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Tax controversy survey:

Procedures and issues for selected countries - 4th edition



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Norton Rose Fulbright

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Tax controversy lawyers with Norton Rose Fulbright around the globe have prepared a fourth annual survey of certain tax controversy procedures and issues referenced below for Australia, Canada, France, Germany, Luxembourg, The Netherlands, South Africa, the United Kingdom, and the United States.

While each tax controversy will involve unique circumstances, this survey serves as a reference tool for tax executives at multinational companies. It will be an evolving tool, and we plan to add additional countries in future surveys. If you would like additional information, please feel free to contact any of the lawyers listed on the back of this survey.

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Examinations

In each country, an administrative agency or department conducts examinations of taxpayers. Such agencies or departments generally have broad investigative powers, such as the power to access documents and witnesses. Commonly faced issues vary from one jurisdiction to the next, but transfer pricing and cross border transactions are common issues. The extent to which a taxpayer can recover its costs of contesting administrative proceedings varies widely between jurisdictions.

Country	Nature of Examination Function	Issues Commonly Faced	Recovery of Administrative Contest Costs
Australia	<p>Australian Taxation Office (ATO):</p> <ul style="list-style-type: none"> • Administrative agency • Broad investigatory powers including access to documents • Does not have adjudicatory powers 	<ul style="list-style-type: none"> • Taxation of trusts • Deductibility of outgoings/ prior year losses • Transfer pricing • Anti-avoidance • GST • ATO exercise of information gathering power • Penalties/Interest 	<ul style="list-style-type: none"> • No recovery unless matter goes to court or tribunal and a costs order is made in favor of taxpayer • Typically costs order enables recovery of about 50%-70% of costs
Canada	<ul style="list-style-type: none"> • Canada Revenue Agency (CRA) has broad powers to access documents and information • Important discovery powers 	<ul style="list-style-type: none"> • Income or capital • Valuations • Anti-avoidance • Transfer pricing 	<ul style="list-style-type: none"> • Part-party • Court discretion • Expert fees • All reasonable disbursements
France	<ul style="list-style-type: none"> • French tax authorities (FTA) have important powers to open audits and inquiries, to access documents and information • FTA do not have adjudicatory powers 	<ul style="list-style-type: none"> • R&D tax credits • VAT • Cross border transactions • Transfer Pricing • CFC legislation • Anti-avoidance rules • Thin capitalization rules • Loss deduction 	<ul style="list-style-type: none"> • No recovery unless matter goes to court or tribunal and a costs order is granted by the judge in favor of taxpayer • The amount recovered is generally low
Germany	<p>Tax Audits:</p> <ul style="list-style-type: none"> • Department of tax authorities • Broad powers to summons documents and testimonies • No independent agency; acts for the tax authorities 	<ul style="list-style-type: none"> • Transfer Pricing • CFC • Interest • Loss utilization • Hidden profit distributions • Intangibles transfer • Expenses • Anti-avoidance rules • Value Added Tax 	<ul style="list-style-type: none"> • No recovery during administrative appeal procedure • Recovery only after successful tax court proceeding and positive costs ruling by tax court • Capped to statutory fees

Country	Nature of Examination Function	Issues Commonly Faced	Recovery of Administrative Contest Costs
Luxembourg	<p>Luxembourg tax authorities (LTA):</p> <ul style="list-style-type: none"> Broad investigation powers Limited adjudicatory powers <p>Financial Intelligence Unit (FIU/ CRF):</p> <ul style="list-style-type: none"> Broad investigation power 	<ul style="list-style-type: none"> Expense deductibility Thin capitalization VAT Transfer pricing PE allocation Payroll tax Exchange of information Often a cross border element 	<ul style="list-style-type: none"> No recovery unless matter goes to court and the judge decides so in favor of the taxpayer The amount recovered is generally low
The Netherlands	<p>Dutch Tax Authorities (DTA):</p> <ul style="list-style-type: none"> Administrative agency Power to perform audits and obtain documents <p>Financial Fraud Unit (FFU):</p> <ul style="list-style-type: none"> Fraud investigation Broad investigation power 	<ul style="list-style-type: none"> Interest deductibility VAT Payroll tax Transfer pricing Substance Penalties Exchange of information Individual's foreign assets/ foreign trusts 	<ul style="list-style-type: none"> Reasonable cost recovery if the taxpayer's position wholly/partially upholds Timely request by taxpayer Legal Costs Decree; a fixed amount per step in the proceedings
South Africa	<p>South African Revenue Service (SARS):</p> <ul style="list-style-type: none"> Administrative agency Wide powers to request or search for and seize material, interview persons Limited adjudicatory powers 	<ul style="list-style-type: none"> Debt versus equity Transfer pricing Research credits Simulated transactions Tax refunds 	<ul style="list-style-type: none"> Not unless an order is made in an appeal to the tax court
UK	<ul style="list-style-type: none"> HM Revenue & Customs (HMRC) can open an enquiry into a tax return, and may require adjustments to be made A taxpayer that disagrees may appeal to the Tax Tribunal 	<ul style="list-style-type: none"> Challenges to tax planning Deductibility of various expenses VAT issues Administrative failures 	<ul style="list-style-type: none"> Costs of the enquiry are for the taxpayer's account In some circumstances some costs of litigation may be recovered if matters proceed to court or the Tax Tribunal
US	<p>Internal Revenue Service (IRS):</p> <ul style="list-style-type: none"> Administrative agency Broad powers to summons documents and testimony Generally does not have adjudicatory powers 	<ul style="list-style-type: none"> Reorganization led to 13 "Campaigns," or focus issues; more to be named Current "Campaigns" include issues related to repatriation, non-filers and transfer pricing 	<p>Net worth requirements:</p> <ul style="list-style-type: none"> \$2,000,000 for individuals \$7,000,000 for entities Cannot protract proceedings "Reasonable" costs \$200 per hour cap currently (exceptions)

Collection of information

Most departments or agencies have broad administrative powers to request documents and conduct interviews of witnesses. Typically, the department or agency can obtain judicial enforcement of its information request and/or utilize discovery in litigation. Most departments or agencies can issue a request, summons or subpoena to a third party to gather information, administratively and/or in litigation.

Country	Administrative Collection of Information From Taxpayer	Judicial Collection of Information From Taxpayer	Collection of Information From Third Parties
Australia	<ul style="list-style-type: none"> • Notice compelling production of documents • Notice compelling attendance to give evidence • Failure to provide information/documents can result in action by ATO/FIRB 	<ul style="list-style-type: none"> • In litigation, ATO can use the discovery process to obtain documents 	<ul style="list-style-type: none"> • In litigation, ATO may use subpoenas or other third party production mechanisms • ATO may issue same notices as can be issued to taxpayer
Canada	<ul style="list-style-type: none"> • Audits • Requirements very broad • Includes foreign-based documents 	<ul style="list-style-type: none"> • Judicially authorized search and seizures • Courts can enforce requirements • In litigation, CRA can use discovery and request full disclosure 	<ul style="list-style-type: none"> • CRA can issue requirement to third party, including foreign based documents • Third party may be examined for discovery (with leave)
France	<ul style="list-style-type: none"> • Informal information requests • Audits • Requirements can be very broad 	<ul style="list-style-type: none"> • Judicially authorized search and seizures • In litigation, the Court can request documents and information from the taxpayer 	<ul style="list-style-type: none"> • FTA have a right to request information to check a taxpayer's position • Judicially authorized search and seizures may extend to third parties
Germany	<ul style="list-style-type: none"> • Digital access to accounting information • Broad taxpayer duties; increased in international cases • Formal audit questions • Failure to provide can result in estimated basis 	<ul style="list-style-type: none"> • Tax authorities can enforce compliance with information duties • In proceeding tax court can request documents and information • Exclusion of facts, if filed too late 	<ul style="list-style-type: none"> • Tax authorities may request information, if necessary and after unsuccessful request with taxpayer

Country	Administrative Collection of Information From Taxpayer	Judicial Collection of Information From Taxpayer	Collection of Information From Third Parties
Luxembourg	<ul style="list-style-type: none"> • Informal information request • Tax audit • Summons for documents or testimony 	<ul style="list-style-type: none"> • Judicially authorized search and seizures • In litigation, the Court can request documents and information from the taxpayer 	<ul style="list-style-type: none"> • LTA can request information • Judicially authorized search and seizures • Banking secrecy can be lifted for judicial criminal investigations or under certain tax treaties
The Netherlands	<ul style="list-style-type: none"> • Audits • Information decisions • Certain companies need to substantiate transaction's arm's-length nature • Certain companies need to confirm compliance with substance 	<ul style="list-style-type: none"> • Information decision objection eligible • Burden of proof to taxpayer if non-compliance • DTA can enforce information through civil court • FFU may use search & seizure 	<ul style="list-style-type: none"> • The DTA may perform a third party audit at third party obliged to keep records • In tax fraud situations the FFU may use search & seizure with third parties
South Africa	<ul style="list-style-type: none"> • Request relevant material • Conduct interviews • Hold inquiries • Conduct audits or criminal investigations 	<ul style="list-style-type: none"> • Search and seizure • In litigation before the tax board or tax court SARS may use discovery 	In litigation before the tax board or tax court SARS may subpoena witnesses and documents
UK	<ul style="list-style-type: none"> • Informal information request first • By notice, HMRC can require information to check a taxpayer's position. No judicial approval of notice is required (but may be sought) 	<ul style="list-style-type: none"> • Tax Tribunal may approve an information notice • In litigation, parties must disclose relevant documents, including those adverse to their case 	<ul style="list-style-type: none"> • HMRC can give notice to third parties requiring information to check a taxpayer's position • Such notice must generally first be approved by the Tax Tribunal
US	<ul style="list-style-type: none"> • Information Document Requests, including one seeking agreement on facts • Summons for documents or testimony • "Formal document request" for foreign based documentation 	<ul style="list-style-type: none"> • IRS can enforce summons • Taxpayer can seek to quash summons • Court can enforce "formal document request" - exclude evidence • In litigation, IRS may use discovery 	<p>IRS may summon:</p> <ul style="list-style-type: none"> • US persons • Foreign-owned US taxpayer or foreign taxpayer with US business as agent for related foreign party <p>In litigation, IRS may use subpoena</p>

Dispute resolution - administrative

The availability of dispute resolution during an examination varies widely between jurisdictions. However, most jurisdictions provide administrative appeal procedures and/or alternative dispute resolution at the conclusion of an examination. Moreover, most jurisdictions provide alternative dispute resolution or judicial review with respect to the results of an administrative appeal.

Country	During Examination	Administrative Review of Examination Results	Post Administrative Review (General)
Australia	<ul style="list-style-type: none"> • ATO encourages alternative dispute resolution (ADR) including independent review and early neutral evaluation 	<ul style="list-style-type: none"> • Taxpayer can object against ATO assessment within 60 days • ATO must determine objection within 60 days • Increasing use of ADR 	Application to Administrative Appeals Tribunal (AAT) or Federal Court for review of ATO decision
Canada	<ul style="list-style-type: none"> • Draft assessment submitted at the end of examination • Settlement often negotiated then • Settlement must be principled 	<ul style="list-style-type: none"> • Independent review by Appeals following notice of objection • More than 70% of cases settled 	Mediation process available
France	<ul style="list-style-type: none"> • A reassessment proposition followed by a confirmation by the field auditor • No obligation to negotiate with the taxpayers 	<ul style="list-style-type: none"> • Taxpayer can challenge the FTA reassessment before higher tax officials • Independent panel committees may be competent to review certain tax reassessment 	Taxpayer can file claim against appeal decision either before the administrative court or the judicial court (regarding net wealth tax and stamp duties)
Germany	<ul style="list-style-type: none"> • Conclusion of tax contract or settlement agreement not possible • Mutual agreement re facts possible at all stages • Obligatory final tax audit discussion meeting 	<ul style="list-style-type: none"> • Taxpayer files appeal • Appeal handled by separate section of tax office • No costs incurred for appeal by tax authorities • Mutual agreement re facts possible 	<ul style="list-style-type: none"> • Taxpayer can file claim against appeal decision • Mutual agreement re facts possible before court. • Technically no mutual settlement possible (tax court decision obligatory)

Country	During Examination	Administrative Review of Examination Results	Post Administrative Review (General)
Luxembourg	<ul style="list-style-type: none"> • Collaboration: LTA/taxpayer, information gathering, correspondence, meeting • Taxpayer can give opinion about outcome before additional assessments/penalties imposed 	<ul style="list-style-type: none"> • Taxpayers can informally request amended tax assessment to relevant tax office or director of LTA or make a formal claim to the director of LTA within 3 months 	<ul style="list-style-type: none"> • Taxpayer can file claim against appeal decision of director either before administrative court or judicial court (regarding indirect taxes and VAT) • Possibility of Mediation
The Netherlands	<ul style="list-style-type: none"> • Collaboration DTA/taxpayer, information gathering, correspondence, meeting • Taxpayer can give opinion about outcome before additional assessments/penalties are imposed 	<ul style="list-style-type: none"> • Objection filed within 6 weeks • Objection dealt by other person of DTA for fair review • Taxpayer is entitled to hearing prior to final decision • Mediation available 	<ul style="list-style-type: none"> • Appeal filed within 6 weeks with district court • Court decision can be appealed with High Court and Supreme Court • May conclude settlement agreement during procedure
South Africa	There are no dispute resolution procedures available to a taxpayer while the taxpayer is under examination	<p>Objection:</p> <ul style="list-style-type: none"> • Taxpayer files objection • Considered by SARS official • ADR if parties agree <p>Appeal to tax board:</p> <ul style="list-style-type: none"> • Taxpayer files notice of appeal • Independent members 	<p>ADR:</p> <ul style="list-style-type: none"> • Agreed between SARS and the taxpayer • Appoint a facilitator (SARS official or third party) to mediate
UK	<ul style="list-style-type: none"> • Emphasis on collaboration between HMRC and taxpayer, information gathering, correspondence and meeting • HMRC bound by policy in considering settlement 	<ul style="list-style-type: none"> • Taxpayers can request a review by an independent HMRC officer • Following examination, a Closure Notice is issued 	<ul style="list-style-type: none"> • Potential for ADR (although usually during examination process)—HMRC policy can limit scope of settlement • Closure Notice can be appealed to the Tax Tribunal
US	<p>Fast Track Settlement:</p> <ul style="list-style-type: none"> • IRS Appeals division employee mediates • Resolve large cases within 120 days, smaller cases within 60 • Taxpayer retains traditional Appeals rights 	<p>Review by IRS Appeals:</p> <ul style="list-style-type: none"> • Appeals is independent division of IRS • Future of in-person Appeals conferences unclear • Examination participation in conferences more frequent 	<p>Mediation:</p> <ul style="list-style-type: none"> • To resolve remaining issues • IRS Appeals mediator, or also, at taxpayer's expense, a third party co-mediator <p>Arbitration program eliminated due to lack of use</p>

Transfer pricing

There is a great deal of variation between jurisdictions in their approach to transfer pricing, although there are ongoing efforts by the OECD to develop consistent “BEPS” approaches. Some apply the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations. While competent authority is typically available, in some jurisdictions it is not commonly employed. The availability and application of correlative adjustments vary widely between jurisdictions.

Country	Transfer Pricing Issues	Competent Authority Proceedings	Correlative Adjustments
Australia	<ul style="list-style-type: none"> • Self-assessment regime • Transfer pricing legislation aligned to OECD standards • Contemporaneous documentation required to avoid penalties 	<ul style="list-style-type: none"> • Very long process • Used increasingly, as transfer pricing adjustments become more common • Advance pricing agreements possible 	<ul style="list-style-type: none"> • ATO has power to make consequential adjustment to tax position of entity or another entity where “fair and reasonable” to do so
Canada	<ul style="list-style-type: none"> • Key issues: inter-company pricing of inventory, services • CRA applies OECD guidelines 	<ul style="list-style-type: none"> • Very long process • Relief where double taxation arises • Choice: competent authority or objection 	None
France	<ul style="list-style-type: none"> • Transfer pricing legislation aligned to OECD standards (including CBCR) • Mandatory documentation is filed each year and upon FTA’s request 	Advanced Pricing Agreement possible	Correlative adjustments are subject to prior claim
Germany	<p>Key issues:</p> <ul style="list-style-type: none"> • Full review of transfer pricing documentation • Pricing of service fees, royalties, interest rates • Cost sharing agreements • Compliance with documentation 	Advanced Pricing Agreement possible	<ul style="list-style-type: none"> • Correlative allocations to other group entities • Formal note to tax office of group entity • Allocation must be reflected in group member’s documentation

Country	Transfer Pricing Issues	Competent Authority Proceedings	Correlative Adjustments
Luxembourg	<ul style="list-style-type: none"> • Legislation aligned to OECD standards • Loans, guarantees under scrutiny • Transfer prices in line with function/risk profile • Economic ownership • Cost sharing agreements 	Advance Pricing Agreement available	May be made
The Netherlands	<ul style="list-style-type: none"> • Non-arm's length loans and guarantees under scrutiny • Transfer prices in line with function/risk profile (substance) • Economic ownership • Cost sharing agreements 	<ul style="list-style-type: none"> • Uni- and multilateral Advance Pricing Agreement available from DTA • Informal no-names basis discussion with DTA possible • MAP available 	Compensating adjustments and secondary adjustments possible in case of transfer pricing adjustments
South Africa	<ul style="list-style-type: none"> • Arm's length pricing must be submitted in returns • No safe harbours 	<ul style="list-style-type: none"> • Taxpayer may approach competent authority where adjustments not in accordance with double taxation agreement • May obtain domestic credits where no DTA relief available 	<ul style="list-style-type: none"> • Returns to be submitted with arm's length treatment already included • Further adjustments made in assessment by SARS • Secondary adjustment is by way of deemed dividend
UK	<ul style="list-style-type: none"> • Inter-company service provision • Business restructurings • Financial transactions, including reinsurance and intra-group debt 	<ul style="list-style-type: none"> • Domestic Advanced Pricing Agreement possible and regularly used • Competent Authority Proceedings available but not frequently used 	May be made
US	<ul style="list-style-type: none"> • Key issues – intercompany pricing of inventory, services, intangibles • Cost sharing agreements used to reduce valuation risk • IRS follows Transfer Pricing Audit Roadmap 	<ul style="list-style-type: none"> • Seek relief when disputes cause tax adjustments to affiliates • Often obtains some double tax relief • Need to exhaust remedies to obtain a US foreign tax credit 	<ul style="list-style-type: none"> • IRS makes correlative allocations to other group members • IRS furnishes written statement of allocation • Allocation must be reflected in other members' documentation

Civil and criminal penalties

While precise amounts of penalties vary, most jurisdictions impose substantial civil penalties for cases involving grossly negligent, willful or fraudulent conduct. Most jurisdictions impose significant prison sentences and/or fines for criminal violations. General and/or specific voluntary disclosure programs are, or are planned to be, available in all jurisdictions.

Country	Civil Penalties	Criminal Penalties	Tax Amnesty Programs
Australia	<ul style="list-style-type: none"> False or misleading statement - 75% of shortfall Tax avoidance scheme – 50% of shortfall Adopting position not reasonably arguable – 25% of shortfall 	<ul style="list-style-type: none"> False or misleading statements – up to A\$9,000 + treble tax avoided Failure to provide tax return or information – up to 2 years prison + A\$9,000 	<ul style="list-style-type: none"> Remission of penalties/interest for voluntary disclosure prior to amended assessment being issued by ATO Tax amnesty programs occur on an ad hoc basis but are unusual
Canada	<ul style="list-style-type: none"> 50% if gross negligence Planner’s total gross entitlement if misrepresentation Failure to disclose foreign assets (5%) 	<p>Making false statements, destroying documents, evading payment of taxes: fine of 200% and 2 years in prison</p>	<ul style="list-style-type: none"> Voluntary disclosure program Cannot be under investigation Must be complete and verifiable
France	<ul style="list-style-type: none"> Interest (0.4% per month) Penalties: <ul style="list-style-type: none"> 10% for small infractions 40% in case of intentional non-compliance 80% in case of abuse of law or fraudulent actions 	<ul style="list-style-type: none"> Tax fraud or accounting fraud: up to 5 years prison and €500,000 to €2,000,000 fine Opposition to a tax audit: up to 6 months prison and up to €25,000 fine 	<ul style="list-style-type: none"> Individuals: remission of penalties/interest for voluntary disclosure (and no criminal suit) Undeclared offshore accounts Detailed requirements
Germany	<ul style="list-style-type: none"> Interest (0.5% per month) starts 15 months after fiscal year Late payment fine (1% of tax for each month tax is not duly paid) Penalties for transfer pricing violations 	<ul style="list-style-type: none"> Intentional evasion - up to 5 years prison (10 years if serious) or fine Grossly negligent evasion - up to €50,000 fine False documentation - up to €5,000 fine Various others 	<p>Voluntary self-disclosure:</p> <ul style="list-style-type: none"> Detailed requirements Impossible if tax office already aware Full and complete disclosure required For serious cases, additional 10% to 20%

Country	Civil Penalties	Criminal Penalties	Tax Amnesty Programs
Luxembourg	<ul style="list-style-type: none"> • Various penalties or administrative fines for non-compliance • Administrative fine for “simple tax fraud” of at least 10% and up to 50% of eluded tax or undue payment 	<ul style="list-style-type: none"> • “Aggravated tax fraud:” up to 3 years in prison and criminal fine up to 7 times eluded taxes • Tax swindle: up to 5 years in prison and criminal fine up to 10 times eluded taxes 	<ul style="list-style-type: none"> • Voluntary disclosure program (until 31 December 2017) • But the taxpayer cannot be under investigation
The Netherlands	<ul style="list-style-type: none"> • Default penalty in case of ordinary negligence; max. €5,278 • Negligence penalty (gross negligence/intent) up to 100% (some income tax matters 300%) of (additional) tax 	<ul style="list-style-type: none"> • Tax fraud max. 4 years prison or max. €20,500 penalty • And can result in conviction for money laundering and/or forgery of documents; confiscation possible if convicted 	<ul style="list-style-type: none"> • No penalty if within 2 years corrected return is filed • The penalty may be limited if after 2 years a corrected and amended tax return is filed voluntarily
South Africa	<ul style="list-style-type: none"> • Various penalties for non-compliance with tax laws or non-payment of tax • Penalties for gross negligence and intentional tax evasion range from 0% - 200% 	<ul style="list-style-type: none"> • Non-compliance with tax laws, secrecy provisions, filing a return without authority - 2 years prison, and/or a fine • Tax evasion - 5 years prison, and/or fine 	<ul style="list-style-type: none"> • Voluntary disclosure program: • Eligible before investigation commences/after investigation has commenced but not concluded, subject to exceptions • Detailed requirements
UK	<ul style="list-style-type: none"> • Failures; a one-off fine or daily flat-rate penalty (may be waived) • Culpable penalties; up to 150% of tax or up to 200% if certain offshore jurisdictions involved 	Various, including evasion (and its facilitation) and fraud; a fine or up to 7-10 years’ prison (depending on the offence, intent and amount involved)	HMRC run some programs related to specific industries or risk areas but these are becoming less common (particularly for declaring offshore income/assets)
US	<ul style="list-style-type: none"> • 20% accuracy-related penalty (40% if gross misvaluation, which can include transfer pricing errors) • 75% civil fraud • Failure to declare foreign account: 50% 	<ul style="list-style-type: none"> • Tax evasion - 5 years prison, \$500,000 fine • False tax return - 3 years prison, \$500,000 fine • Failure to declare foreign account - 5 years prison, \$250,000 fine 	<p>General Voluntary Disclosure Program:</p> <ul style="list-style-type: none"> • Cannot be under investigation <p>Offshore Voluntary Disclosure Program:</p> <ul style="list-style-type: none"> • Undeclared foreign accounts • Detailed requirements

Judicial challenges

All jurisdictions provide for judicial review of at least some determinations by the tax agency or department. Settlement procedures, such as direct negotiation between the parties or alternative dispute resolution, are common. In all jurisdictions, a taxpayer may recover some portion of the costs of a successful judicial challenge.

Country	Actions Subject to Judicial Review	Settlement Procedures/Options	Recovery of Judicial Challenge Costs
Australia	<ul style="list-style-type: none"> • ATO disallows objection against tax assessment (e.g. for inclusion of income or denial of deduction) • ATO denies refund claim 	<ul style="list-style-type: none"> • ATO encourages alternative dispute resolution (ADR) such as “independent review,” “early neutral evaluation,” conciliation and mediation 	<ul style="list-style-type: none"> • No recovery unless matter goes to court or tribunal and costs order is made in favor of taxpayer • Typically a costs order will enable recovery of about 50%-70% of costs
Canada	<ul style="list-style-type: none"> • Minister’s refusal to grant interest or penalty relief or extension • Rectification orders • Minister’s refusal to register a charity 	<ul style="list-style-type: none"> • At all levels of process • Negotiation with Justice lawyer • Settlement conference sponsored by Courts 	<ul style="list-style-type: none"> • Costs to successful litigant • Can be solicitor-client if settlement proposal rejected
France	FTA’s decision which dismisses the tax claim (or FTA’s silence within a 6 months period) either before the Administrative Court or the Judicial Court	At all levels of process	Same requirements as for administrative costs
Germany	<ul style="list-style-type: none"> • Final decision of tax office (e.g. appeal decision) • Ascertainment of legal position • Commitment of tax office to an action or omission 	<ul style="list-style-type: none"> • Tax court decision • Revision against legal errors of tax court decision or unclear legal questions 	Same requirements as for administrative costs

Country	Actions Subject to Judicial Review	Settlement Procedures/Options	Recovery of Judicial Challenge Costs
Luxembourg	LTA's decision (or LTA's silence within a 6 months period) either before the Administrative Court or the Judicial Court (the latter cannot judge in pejus)	LTA and taxpayers can eventually desist from the process but tax authorities cannot reach an agreement with the taxpayer once the judicial process has been launched	Same requirements as for administrative costs
The Netherlands	All (formal) decisions by the DTA	<ul style="list-style-type: none"> • Tax court decision • Amical settlement 	<ul style="list-style-type: none"> • Reasonable cost recovery if taxpayer's position wholly/partially upholds • Timely request by taxpayer • Legal Costs Decree; a fixed amount per step in the proceedings
South Africa	<ul style="list-style-type: none"> • SARS disallows taxpayer's objection • Decision of tax board • No decision by tax board in 60 days • Common law or administrative grounds of review • Imposition of a penalty 	<ul style="list-style-type: none"> • SARS may allow if taxpayer requests mediation in notice of appeal • All courts: negotiate with other party within dispute settlement guidelines 	<ul style="list-style-type: none"> • Successful party can recover costs in High Court and Tax Court
UK	<ul style="list-style-type: none"> • Closure Notice may be appealed to the Tax Tribunal • The way in which HMRC acts or makes decisions may also be open to challenge by taxpayers in the administrative court 	<ul style="list-style-type: none"> • The Tax Tribunal will consider and decide the case • The decision of the Tax Tribunal may be appealed on points of law to higher courts 	<ul style="list-style-type: none"> • Taxpayers should not expect to recover all costs • May recover some costs in the Tax Tribunal, and costs on appeal will generally follow the decision of the court
US	<ul style="list-style-type: none"> • IRS issues notice of deficiency • IRS denies refund claim • IRS denies collection relief (if no prior opportunity to dispute) • IRS denies whistleblower claim 	<ul style="list-style-type: none"> • Tax Court (deficiency cases): consideration by IRS Appeals • All courts: negotiate with government lawyer • All courts: court-sponsored mediation or arbitration 	<p>Same requirements as for administrative costs, plus:</p> <ul style="list-style-type: none"> • Must exhaust administrative remedies • Can recover costs if judgment does not exceed amount of qualified offer

Privilege protection for information

All jurisdictions provide a privilege for communications between an attorney and client for the purpose of securing or giving legal advice, and the privilege can be waived. The availability of other privileges, such as a tax advisor or accountant privilege or a litigation or work product privilege, varies widely between jurisdictions.

Country	Tax Advisor Privilege	Attorney/Solicitor Privilege	Other Privileges
Australia	ATO has an “accountant’s concession” – ATO will not seek access to certain documents except for fraud or evasion or documents relating to transaction implementation	<ul style="list-style-type: none"> • Restricted to legal practitioners • Protects communications with dominant purpose of giving or receiving legal advice • Can be waived so great care must be taken 	<ul style="list-style-type: none"> • Legal professional privilege extends to confidential communications for main purpose of provision of legal advice or use in litigation/expected litigation
Canada	None	<ul style="list-style-type: none"> • Attorney-client privilege • None for accountants unless as agent or client of lawyer 	Common interest privilege
France	None	<ul style="list-style-type: none"> • Attorney-client privilege • Protects communication between attorney and client • Can be waived only by the client 	Legal professional privilege extends to confidential communications for provision of legal advice or use in (expected) litigation and to correspondences between lawyers
Germany	Tax advisor privilege, similar to attorney client privilege	<ul style="list-style-type: none"> • Protects communication between attorney and client • Right to refuse to give evidence • Can be waived by client 	None

Country	Tax Advisor Privilege	Attorney/Solicitor Privilege	Other Privileges
Luxembourg	None	Attorney-client privilege: <ul style="list-style-type: none"> • Terrorism and anti-money laundering exceptions • Can be waived by the court in limited circumstances (criminal offences) 	Legal professional privilege extends to confidential communications for main purpose of provision of legal advice or use in litigation/expected litigation
The Netherlands	(Informal) legal privilege; on the basis of case law/ fair play principle clients do not need to disclose the advice of a tax advisor in an audit procedure	<ul style="list-style-type: none"> • Full attorney-client privilege • Only attorneys may plea in the Supreme Court tax cases; not required for district court or high court cases 	None
South Africa	None	Attorney-client privilege: <ul style="list-style-type: none"> • Protects communications between client and attorney for purpose of securing legal advice • Crime-fraud exception • Can be waived 	Litigation privilege: <ul style="list-style-type: none"> • Protects communications and materials prepared in anticipation of litigation by party or representative • Can be waived
UK	No specific tax advisor privilege (but in extremely limited circumstances HMRC are prevented from requiring a tax advisor to produce tax working papers)	Legal advice privilege protects confidential communications between lawyers and their clients made for the dominant purpose of seeking or giving legal advice	Litigation privilege protects confidential communications between lawyers and clients (or a third party), made for or used in connection with actual or pending litigation
US	Federal tax practitioner privilege. Similar to attorney-client privilege, but major exceptions such as: <ul style="list-style-type: none"> • Criminal tax matters • Promotion of tax shelters 	Attorney-client privilege: <ul style="list-style-type: none"> • Protects communications between client and attorney for purpose of securing legal advice • Crime-fraud exception • Can be waived 	Work product privilege: <ul style="list-style-type: none"> • Protects materials prepared in anticipation of litigation by party or representative • Unless other party shows substantial need • Harder to waive

Statutes of limitations

Specific periods of limitation vary between jurisdictions. Civil periods of limitation are typically a few years, unless fraud is involved, in which case the periods often are much longer or unlimited. Periods of limitation for criminal violations often are also much longer or unlimited.

Country	Assessments	Refunds	Criminal Tax Matters
Australia	<ul style="list-style-type: none"> • Self-assessment by lodging return • Audit and re-assess: 2 years (individual/small business), 4 years (others), unlimited (fraud), generally 7 years for transfer pricing 	ATO may re-assess at request of taxpayer within 2 years (individuals and small business entities) or 4 years (all other taxpayers) or unlimited (fraud or evasion)	Unlimited period for fraud/ evasion
Canada	<ul style="list-style-type: none"> • 3 years from original assessment (individual and private corporations) • 4 years for public corporations • 3 year extension for non-resident 	None	No limitation for tax evasion
France	<ul style="list-style-type: none"> • 3 years from the end of the calendar year in which the tax is owed (6 years regarding net wealth tax) • Specific provisions for local taxes 	<ul style="list-style-type: none"> • 2 years from the end of the calendar year in which the tax was paid or assessed • Specific provisions for local taxes 	10 years for certain cases of tax evasion and tax fraud
Germany	<ul style="list-style-type: none"> • 4 years after tax return was filed • If no return filed, 4-year period starts 3 years after end of tax year • Various possible extensions, including by start of audit 	5 years from the end of the calendar year in which the refund claim becomes due	<ul style="list-style-type: none"> • 5 years - grossly negligent evasion • 10 years - intentional fraud • Each starts with a delay (see Assessments) • Various possible extensions, including by start of audit

Country	Assessments	Refunds	Criminal Tax Matters
Luxembourg	<ul style="list-style-type: none"> • 5 years from the end of the calendar year in which the tax is owed • Exceptionally 10 years • Specific provisions for indirect and local taxes 	1 calendar year from the end of the calendar year in which the tax was paid or assessed	10 years for certain cases of tax evasion and tax fraud
The Netherlands	<ul style="list-style-type: none"> • Generally 5 years • 12 years in cases where foreign assets are involved 	<ul style="list-style-type: none"> • If appealed in time • Ex officio reduction possible thereafter; no time limitation the law. Policy based an ex officio reduction is only granted for the past 5 years 	12 years for criminal tax matters
South Africa	<ul style="list-style-type: none"> • 3 years from original assessment • 5 years if self-assessed or no return received or required • Fraud or negligent misrepresentation, no prescription 	<ul style="list-style-type: none"> • 3 years from the date of assessment by SARS • 5 years in the case of self-assessment • Erroneous refunds regarded as an outstanding tax debt 	<ul style="list-style-type: none"> • 20 years from the time the <i>offense</i> was committed unless otherwise specified
UK	Generally 4 years, increasing to 6 years for careless conduct by a taxpayer, or 20 years in the case of a deliberate act by a taxpayer resulting in lost tax	In limited circumstances, claims for relief for overpaid tax may be made not more than 4 years after the end of the relevant accounting period	Generally no specific time limitations for criminal tax matters
US	<ul style="list-style-type: none"> • 3 years from filing of return • 6 years, if greater than 25% omission of income • If no return filed, IRS may assess at any time • If fraud, any time • Agreement may extend 	<ul style="list-style-type: none"> • Generally, later of 3 years from filing of return or 2 years from when tax paid • If the former, may only recover amounts paid within preceding 3 years plus extensions 	<ul style="list-style-type: none"> • 5 or 6 years for felonies • 10 years if bank involved • Measured from last affirmative act of evasion or overt act in furtherance of conspiracy • 3 years for misdemeanors

Interest

Current interest rates vary greatly between jurisdictions, from as low as 1.5% to as high as almost 10%. The various jurisdictions do not follow a consistent pattern regarding interest on deficiencies or underpayments versus interest on refunds. Most jurisdictions do not have special rules for determining different underpayment interest rates for specified types of underpayments (such as the United States' special rule providing a higher interest rate for large corporate underpayments).

Country	Deficiencies (In General)	Special Rules With Respect to Certain Deficiencies	Refunds
Australia	<ul style="list-style-type: none"> Rates determined quarterly Underpayment: base rate + 3% (currently 4.70%) Late payment: base rate + 7% (currently 8.70%) 	None	<ul style="list-style-type: none"> Base rate (currently 1.76%)
Canada	Determined quarterly – currently 5%. Not deductible	None	Interest applicable (may be part of negotiation)
France	0.4% per month (<i>i.e.</i> 4,8% per annum)	None	0.4% per month (<i>i.e.</i> 4,8% per annum)
Germany	<ul style="list-style-type: none"> 0.5% per month (<i>i.e.</i> 6% per annum) Interest expenses not deductible for income tax purposes 	<ul style="list-style-type: none"> Tax evasion amounts subject to regular interest rate (<i>i.e.</i> 0.5% per month) Interest run may begin earlier 	<ul style="list-style-type: none"> 0.5% per month (<i>i.e.</i> 6% per annum) Refunds taxable for income tax purposes

Country	Deficiencies (In General)	Special Rules With Respect to Certain Deficiencies	Refunds
Luxembourg	<ul style="list-style-type: none"> • 1% per month default interest for late income, municipal business or net wealth tax • Interest expenses not deductible (income tax) • 0.6% per months for late VAT payment 	None	<ul style="list-style-type: none"> • No interest on overpaid direct taxes • In principle 0.6% per month for overpaid VAT amount
The Netherlands	8% per annum for underpaid corporate income tax and 4% for other taxes	None	<ul style="list-style-type: none"> • Interest on overpaid tax: 4%/annum and 8%/annum for underpaid corporate tax (2016) • Certain conditions for a refund apply • Interest on overdue tax 4%
South Africa	Interest on tax debts is currently 10.25%	Interest rates can change depending on period when debt is outstanding	<ul style="list-style-type: none"> • Interest on refunds now 10.25%, depends on when debt became due • Interest on overpayment of provisional tax now 6.25%, depends on the period
UK	The interest rate on late paid taxes is usually pegged to be a few basis points above prevailing interest rates	Differing deficiencies are dealt with by way of penalties, rather than different interest rates	The repayment interest rate is usually pegged to be a few basis points above prevailing interest rates
US	<ul style="list-style-type: none"> • Federal short-term rate plus 3% • Rate currently is 4% 	<p>“Hot” Interest:</p> <ul style="list-style-type: none"> • Corporate underpayments greater than \$100,000 • Federal short-term rate plus 5% • Begins running 30 days after first letter proposing deficiency 	<ul style="list-style-type: none"> • For corporations, federal short-term rate plus 2% (.5% to extent overpayment exceeds \$10,000) • For all others, federal short-term rate plus 3%; rate currently is 4%

Reconciliation of laws/applications of doctrines

Most jurisdictions have statutory and judicial anti-avoidance rules targeting transactions that are dominated by tax avoidance purposes or that lack economic substance. Rules applying substance over form are also common. In most jurisdictions, tax laws may be challenged as contravening constitutional or EU law, but the frequency of such challenges varies.

Country	Anti-avoidance Statutes	Anti-avoidance Judicial Doctrines	Compliance of Tax Laws with EU Law/Constitutional Law
Australia	<ul style="list-style-type: none"> • General anti-avoidance rules: ATO can apply to transaction with sole/dominant purpose to obtain tax benefit • Specific anti-avoidance rules, including for multinationals 	<ul style="list-style-type: none"> • Sham transactions: form of transaction can be disregarded if parties intend that form is disguise for some other transaction • Whether transaction has legal effect 	Often constitutional challenges to imposition of new tax and those challenges usually fail
Canada	General anti-avoidance rule: requires tax benefit, avoidance transaction and abuse	Judicial doctrines: sham, ineffective or incomplete transaction, substance over form	On rare occasions: <i>Charter</i> challenge (infringement of human rights)
France	<ul style="list-style-type: none"> • FTA office can disregard and re-qualify transactions that lack economic substance • Substance over form • Many special anti-avoidance provisions 	Same principles as for tax offices apply for tax courts	A number of challenges to tax law have been made on the basis of breaches of EU freedoms or Constitutional law (occasionally on the basis of the Human Rights Act)
Germany	<ul style="list-style-type: none"> • General anti-avoidance rule (GAAR): disregard and re-qualify transactions lacking economic substance • Substance over form • Many special anti-avoidance rules (SAAR) 	GAAR and SAAR applicable in front of tax courts, but tax courts tend to be more reluctant to apply GAAR	<ul style="list-style-type: none"> • Challenges to tax laws frequent • Many court proceedings in relation to the compliance of tax laws with German Constitutional law and EU law

Country	Anti-avoidance Statutes	Anti-avoidance Judicial Doctrines	Compliance of Tax Laws with EU Law/Constitutional Law
Luxembourg	<ul style="list-style-type: none"> • General anti-avoidance rules (sham transaction, abuse of law) • Specific anti-avoidance rules • Substance over form • Disregard and re-qualify transactions 	<ul style="list-style-type: none"> • Same principles apply before LTA and tax courts • No specific judicial doctrine (other than in VAT matters, where EU 'abuse of law' regime can apply) 	<ul style="list-style-type: none"> • Challenges to tax laws are rare • When a EU law breach has been raised, changes under domestic tax law to comply generally followed shortly
The Netherlands	<ul style="list-style-type: none"> • Targeted anti-abuse provisions are included in various tax laws • In the General tax act is a general anti-avoidance clause although this is in practice never invoked 	<ul style="list-style-type: none"> • Abuse of law (<i>Fraus legis</i>) doctrine allows the DTA to disregard a transaction • For the VAT the EU 'abuse of law' regime can apply 	<ul style="list-style-type: none"> • Courts are not allowed to test against the constitution • Numerous proceedings in relation to compliance of tax laws with EU law and the ECHR (especially penalties)
South Africa	SARS can disregard, combine, re-characterize steps of an avoidance arrangement (transactions not normally employed for <i>bona fide</i> purposes, lacking commercial substance)	<ul style="list-style-type: none"> • Substance-over-form: Courts can treat transactions in accordance with their substance rather than form 	Constitutional challenges to tax laws rare
UK	<ul style="list-style-type: none"> • General anti-abuse rule to tackle abusive avoidance • Numerous targeted anti avoidance rules, particularly looking at the objects or purposes of parties to a transaction 	No specific judicial doctrine (other than in VAT matters, where EU 'abuse of law' regime can apply); however, legislation is interpreted purposively	<ul style="list-style-type: none"> • A number of challenges to tax law have been made on the basis of breaches of EU freedoms • Challenges are occasionally made on the basis of the Human Rights Act
US	<ul style="list-style-type: none"> • IRS can disregard transactions that lack economic substance • Partnership anti-abuse regulations: IRS can recast transactions to be consistent with intent of statutes 	<ul style="list-style-type: none"> • Substance-over-form: Courts can treat transactions in accordance with their substance rather than form • Step transaction: Courts can collapse steps of a transaction 	<ul style="list-style-type: none"> • Challenges to tax laws rare • Affordable Care Act – constitutional exercise of taxing power • Defense of Marriage Act – unconstitutional, including as applied to tax laws

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