

Tax Litigation

Around the world, governments are struggling and starved for cash. Western nation-state tax policies have also shifted to a 'no tolerance' stance against aggressive tax planning, tax avoidance and tax evasion.

This policy shift is catching on elsewhere. The consequence of these new global realities is the growth of tax litigation as corporations and individuals battle the tax authorities in court. This first edition of *Tax Litigation* covering 29 countries around the globe provides a single, essential starting point of practical reference for owners and leaders of businesses, general counsel, tax lawyers, accounting professionals, students and members of the general public with ready access to the fundamentals of tax litigation in a multi-jurisdictional, comparative format.

'As a consequence of modern international business, nations have imposed upon the individual and corporation a confusing web of sometimes conflicting tax considerations and complex court processes. To successfully navigate these turbulent tax waters one finds Tax Litigation an essential resource'

Bert Krista, Founder of SoftMoc

'This volume – the collaborative work product of the globe's leading tax litigators – represents an astonishingly rich resource for anyone wanting to quickly master the similarities and differences in tax litigation around the world.'

Benjamin Alarie, Associate Professor & Associate Dean First Year Program, Faculty of Law, University of Toronto

'An excellent resource that every international tax practitioner needs to add to their library.'

Gordon R. Jessup, BMath, CPA, CA, Partner, Fuller Landau LLP, Chartered Accountants



FIRST
EDITION
2013

Tax Litigation

General Editor: David W. Chodikoff,
Miller Thomson LLP

THE EUROPEAN LAWYER
REFERENCE

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Jurisdictional comparisons

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Foreword Gerald J. Rip, The Honourable Chief Justice, Tax Court of Canada

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Foreword

Gerald J. Rip

The Honourable Chief Justice, Tax Court of Canada

Litigation of tax disputes may vary from country to country but the common goal is the same: to put finality to a tax dispute between the Government and a taxpayer. Tax litigation, unlike most other litigation, puts the resources of a state against the means of a taxpayer and the taxpayer's means may be very modest or quite substantial. But in all cases, the procedures in litigation should serve to put the parties in equal balance. *Tax Litigation* is a successful effort to describe how several countries attain equal balance between tax litigants.

Tax procedure is an evolving process. A country's tax litigation procedures are influenced by the country's legal, social and economic history and development.

A lawyer with clients residing or carrying on business in a foreign country will want an authoritative and readable text to understand the often different tax litigation process in a foreign country if called upon by a client. *Tax Litigation* is the tool that will serve the tax professional in giving immediate first aid assistance to a client who has a tax problem in another jurisdiction before consulting with a lawyer in that country. The book is timely given the international conduct of business places the shadow of tax collectors over even the simplest transaction in a foreign country.

Leading tax lawyers from 29 countries have joined in contributing to *Tax Litigation*, each providing a clear, concise and full description of the tax litigation process in their country. The reader will learn of processes in both the civil and criminal areas of tax litigation.

Tax Litigation comprises 29 chapters, one for each country represented in the book. Each chapter is divided into sections that permit the reader to zero in on what may be his or her interest at the moment: an overview, the pre-court process that includes possible resolution of the dispute before trial, the trial process in first instance: the trial itself and whether it emphasises the examination and cross-examination of witnesses or the review of the documentary evidence that was before the tax officials, for example; how evidence may vary in a civil trial or a criminal trial; expert witness evidence that may include new procedures such as 'hot-tubbing'¹; are argument and submissions to the court or tribunal in writing only or orally?; the decision; what must the trier consider; the burning issue of costs and expenses of

¹ This practice is also sometimes referred to by the less flamboyant label 'concurrent evidence'. In short, 'hot-tubbing' describes the process where in a complex, technical trial expert witnesses confer with one another before the hearing in order to narrow the issues and identify the points on which their views differ or testify together in court on a panel rather than one expert testifying after another on the witness stand.

going to trial; appeals from judgment of the decision in the appeal in first instance and an optional discussion of 'hot' areas of tax interest in the country, such as tax evasion, transfer pricing and anti-avoidance rules.

At times the reader will recognise procedures in another country that are quite similar to those he or she is familiar with. At other times the reader will be quite surprised at the differences: the arena where the tax appeal is heard may be a specialised court dealing only with tax matters, a general court of law where a judge may hear a motor vehicle accident in the morning and a tax appeal during the afternoon, or a tribunal or administrative board; the person presiding at the trial may or may not be a judge or a person trained in tax law; some countries may prefer documentary over oral evidence and others the opposite; the burden of proof may vary from country to country; the decision maker may be required to provide detailed reasons for the decision in some jurisdictions, while a few simple sentences may suffice elsewhere. All this and more serve to fascinate the tax professional who has an interest in litigation.

It will not only be tax practitioners who will realise the value of *Tax Litigation* but so will judges, court administrators and even officials of taxation agencies: *Tax Litigation* offers them an inexpensive opportunity to compare domestic practice and procedure to those of other countries and perhaps readers in position to do so may want to consider adopting processes from other countries in the continuing evolution of their country's tax litigation process.

The 29 authors and co-authors and the editors of *Tax Litigation* have provided a valued service to the international tax community and I wish to thank them for the time and energy they have invested in this project.

Gerald J. Rip
August 2013

Acknowledgements

David W. Chodikoff Partner, Miller Thomson LLP

In order to bring a book of this type to print it requires the involvement and commitment of many people. On my personal homefront, my wife, Tanya and son, Daniel, have endured my almost daily reports on the progress of the project. I am pretty sure that both of them felt that they actually worked on this project too. Thank you, Tanya and Daniel, for your patience and endurance. Love knows no bounds!

If not for my meeting with Katie Burrington (Commercial Director, *European Lawyer*, Thomson Reuters) in Dublin, Ireland in October of 2012 at the International Bar Association Conference, this project would not have been born. Thank you, Katie, for your consistent support, hard work and good cheer. Even when the project seemed to veer off course, Katie was always looking at the 'bright side of life'.

I owe a great deal to my law partner, James ('Jim') M. Klotz. Jim is a recognised world leader in Anti-Corruption and International Governance as well as International Business Transactions. Thanks to Jim's support and contacts, we were able to recruit a number of contributors for this project. Thanks, Jim. I also want to thank my tax partners for their encouragement and support, specifically, James ('Jim') Hutchinson, John Campbell and Martin Rochweg. There were others in my law firm who offered support in one form or another as well. My thanks to Emily Cole, Peter Auvinen, Michael Kerr, Mark Frederick and Michael Pace. I also thank Sheldon Silver, Q.C. who had a hand in the design of the template.

In Canada, my editorial team consisted of senior assistant editor, Jamie Walker, and assistant editors Sarah Virani, Shaun Parekh and Victoria Rodrigues. These second year law students working for the summer at Miller Thomson LLP demonstrated a keen interest in both the subject matter and the work. I look forward to watching each one of these young persons develop in their respective legal careers as they are all superstars in my estimation!

Coordinating all of the production work and pretty much responsible for everything that involves my practice of law is my 'Chief of Staff' (a monicker that she has well earned over eight years of work with me), Filomena ('Fil') Mendonca. As I often freely admit, any success that I may have in the private practice of law or that is law related can be directly attributable to Fil's support and help. Thank you, Fil.

I want to thank the Honourable Chief Justice of the Tax Court of Canada, Gerald Rip, for agreeing to prepare a foreword for this enterprise. Thank you, Chief Justice.

My thanks, as well, to all of those individuals who took the time from

their incredibly busy schedules to write an endorsement for this book. Thank you!

I cannot say enough about the good humour and hard work of all of the contributors. Given the tight timelines, their individual efforts were simply extraordinary. Thank you!

Finally, this project would not have reached completion without the capable efforts of the Thomson Reuters UK team lead by Emily Kyriacou and Magda Wika with no less effort and support from Caroline Pearce and Dawn McGovern. Thank you!

David W. Chodikoff
August 2013

Preface

David W. Chodikoff Partner, Miller Thomson LLP

In October 2012, I attended the annual conference of the International Bar Association in Dublin, Ireland. The conference was held at the relatively new conference centre in downtown Dublin. From this visitor's point of view, the centre is a beautiful building. Upon entering the conference centre, the first thing you could not help but to encounter was the Thomson Reuters booth. As the saying goes, this booth was 'front and centre'. There were bookcases full of Thomson Reuters' published works. As I examined the books on display, it was not long before a series of books caught my eye. The series entitled '*The European Lawyer Reference Series*' had plenty of titles ranging from Arbitration World to Gaming Law to Private Client Tax. Each book was a jurisdictional comparison of a particular subject. I was impressed by the concept and the titles that were covered by the series.

One of the Thomson Reuters people working at the booth was Katie Burrington. I made some enquiries about the series. 'Yes', Katie explained: 'the General Editor is responsible for designing the template that every participating law firm follows'. Katie told me that the General Editor was also responsible for the recruitment of the participating law firms. My interest was palpable. I asked Katie if there was a book in the series on the subject of tax litigation. 'No', she replied. 'Would Thomson Reuters be interested in a book on the subject for the series?' I asked. 'Yes', replied Katie. It was then that I said: 'I am your man!'

I had only two conditions. First, this book had to cover both the common law/civil code context of tax litigation and it also had to cover the criminal side or the defence of tax prosecutions and related offences. The second condition was that I could not commence the project until 2013. Katie said 'no problem' to these two conditions.

This book project started in earnest in February of 2013. It is fair to say that it is a remarkable achievement by any measure to have a book of this nature and quality reach the global market in such a short period of time. The credit goes to so many people and they are recognised in the acknowledgment.

In this book, there are 29 chapters. Twenty-nine leading law firms in the field of tax litigation provide their respective analysis of the process and procedure for challenging tax assessments and authorities within their respective country. The approach for each chapter has been standardised. The contributors have provided an overview of both the common law/civil code context of tax litigation and the defence of tax prosecutions and related offences. Because of this defined structure, this book is arguably unique in the tax publishing world. Each contributor has attempted to canvass

the following topics within their jurisdiction: significant subjects of tax litigation, the pre-court process, the trial process, documentary evidence, witness evidence, expert evidence, argument, the decision, costs, appeals and hot areas of interest.

It is our collective wish that readers and users of this book find it a useful source of information regarding the subject of tax litigation around the globe.

David W. Chodikoff
August 2013

China

HJM Asia Law

Caroline Berube with contributions from Brad Alexander & Donfil Wong

1. OVERVIEW

1.1 Significant subjects of tax litigation

There have been a number of changes to the tax administrative review process in the People's Republic of China (hereinafter China or the PRC). Most of these changes stemmed from the introduction of the Enterprise Income Tax Law on 1 January, 2008, which significantly changed the China tax system by broadening the definition of a tax resident, increasing the documentation requirements for transfer pricing, and introducing a general anti-avoidance rule. These changes have had a significant impact on tax litigation in China in both the civil and criminal context.

This chapter discusses the current rules and regulations regarding tax litigation in China, examines the common procedures for such administrative action, and highlights some of the key issues for companies to consider.

1.2 Identification of legislative framework

The relationship between the taxpayer and the tax authority is deemed as an administrative relationship, where the tax authority is the law enforcement agency and the taxpayer must obey. Therefore, this relationship in China is neither recognised as a civil relationship nor is it governed by the Civil Code. Rather, it is governed by administrative laws.

There are two different procedures for tax litigation in China: the administrative procedure and the criminal procedure. Under the former, the taxpayer generally brings action against the tax authority to challenge a ruling or other determination. The latter involves actions brought by the authorities against taxpayers for alleged breaches of the regulations.

1.2.1 Common law and/or Civil Code context

The main laws and relevant administrative regulations regarding income tax are as follows:

- Individual Income Tax Law of the PRC, effective from 10 September, 1980 (revised 30 June, 2011) (the IIT Law);
- Enterprise Income Tax Law of the PRC, effective from 1 January, 2008;
- Administrative Penalty Law of the PRC, effective from 1 October, 1996;
- Administrative Reconsideration Law of the PRC, effective from 1 October, 1999;
- Administrative Procedure Law of the PRC, effective from 1 October, 1990;

- Administration of Tax Collection Law of the PRC, effective from 1 May, 2001;
- Rules for the Implementation of Administration of Tax Collection Law of the PRC, effective from 15 October, 2002 (revised 9 November, 2012);
- Regulation regarding Some Issues of the Evidences of the Administrative Procedure, effective from 1 October, 2002;
- Measures on the Payment of Litigation Costs, effective from 1 April, 2007.

1.2.1 Tax evasion and other criminal tax offences

The main laws regarding tax evasion and related criminal regulations are:

- Criminal Law of the PRC, effective from 1 October, 1997 (the Criminal Law);
- Amendment (VII) to the Criminal Law of PRC, effective from 28 February, 2009
- Criminal Procedure Law of the PRC, effective from 1 January, 1980; the latest revision was enacted on 14 March, 2012;
- Interpretation in relation to the Performance of the Criminal Procedure Law, effective from 1 January, 2013.

2. THE PRE-COURT PROCESS

2.1 Common law and/or Civil Code: assessments, reassessments and administrative determinations

2.1.1 Resolving disputes before court

Generally, all income tax related disputes stem from the decisions or actions of the tax authority. If the taxpayer wishes to challenge a decision by the tax authority, they may apply to the higher tax authority for reconsideration of the decision (the second paragraph of Article 12 of Administrative Reconsideration Law). During the period of administrative reconsideration, the taxpayer cannot initiate any administrative litigation (Article 16 of Administrative Reconsideration Law).

In general, the administrative reconsideration shall be completed within 60 days from the date the application is accepted (Article 31 of Administrative Reconsideration Law). In the event that the taxpayer disagrees with the decision of the higher tax authority, they may initiate administrative litigation to challenge this decision. Note that the taxpayer must initiate any administrative litigation within 15 days from the date of the decision of the higher tax authority (Article 19 of Administrative Reconsideration Law).

2.1.2 The criminal context – elements of the offence (laying of the charge)

Earlier versions of the Criminal Law provided that the base amount of tax avoided constituting a criminal offence must be equal to RMB 10,000 (approximately €1,250) and be equivalent to 10 per cent of the taxpayer's total tax liability. However, this fixed amount was unable to provide the authorities with the flexibility and discretion required to apply the law evenly across the different regions of China, in which the standard of living may vary significantly. Accordingly, the current Criminal Law provides a

revised standard for criminal tax evasion – namely, in order to constitute a criminal offence, the base amount of tax evaded by the taxpayer must be both ‘relatively high’ and be equivalent to 10 per cent of the taxpayer’s total tax liability. The new revision provides the authorities with more flexibility for different jurisdictions in China.

Specifically, Section 3 of Amendment (VII) to the Criminal Law (namely the amendment to Article 201 of the Criminal Law) provides that the following constitutes a criminal offence:

‘In the event that a taxpayer files a false tax return or fails to file a tax return with the intent of deception or concealment, if the amount of the tax evaded is relatively high and accounts for at least 10 per cent of the tax liability, such taxpayer shall be subject to maximum three years’ imprisonment or criminal detention and a fine concurrently. If the amount of the tax evaded is high and accounts for more than 30 per cent of the tax payable, such taxpayer shall be sentenced to three to seven years; imprisonment and subject to a fine.

A party obliged to withhold tax but failing to pay or fully pay the tax withheld or collected that the amount of the tax liability in question is high shall be subject to punishment in accordance with the preceding.

Where the aforementioned breach is committed more than twice but penalty is not yet imposed, the amount involved shall be accumulated.’

Therefore, the authorities have flexibility to determine when to initiate criminal proceedings regarding tax evasion, but the penalties regarding the offences are stipulated in accordance with the amount of the evasion.

2.1.3 Early resolution (plea bargain)

The Criminal Law provides taxpayers with the opportunity to avoid criminal proceedings and additional liability by paying any overdue tax and any relevant penalties associated with the outstanding balance. If, upon receiving notice of the overdue tax balance and administrative penalty, the taxpayer satisfies the outstanding balance, then the taxpayer will not face any further criminal proceedings. In particular, Section 3 of Amendment (VII) to the Criminal Law provides that:

‘For the act as provided in the first paragraph, if the taxpayer in question, after receiving the notice on demanding tax arrears issued by the tax authorities, pays the overdue tax, pay the charge on late payment of such overdue tax and is imposed administrative punishment, such taxpayer shall not be held criminally liable, except for those who have been subject to criminal punishment on the grounds of tax evasion in the latest five years or have been imposed administrative punishment for two times or more by the tax authorities shall be excepted.’

3. THE TRIAL PROCESS: FROM COMMENCEMENT TO JUDGMENT

3.1 The role of the trier of fact (judge)

3.1.1 Commencing proceedings in the common law and/or civil court systems

A taxpayer may initiate proceedings against the tax authority by one of two possible methods. First, the taxpayer may challenge a decision by the

tax authority by appealing to the higher tax authority for administrative reconsideration. In the event that the higher tax authority rules in favour of the initial tax authority, the taxpayer may initiate administrative proceedings within 15 days of the date of the administrative reconsideration decision. Alternatively, a taxpayer may initiate litigation directly within three months from the date they become aware of the initial administrative decision (Article 39 of Administrative Procedure Law).

Most cases filed by the taxpayer should be filed in the lower people's court in the district where the relevant tax authority is located. However, in certain important or complicated cases, the intermediate court in the jurisdiction will take control over action in the first instance.

3.1.2 The Government response

Once the court receives a complaint, the following elements must be examined to determine whether to accept the complaint and register the case. In accordance with Article 41 of the Administrative Procedure Law, the complaint must include the following elements:

1. the plaintiff is the individual, legal entity or other organisation who alleges that his/its own legal rights are infringed by the administrative act;
2. there is a specific defendant, which should be an administrative agency;
3. there are specific claims of litigation and relevant fact; and
4. the case is within the jurisdiction of the court.

The court then determines whether to accept the complaint and file the case in writing within seven days from the date it receives the complaint (Article 42 of the Administrative Procedure Law).

3.1.3 The burden of proof

(i) Common law and/or Civil Code

As is indicated above, the initial complaint submitted by the taxpayer must satisfy certain elements before it is accepted and registered with the court. Additionally, the taxpayer must provide sufficient evidence to establish their claims in accordance with common litigation principles.

Once the taxpayer has met their burden, the burden shifts to the tax authority to demonstrate that the decision being challenged is accurate and must provide relevant support for such decision (Article 32 of the Administrative Procedure Law). However, during the course of litigation, the tax authority is not permitted to collect any evidence from the taxpayer or other witnesses (Article 33 of the Administrative Procedure Law).

Throughout the course of the proceedings, the court also has the power to demand additional evidence from either party (Article 34 of the Administrative Procedure Law).

(ii) Criminal cases

For all criminal proceedings, the burden is on the People's Procuratorate (the Chinese authority responsible for criminal prosecutions) to demonstrate that the taxpayer has violated the relevant income tax regulations (Article 49 of the Criminal Procedure Law).

3.1.4 The trial timetable

The pretrial procedure is stipulated by Article 43 of the Administrative Procedure Law. In general, there are fewer civil procedural delays and the trial process moves faster compared with many European countries.

Once the court has decided to accept the complaint and register the case, it must deliver a copy of the complaint and relevant evidence submitted by the taxpayer to the defendant (tax authority) within five days. The tax authority shall submit its letter of defence and relevant evidence within 10 days from the date it receives the complaint from the court. The court shall deliver the letter of defence and relevant evidence to the plaintiff within five days of receiving them from the defendant.

The trial is scheduled soon after the relevant evidence and claims have been delivered to each party with the judgment to follow soon after. In total, the judgment shall be made within three months from the date the case was originally accepted and registered (Article 57 of the Administrative Procedure Law).

3.2 The criminal process – how it begins

Once the tax authority has determined that the amount of tax evasion is sufficient to constitute a crime, it will transfer the evidence to the competent judicial authority, which is generally the local public safety bureau (the PSB). (Article 77 of Administration of Tax Collection Law). Specifically, Article 77 of the Administration of Tax Collection Law provides that:

‘Where a taxpayer or a withholding agent has any of the acts prescribed in Articles 63, 65, 66, 67, 71 of this Law and is suspected to have committed an offence, the tax authority shall hand over the case to the judicial authority in accordance with the law, and the criminal liabilities shall be investigated.’

Once the PSB has received the case, it may detain the taxpayer for up to 30 days, depending on how complicated the case is (Article 89 of the Criminal Procedure Law). If the PSB believes that it is necessary to arrest the suspect, it shall submit an application for arrest to the People’s Procuratorate during the period of detention (Article 89 of the Criminal Procedure Law). The People’s Procuratorate must decide whether to arrest the taxpayer within seven days of receipt of the application for arrest from the PSB (Article 89 of the Criminal Procedure Law). In the event that the People’s Procuratorate decides to proceed with the arrest, the arrest and investigation period can last from two to seven months depending on the seriousness or complexity of the case (Articles 154, 156 and 157 of the Criminal Procedure Law).

The People’s Procuratorate must decide whether to proceed with prosecuting the case within one to three-and-a-half months (Articles 169 and 171 of the Criminal Procedure Law). Once the case is filed, the court may follow either normal procedure or summary procedure.

Under the standard procedure, the judgment shall be issued within two to three months from the date the case is accepted by the court. In certain instances, the trial may be extended for another three months upon approval by the higher court (Article 202 of the Criminal Procedure Law).

For instances of summary procedure, the judgment shall be made within

20 days to one-and-a-half months from the date the case is accepted by the court (Article 202 of the Criminal Procedure Law).

4. DOCUMENTARY EVIDENCE

4.1 Pre-trial exchange of documentary evidence

The court is not required to compel an exchange of evidence before the trial. In practice, however, courts generally require a pre-trial exchange of evidence when there is substantial documentary evidence provided by both parties (Article 21 of the Regulation regarding Some Issues of the Evidences of the Administrative Procedure). The pre-trial exchange process is discussed in section 4.1.1 below.

4.1.1 Examinations for discovery before trial

Pre-trial examinations in China differ from those in most Western jurisdictions insofar as China does not focus on the examination of witnesses, opposing parties, or related individuals about the matters involved in the lawsuit.

Rather, the parties will, in the presence of a judge, exchange evidence and either accept the evidence as true and correct or raise a challenge. The judge will record the minutes of such meeting in order to confirm which evidence was challenged and which was accepted by each party. Any witnesses that the parties intend to call are not required to be present for the pre-trial examination.

4.1.2 Special rules: special considerations

If both parties acknowledge the validity of any documentary evidence during the pre-trial exchange, they will be precluded from objecting to the validity during the hearing (Article 35 of the Regulation regarding Some Issues of the Evidence of the Administrative Procedure).

Similarly, if the defendant is absent from the court hearing, any evidence submitted shall not be deemed to be a valid basis for the judgment unless such evidence was submitted and acknowledged during the pre-trial exchange (Article 36 of the Regulation regarding Some Issues of the Evidence of the Administrative Procedure).

In addition to whether certain evidence may serve as the basis of a court's judgment, the court must also consider whether evidence must be kept confidential. Any evidence pertaining to state secrets, business secrets, personal secrets, or other confidential matters cannot be discussed publicly or argued during the hearing (Article 37 of the Regulation regarding Some Issues of the Evidence of the Administrative Procedure).

Parties are also required to submit the original documents to the court unless: (i) it is unreasonably difficult to present the original evidence and the court has approved the submission of a copy in lieu of the original; or (ii) the original document no longer exists and there is evidence to demonstrate that the copy to be submitted is a true and correct copy (Article 41 of the Regulation regarding Some Issues of the Evidence of the Administrative Procedure).

4.2 Criminal context: disclosure

The lawyer for the taxpayer may review and make copies of any documentary evidence related to the case file from the case file from the day when the People's Procuratorate files the indictment (Article 38 of the Criminal Procedure Law).

A situation may arise where the taxpayer's lawyer suspects that the PSB or People's Procuratorate has collected evidence that was not submitted to the court but may nevertheless prove the suspect's innocence or reduce the seriousness of the crime. Here, the lawyer for the taxpayer may apply to the People's Procuratorate or the court to compel admission of such evidence (Article 39 of the Criminal Procedure Law).

4.2.1 Special considerations

None applicable.

5. WITNESS EVIDENCE

5.1 Common law and/or Civil Code: trial considerations

5.1.1 Witness preparation

The rules regarding witnesses for income tax-related matters are provided in the Regulation regarding Some Issues of the Evidence of the Administrative Procedure.

In order to provide the witness evidence, the plaintiff or defendant shall submit the following documents to the court (Article 13):

- personal information like name, age, address, etc;
- the written statement of the witness shall be signed by the witness or affixed with personal seal if physical signature is inconvenient to make;
- the written statement of the witness shall be written with the date of issuance;
- a copy of identity certificates of the witness shall be attached.

A party that wishes to have a witness(es) testify on its behalf must apply to the court before the deadline for the submission of evidence (Article 43). The witness must attend the court hearing in person, except for certain statutory situations provided in Article 41 and the absence due to such is approved by the court (Article 41).

In certain instances, the plaintiff (taxpayer) may compel the administrative officer who issued the original decision that is being challenged to attend the court hearing in accordance with Article 44. Specifically, the plaintiff may compel the administrative officer to appear as a witness in the following instances:

- the taxpayer is challenging the on-site notes;
- the taxpayer is challenging the category or quantity of the detained property;
- the taxpayer is challenging the sample or the custodian of the inspected objects; or
- the taxpayer is challenging the legality of the identity of the administrative officer who has conducted the enforcement.

5.2 Criminal context – hearsay evidence

The witness shall attend the court hearing and be questioned by the People's Procuratorate and the defendant (taxpayer) and his lawyer (Article 59 of the Criminal Procedure Law).

6. EXPERT EVIDENCE

6.1 Common law and/or Civil Code – the expert report

6.1.1 Expert evidence at trial

The rules regarding expert evidence are also set forth in the Regulation regarding Some Issues of the Evidence of the Administrative Procedure.

Any expert report (appraisal) submitted to court must demonstrate the information of client, the items appraised, the documents and materials submitted to the appraising agency, the basis of the appraisal, the applied technique and measure, the information of the appraising agency, the qualification of the expert, and must be signed by the testifying expert and affixed with the appraising agency's seal (Article 14).

It may be possible for the plaintiff (taxpayer) to submit evidence showing that the appraisal submitted by the defendant was defective. Here, the plaintiff may apply to the court for reappraisal before its deadline to submit evidence (Article 29). Additionally, either party may apply to the court for reappraisal against the expert report, which is issued by the agency designated by the court, under certain situations as stipulated in Article 30.

Unlike normal witnesses who must appear in order for their testimony to be submitted, an expert witness is only required to attend the court hearing upon request by the opposing party. However, the court may exempt an expert from attending the hearing in certain scenarios as provided in Article 41 (Article 47).

6.2 Criminal context – the expert

In criminal cases, the People's Procuratorate is responsible for submitting any evidence to support the charges (Article 49 of the Criminal Procedure Law). The investigating agency (usually the PSB) must inform the suspect about the expert's opinion. If the defendant (taxpayer) wishes to contest the expert's opinion, they can apply for reappraisal or submit a separate appraisal prepared by their own expert witness to challenge the opinion (Article 146 of the Criminal Procedure Law).

The expert only attends the hearing in the event that the litigation party has objection against the expert's opinion and the court agrees so. If the expert refuses to present under court's summons, such expert evidence shall not be the basis of the judgment (Article 187 of the Criminal Procedure Law).

6.2.1 Special considerations

Note that any time spent on any psychological examination or similar procedure of the defendant, if applicable, is not included the proscribed timeframe for the criminal trial (Article 147 of the Criminal Procedure Law).

7. ARGUMENT

7.1 Common law and/or Civil Code: closing the case

As a general matter, Chinese courts are more focused on documentary evidence than arguments made by lawyers. Therefore, opening and closing arguments do not tend to have as much influence in China compared with other jurisdictions.

However, in the event that the documentary evidence is either ambiguous or contested, oral arguments can be instrumental in the court's determination.

7.2 Criminal context – closing the case

If the defendant's closing statement addresses new fact or evidence which the court believes may be relevant to the outcome, the court has the discretion to request further arguments on the subject from each party (Article 236 of the Interpretation in relation to the Performance of the Criminal Procedure Law).

8. THE DECISION

8.1 Common law and/or Civil Code context

There are four possible outcomes for the administrative decision in the context of civil litigation (Article 54 of the Administrative Procedure Law).

First, the court may uphold the initial administrative decision as correct and legal.

Second, in the event that the court determines that the administrative decision is defective, whether in part or in full, it may overturn the administrative decision or the defective element. Additionally, the court has the option to demand that the tax authority issue a new decision in replace of the defective decision.

Third, the court may demand the administrative authority to perform its obligation (ie pay tax return, etc) within certain time limit.

Fourth, the court may uphold the administrative decision, but amend the punishment proscribed thereby.

The Administrative Procedure Law and its interpretation do not expressly require that a court state its reasoning when rendering its judgment, reasons for the decision shall be stated in the judgment. However, the template for administrative judgments, which was issued by the Supreme People's Court on 8 December, 2004, lists the reasoning behind the judgment (Number of the notice: Fa Fa [2004] No. 25). In practice, courts generally will provide a summary of the reasoning when issuing their judgment.

8.2 Criminal context

Unlike civil judgments or administrative decisions, all criminal judgments must expressly state the basis of the judgment and the reasons why the court either accepted or refused to accept the opinions of each party (Article 246 of the Interpretation in relation to the Performance of the Criminal Procedure Law).

9. COSTS

9.1 Common law and/or Civil Code

The Measures on the Payment of Litigation Costs governs the costs incurred from civil litigation and administrative litigation. The litigation expenses, including any expenses related to expert evidence, shall be borne by the losing party. In the event of a mixed judgment (ie, court partially overturns the administrative decision), these costs may be apportioned subject to the respective responsibility imposed by the court (Article 74 of the Administrative Procedure Law and Article 6 of the Measures on the Payment of Litigation Cost).

9.2 Criminal context

Taxpayers are responsible for paying their own legal fees.

To date, there are no express rules regarding the costs for expert witnesses. In practice, however, courts follow the principle that ‘who addresses the evidence, shall assume the expenses therefrom’. Also, expenses such as transportation, accommodation and meal costs for any expert witness are paid by the court (Article 63 of the Criminal Procedure Law and Article 207 of the Interpretation in relation to the Performance of the Criminal Procedure Law).

10. APPEALS

10.1 Common law and/or Civil Code – the right to appeal

10.1.1 Basic procedure to appeal

Either party may appeal the judgment issued by the court of first instance in a civil proceeding. A party must submit an application for appeal within 15 days from the date the judgment was rendered or within 10 days from the date the written verdict was issued. In the event that neither party files an appeal within this period, the judgment becomes final and binding (Article 58 of the Administrative Procedure Law). The application for appeal is generally submitted to the original court where the judgment was made (Article 66 of the Interpretation of the Administrative Procedure Law).

In the event of an appeal, parties must follow the same timeframe for the submission of statements and relevant evidence as stipulated in the court of the first instance (Article 66 of the Interpretation of the Administrative Procedure Law). The appellate court renders its judgment within two months from the date the appeal is accepted (Article 60 of the Administrative Procedure Law).

10.2 Criminal context – the right to appeal

10.2.1 Basic procedure to appeal

Either party may appeal the judgment issued by the court of first instance in a criminal proceeding. In order to appeal, a party must submit an application to appeal within 10 days from the date the judgment was rendered or within five days of issuing the written verdict. In the event that neither party files an appeal within this time period, the judgment becomes final and binding (Article 219 of the Criminal Procedure Law).

In the event that the defendant (taxpayer) wishes to appeal the judgment, they should submit the application for appeal to the court of first instance where the judgment was rendered. Upon receiving the application for appeal, the court of first instance will transfer the case to the higher court within three days (Article 220 of the Criminal Procedure Law).

In the event that the People's Procuratorate wishes to appeal the judgment, it must submit its protest to the court of first instance where the judgment was rendered and copied to the higher court. However, if the higher People's Procuratorate deems that the protest is improper, the higher People's Procuratorate may withdraw the protest from the higher court and inform the lower People's Procuratorate of its decision (Article 221 of the Criminal Procedure Law).

If the higher court accepts the appeal, it must render its judgment within two months from the date it accepted the appeal. This timeframe may be extended by an additional two months upon approval by the High People's Court (Article 232 of the Criminal Procedure Law).

11. HOT AREAS OF INTEREST

11.1 Common law and/or Civil Code

11.1.1 Tax shelters

Probably the most relevant area of interest regarding tax litigation in a civil context is the issue of tax shelters.

One of the seminal cases regarding this issue is (2011) XuXingChu No. 86. The plaintiff, a corporate shareholder of a Shanghai construction company (the company), filed this claim against the Shanghai State Tax Bureau (the defendant) for its refusal to disclose tax information.

In 2010, an unknown individual informed the defendant that the company had evaded tax in one of its construction projects. The defendant subsequently issued a notice (the notice) to the company stating the tax payable for the project.

After receiving the notice, the plaintiff submitted numerous written requests to the defendant to provide further details regarding the relevant facts, regulations and calculations that were the basis for the notice. The defendant sent a written response refusing to provide the requested information to the plaintiff because the plaintiff was not a related person to the notice. The plaintiff then filed a claim against the defendant in the Shanghai Xuhui District People's Court to compel the defendant to respond to its inquiries.

The Court determined that, according to Article 8 of Law Of The People's Republic Of China On The Administration Of Tax Collection (2001 version), the plaintiff was not in fact an 'interested person' because the designation only applied to the taxpayer and the withholding agent – not a shareholder of either.

11.2 Criminal context

11.2.1 Sentencing for co-operation

One of the most contested and relevant issues regarding tax litigation in the

criminal context is the sentence that applies to defendants who cooperate with the authorities. The courts generally show some leniency when the defendant confesses and cooperates. However, even defendants who confess and repay a portion of their evaded tax may face penalties such as imprisonment.

In the first case, the defendant, an individual in the iron production industry, issued fake financial reports to avoid RMB 1,152,729.53 in taxes. The amount of tax evaded constituted approximately 30 per cent of the total tax payable. The defendant signed a confession and paid back most of the outstanding tax, but a balance of RMB 275,729.53 remained. The Zhuzhou Intermediate Court sentenced him to three years' imprisonment and a fine of RMB 100,000.

In the second case, the defendant, a shareholder, concealed relevant facts and financial records of the company in order to avoid the payment of VAT. As a result of its actions, the company evaded RMB 396,835.53, approximately 90 per cent of the VAT payable. The defendant eventually paid back the VAT in full. As a result, the court sentenced the defendant to four years of probation instead of three years' imprisonment and a fine of RMB 50,000.

In the third case, the defendants, a Shanghai trading company and two of its financial representatives, had issued false VAT invoices, allowing the company and others to avoid payment of RMB 400,000. Both defendants confessed and surrendered to the authorities. The trading company was fined RMB 100,000 and the individuals were sentenced to three years of probation instead of three years' imprisonment and six months of probation instead of six months of detention.

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