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# Tax controversy survey:

Procedures and issues for selected countries - 6th edition



November 2019



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Tax controversy lawyers with Norton Rose Fulbright around the globe have prepared a sixth annual survey of certain tax controversy procedures and issues referenced below for Australia, Brazil, 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.

Included with this edition is a special report, on implementation of arbitration and alternative dispute resolution mechanisms to deal with intra-European Economic Community cross-border disputes.

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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	Australian Taxation Office (ATO): <ul style="list-style-type: none"> <li>• Administrative agency</li> <li>• Broad investigatory powers including access to documents</li> <li>• Does not have adjudicatory powers</li> </ul>	<ul style="list-style-type: none"> <li>• Taxation of trusts</li> <li>• Deductibility of outgoings/prior year losses</li> <li>• Transfer pricing</li> <li>• Anti-avoidance</li> <li>• GST</li> <li>• ATO exercise of information gathering power</li> <li>• Penalties/Interest</li> </ul>	<ul style="list-style-type: none"> <li>• No recovery unless matter goes to court or tribunal and a costs order is made in favor of taxpayer</li> <li>• Typically costs order enables recovery of about 50%-70% of costs</li> </ul>
Brazil	Brazilian Federal Revenue Office (RFB): <ul style="list-style-type: none"> <li>• Broad investigation and adjudicatory powers</li> <li>• Fraud investigation</li> <li>• Anti-smuggling</li> </ul>	<ul style="list-style-type: none"> <li>• Anti-avoidance</li> <li>• Income or capital</li> <li>• Cross-border transactions</li> <li>• Penalties</li> <li>• Transfer pricing</li> <li>• Expense deductibility</li> <li>• Challenges to tax planning</li> <li>• Unpaid taxes</li> <li>• Irregularities in tax payment</li> </ul>	<ul style="list-style-type: none"> <li>• No recovery</li> </ul>
Canada	<ul style="list-style-type: none"> <li>• Canada Revenue Agency (CRA) has broad powers to access documents and information</li> <li>• Important discovery powers</li> </ul>	<ul style="list-style-type: none"> <li>• Income or capital</li> <li>• Valuations</li> <li>• Anti-avoidance</li> <li>• Transfer pricing</li> </ul>	<ul style="list-style-type: none"> <li>• Part-party</li> <li>• Court discretion</li> <li>• Expert fees</li> <li>• All reasonable disbursements</li> </ul>
France	French tax authorities (FTA): <ul style="list-style-type: none"> <li>• Can open audits and inquiries, access documents and information</li> <li>• No adjudicatory powers</li> <li>• Lose monopoly of criminal prosecution: frauds over €100,000 reported to prosecutor</li> </ul>	<ul style="list-style-type: none"> <li>• R&amp;D tax credits</li> <li>• VAT</li> <li>• Cross border transactions</li> <li>• Transfer Pricing</li> <li>• CFC legislation</li> <li>• Anti-avoidance rules</li> <li>• Thin capitalization rules</li> <li>• Loss deduction</li> <li>• Substance</li> </ul>	<ul style="list-style-type: none"> <li>• No recovery unless matter goes to court or tribunal and a costs order is granted by the judge in favor of taxpayer</li> <li>• The amount recovered is generally low</li> </ul>



Country	Nature of Examination Function	Issues Commonly Faced	Recovery of Administrative Contest Costs
Germany	<p>Tax Audits:</p> <ul style="list-style-type: none"> <li>• Department of tax authorities</li> <li>• Broad powers to summons documents and testimonies</li> <li>• No independent agency; acts for the tax authorities</li> </ul>	<ul style="list-style-type: none"> <li>• Transfer Pricing</li> <li>• CFC</li> <li>• Interest</li> <li>• Loss utilization</li> <li>• Hidden profit distributions</li> <li>• Intangibles transfer</li> <li>• Expenses</li> <li>• Anti-avoidance rules</li> <li>• Value Added Tax</li> </ul>	<ul style="list-style-type: none"> <li>• No recovery during administrative appeal procedure</li> <li>• Recovery only after successful tax court proceeding and positive costs ruling by tax court</li> <li>• Capped to statutory fees</li> </ul>
Luxembourg	<p>Luxembourg tax authorities (LTA):</p> <ul style="list-style-type: none"> <li>• Broad investigation powers</li> <li>• Limited adjudicatory powers</li> </ul> <p>Financial Intelligence Unit (FIU/CRF):</p> <ul style="list-style-type: none"> <li>• Broad investigation power</li> </ul>	<ul style="list-style-type: none"> <li>• Expense deductibility</li> <li>• Thin capitalization</li> <li>• VAT</li> <li>• Transfer pricing</li> <li>• PE allocation</li> <li>• Payroll tax</li> <li>• Exchange of information</li> <li>• Often a cross border element</li> </ul>	<ul style="list-style-type: none"> <li>• No recovery unless matter goes to court and the judge decides so in favor of the taxpayer</li> <li>• The amount recovered is generally low</li> </ul>
The Netherlands	<p>Dutch Tax Authorities (DTA):</p> <ul style="list-style-type: none"> <li>• Administrative agency</li> <li>• Power to perform audits and obtain documents</li> </ul> <p>Financial Fraud Unit (FFU):</p> <ul style="list-style-type: none"> <li>• Fraud investigation</li> <li>• Broad investigation power</li> </ul>	<ul style="list-style-type: none"> <li>• Interest deductibility</li> <li>• VAT</li> <li>• Payroll tax</li> <li>• Transfer pricing</li> <li>• Substance</li> <li>• Penalties</li> <li>• Exchange of information</li> <li>• Individual's foreign assets/ foreign trusts</li> </ul>	<ul style="list-style-type: none"> <li>• Reasonable cost recovery if the taxpayer's position wholly/ partially upholds</li> <li>• Timely request by taxpayer</li> <li>• Legal Costs Decree; a fixed amount per step in the proceedings</li> </ul>
South Africa	<p>South African Revenue Service (SARS):</p> <ul style="list-style-type: none"> <li>• Administrative agency</li> <li>• Wide powers to request or search for and seize material, interview persons</li> <li>• Limited adjudicatory powers</li> </ul>	<ul style="list-style-type: none"> <li>• Debt versus equity</li> <li>• Transfer pricing</li> <li>• Research credits</li> <li>• Simulated transactions</li> <li>• Tax refunds</li> </ul>	<ul style="list-style-type: none"> <li>• Not unless an order is made in an appeal to the tax court</li> </ul>
UK	<ul style="list-style-type: none"> <li>• HM Revenue &amp; Customs (HMRC) can open an enquiry into a tax return, and may require adjustments to be made</li> <li>• A taxpayer that disagrees may appeal to the Tax Tribunal</li> </ul>	<ul style="list-style-type: none"> <li>• Challenges to tax planning</li> <li>• Deductibility of various expenses</li> <li>• VAT issues</li> <li>• Administrative failures</li> </ul>	<ul style="list-style-type: none"> <li>• Costs of the enquiry are for the taxpayer's account</li> <li>• In some circumstances some costs of litigation may be recovered if matters proceed to court or the Tax Tribunal</li> </ul>
US	<p>Internal Revenue Service (IRS):</p> <ul style="list-style-type: none"> <li>• Administrative agency</li> <li>• Broad powers to summons documents and testimony</li> <li>• Generally does not have adjudicatory powers</li> </ul>	<ul style="list-style-type: none"> <li>• Reorganization has led to 53 "Campaigns," or focus issues</li> <li>• Current "Campaigns" include issues related to repatriation, deemed repatriation tax, non-filers and transfer pricing</li> </ul>	<p>Net worth requirements:</p> <ul style="list-style-type: none"> <li>• \$2,000,000 for individuals</li> <li>• \$7,000,000 for entities</li> <li>• Cannot protract proceedings</li> <li>• "Reasonable" costs</li> <li>• \$200 per hour cap currently (exceptions)</li> </ul>

## 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"> <li>• Notice compelling production of documents</li> <li>• Notice compelling attendance to give evidence</li> <li>• Failure to provide information/documents can result in action by ATO/FIRB</li> </ul>	<ul style="list-style-type: none"> <li>• In litigation, ATO can use the discovery process to obtain documents</li> </ul>	<ul style="list-style-type: none"> <li>• In litigation, ATO may use subpoenas or other third party production mechanisms</li> <li>• ATO may issue same notices to third parties as can be issued to taxpayer</li> </ul>
Brazil	<ul style="list-style-type: none"> <li>• Requirements very broad;</li> <li>• Broad taxpayer duties</li> <li>• Summons for documents or testimony</li> <li>• Notice compelling production of documents</li> </ul>	<ul style="list-style-type: none"> <li>• Judicially authorized search and seizures</li> <li>• In litigation, the Court can request documents and information from the taxpayer</li> <li>• Burden of proof to claimant</li> </ul>	<ul style="list-style-type: none"> <li>• In litigation, subpoenas or other third party production mechanisms can be used</li> </ul>
Canada	<ul style="list-style-type: none"> <li>• Audits</li> <li>• Requirements very broad</li> <li>• Includes foreign-based documents</li> </ul>	<ul style="list-style-type: none"> <li>• Judicially authorized search and seizures</li> <li>• Courts can enforce requirements</li> <li>• In litigation, CRA can use discovery and request full disclosure</li> </ul>	<ul style="list-style-type: none"> <li>• CRA can issue requirement to third party, including foreign based documents</li> <li>• Third party may be examined for discovery (with leave)</li> </ul>
France	<ul style="list-style-type: none"> <li>• Informal information requests</li> <li>• Audits</li> <li>• Requirements can be very broad</li> <li>• DACG Directive-mandatory disclosure of aggressive tax planning of cross-border transactions</li> </ul>	<ul style="list-style-type: none"> <li>• Judicially authorized search and seizures</li> <li>• In litigation, the Court can request documents and information from the taxpayer</li> </ul>	<ul style="list-style-type: none"> <li>• FTA have a right to request information to check a taxpayer's position</li> <li>• Judicially authorized search and seizures may extend to third parties</li> </ul>



Country	Administrative Collection of Information From Taxpayer	Judicial Collection of Information From Taxpayer	Collection of Information From Third Parties
Germany	<ul style="list-style-type: none"> <li>Digital access to accounting information</li> <li>Broad taxpayer duties; increased in international cases</li> <li>Formal audit questions</li> <li>Bilateral information exchange</li> <li>Failure to provide can result in estimated basis</li> </ul>	<ul style="list-style-type: none"> <li>Tax authorities can enforce compliance with information duties</li> <li>In proceeding tax court can request documents and information</li> <li>Exclusion of facts, if filed too late</li> </ul>	<ul style="list-style-type: none"> <li>Tax authorities may request information, if necessary and after unsuccessful request with taxpayer</li> </ul>
Luxembourg	<ul style="list-style-type: none"> <li>Digital access to accounting information in certain cases (FAIA)</li> <li>Informal or formal information request(s)</li> <li>Tax audit</li> <li>Summons for documents or testimony</li> </ul>	<ul style="list-style-type: none"> <li>Judicially authorized search and seizures</li> <li>In litigation, the Court can request documents and information from the taxpayer</li> </ul>	<ul style="list-style-type: none"> <li>LTA can request information</li> <li>Judicially authorized search and seizures</li> <li>Banking secrecy can be lifted for judicial criminal investigations or under certain tax treaties/directives</li> </ul>
The Netherlands	<ul style="list-style-type: none"> <li>Audits</li> <li>Information decisions</li> <li>Certain companies need to substantiate transaction's arm's-length nature</li> <li>Certain companies need to confirm compliance with substance</li> </ul>	<ul style="list-style-type: none"> <li>Information decision objection eligible</li> <li>Burden of proof to taxpayer if non-compliance</li> <li>DTA can enforce information through civil court</li> <li>FFU may use search &amp; seizure</li> </ul>	<ul style="list-style-type: none"> <li>The DTA may perform a third party audit at third party obliged to keep records</li> <li>In tax fraud situations the FFU may use search &amp; seizure with third parties</li> </ul>
South Africa	<ul style="list-style-type: none"> <li>Request relevant material</li> <li>Conduct interviews</li> <li>Hold inquiries</li> <li>Conduct audits or criminal investigations</li> </ul>	<ul style="list-style-type: none"> <li>Search and seizure</li> <li>In litigation before the tax board or tax court SARS may use discovery</li> </ul>	<ul style="list-style-type: none"> <li>In litigation before the tax board or tax court SARS may subpoena witnesses and documents</li> </ul>
UK	<ul style="list-style-type: none"> <li>Informal information request first</li> <li>By notice, HMRC can require information to check a taxpayer's position. No judicial approval of notice is required (but may be sought)</li> </ul>	<ul style="list-style-type: none"> <li>Tax Tribunal may approve an information notice</li> <li>In litigation, parties must disclose relevant documents, including those adverse to their case</li> </ul>	<ul style="list-style-type: none"> <li>HMRC can give notice to third parties requiring information to check a taxpayer's position</li> <li>Such notice must generally first be approved by the Tax Tribunal</li> </ul>
US	<ul style="list-style-type: none"> <li>Information Document Requests, including one seeking agreement on facts</li> <li>Summons for documents or testimony</li> <li>"Formal document request" for foreign based documentation</li> </ul>	<ul style="list-style-type: none"> <li>IRS can enforce summons</li> <li>Taxpayer can seek to quash summons</li> <li>Court can enforce "formal document request" - exclude evidence</li> <li>In litigation, IRS may use discovery</li> </ul>	<p>IRS may summon:</p> <ul style="list-style-type: none"> <li>US persons</li> <li>Foreign-owned US taxpayer or foreign taxpayer with US business as agent for related foreign party</li> </ul> <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"> <li>• ATO encourages alternative dispute resolution (ADR) including independent review and early neutral evaluation</li> </ul>	<ul style="list-style-type: none"> <li>• Taxpayer can object against ATO assessment within 60 days</li> <li>• ATO must determine objection within 60 days</li> <li>• Increasing use of ADR</li> </ul>	<ul style="list-style-type: none"> <li>• Application to Administrative Appeals Tribunal (AAT) or Federal Court for review of ATO decision</li> </ul>
Brazil	<ul style="list-style-type: none"> <li>• Collaboration: RFB/taxpayer, information gathering, correspondence, meeting;</li> <li>• Taxpayer can give opinion about outcome before additional assessments/penalties imposed.</li> <li>• Ongoing discussions about the possibility of settlements</li> </ul>	<ul style="list-style-type: none"> <li>• Taxpayer can object against RFB assessment within 30 days</li> </ul>	<ul style="list-style-type: none"> <li>• Taxpayer can appeal to the Administrative Tax Appeals Tribunal (CARF)</li> </ul>
Canada	<ul style="list-style-type: none"> <li>• Draft assessment submitted at the end of examination</li> <li>• Settlement often negotiated then</li> <li>• Settlement must be principled</li> </ul>	<ul style="list-style-type: none"> <li>• Independent review by Appeals following notice of objection</li> <li>• More than 70% of cases settled</li> </ul>	<ul style="list-style-type: none"> <li>• Mediation process available</li> </ul>
France	<ul style="list-style-type: none"> <li>• A reassessment proposition followed by a confirmation by the field auditor</li> <li>• No obligation to negotiate with the taxpayers</li> </ul>	<ul style="list-style-type: none"> <li>• Taxpayer can challenge the FTA reassessment before higher tax officials</li> <li>• Independent panel committees may be competent to review certain tax reassessment</li> </ul>	<ul style="list-style-type: none"> <li>• Taxpayer can file claim against appeal decision either before the administrative court or the judicial court (regarding net wealth tax and stamp duties)</li> </ul>
Germany	<ul style="list-style-type: none"> <li>• Conclusion of tax contract or settlement agreement not possible</li> <li>• Mutual agreement re facts possible at all stages</li> <li>• Obligatory final tax audit discussion meeting</li> </ul>	<ul style="list-style-type: none"> <li>• Taxpayer files appeal</li> <li>• Appeal handled by separate section of tax office</li> <li>• No costs incurred for appeal by tax authorities</li> <li>• Mutual agreement re facts possible</li> </ul>	<ul style="list-style-type: none"> <li>• Taxpayer can file claim against appeal decision</li> <li>• Mutual agreement re facts possible before court</li> <li>• Technically no mutual settlement possible (tax court decision obligatory)</li> </ul>



Country	During Examination	Administrative Review of Examination Results	Post Administrative Review (General)
Luxembourg	<ul style="list-style-type: none"> <li>• Collaboration: LTA/taxpayer, information gathering, correspondence, meeting</li> <li>• Taxpayer can give opinion about outcome before additional assessments/penalties imposed</li> </ul>	<ul style="list-style-type: none"> <li>• 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</li> </ul>	<ul style="list-style-type: none"> <li>• Taxpayer can file claim against appeal decision of director either before administrative court or judicial court (regarding indirect taxes and VAT)</li> <li>• Possibility of Mediation</li> </ul>
The Netherlands	<ul style="list-style-type: none"> <li>• Collaboration DTA/taxpayer, information gathering, correspondence, meeting</li> <li>• Taxpayer can give opinion about outcome before additional assessments/penalties are imposed</li> </ul>	<ul style="list-style-type: none"> <li>• Objection filed within 6 weeks</li> <li>• Objection dealt by other person of DTA for fair review</li> <li>• Taxpayer is entitled to hearing prior to final decision</li> <li>• Mediation available</li> </ul>	<ul style="list-style-type: none"> <li>• Appeal filed within 6 weeks with district court</li> <li>• Court decision can be appealed with High Court and Supreme Court</li> <li>• May conclude settlement agreement during procedure</li> </ul>
South Africa	<ul style="list-style-type: none"> <li>• There are no dispute resolution procedures available to a taxpayer while the taxpayer is under examination</li> </ul>	<p>Objection:</p> <ul style="list-style-type: none"> <li>• Taxpayer files objection</li> <li>• Considered by SARS official</li> <li>• ADR if parties agree</li> </ul> <p>Appeal to tax board:</p> <ul style="list-style-type: none"> <li>• Taxpayer files notice of appeal</li> <li>• Independent members</li> </ul>	<p>ADR:</p> <ul style="list-style-type: none"> <li>• Agreed between SARS and the taxpayer</li> <li>• Appoint a facilitator (SARS official or third party) to mediate</li> </ul>
UK	<ul style="list-style-type: none"> <li>• Emphasis on collaboration between HMRC and taxpayer, information gathering, correspondence and meeting</li> <li>• HMRC bound by policy in considering settlement</li> </ul>	<ul style="list-style-type: none"> <li>• Taxpayers can request a review by an independent HMRC officer</li> <li>• Following examination, a Closure Notice is issued</li> </ul>	<ul style="list-style-type: none"> <li>• Potential for ADR (although usually during examination process)—HMRC policy can limit scope of settlement</li> <li>• Closure Notice can be appealed to the Tax Tribunal</li> </ul>
US	<p>Fast Track Settlement:</p> <ul style="list-style-type: none"> <li>• IRS Appeals division employee mediates</li> <li>• Resolve large cases within 120 days, smaller cases within 60</li> <li>• Taxpayer retains traditional Appeals rights</li> </ul>	<p>Review by IRS Appeals:</p> <ul style="list-style-type: none"> <li>• Appeals is independent division of IRS</li> <li>• In-person conferences available in field cases</li> <li>• Examination participation in conferences more frequent</li> </ul>	<p>Mediation:</p> <ul style="list-style-type: none"> <li>• To resolve remaining issues</li> <li>• IRS Appeals mediator, or also, at taxpayer's expense, a third party co-mediator</li> </ul> <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"> <li>• Self-assessment regime</li> <li>• Transfer pricing legislation aligned to OECD standards</li> <li>• Contemporaneous documentation required to avoid penalties</li> </ul>	<ul style="list-style-type: none"> <li>• Very long process</li> <li>• Used increasingly, as transfer pricing adjustments become more common</li> <li>• Advance pricing agreements possible</li> </ul>	<ul style="list-style-type: none"> <li>• ATO has power to make consequential adjustment to tax position of entity or another entity where “fair and reasonable” to do so</li> </ul>
Brazil	<ul style="list-style-type: none"> <li>• Legislation includes different criteria to be used for calculation of transfer pricing</li> <li>• Ongoing discussions to adapt legislation to OECD standards</li> <li>• Transfer pricing rules applicable to all transactions involving countries with favored taxation</li> <li>• Formal approach</li> </ul>	None	None
Canada	<ul style="list-style-type: none"> <li>• Key issues: inter-company pricing of inventory, services</li> <li>• CRA applies OECD guidelines</li> </ul>	<ul style="list-style-type: none"> <li>• Very long process</li> <li>• Relief where double taxation arises</li> <li>• Choice: competent authority or objection</li> </ul>	None
France	<ul style="list-style-type: none"> <li>• Transfer pricing legislation aligned to OECD standards (including CBCR)</li> <li>• Mandatory documentation is filed each year and upon FTA’s request (two levels of information may be requested depending on turnover of taxpayer)</li> </ul>	<ul style="list-style-type: none"> <li>• Advanced Pricing Agreement possible</li> </ul>	<ul style="list-style-type: none"> <li>• Correlative adjustments are subject to prior claim</li> </ul>



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

## 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 most jurisdictions.

Country	Civil Penalties	Criminal Penalties	Tax Amnesty Programs
Australia	<ul style="list-style-type: none"> <li>• False or misleading statement – 75% of shortfall</li> <li>• Tax avoidance scheme – 50% of shortfall</li> <li>• Adopting position not reasonably arguable – 25% of shortfall</li> </ul>	<ul style="list-style-type: none"> <li>• False or misleading statements – up to A\$8,400</li> <li>• Failure to comply with requirements under taxation law – up to A\$10,500 and/or imprisonment up to 12 months</li> <li>• Serious tax offences – imprisonment up to 10 years</li> </ul>	<ul style="list-style-type: none"> <li>• Remission of penalties/interest for voluntary disclosure prior to amended assessment being issued by ATO</li> <li>• Tax amnesty programs occur on an ad hoc basis but are unusual</li> </ul>
Brazil	<ul style="list-style-type: none"> <li>• Various penalties or administrative fines for non-payment or non-compliance with tax legislation</li> <li>• Fines between 75% + interest (doubled in case of fraud or evasion, in which case it could rise up to 225%), and/or loss of goods</li> </ul>	<ul style="list-style-type: none"> <li>• Several, including the omission of information, making false statements, fraud tax monitoring, forged documents, failure to provide invoice (evidencing tax withholding); up to five years in prison and/or fine.</li> </ul>	<ul style="list-style-type: none"> <li>• Not available at this date, but there is an ongoing legislative project to implement such a program</li> </ul>
Canada	<ul style="list-style-type: none"> <li>• 50% if gross negligence</li> <li>• Planner's total gross entitlement if misrepresentation</li> <li>• Failure to disclose foreign assets (5%)</li> </ul>	<ul style="list-style-type: none"> <li>• Making false statements, destroying documents, evading payment of taxes: fine of 200% and 2 years in prison</li> </ul>	<ul style="list-style-type: none"> <li>• Voluntary disclosure program</li> <li>• Cannot be under investigation</li> <li>• Must be complete and verifiable</li> </ul>
France	<ul style="list-style-type: none"> <li>• Interest (0.20% per month)</li> <li>• Penalties: <ul style="list-style-type: none"> <li>• 10% for small infractions</li> <li>• 40% in case of intentional non-compliance</li> <li>• 80% in case of abuse of law or fraudulent actions</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>• Tax fraud or accounting fraud: up to 5 or 7 years prison and €500,000 to €3,000,000 fine</li> <li>• Opposition to a tax audit: up to 6 months prison and up to €25,000 fine</li> <li>• Important tax sanctions and convictions published on FTA website</li> <li>• Tax fine for counsel for fraudulent/abusive arrangements</li> </ul>	<ul style="list-style-type: none"> <li>• Remission of interest for express mention in tax return and 50% reduction in case of amended return filed prior to tax audit</li> </ul>

Country	Civil Penalties	Criminal Penalties	Tax Amnesty Programs
Germany	<ul style="list-style-type: none"> <li>• Interest (0.5% per month) starts 15 months after fiscal year</li> <li>• Late payment fine (1% of tax for each month tax is not duly paid)</li> <li>• Penalties for transfer pricing violations</li> </ul>	<ul style="list-style-type: none"> <li>• Intentional evasion – up to 5 years prison (10 years if serious) or fine</li> <li>• Grossly negligent evasion – up to €50,000 fine</li> <li>• False documentation – up to €5,000 fine</li> <li>• False/delayed transfer pricing documentation – up to €1,000,000 fine</li> </ul>	<p>Voluntary self-disclosure:</p> <ul style="list-style-type: none"> <li>• Detailed requirements</li> <li>• Impossible if tax office already aware</li> <li>• Full and complete disclosure required</li> <li>• For serious cases, additional 10% to 20%</li> </ul>
Luxembourg	<ul style="list-style-type: none"> <li>• Various penalties or administrative fines for non-compliance</li> <li>• Administrative fine for “simple tax fraud” of at least 10% and up to 50% of eluded tax or undue payment</li> </ul>	<ul style="list-style-type: none"> <li>• “Aggravated tax fraud:” up to 3 years in prison and criminal fine up to 7 times eluded taxes</li> <li>• Tax swindle: up to 5 years in prison and criminal fine up to 10 times eluded taxes</li> </ul>	<ul style="list-style-type: none"> <li>• No program available at this date</li> </ul>
The Netherlands	<ul style="list-style-type: none"> <li>• Default penalty in case of ordinary negligence; max. €5,278</li> <li>• Negligence penalty (gross negligence/intent) up to 100% (some income tax matters 300%) of (additional) tax</li> </ul>	<ul style="list-style-type: none"> <li>• Tax fraud max. 6 years prison or max. €20,750 penalty</li> <li>• And can result in conviction for money laundering and/ or forgery of documents; confiscation possible if convicted</li> </ul>	<ul style="list-style-type: none"> <li>• No penalty if within 2 years corrected return is filed</li> <li>• The penalty may be limited if after 2 years a corrected and amended tax return is filed voluntarily</li> </ul>
South Africa	<ul style="list-style-type: none"> <li>• Various penalties for non-compliance with tax laws or non-payment of tax</li> <li>• Penalties for gross negligence and intentional tax evasion range from 0% - 200%</li> </ul>	<ul style="list-style-type: none"> <li>• Non-compliance with tax laws, secrecy provisions, filing a return without authority – 2 years prison, and/or a fine</li> <li>• Tax evasion – 5 years prison, and/or fine</li> </ul>	<ul style="list-style-type: none"> <li>• Voluntary disclosure program:</li> <li>• Eligible before investigation commences/after investigation has commenced but not concluded, subject to exceptions</li> <li>• Detailed requirements</li> </ul>
UK	<ul style="list-style-type: none"> <li>• Failures; a one-off fine or daily flat-rate penalty (may be waived)</li> <li>• Culpable penalties; up to 150% of tax or up to 200% if certain offshore jurisdictions involved</li> </ul>	<ul style="list-style-type: none"> <li>• 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)</li> </ul>	<ul style="list-style-type: none"> <li>• HMRC run some programs related to specific industries or risk areas but these are becoming less common (particularly for declaring offshore income/assets)</li> </ul>
US	<ul style="list-style-type: none"> <li>• 20% accuracy-related (40% if gross misvaluation, including transfer pricing errors)</li> <li>• 75% civil fraud</li> <li>• Undeclared foreign account: 50%</li> <li>• Most require written supervisor approval</li> </ul>	<ul style="list-style-type: none"> <li>• Tax evasion – 5 years prison, \$500,000 fine</li> <li>• False tax return – 3 years prison, \$500,000 fine</li> <li>• Failure to declare foreign account – 5 years prison, \$250,000 fine</li> </ul>	<p>General Voluntary Disclosure Program:</p> <ul style="list-style-type: none"> <li>• Cannot be under investigation</li> </ul> <p>Offshore Voluntary Disclosure Program closed on September 28, 2018</p>

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



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

## 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	<ul style="list-style-type: none"> <li>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</li> </ul>	<ul style="list-style-type: none"> <li>Restricted to legal practitioners</li> <li>Protects communications with dominant purpose of giving or receiving legal advice</li> <li>Can be waived so great care must be taken</li> </ul>	<ul style="list-style-type: none"> <li>Legal professional privilege extends to confidential communications for main purpose of provision of legal advice or use in litigation/expected litigation</li> </ul>
Brazil	None	<ul style="list-style-type: none"> <li>Attorney-client privilege</li> </ul>	None
Canada	<ul style="list-style-type: none"> <li>Taxpayers not required to disclose soft spots to tax authorities during audit, including tax accrual workpapers</li> </ul>	<ul style="list-style-type: none"> <li>Attorney-client privilege</li> <li>None for accountants unless as agent or client of lawyer</li> </ul>	<ul style="list-style-type: none"> <li>Common interest privilege</li> </ul>
France	None	<ul style="list-style-type: none"> <li>Attorney-client privilege</li> <li>Protects communication between attorney and client</li> <li>Can be waived only by the client</li> </ul>	<ul style="list-style-type: none"> <li>Legal professional privilege extends to confidential communications for provision of legal advice or use in (expected) litigation and to correspondences between lawyers</li> </ul>
Germany	<ul style="list-style-type: none"> <li>Tax advisor privilege, similar to attorney client privilege</li> </ul>	<ul style="list-style-type: none"> <li>Protects communication between attorney and client</li> <li>Right to refuse to give evidence</li> <li>Can be waived by client</li> </ul>	None

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

## 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"> <li>• Self-assessment by lodging return</li> <li>• Audit and re-assess: 2 years (individual/small business), 4 years (others), unlimited (fraud), generally 7 years for transfer pricing</li> </ul>	<ul style="list-style-type: none"> <li>• 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)</li> </ul>	<ul style="list-style-type: none"> <li>• Unlimited period for fraud/evasion</li> </ul>
Brazil	<ul style="list-style-type: none"> <li>• Generally 5 years from the beginning of the following calendar year in which the tax is owed</li> </ul>	<ul style="list-style-type: none"> <li>• Five years in the case of self-assessment, from the date in which the tax was deemed to be owed, or five years from the date at which tax was paid</li> </ul>	<ul style="list-style-type: none"> <li>• 12 years from the time the offense was committed</li> </ul>
Canada	<ul style="list-style-type: none"> <li>• 3 years from original assessment (individual and private corporations)</li> <li>• 4 years for public corporations</li> <li>• 3 year extension for non-resident</li> </ul>	<p>None</p>	<ul style="list-style-type: none"> <li>• No limitation for tax evasion</li> </ul>
France	<ul style="list-style-type: none"> <li>• 3 years from the end of the calendar year in which the tax is owed</li> <li>• Extension to 6 years in respect to net real estate wealth tax if not sufficiently disclosed</li> <li>• Specific provisions for local taxes</li> </ul>	<ul style="list-style-type: none"> <li>• 2 years from the end of the calendar year in which the tax was paid or assessed</li> <li>• Specific provisions for local taxes</li> </ul>	<ul style="list-style-type: none"> <li>• 10 years for certain cases of tax evasion, tax fraud and nondisclosure of offshore assets, bank accounts, insurance contracts or trusts</li> <li>• Further extension of 2 years in case of criminal investigation</li> </ul>
Germany	<ul style="list-style-type: none"> <li>• 4 years after tax return was filed</li> <li>• If no return filed, 4-year period starts 3 years after end of tax year</li> <li>• Various possible extensions, including by start of audit</li> </ul>	<ul style="list-style-type: none"> <li>• 5 years from the end of the calendar year in which the refund claim becomes due</li> </ul>	<ul style="list-style-type: none"> <li>• 5 years – grossly negligent evasion</li> <li>• 10 years – intentional fraud</li> <li>• Each starts with a delay (see Assessments)</li> <li>• Various possible extensions, including by start of audit</li> </ul>



Country	Assessments	Refunds	Criminal Tax Matters
Luxembourg	<ul style="list-style-type: none"> <li>• 5 years from the end of the calendar year in which the tax is owed</li> <li>• Exceptionally 10 years (incomplete tax returns, irrespective of fraud)</li> <li>• Specific provisions for indirect and local taxes</li> </ul>	<ul style="list-style-type: none"> <li>• 1 calendar year from the end of the calendar year in which the tax was paid or assessed</li> </ul>	<ul style="list-style-type: none"> <li>• 10 years for certain cases of tax evasion and tax fraud</li> </ul>
The Netherlands	<ul style="list-style-type: none"> <li>• Generally 5 years</li> <li>• 12 years in cases where foreign assets are involved</li> </ul>	<ul style="list-style-type: none"> <li>• If appealed in time</li> <li>• Ex officio reduction possible thereafter; no time limitation the law. Policy based an ex officio reduction is only granted for the past 5 years</li> </ul>	<ul style="list-style-type: none"> <li>• 12 years for criminal tax matters</li> </ul>
South Africa	<ul style="list-style-type: none"> <li>• 3 years from original assessment</li> <li>• 5 years if self-assessed or no return received or required</li> <li>• Fraud or negligent misrepresentation, no prescription</li> </ul>	<ul style="list-style-type: none"> <li>• 3 years from the date of assessment by SARS</li> <li>• 5 years in the case of self-assessment</li> <li>• Erroneous refunds regarded as an outstanding tax debt</li> </ul>	<ul style="list-style-type: none"> <li>• 20 years from the time the <i>offense</i> was committed unless otherwise specified</li> </ul>
UK	<ul style="list-style-type: none"> <li>• 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</li> </ul>	<ul style="list-style-type: none"> <li>• 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</li> </ul>	<ul style="list-style-type: none"> <li>• Generally no specific time limitations for criminal tax matters</li> </ul>
US	<ul style="list-style-type: none"> <li>• 3 years from filing of return</li> <li>• 6 years, if greater than 25% omission of income</li> <li>• If no return filed, IRS may assess at any time</li> <li>• If fraud, any time</li> <li>• Agreement may extend</li> </ul>	<ul style="list-style-type: none"> <li>• Generally, later of 3 years from filing of return or 2 years from when tax paid</li> <li>• If the former, may only recover amounts paid within preceding 3 years plus extensions</li> </ul>	<ul style="list-style-type: none"> <li>• 5 or 6 years for felonies</li> <li>• 10 years if bank involved</li> <li>• Measured from last affirmative act of evasion or overt act in furtherance of conspiracy</li> <li>• 3 years for misdemeanors</li> </ul>

## 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"> <li>Rates determined quarterly</li> <li>Underpayment: base rate + 3% (currently 4.54%)</li> <li>Late payment: base rate + 7% (currently 8.54%)</li> </ul>	None	<ul style="list-style-type: none"> <li>Base rate (currently 1.54%)</li> </ul>
Brazil	<ul style="list-style-type: none"> <li>Calculated monthly based on the SELIC rate</li> </ul>	None	<ul style="list-style-type: none"> <li>Calculated monthly based on the SELIC rate</li> </ul>
Canada	<ul style="list-style-type: none"> <li>Determined quarterly – currently 5%. Not deductible</li> </ul>	None	<ul style="list-style-type: none"> <li>Interest applicable (may be part of negotiation)</li> </ul>
France	<ul style="list-style-type: none"> <li>0.2% per month (i.e. 2.4% per annum)</li> </ul>	None	<ul style="list-style-type: none"> <li>0.2% per month (i.e. 2.4% per annum)</li> </ul>
Germany	<ul style="list-style-type: none"> <li>0.5% per month (i.e. 6% per annum)</li> <li>Interest rate is challenged by constitutional court. Appeal recommended.</li> <li>Interest expenses not deductible for income tax purposes</li> </ul>	<ul style="list-style-type: none"> <li>Tax evasion amounts subject to regular interest rate (i.e. 0.5% per month)</li> <li>Interest run may begin earlier</li> </ul>	<ul style="list-style-type: none"> <li>0.5% per month (i.e. 6% per annum)</li> <li>Refunds taxable for income tax purposes</li> </ul>

Country	Deficiencies (In General)	Special Rules With Respect to Certain Deficiencies	Refunds
Luxembourg	<ul style="list-style-type: none"> <li>• 0.6% per month default interest for late payment of income, municipal business or net wealth tax as well as VAT late payment</li> <li>• Interest expenses not deductible (income tax)</li> </ul>	None	<ul style="list-style-type: none"> <li>• No interest on overpaid direct taxes</li> <li>• In principle 0.6% per month for overpaid VAT amount</li> </ul>
The Netherlands	<ul style="list-style-type: none"> <li>• 8% per annum for underpaid corporate income tax and 4% for other taxes</li> </ul>	None	<ul style="list-style-type: none"> <li>• Interest on overpaid tax: 4%/annum and 8%/annum for underpaid corporate tax (2019)</li> <li>• Certain conditions for a refund apply</li> <li>• Interest on overdue tax 4%</li> </ul>
South Africa	<ul style="list-style-type: none"> <li>• Interest on tax debts is currently 10%</li> </ul>	<ul style="list-style-type: none"> <li>• Interest rates can change depending on period when debt is outstanding</li> </ul>	<ul style="list-style-type: none"> <li>• Interest on refunds now 10%, depends on when debt became due</li> <li>• Interest on overpayment of provisional tax now 6%, depends on the period</li> </ul>
UK	<ul style="list-style-type: none"> <li>• The interest rate on late paid taxes is usually pegged to be a few basis points above prevailing interest rates (currently 3.25%)</li> </ul>	None	<ul style="list-style-type: none"> <li>• Currently 0.5%</li> </ul>
US	<ul style="list-style-type: none"> <li>• Federal short-term rate plus 3%</li> <li>• Rate currently is 5%</li> </ul>	<p>“Hot” Interest:</p> <ul style="list-style-type: none"> <li>• Corporate underpayments greater than \$100,000</li> <li>• Federal short-term rate plus 5%; rate currently is 7%</li> <li>• Begins running 30 days after first letter proposing deficiency</li> </ul>	<ul style="list-style-type: none"> <li>• For corporations, federal short-term rate plus 2% (.5% to extent overpayment exceeds \$10,000); rates currently are 4% and 2.5%, respectively</li> <li>• For all others, federal short-term rate plus 3%; rate currently is 5%</li> </ul>

## Reconciliation of laws/application 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"> <li>• General anti-avoidance rules: ATO can apply to transaction with sole/dominant purpose to obtain tax benefit</li> <li>• Specific anti-avoidance rules, including for multinationals</li> </ul>	<ul style="list-style-type: none"> <li>• Sham transactions: form of transaction can be disregarded if parties intend that form is disguise for some other transaction</li> <li>• Whether transaction has legal effect</li> </ul>	<ul style="list-style-type: none"> <li>• Often constitutional challenges to imposition of new tax and those challenges usually fail</li> </ul>
Brazil	<ul style="list-style-type: none"> <li>• General anti-avoidance rule: requires tax benefit, avoidance transaction and abuse</li> </ul>	<ul style="list-style-type: none"> <li>• Substance over form: form of transaction can be disregarded if parties intend that form is disguise for tax saving purposes (Theory of business intent)</li> </ul>	<ul style="list-style-type: none"> <li>• A number of challenges to tax law have been made on the basis of breaches of Constitutional principles (legality, economical freedom, equality)</li> </ul>
Canada	<ul style="list-style-type: none"> <li>• General anti-avoidance rule: requires tax benefit, avoidance transaction and abuse</li> </ul>	<ul style="list-style-type: none"> <li>• Judicial doctrines: sham, ineffective or incomplete transaction, substance over form</li> </ul>	<ul style="list-style-type: none"> <li>• On rare occasions: <i>Charter</i> challenge (infringement of human rights)</li> </ul>
France	<ul style="list-style-type: none"> <li>• FTA office can disregard and re-qualify transactions that lack economic substance</li> <li>• Substance over form</li> <li>• Many special anti-avoidance provisions</li> <li>• New provision: FTA can disregard arrangement with a main objective of tax advantage</li> </ul>	<ul style="list-style-type: none"> <li>• Intent of legislature must be taken into account when challenge based on anti-avoidance rule</li> </ul>	<ul style="list-style-type: none"> <li>• 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)</li> </ul>
Germany	<ul style="list-style-type: none"> <li>• General anti-avoidance rule (GAAR): disregard and re-qualify transactions lacking economic substance</li> <li>• Substance over form</li> <li>• Many special anti-avoidance rules (SAAR)</li> </ul>	<ul style="list-style-type: none"> <li>• GAAR and SAAR applicable in front of tax courts, but tax courts tend to be more reluctant to apply GAAR</li> </ul>	<ul style="list-style-type: none"> <li>• Challenges to tax laws frequent</li> <li>• Many court proceedings in relation to the compliance of tax laws with German Constitutional law and EU law</li> </ul>



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

## Resolving EU international tax disputes – a new way forward?

### Background

Mutual Agreement Procedures are essential for ensuring that where there is an international tax dispute, groups do not end up with double taxation as a result of an adjustment in one jurisdiction and no relief in the other. However, they have been much criticized as being slow, cumbersome and reliant on the progress made by two tax authorities, with little ability on the part of the taxpayers to intervene.

In 1990, Member States of the European Economic Community adopted the Arbitration Convention which introduced the concept of arbitration for intra-EEC cross-border tax transfer pricing disputes where Member States had failed to resolve a dispute through the mutual agreement procedure (MAP). This only applied to a limited category of tax disputes (transfer pricing and profit allocation for permanent establishments). As such, it was of limited benefit. The need for effective resolution of tax disputes was also highlighted by Action 14 of the OECD BEPS action plan; this aimed to implement minimum standards to improve the resolution of tax-related disputes between jurisdictions. It highlighted continued issues on the effectiveness of the MAP procedures. In response, the EU adopted Directive 2017/1852 (the Directive) in October 2017. This extended the arbitration and alternative dispute resolution mechanisms to a much wider range of cross-border tax disputes. The Directive has now come into force in the EU.

The Directive is intended to enable taxpayers to ensure that the MAP procedure does not become too protracted. It allows for a complaints procedure and the possibility of referring the matter to an Advisory Commission if matters are not resolved within a certain period. It therefore potentially offers the opportunity for international groups to bring matters to a head and break a MAP deadlock.

### Scope of the Directive

The Directive applies to disputes between Member States as to the interpretation and application of intra-EU bilateral/multilateral double tax treaties. It does not extend to tax treaties between EU Member States and third countries, nor does it extend to estate/gift taxes.

### The procedure

The Directive gives taxpayers facing cross-border tax disputes a number of additional rights and avenues with which to increase the speed and certainty of dispute resolution. The key concepts of the procedure will be familiar to taxpayers who are aware of the Article 25 procedure of the OECD Model Tax Convention on Income and on Capital.

By virtue of the rights conferred by the Directive, an “affected person” becomes entitled to submit a “complaint” on a “question in dispute”, where:

- “affected person” means any person (including individuals) who is a resident of a member state for tax purposes;
- “complaint” is the resolution procedure; and
- “question in dispute” is the matter giving rise to the dispute between Member States.

Making a “complaint” is broadly similar to presenting a case under the existing Article 25 procedure present in many bilateral treaties, but there are some important differences. Large undertakings and groups must submit their complaint to each member state competent authority, whereas individuals and smaller undertakings must submit the complaint to their state of residence. The process is outlined below:

- Taxpayers may initiate the complaint procedure under the Directive (irrespective of whether the Member States have a mutual agreement procedure article in any treaty between them) to resolve disputes within three years. The complaint must be accompanied by detailed submissions which provide information in accordance with the Directive.
- Competent authorities must decide whether to accept or reject the complaint within six months of the complaint/the receipt of further information (if requested).
- A complaint may be rejected outright on the basis that further information has not been provided, the limitation period of three years has expired, or if a competent authority decides that there is no question in dispute. If a complaint is rejected, the affected person has recourse to the national courts to have the complaint admitted.
- A competent authority’s failure to make a decision constitutes admission of the complaint, and allows the complaint to proceed. The competent authority of a member state may alternatively resolve the complaint by taking unilateral action.
- If the complaint is admitted and unilateral action is not taken, then the competent authorities must endeavor to resolve the question in dispute within two years, subject to limited extendibility in certain circumstances. Any decision agreed between competent authorities must be communicated to the taxpayer and is binding upon/enforceable against those competent authorities.
- If the procedure set out above fails, taxpayers can request that the Member States concerned form an Advisory Commission comprising independent panelists and representatives of the competent authorities to arbitrate.
- The Advisory Commission must issue an opinion within six months. If an Advisory Commission is not formed the taxpayer may bring an action before its national court to force Member states to form such a committee. Where an Advisory Committee decision is not implemented, the taxpayer may, in certain circumstances, be able to enforce the opinion before the national courts.
- Alternatively, competent authorities may elect to form an Alternative Dispute Resolution Commission, the form and composition of which is determined by the relevant competent authorities. The taxpayer has no right to participate in decisions about the form, composition or type of dispute resolution mechanism chosen.

## Implementation

### General

Member States were required to transpose the Directive into national law by 30 June 2019. In doing so, Member States could exercise two derogations from the Directive. Member states could choose to:

- deny access to the Advisory Commission in cases of tax fraud, willful default and gross negligence; and/or
- deny access to the Advisory Commission where there is no double taxation.

Where Member States have chosen to exercise these derogations, it may raise practical problems where:

- double taxation and negligence are concurrent, where proceedings regarding negligence proceed while the substance of the dispute remains unresolved; or
- where cross-border tax disputes do not concern double taxation but require the co-operation of more than one tax authority.

### France

France has already implemented the Directive through primary legislation (Transposition de la directive sur le règlement des différends fiscaux dans l'UE (Loi art. 130)). The domestic law provisions follow the provisions of the Directive. France has chosen to exercise both derogations. Therefore:

- Access to the Advisory Commission is denied where 40/80% penalties apply.
- Double taxation is defined in the French implementation of the Directive as occurring where (i) there is an additional tax burden; (ii) there is an increase in a tax burden; or (iii) where there is a cancellation or reduction of losses that could have been used to offset taxable profits.

A decree (Décret n° 2019-616 du 21 juin 2019 relatif au règlement des différends fiscaux dans l'Union européenne) was made on 21 June 2019, which provided more detail regarding the calculation of time periods and the related actions of the French tax administration

### Germany

Germany has yet to implement the Directive. However, a draft law is currently under first consultation in the Bundestag as of 29 September 2019. As it stands the draft bill exercises both available derogations.

### Luxembourg

Implementation in Luxembourg is ongoing. A draft bill was published on 11 April 2019. Stakeholders are currently providing comments on the draft bill, which seeks to transpose the Directive on an almost “word for word” basis as it stands. As it stands the draft bill exercises both available derogations.

### Netherlands

The Netherlands has implemented the Directive through its Tax Arbitration Act which came into force on 15 July 2019. The Netherlands has exercised the derogation to deny access to the Advisory Commission where the taxpayer is subject to final and irrevocable penalties for tax fraud, willful default or gross negligence and such penalty relates directly to the matter in dispute. However, the Netherlands does not deny access to the Advisory Commission where the question in dispute does not concern double taxation.

### United Kingdom

HM Revenue & Customs conducted a technical consultation on the Draft Double Taxation Dispute Resolution (EU) Regulations 2019, which seek to give effect to the Directive in combination with section 83 of the Finance Act 2019. The draft regulations exercise both derogations outlined above. While the outcome of that consultation has yet to be published and the proposed regulations remain in draft, a number of comments may be made:

- There is ambiguity of which court is the competent court for the purposes of the Directive. It has been suggested that this should be the Upper Tribunal Tax Chamber, however, the draft regulations provide that this may also be the High Court/ Court of Session.
- The draft regulations are unclear about who is suitably qualified as a “person of independent standing” to be included in any Advisory Commission.



## Brexit

The Directive has entered into force while the UK is still a member of the EU which means that the UK must give effect to the Directive. However, if the UK leaves the EU (irrespective of whether it leaves the EU with or without a transitional period), the UK would need to decide whether it will retain legislation giving effect to the Directive. It seems likely that the UK would retain such legislation in one form or another, as part of the UK's commitment to dispute resolution mechanisms in the international tax space.

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