpone the DAC 6 regime regarding the reporting of certain cross-border arrangements according to Directive 2018/822/EU (for details, see above) becoming applicable from 1 July 2020 to 1 October 2020.

The actual impact of COVID-19 on pending and upcoming tax controversies cannot be estimated yet. However, it seems to be unlikely that because of the pandemically induced economic crisis tax audits are to be carried out more frequently or in a more severe way solely in order to generate revenue (during the crisis-related shutdown, tax audits are also continuously carried out online to the extent possible). Also, in a short and medium-term perspective, such action by the Austrian tax authorities would be inconsistent with measures introduced by the Austrian legislator and the Austrian tax authorities themselves to protect the economy.

Rather, the increased spending will likely result in a major budget deficit in 2020 so that discussions will arise as to how to fund this public spending. This discussion will depend to a large extent on the duration and extent of the economic crisis. While it is likely that the discussion about the (re-)introduction of an inheritance and/or gifting tax may resurface again, the most likely outcome is that the tax reliefs and tax cuts (eg, reduction of corporate income tax from currently 25% to 21%) will be postponed.

## 2. Tax Audits

### 2.1 Main Rules Determining Tax Audits

There is no fixed audit cycle prescribed by the Austrian tax law. The frequency of tax audits depends on various factors, the most important of which are business size and general tax compliance. While smaller businesses may be audited in the range of every five years (or not at all), large businesses are often audited on a permanent basis.

In this context it is worth mentioning that in 2019 a new system of “horizontal monitoring” entered into force. This regime is available for large companies, whose annual turnover exceeds EUR40 million, as well as for banking institutions and insurance companies. If an enterprise decides to opt for the horizontal monitoring mechanism, it will not be subject to tax audits any more, but is going to be in constant communication with the tax authorities, with its activities being reviewed on an ongoing basis. There are further conditions that need to be met in order to participate in the system. In particular, the previous tax behaviour of the applicant must meet certain standards of compliance (eg, no criminal tax evasion in the past five years and implementation of an effective internal tax-control system).

### 2.2 Initiation and Duration of a Tax Audit

As mentioned above, Austrian tax law does not provide for fixed audit cycles. There is also no regulation prescribing the maximum duration of an audit. The duration heavily depends on the workload of the competent tax authority, the complexity of the reviewed matters and the taxpayer’s co-operation. The audit of a small business may be finished within a few days, whereas the audit of a multinational enterprise might take several months. The duration may be influenced by the taxpayer to a certain degree by his level of preparation for the audit and co-operation during the audit.

As stated above, the findings of a tax audit may result in amended tax assessments until the statute of limitation, which in general is six years, but ten years in the case of tax evasion. This period starts with the lapse of the year for which the assessment was filed. The limitation period is extended by one year if investigative actions are undertaken in the year of the expiry (may apply more than once).

### 2.3 Location and Procedure of Tax Audits

In principle, tax audits are carried out on the premises of the taxpayer. Only in cases where this is not possible or exceptionally unreasonable may audits take place at the competent tax office or at the office of the taxpayer’s legal representative. During the COVID-19 crisis, tax audits are made online to the extent possible.

The type of reviewed data heavily depends on the taxpayer. Austrian law does not set out a mandatory way to submit the documents. Those may therefore be handed in both in physical or digital form. The tax authority may further also interview the taxpayer’s employees or other ultimately third parties if this is necessary to clarify the provided data.

### 2.4 Areas of Special Attention in Tax Audits

Ordinary tax audits of companies usually comprise corporate income tax, VAT and withholding tax matters. Lately, auditors especially focused on international activities, such as reorganisations, intra-group cross-border transactions or transfer pricing matters. It is expected that tax audits will even more focus on such international transactions in the future due to the international efforts to combat tax evasion and prevent base erosion and profit shifting.

Apart from this, there are so-called audits on wage-related charges (ie, wage tax and several social security contributions). These audits used to be carried out by the competent tax authorities or by auditors of the social security institutions. The regime was changed by the legislator with effect from 1 January 2020 but the change was held unconstitutional by the Austrian constitutional court. It may only be applied until end of June 2020. It is not yet clear how the legislator is going to react to this development.

### 2.5 Impact of Rules Concerning Cross-Border Exchanges of Information and Mutual Assistance Between Tax Authorities on Tax Audits

Austria fully participates in the OECD’s system of automatic international exchange of tax information and has implemented all of the six EU Directives on Administrative Cooperation (DAC 1-6). The shared data includes information on five categories of non-financial income (DAC 1), on financial accounts (DAC 2), on advance tax rulings (DAC 3), on country-by-country reports (DAC 4), on beneficial ownership (DAC 5) and on certain cross-border arrangements (DAC 6).

As most of these rules have only been in force for a relatively short period of time, it cannot be clearly said whether they are going to lead to an overall increase in tax audit activities. However, they certainly contribute to a shift in audits towards international matters, as outlined above.

As regards joint cross-border tax audits, it has to be pointed out that Austria transposed Directive 2011/16/EU on administrative co-operation in the field of taxation, thus creating a legal basis for joint cross-border tax audits. Particularly common in this respect are joint audits with the German tax authorities.

## 2.6 Strategic Points for Consideration During Tax Audits

The taxpayer is obliged to co-operate with the tax authorities in the course of a tax audit to the extent necessary to allow for an appropriate audit procedure. Unjustified refusal to provide requested documents or attempts to complicate or delay the audit may constitute a violation of that obligation. Such violations may entitle the tax authorities to estimate the relevant tax base and may include a safety margin to the detriment of the taxpayer. From a practical point of view, it is therefore advisable for the taxpayer to co-operate with the auditors, to clarify his or her arguments, prove the content of their documentation and declarations, and generally supply to the auditor all the information that is needed to ascertain the facts relevant for taxation.

It is further advisable to properly prepare for an announced audit, simply to facilitate the auditor's work and thus keep the audit's duration as short as possible. Preparatory measures in this respect are, for example, the proper filing and above all storage of (physical or digital) vouchers and accounting documents or the setting up of suitable workplaces for the auditors in charge at the taxpayer's premises as soon as a tax audit has been announced.

The authors' experience is that taxpayers and tax counsels should not underestimate the attention necessary for answering tax audit questions and/or document requests adequately. They have seen far too many situations where the tax auditors were provided with incorrect/incomprehensive information (possibly several times) and the mere fact that from the tax auditor's perspective the taxpayer told different stories of the same transaction resulted in the tax audit disregarding the taxpayer's explanations. The authors have seen cases where this was even upheld in court.

## 3. Administrative Litigation

### 3.1 Administrative Claim Phase

If the Austrian tax authorities have issued a tax decree that the taxpayer considers infringing his or her rights, such taxpayer may file an administrative appeal within one month after the delivery of the tax decree – to be filed with the issuing tax authority. This deadline may, upon request of the taxpayer, be (if necessary, also repeatedly) extended by the Austrian tax authorities for reasons worth considering.

The administrative appeal has to comprise the following elements:

- the decree against which it is directed;
- a statement of the points on which the decree is contested;

- a statement of the requested changes; and
- a statement of reasons.

The Austrian tax authority will review the case and, after having carried out any further investigations necessary, render an administrative appeal decision. The Austrian tax authority will not render an administrative appeal decision if:

- the taxpayer has requested so in the administrative appeal and the tax authorities refer the administrative appeal to the Federal Fiscal Court within three months of receipt;
- the taxpayer only claims that a regulation is not in line with the statutory law, a statutory law is unconstitutional or that international conventions are unlawful; or
- the tax decree that is appealed has been issued by the Federal Ministry of Finance.

The underlying objective of this procedure is the establishment of a system of administrative self-control that may potentially handle taxpayers' claims at an early stage.

Because a taxpayer and the tax authorities can (jointly) effectively waive the administrative appeal decision, it can be said that the Austrian administrative claim phase in tax procedures is an optional one.

### 3.2 Deadline for Administrative Claims

If the Austrian tax authorities do not render their administrative appeal decision within six months after the filing of the administrative appeal for reasons for which the tax authorities are overwhelmingly responsible, the taxpayer may file a complaint of delay with the Federal Fiscal Court. The Federal Fiscal Court may grant the competent tax authority an additional period of three months (which can be extended once for reasons specifically related to the case), after which the administrative appeal automatically changes into a judicial appeal and the Federal Fiscal Court becomes competent to decide the case.

## 4. Judicial Litigation: First Instance

### 4.1 Initiation of Judicial Tax Litigation

If the taxpayer is not satisfied with the administrative appeal, he or she may file a judicial appeal (a so-called request for submission of the appeal to the Federal Fiscal Court) within one month after the delivery of the administrative appeal decision. If the judicial appeal is made in time, the appeal process is deemed undecided, the appeal changes into a judicial appeal and the Federal Fiscal Court becomes competent for the case.

If the request for the appeal is not submitted by the tax authority to the Federal Fiscal Court within two months, the taxpayer may

submit a reminder directly to the Federal Fiscal Court, which has the same effect as a submission of the appeal.

In certain situations (see above), there is no administrative appeal decision but the Federal Fiscal Court is directly competent.

## 4.2 Procedure of Judicial Tax Litigation

Unless one of the specific cases applies in which the Federal Fiscal Court is directly competent (see above), court procedures are started by the taxpayer filing an administrative appeal.

Under Austrian procedural law, taxpayers may represent themselves in Federal Fiscal Court procedures. Alternatively, they may have themselves represented by a professional representative such as an attorney-at-law, a tax adviser or an auditor. It is strongly suggested to retain professional counsel.

After the Federal Fiscal Court has become competent for the case, the tax authorities may generally neither amend nor revoke the contested decree. Procedures at the Federal Fiscal Court follow the principle of official investigation. The Federal Fiscal Court will thus investigate the facts and circumstances *ex officio*. Both the taxpayer and the Austrian tax authorities may present new facts.

The Federal Fiscal Court may dismiss or allow the appeal and hereby revoke or amend the contested tax decree. Amendments to the tax decree may also be to the disadvantage of the taxpayer.

A public hearing is held only if requested by the taxpayer or deemed necessary by the court.

The Federal Fiscal Court generally decides on the matter itself, but may also refer the case back to the tax authorities if extensive additional investigations are deemed necessary. The tax authorities are then bound by the legal view set out in the court's decision.

The Austrian tax authorities generally publish court decisions online in the so-called Fiscal Documentation (*findok*) in anonymised form.

## 4.3 Relevance of Evidence in Judicial Tax Litigation

There is no limit as to what is allowed as evidence. Anything that is appropriate to prove the taxpayer's case may be provided as evidence. Mostly documentary evidence and witness testimony are used. But site visits, expert opinions or reports are possible as well. Further, taxpayer's testimony is generally considered by the court to be of great importance, although the taxpayer formally is not allowed as a witness. Witnesses are usually sum-

moned by the court, unless their whereabouts are unknown. Witnesses are required by law to make a testimony unless they are allowed to refuse to give testimony by law (eg, a relative of the taxpayer).

Evidence must be presented until the end of the oral hearing if any or by a deadline set by the court. Austria has a two-level judicial appeal system. New facts and evidence may only be presented in the first level (Federal Fiscal Court).

## 4.4 Burden of Proof in Judicial Tax Litigation

As Austrian tax proceedings follow the principle of official investigation, there are no statutory provisions regarding the burden of proof. That means the tax authorities and ultimately the Federal Fiscal Court have to investigate the facts both in favour of and to the detriment of the taxpayer. The result has to be shared with the taxpayer.

However, under general procedural tax law, the tax authorities have to prove all facts and circumstances necessary to justify a tax claim against the taxpayer. The taxpayer, on the other hand, is required to present his or her position and provide substantiated evidence against the facts presented by the tax authorities. In circumstances where it cannot be expected that the taxpayer can provide substantial proof, he or she at least has to show that his or her position is plausible.

Generally, the taxpayer is obligated to co-operate with the tax authorities. In cross-border situations the taxpayer's obligation to co-operate is increased. Also, the taxpayer is subject to a number of tax and non-tax documentation obligations. If the taxpayer fails to meet any of these obligations, the tax authorities may draw conclusions about the existence or non-existence of a certain fact based on the principle of free assessment of evidence. This may be to the detriment of the taxpayer.

In fiscal criminal proceedings the burden of proof rests with the fiscal criminal authorities. This results from the fact that any doubt arising should benefit the accused (principle of benefit of doubt).

## 4.5 Strategic Options in Judicial Tax Litigation

The strategy pursued has to be adapted to each individual case and there are no general guidelines suitable for every case.

However, there may be certain recommendations that are applicable for a larger number of matters.

Regarding the timing to file evidential documents during court proceedings, for example, it is always advisable to file favourable evidence at the beginning of the proceedings, so that the



court has enough time to properly take the presented facts into consideration. This applies all the more the bigger the case.

Taxpayers should further not only present the facts, but should embed these facts into their substantiated legal argumentation. As a result, representation through a legal representative is highly advisable even if not mandatory.

With respect to settlements, it should be stated that depending on the case and the current state of the proceedings, the Austrian tax authorities might be open to out-of-court settlements.

## 4.6 Relevance of Jurisprudence and Guidelines to Judicial Tax Litigation

It is necessary to substantiate the administrative appeal and all further inputs with legal arguments. Those may be derived either from legal literature (eg, commentaries or articles) or previous jurisprudence. Of particular importance in this respect is the case law of the Austrian Supreme Administrative Court (supreme authority in tax matters – see below). Although (neither the tax authorities nor) the Federal Fiscal Court is bound by the Supreme Administrative Court's previous case law, its decisions very rarely deviate from the Supreme Administrative Court's legal views (such deviation while possible would be grounds for a second-level judicial appeal to the Supreme Administrative Court). Depending on the case, the citation of the European Court of Justice's or the Austrian Constitutional Court's jurisprudence may also be of great importance.

International guidelines such as the OECD Transfer Pricing Guidelines or the OECD Model Tax Convention are usually followed by the tax authorities and may also be used as a basis for argumentation in tax court proceedings.

The Austrian Federal Ministry of Finance has issued administrative guidelines (eg, for income taxes, corporate income taxes or transfer pricing). These guidelines have no binding effect on the courts. In practice, however, their mentioning may strengthen the taxpayer's argumentation.

## 5. Judicial Litigation: Appeals

### 5.1 System for Appealing Judicial Tax Litigation

A decision by the Federal Fiscal Court can be appealed to the Austrian Supreme Administrative Court (the second and supreme instance in tax matters in Austria) both by the taxpayer and/or the tax authorities if the decision concerns legal issues of fundamental importance. A legal issue is considered to be of fundamental importance if the contested court ruling deviates from the Supreme Administrative Court's past decisions, or if there is no (or no consistent) case law on the issue in question.

Appeals in tax matters to the Supreme Administrative Court may only be submitted by an attorney-at-law, a tax adviser or an auditor. No minimum value threshold applies. Most of the submissions to the Supreme Administrative Court are subject to a filing charge of EUR240.

If taxpayers are of the opinion that a decision of the Federal Fiscal Court violates their constitutional rights or is based on an unconstitutional or otherwise unlawful statute, they may address the Austrian Constitutional Court (within a period of six weeks after the Federal Fiscal Court's decision).

The taxpayer may also request that the Constitutional Court forwards the case to the Supreme Administrative Court if the Constitutional Court holds that actually no constitutional rights of the taxpayer have been violated (so-called successive judicial appeal). Further, there is the possibility to address both the Constitutional Court and Supreme Administrative Court simultaneously on different grounds (so-called parallel appeal).

### 5.2 Stages in the Tax Appeal Procedure

The appeal to the Austrian Supreme Administrative Court has to be filed within a non-extendable period of six weeks after the Federal Fiscal Court's decision. The appeal has to be addressed to the Federal Fiscal Court, which assesses whether the procedural requirements are met.

In order to be admissible, the matters brought before the Supreme Administrative Court must address fundamental questions regarding the application or uniformity of Austrian law. The Federal Fiscal Court has to decide on the admissibility of the appeal based on these criteria in its decision. The Supreme Administrative Court is, however, not bound by this decision. Therefore, an appeal to the Supreme Administrative Court may be admitted by the Supreme Administrative Court even if held inadmissible by the Federal Fiscal Court or vice versa.

The Supreme Administrative Court only rules on questions of law and on errors of law or procedure, which might have influenced the wrong determination of facts. The Supreme Administrative Court will not perform any investigations on the underlying facts on its own, nor will it review the facts and circumstances provided by the Federal Fiscal Court. Also, the Supreme Administrative Court will not consider any new facts brought forward.

The Supreme Administrative Court may either lift the contested decision or dismiss the second-level judicial appeal. Alternatively, the Supreme Administrative Court may refer the case back to the Federal Fiscal Court if the Federal Fiscal Court has violated procedural rules, which, if observed, would have led to a different set of facts. In rare cases, where there is no need

for further investigation of the facts and circumstances, the Supreme Administrative Court may also rule on the merits of the case on its own. Additionally, the Supreme Administrative Court may be obliged to refer a case to:

- the Austrian Constitutional Court if it considers a legal provision to be incompatible with the Austrian Constitution; or
- to the European Court of Justice if a question arises that needs to be interpreted under EU law or if doubt arises about the compatibility of an Austrian provision with EU law.

### 5.3 Judges and Decisions in Tax Appeals

Austrian law comprises the principle of the lawful judge. This principle requires that the judge (relating to the court, the body of the court and the individuals of which that body consists) must be determined before a case is brought to the court. Therefore, the competent court and the body of the court hearing a case are determined by statutory law. The individuals deciding on a specific case are generally determined based on a plan of distribution of responsibilities resolved by a committee consisting of and elected by the judges of the respective court before the beginning of the respective business year.

At the Federal Fiscal Court, cases are heard by a single judge unless the taxpayer requests otherwise or the single judge deems that the decision of the case will have a significance that goes beyond the specific case. In these cases the court will hear the case as a senate of two professional judges and two lay judges.

All judges at the Austrian Supreme Administrative Court are professional judges, independent in exercising their office. The Administrative Court decides in senates with three, five or nine judges. Most of the time the senates comprise five members, except in cases that are particularly simple or have been clarified by previous case law, then the decision is taken by only three judges. In rare cases, where the decision would mean a deviation from previous case law or if the legal question is not uniformly answered in previous case law, a senate of nine judges is formed (so-called reinforced senate). The judges are appointed by the Austrian Federal President on recommendation of the Austrian Federal Government. Each member must hold a degree in law and must have gained at least ten years of professional experience in the legal profession.

The members of the Austrian Constitutional Court come from different professions (eg, judges, university professors, civil servants or attorneys-at-law) and must be qualified for the office by a degree in law and many years of relevant professional experience. There are, however, no full-time judges because the judges of the Austrian Constitutional Court may continue to exercise their out-of-court profession. Only civil

servants must resign from their office due to incompatibility reasons. The sessions of the Austrian Constitutional Court are held as required, which means the court does not meet on a permanent basis, but usually four times a year for three weeks each (usually in March, June, October and December). In most cases, the Austrian Constitutional Court hears cases as a senate of all 12 members. Cases whose importance does not go beyond the specific individual case or that have already been resolved in earlier decisions are, however, heard by a senate comprising only six members (so-called small formation). The members and substitute members are appointed by the Austrian Federal President on recommendations of the Austrian Federal Government, or either of the two houses of the Austrian parliament.

## 6. Alternative Dispute Resolution (ADR) Mechanisms

### 6.1 Mechanisms for Tax-Related ADR in this Jurisdiction

In Austria there are no actual domestic ADR mechanisms available. At almost any stage of the tax procedure the taxpayer may, however, contact the competent tax authorities and ask if there is room for negotiations.

There is further the possibility for binding rulings that may be requested from the tax authorities on issues of group taxation, transfer pricing or tax-neutral reorganisations and, new since 2019 and partly 2020, regarding other fields of international tax law, questions regarding the general anti-abuse rule (GAAR) and VAT (for more details, see below).

Austria has, however, concluded several double taxation treaties – comprising mutual agreement procedures.

In addition to the dispute settlements set out in individual double taxation treaties, there is, in implementation of Directive EU 2017/1852, the possibility for lodging dispute settlement complaints regarding the interpretation and application of double taxation treaties. Since September 2019, taxpayers facing intra-EU tax disputes may, within three years of the first notification of the tax dispute, submit a request to initiate a dispute settlement procedure to the tax authorities. During this procedure, the member states involved are encouraged to find a common solution within two years. If an agreement is reached between the member states, it constitutes an enforceable decision for the taxable person concerned. If, on the other hand, the member states involved do not reach an agreement on the complaint within two years (with a possible extension of up to one year), arbitration proceedings must be carried out. The final decision by the Advisory Committee then binds the

member states involved, if no agreement can be reached within a further six months.

## 6.2 Settlement of Tax Disputes by Means of ADR

As stated above, there are no domestic ADR mechanisms available in Austria.

## 6.3 Agreements to Reduce Tax Assessments, Interest or Penalties

As stated above, there are no domestic ADR mechanisms available in Austria.

The Austrian fiscal criminal law provides for the possibility of voluntary disclosure in order to avoid sanctions for fiscal offences (for details, see below).

## 6.4 Avoiding Disputes by Means of Binding Advance Information and Ruling Requests

In addition to informal non-binding statements by the tax authorities, taxpayers may apply for formal advance tax rulings. While the tax authorities may have discretion as to whether to issue an informal statement, they are obligated to issue a binding ruling if the taxpayer is able to show a specific interest in such.

A binding ruling may only be applied for regarding a limited scope of matters. As of 2020, the catalogue of these matters comprises reorganisations, tax groups, international tax law, questions regarding the general anti-abuse rule and VAT. The ruling is to be issued within two months of the application.

The application for a binding ruling is subject to a fee. The fee amounts to EUR500 if the binding ruling request is denied or withdrawn in time. Otherwise, the fee depends on the taxpayer's annual turnover with a base fee of EUR1,500. If the taxpayer's annual turnover exceeds EUR400,000, the base fee is gradually increased up to a maximum of EUR20,000 (for companies whose turnover exceeds EUR40 million). The Austrian tax authorities, however, do not charge any fee for the issuance of informal rulings.

A ruling reduces the risk that the Austrian tax authorities take a divergent view. For a ruling to be binding, the actual facts and circumstances must not deviate from the facts and circumstances presented in the application for the ruling. If this is the case, the Austrian tax authorities are bound by the ruling and have to base their assessment upon this view. The taxpayer may, however, also be protected against the deviation from informal statements, based on the protection of good faith.

## 6.5 Further Particulars Concerning Tax ADR Mechanisms

As stated above, there are no domestic ADR mechanisms available in Austria.

The application for binding advance rulings is only possible regarding the limited scope of matters stated above. For informal rulings, no such restrictions apply (for details on rulings, see above).

## 6.6 Use of ADR in Transfer Pricing and Cases of Indirect Determination of Tax

Cross-border advance pricing arrangements may be applied for on the basis of double taxation treaties containing a provision based on Article 25 of the OECD's Model Tax Convention. Those arrangements are negotiated between the Austrian Ministry of Finance and foreign tax authorities on a bilateral or multilateral basis (the taxpayer is not involved in this procedure). Within the European Union, the outcome of such arrangements is subjected to a mandatory automatic information exchange system. However, advance pricing arrangements are intended to clarify specific issues of the interpretation of double taxation treaties only on a rather generic level.

Taxpayers may further apply for dispute settlement regarding the interpretation and application of a double taxation treaty under the implementing provision of Directive EU 2017/1852 since September 2019 (for details, see above).

# 7. Administrative and Criminal Tax Offences

## 7.1 Interaction of Tax Assessments with Tax Infringements

It is important to distinguish between two types of tax audits in Austria:

- “regular” tax audits as a part of administrative tax proceedings; and
- fiscal criminal audits.

While all Austrian businesses are subject to tax audits on a regular basis, usually every three to five years (for details, see above), fiscal criminal audits are only carried out if there is a concrete indication of a fiscal criminal offence. However, “regular” tax audits may lead to the initiation of fiscal criminal proceedings and therefore potentially to the conducting of further fiscal criminal audits. Every “regular” tax audit report is reviewed and assessed by a competent fiscal criminal tax officer from the perspective of fiscal criminal law. If the fiscal criminal tax officer

sees an indication of a fiscal criminal offence, he may initiate fiscal criminal proceedings.

Not only individuals but also legal entities may be subject to fiscal criminal proceedings if:

- an offence is committed to the benefit of the legal entity or in violation of obligations of the legal entity; and
- such offence is committed by a high-ranking officer (so-called decision maker); or
- an employee and decision makers have violated their duties of supervision.

## 7.2 Relationship Between Administrative and Criminal Processes

In Austria there are two possible types of fiscal criminal proceedings: administrative fiscal criminal proceedings and judicial fiscal criminal proceedings. The first type is handled by the tax authorities as fiscal criminal authorities, whereas the second type is handled by ordinary criminal courts.

The principle applies that the tax authorities are competent for less severe and the courts for major offences. In particular, the tax authorities are competent for negligent offences and intentional offences where the amount of evaded taxes does not exceed EUR100,000. The ordinary courts, on the other hand, are competent for intentional offences where the amount of evaded taxes exceeds EUR100,000 (in some cases an overall perspective may result in several offences being considered collectively with respect to this threshold) and for certain qualified offences (eg, involving the smuggling of goods).

After the initiation of fiscal criminal proceedings, a change of competence may occur in both directions, from the tax authorities to the ordinary courts, and vice versa. This may happen, for example, if additional offences are discovered or initially reached thresholds are undercut.

## 7.3 Initiation of Administrative Processes and Criminal Cases

As outlined above, every tax audit report is also reviewed and assessed by a competent fiscal criminal tax officer from the perspective of fiscal criminal law. Thus, (external) tax audits may result in fiscal criminal proceedings being initiated.

Further, fiscal criminal proceedings may be initiated if a suspicious case has been reported to the authorities and first investigations showed that there are sufficient grounds for suspicion to initiate proceedings. Furthermore, most public authorities and courts are obligated to notify the competent fiscal criminal authority on offences that come to their attention.

## 7.4 Stages of Administrative Processes and Criminal Cases

### Administrative Fiscal Criminal Proceedings

After the initiation of the fiscal criminal proceedings, the fiscal criminal authority carries out investigations; for example, by questioning the accused or witnesses or by dawn raids. If in the opinion of the fiscal criminal authority the facts of the case have been sufficiently clarified, the fiscal criminal authority is convinced that the accused has committed a fiscal offence and the accused had the opportunity to comment on the accusation, the fiscal criminal authority may issue a so-called penalty order, which constitutes a simplified procedure without a hearing. If such a simplified procedure is not possible or if the accused files an objection against the penalty order in due time, a hearing has to be held. In the course of this hearing, the accused may present any evidence that has not yet been taken into account or submit additional requests for evidence. If all further investigations are conducted, the fiscal criminal authority will issue a decision either to discontinue the proceedings or to impose sanctions.

### Judicial Fiscal Criminal Proceedings

Fiscal criminal court proceedings are carried out according to the principles of ordinary criminal proceedings, supplemented by specific fiscal criminal provisions. Therefore, the public prosecution is the authority in charge and the fiscal criminal authority only carries out investigative tasks on behalf of the public prosecution. There is further no possibility of simplified procedures.

Regarding possible penalties, intentional tax evasion is sanctioned with a fine of up to twice (respectively up to three times in the case of commercial tax evasion) the evaded tax amount or up to two (respectively three) years of imprisonment. In the case of qualified forms of tax evasion (eg, under the use of falsified documents or fictitious structures), penalties of up to ten years of imprisonment are possible.

## 7.5 Possibility of Fine Reductions

During the assessment of the penalty, mitigating factors must be taken into consideration that may potentially reduce the amount due. Such factors are, for example, repentant confession or previous integrity of the accused.

Apart from that, there is the possibility that penalties may be (partially) indulged under certain conditions (eg, if it is not necessary to enforce the complete penalty in order to counteract the commission of further offences). This, however, only applies in the case of court proceedings.

## 7.6 Possibility of Agreements to Prevent Trial

The Austrian fiscal criminal law provides for the possibility of voluntary self-disclosure in order to avoid sanctions for fiscal

offences. This applies to all kinds of fiscal offences. The taxpayer must voluntarily disclose all facts and circumstances related to the fiscal offences committed before the offence has been fully or partially detected by the Austrian authorities, and pay the amount of tax evaded within one month after the submission of the voluntary self-disclosure, or at least apply for payment reliefs within this month. If a voluntary disclosure is made at the beginning of a tax audit, a surcharge of 20% of the tax evaded must be paid. Furthermore, only the persons actually included in the voluntary self-disclosure will benefit from the waiver of sanctions.

## 7.7 Appeals Against Criminal Tax Decisions

As mentioned above, a simplified penalty order can be appealed against in written form within one month with the issuing fiscal criminal authority. The penalty order is then suspended and the criminal proceedings will be continued with a hearing.

Regular decrees of the Austrian tax authorities in fiscal criminal matters can be appealed to the Federal Fiscal Court and ultimately to the Supreme Administrative Court.

Court decisions in a fiscal criminal case can be appealed to the Court of Second Instance and further (in certain cases) to the Austrian Supreme Court of Justice.

## 7.8 Rules Challenging Transactions and Operations in this Jurisdiction

Fiscal criminal penalties result from a (deliberate/negligent) reduction of tax together with the breach of the taxpayer's obligation to notify the tax authorities and fully disclose all information relevant for matters of his or her taxation.

The tax authorities quite regularly refer to tax evasion in connection with GAAR because the statute of limitation under Austrian procedural tax law is extended to ten years in the case of tax evasion.

While the authors' impression is that the courts seem more reluctant to apply GAAR in fiscal criminal proceedings, there are a number of cases where a court has applied GAAR in fiscal criminal proceedings. For instance, in October 2018 the Austrian Constitutional Court upheld a decision by the district court of Vienna in which someone was convicted as having contributed to a tax evasion based on the Austrian GAAR provision (Section 22, Austrian Federal Fiscal Code).

## 8. Cross-Border Tax Disputes

### 8.1 Mechanisms to Deal with Double Taxation

Whether a cross-border double taxation is (better) remedied by means of domestic litigation or an available mechanism under the respective double tax treaty, if any, will depend entirely on the specifics of the case at hand.

However, it is probably more common to try to use domestic litigation.

### 8.2 Application of GAAR/SAAR to Cross-Border Situations

According to predominant jurisprudence in Austria, GAAR and SAAR apply in cross-border situations covered by bilateral treaties. The Supreme Administrative Court's constant case law is that this is in line with the objective of bilateral tax treaties.

### 8.3 Challenges to International Transfer Pricing Adjustments

There is no official data available; however, it appears that the majority of transfer pricing cases are challenged domestically.

### 8.4 Unilateral/Bilateral Advance Pricing Agreements

On the basis of double taxation treaties containing a provision that reflects Article 25 of the OECD Model Tax Convention (and including the standards stipulated in Articles 16 to 26 of the Multilateral Instrument), cross-border advance pricing agreements can be negotiated by the Ministry of Finance. Both unilateral and bilateral/multilateral agreements are possible; however, unilateral agreements bear the risk of not eliminating the threat of double taxation, in case the other state involved does not share the legal opinion expressed in the Austrian ruling.

### 8.5 Litigation Relating to Cross-Border Situations

There is no official data available, but it is likely that matters of withholding tax, tax grouping and transfer pricing are among those with the highest rates of cross-border tax litigation.

## 9. Costs/Fees

### 9.1 Costs/Fees Relating to Administrative Litigation

The Austrian tax authorities do not charge administrative fees for lodging an appeal.

However, it has to be noted that already on the administrative level, costs for legal advice may occur, albeit there is no obligation to be represented by a legal representative.

## 9.2 Judicial Court Fees

The proceedings at the Federal Fiscal Court are free of administrative charges and legal representation is, as in administrative proceedings, not required (although highly advisable).

Both the Austrian Supreme Administrative Court and the Constitutional Court charge administrative fees in the amount of EUR240 when lodging an appeal.

If a taxpayer is not able to cover the costs of the proceedings due to his or her precarious economic situation, he or she may, however, apply for so-called procedural assistance. Procedural assistance is understood to mean exemption from any costs that may incur during the proceedings, which in particular also means free representation by an attorney-at-law or tax adviser.

## 9.3 Indemnities

There is no compensation claimable by the taxpayer if the court decides that the initial additional tax assessment is absolutely void and null. However, tax amounts already paid have to be reimbursed and the taxpayer may claim interest.

## 9.4 Costs of Alternative Dispute Resolution

As mentioned above, the application for a binding advance ruling is subject to an administrative fee. The fee ranges from EUR1,500 to EUR20,000 depending on the annual turnover of the taxpayer. Informal rulings, however, are free of charge.

## 10. Statistics

### 10.1 Pending Tax Court Cases

The only numbers publicly available in relation to tax proceedings can be derived from the Austrian Federal Fiscal Court's annual reports. In 2018, 11,240 cases were closed at the Federal Fiscal Court. The number of pending cases, however, is unknown.

Further, there have been 213 appeals to the Austrian Supreme Court in tax matters and 13 tax-related appeals to the Austrian Constitutional Courts in 2018. The total numbers of pending and closed cases at both Supreme Courts, however, are unknown.

## 10.2 Cases Relating to Different Taxes

Out of the total number of closed cases at the Federal Fiscal Court in 2018:

- 21.4% related to income tax matters of self-employed persons and entrepreneurs;
- 15.8% to VAT matters;
- 12.5% to income tax matters of employed persons;
- 10.4% to appeals against decrees resulting from wage tax audits;
- 8.9% to corporate income tax matters;
- 8.7% to matters of tax collection;
- 6.9% to real estate transfer tax and stamp duty matters;
- 5.9% to other tax matters (eg, motor vehicle tax);
- 4.4% to family allowance and other matters of allowances;
- 4% to the determination of income;
- 0.7% to matters of unitary values; and
- 0.2% to appeals against administrative measures taken by the tax authorities.

## 10.3 Parties Succeeding in Litigation

The total number of successful litigations can only be roughly derived from the Federal Fiscal Court's annual report. In 2018, taxpayers succeeded in around 28% of closed cases.

## 11. Strategies

### 11.1 Strategic Guidelines in Tax Controversies

It is vital that tax controversies are thoroughly prepared. The taxpayer has to timely retain a counsel to review and summarise the facts and to prepare legal arguments. Also, it must not be forgotten that new facts and evidence can only be brought forward while the case is pending with the Federal Fiscal Court. It is also generally advisable to request an oral hearing.



# AUSTRIA LAW AND PRACTICE

Contributed by: Gerald Schachner, Kornelia Wittmann, Nicolas D Wolski and Lucas Hora, *bpv Huegel*

**bpv Huegel** is among the leading law firms in Austria. It is regarded as the Austrian partner for highly complex matters that require specialised tax and legal knowledge. The tax team is one of the largest in the Austrian legal market. With dual-qualified members (being qualified both tax advisers and attorneys at law), the seasoned team offers the full range of tax services, including obtaining rulings, assistance in tax audits, tax litigations, arbitration proceedings, evaluation of tax risks,

voluntary disclosures with penal waiver effect, fiscal criminal law matters, internal investigations and accounting issues. Strong-minded commitment to clients, excellent know-how and results-driven efficiency make bpv Huegel the first choice for challenging legal issues, significant transactions and critical tax litigations. The firm strives to provide the highest standard of advice in everything it does. As a result, it has been one of the leading legal tax providers in Austria for decades running.

## Authors



**Gerald Schachner** is a partner at bpv Huegel, head of the firm's tax law practice group and co-head of the tax litigation department. Gerald is dual-qualified as an attorney-at-law and tax adviser. After having gained profound experience in tax law while working several years with

Arthur Andersen, Deloitte and Norton Rose, Gerald joined bpv Huegel in 2010. Gerald is highly regarded in numerous national and international rankings. Gerald's practice focuses on corporate tax law, tax restructuring and tax controversies including fiscal criminal tax law, and combines comprehensive corporate and M&A experience with in-depth tax knowledge that enables clients to achieve positive outcomes.



**Nicolas D Wolski** is a senior associate and qualified both as an attorney-at-law (Frankfurt Bar) and a tax adviser (with qualifications in Germany and Austria). Before joining bpv Huegel, Nicolas worked for several years with major international law firms abroad – lastly as counsel with

Willkie Farr & Gallagher's Frankfurt office. Nicolas focuses on tax advice in M&A transactions and specialises in the tax aspects of international reorganisations and financings and tax controversies (tax audits, administrative and judicial appeals), and conducts tax-driven internal investigations and how to deal with the findings (eg, voluntary disclosure with the objective to avoid sanctions).



**Kornelia Wittmann** is a partner at bpv Huegel and co-heads bpv Huegel's tax litigation department. She holds a double degree in economics and law and an LLM in international tax law. Kornelia is dual-qualified as an attorney-at-law and as an Austrian and Hungarian tax adviser.

Before joining bpv Huegel, she worked with PwC for several years. Kornelia is recognised in numerous national and international rankings. Her main areas of practice are tax litigation including fiscal criminal law, corporate, international and M&A tax law. Further, Kornelia provides advice in national and international accounting law and in banking supervisory law.



**Lucas Hora** has been an associate with bpv Huegel since 2019. He mainly specialises in tax and tax procedural law (including tax controversies) and in addition deals with fiscal criminal law, corporate law and accounting law issues. Lucas studied law at the University of Vienna and business law

at the Vienna University of Economics and Business Administration. Currently he is completing his PhD studies in law and his Master's degree in business administration at the University of Vienna, focusing on business law and financial reporting. Before joining bpv Huegel, Lucas gained experience at PwC and at the Austrian Federal Fiscal Court.

**bpv Huegel**

Enzersdorferstraße 4  
2340 Mödling  
Austria

Tel: +43 2236 8933 77  
Fax: +43 2236 8933 77 40  
Email: [gerald.schachner@bpv-huegel.com](mailto:gerald.schachner@bpv-huegel.com)  
Web: [www.bpv-huegel.com](http://www.bpv-huegel.com)

**bpv HÜGEL**