Tax Litigation 2017

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LATIN LAWYER
Reference

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1 What is the tax authority in your jurisdiction, and can you give a general description of its structure? Provide a general assessment of the authority?

The tax authority in Panama is the General Directorate of Revenue (DGI), which is a directorate under the Ministry of Economy and Finance. Its head is the Director General of Revenue, who reports to the Minister of Economy and Finance.

The DGI is divided into several departments, including: taxpayers' assistance, legal advisory, international taxation, transfer pricing, collections, account balances, audit, invoicing, exemptions and refunds. However, all acts must be signed and issued by its Director.

The caseload of the tax authority is heavy and the turnaround time is generally slow. Among the factors that contribute to the slow pace of the tax authority are its centralised organisation, a lack of sufficient personnel to meet the demand and the lack of an efficient method to organise and manage the documents.

The tax authority has recently updated its software with views to provide a more efficient tax filing system and to expedite certain processes, including the recognition of tax exemptions, credits and refunds. Eventually it will allow the taxpayers to follow the status of certain processes online.

2 Can you outline the typical process involved with tax disputes in your jurisdiction, from filing, to notice of deficiency, to litigation? Are there alternative procedures?

Process before the tax authority

The formal process for tax disputes in Panama begins with an administrative procedure before the tax authority, which is the filing of a recourse for review of an original resolution issued by the tax authority to which the taxpayer objects. The recourse for review must be filed within 15 business days following the date when the taxpayer is notified of the initial resolution. In the recourse for review, the taxpayer can request a clarification, modification or revocation of the original resolution.

The tax authority will analyse the evidence presented and may require the production of additional evidence. The Tax Code dictates that the recourse should be resolved within two months unless the tax authority has ordered the production of additional evidence. In practice, the process to resolve a recourse generally takes several months.

Once the resolution deciding the recourse is issued, it must be notified in person by the tax authority to the taxpayer's last recorded domicile or, if the taxpayer is not located within two business days, by edict published by the tax authority within 10 business days and also in a national newspaper within three consecutive days.

Process before the Tax Administrative Tribunal

Resolutions issued by the tax authority deciding recourses for review can be appealed before the Tax Administrative Tribunal, which is the trial court for tax matters and the final step in the administrative process.

To file an appeal before the Tax Administrative Tribunal, the taxpayer has 15 business days following the date that they are notified by the tax authority of the resolution deciding the recourse for review. The judge in charge of the appeal must determine the admissibility of the appeal, confirming that it was filed properly and in a timely manner by a party with legal standing and that the Tribunal has subject matter jurisdiction over the appeal. The admissibility of the appeal must be notified in person to the taxpayer.

Once the recourse for appeal is admitted, the tax authority has five days to file counter evidence and the judge will decide on the admissibility of the evidence submitted by both parties. The judge may require the production of additional evidence by the parties in order to obtain further clarification on the subject matter of the appeal. The judge may also convene a hearing after all evidence has been submitted and evaluated, if it is deemed that further information is required to resolve the matter. Following the analysis of evidence and the hearing, if held, the parties have five days to file written pleas. Finally, the Tribunal must issue its decision.

The appeal before the Tax Administrative Tribunal should be resolved within two months unless the production of evidence has been ordered. Once the resolution deciding the appeal is issued, it must be notified in person at the taxpayer's last recorded address or, if not found in two different business days, by edict published at the Tax Administrative Tribunal within 10 business days and also in a national newspaper within three consecutive days.

Other processes before the tax authority

With respect to matters for which a resolution is initially not issued by the tax authority, such as an objection to a tax balance statement or a tax exemption that has not been duly applied, a correction form is filed in order to resolve these matters. It is not necessary to file a recourse for review.

It is also possible to pay a deficiency and then file a request for refund before the tax authority. However, a request for a refund entails a long process within the tax authority, which could take years to be resolved. If the refund is denied, it may be challenged with a recourse for review filed with the tax authority, and then appealed to the Tax Administrative Tribunal.

3 Are there alternative dispute resolution mechanisms prior to trial, such as mediation or arbitration? Are such processes mandatory or contingent on the agreement of the parties?

There are no formal alternative dispute resolution mechanisms, such as mediation or arbitration, which would apply to tax controversy.

4 What is the process for appealing trial court decisions?

Once the Tax Administrative Tribunal issues its resolution deciding the recourse for appeal, the administrative process ends and the taxpayer has two months to appeal the original resolution of the tax authority and the decision of the Tax Administrative Tribunal before the Third Chamber of the Supreme Court, which has competence over all appeals on administrative matters.

In this appeal process, the taxpayer would petition the Supreme Court to rule that the resolution issued by the tax authority was illegal and to reinstate any rights denied to the taxpayer by the tax authority.

Prior to the filing of the appeal, the taxpayer must pay, as a deposit, the taxes that the tax authority claims are due by the taxpayer. The appeal filing must include receipt of such deposit payment. Once the appeal process finalises and judgement is issued, the amount that the Third Chamber of the Supreme Court determines that it is owed by the taxpayer will be deemed paid and the difference between the amount the Court determines is due and the deposit paid by the taxpayer will be refunded to the taxpayer.

Judgements issued by the Third Chamber of the Supreme Court must be notified to the parties either in person or by edict published for five days. After five days following the notification in person, or once the notification by edict is completed, judgement will be final.

5 Is there a formal discovery process in tax litigation and controversy in your jurisdiction, and is it the same as that for general litigation?

In Panama, there is no formal discovery process that would allow obtaining evidence prior to the trial or administrative proceeding. There is a formal discovery or investigative process but the production of evidence is ordered by administrative body or court hearing the matter and is not requested directly by the parties.

6 Is attorney–client privilege recognised in your jurisdiction? Does it cover drafts of tax documents? Do any similar forms of privilege protect communications between other professionals, such as accountants, and their clients?

The Constitution protects private documents, indicating that they cannot be examined or withheld, unless they are legally required by a competent authority for a particular purpose. The law requires that orders to produce or to inspect documents be made with respect to specific documents with substantial relation to the legal proceeding and 'fishing expeditions' are not allowed.

In addition, the Attorney's Code of Ethics and Professional Responsibility, approved by the National College of Attorneys in 2011, indicates that attorneys have a duty to keep their clients' secrets and disclosures. It also states that this duty persists even after the legal services have been completed and that it applies also to the attorney's employees. Pursuant to this Code, neither the attorneys nor their employees can be forced to reveal the client's disclosures, unless authorised by the client.

However, if the client is duly required to produce evidence as part of a particular legal proceeding, documents containing communications between the client and his or her attorney would be admissible as evidence, provided certain conditions are met. Nonetheless, in that case, it would be possible to file a motion arguing that the request to produce evidence failed to clearly specify or individualise the required documents or to file an amparo before the Supreme Court challenging the order on the grounds that it has violated the constitutional right to privacy of communications.

With respect to direct testimony, attorneys cannot be compelled to testify with respect to disclosures made to them by their clients or with respect to advice given to clients in relation to the legal proceedings at issue.

7 Are there formal rules of evidence and procedure? Are they different from general litigation rules?

There are formal rules of evidence and procedure and they are particular to processes before the tax authority and the Tax Administrative Tribunal. However, in general, they are similar to the general administrative procedure, established by Law No. 38 of 2000. In fact, any procedural aspects not specifically regulated by the Tax Code and the Tax Administrative Tribunal law and regulations are governed by the general administrative procedure. At the level of the Third Chamber of the Supreme Court, the rules of evidence and procedure are the same as for all administrative matters heard by such Chamber but are different from those for general civil litigation.

At the level of the tax authority, the taxpayer should submit all evidence in his or her possession with the filing of the recourse for review and the tax authority will rule on its admissibility. If the evidence is held inadmissible, the tax authority must issue an administrative act to that effect and the taxpayer will have five business days to appeal such decision before the Tax Administrative Tribunal. The tax authority may also obtain evidence by its own motion, and it must notify the taxpayer of such evidence. The taxpayer will have eight business days to oppose such evidence.

At the level of the Tax Administrative Tribunal, the petitioner must file all supporting evidence in his or her possession with the appeal claim and the tax authority has five business days to file counter evidence. The judge will decide on the admissibility of the evidence submitted by both parties and there is no recourse against the resolution admitting or denying the admissibility of the evidence. The judge may require the production of additional evidence by the parties in order to obtain further clarification on the case. The Tax Administrative Tribunal may also obtain evidence by its own motion and it must notify the taxpayer and the tax authority, after which they will have eight business days to respond to such evidence.

After the investigation process ends, the judge may conduct a hearing, by its own motion or at the request of one of the parties. The appellant, an attorney representing the tax authority and the other two judges of the Tax Administrative Tribunal must attend the hearing. During the hearing, each party will have an hour to argue their cases. The judges may question the parties and the parties must respond during such period of time.

As a final step, the parties have five days to file final arguments in writing, after which the judge will decide on the appeal.

8 Does the judge or opposing counsel question witnesses in tax litigation?

During the process of appeals filed before the Tax Administrative Tribunal, the judge may question witnesses during the hearing convened at his or her own instance or at the request of one of the parties.

9 Can criminal charges be levied under tax law, and how often are criminal sanctions sought?

Tax offences are penalised under the Tax Code but are not crimes under the Penal Code. The Tax Code establishes the sanctions for tax offences, which include a prison sentence of one month to one year only in case of fraud. However, to date, taxpayers have not been penalised with prison time.

10 Does the same agency prosecute both criminal and civil tax litigation?

In Panama there is no criminal tax litigation given that tax offences are not crimes under the Penal Code.

11 Are trials heard by the general courts, or are there specialist tax courts?

In Panama, there is a specialist tax administrative court: the Tax Administrative Tribunal. The Tax Administrative Tribunal was created by means of Law No. 8 of 15 March 2010. The Tax Administrative Tribunal is comprised of three judges and their deputies, who are all appointed by the President and ratified by the National Assembly for a term of five years with the possibility of re-election. Two of them must be attorneys and one must be a certified public accountant.

The Tax Administrative Tribunal has competence to resolve appeals from administrative acts, procedures and resolutions issued by the tax authority. It also has power to propose to the Ministry of Economy and Finance initiatives for new legislation in areas that are not well regulated under existing laws and rules.

Appeals to resolutions issued by the Tax Administrative Tribunal may be filed before the Third Chamber of the Supreme Court, which has competence over all appeals on administrative matters.

12 Which party has the initial burden of proof on common tax issues? What level of proof must be established?

The taxpayer has the initial burden of proof on common tax issues. Tax laws and regulations do not specify the standard of proof that must be established by the taxpayer, but in practice it is a high standard of proof.

13 Is interest available to the taxpayer following a successful claim for overpayment? If so, how are the rates calculated, and when do they begin to accrue?

Interest is unavailable to the taxpayer following a successful claim for overpayment.

14 Which is the competent authority for resolving tax treaty claims in your jurisdiction? Outline how the authority operates in practice.

The competent authority for resolving tax treaty claims in Panama is the same as the competent authority for general tax claims, which would be the tax authority for the first stance recourse and the Tax Administrative Tribunal for appeals, both at the administrative level. The holding of the Tax Administrative Tribunal can be appealed to the Third Chamber of the Supreme Court.

15 Can tax law or regulations be applied retroactively, and under what circumstances?

Tax law and regulations can be applied retroactively only if they are public policy or of social interest. The law or regulation must expressly state this premise in order for the tax to apply retroactively.

16 What is the statute of limitations on tax claims, and what are some common ways it can be tolled? Are there exceptions to tolling?

The statute of limitations for the tax authority to assess income tax owed by a taxpayer is seven years from the date the income tax should have been paid. However, if the taxpayer filed an income tax return, the statute of limitations for the review and audit of a filed income tax return is three years. Thus, the tax authority would have three years from the date the income tax return was filed to determine that the income amount due was higher than the one reported and to charge such amounts to the taxpayer.

For income tax withholding obligations, the statute of limitations is 15 years. This includes income tax withholdings on payments abroad, dividend tax payments, and income tax withholding on payments to employees.

For income tax claims, the statute of limitations generally can be tolled by any act in writing by the tax authority intending to charge the tax due, by a formal act by the tax authority against the taxpayer requiring payment of taxes due, or by a formal payment agreement between the taxpayer and the tax authority.

The statute of limitations for VAT is five years from the first date of the month following the month in which the VAT should have been paid. The statute of limitations is tolled as a result of any written act of the tax authority intending to charge the VAT due.

There are no express exceptions for tolling included in the existing tax laws and regulations.

17 Is litigation over VAT or other non-income taxes significant in your jurisdiction?

Most tax controversy processes are related to income tax matters, in particular with respect to the application of the minimum income tax calculation known as the alternative income tax calculation or CAIR. However, controversies over VAT are also common.

Estif Aparicio

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Estif Aparicio joined the firm in 2000 and became a partner in 2011.

Mr Aparicio is a skilled corporate lawyer, currently specialising in complex financing of private and public major construction and infrastructure projects, with a focus on energy, public transportation, airports, ports, health and other social infrastructure.

He possess a unique insight to the power generation industry and the Panamanian government "green energy" policy favouring wind, solar, gas and hydroelectric generation, having represented the lenders that have provided financing to close 35 per cent of the total generation capacity of the country.

Mr Aparicio has outstanding deal management and broad expertise setting up a variety of structures, including syndicated and bilateral, secured and unsecured, and domestic and cross-border financings. He has represented creditors in the biggest and perhaps most complex trasactions in Panama in recent years, including the expansion of the Tocumen International Airport; the first and second line of the Panama City Metro; Cinta Costera phases I, II and III; and Metro Bus, Panama City new public transportation system.

From 2004 to 2006, the firm granted Mr Aparicio a leave of absence to work for the Panamanian government as chief trade negotiator of all bilateral and multilateral free trade agreements. As chief trade negotiator, Mr Aparicio coordinated Panama's participation in the Doha Round of negotiations of the World Trade Organization and successfully negotiated free trade agreements with the United States, Singapore and Chile.

From 2006 to 2007, Mr Aparicio worked for the law firm of Sullivan & Cromwell LLP in New York, participating in capital markets, M&A and project finance transactions.

Mr Aparicio is an active member of the International Bar Association (IBA); the International Fiscal Association (IFA); and the Instituto Panameño de Gobierno Corporativo (Panamanian Institute of Corporate Governance).

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María Cristina Guardia is a senior associate of the firm since 2010.

Ms Guardia's practice focuses on taxation; estates, trusts and foundations; doing business and multinationals in Panama; international business transactions; and corporations.

As an active member of the Doing Business and Multinationals in Panama practice group, Ms Guardia provides comprehensive taxation services to domestic and foreign clients operating in Panama.

Ms Guardia has a Juris Doctor from George Washington University Law School and a Bachelor of Arts in Political Economy from Tulane University.

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