The Tax Disputes and Litigation Review

Fourth Edition

Editor
Simon Whitehead

Law Business Research

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EDITOR'S PREFACE

The objective of this book is to provide tax professionals involved in disputes with revenue authorities in multiple jurisdictions with an outline of the principal issues arising in those jurisdictions. In this, the fourth edition, we have continued to concentrate on the key jurisdictions where disputes are likely to occur for multinational businesses.

Each chapter provides an overview of the procedural rules that govern tax appeals and highlights the pitfalls of which taxpayers need to be most aware. Aspects that are particularly relevant to multinationals, such as transfer pricing, are also considered. In particular, we have asked the authors to address an area where we have always found worrying and subtle variations in approach between courts in different jurisdictions, namely the differing ways in which double tax conventions can be interpreted and applied.

The idea behind this book commenced in 2013 with the general increase in litigation as tax authorities in a number of jurisdictions took a more aggressive approach to the collection of tax; in response, no doubt, to political pressure to address tax avoidance. In the UK alone we have seen the tax authority vested with broad new powers not only of disclosure but even to require tax to be paid in advance of any determination by a court that it is due. The provisions empower the revenue authority, an administrative body, to compel payment of a sum, the subject of a genuine dispute, without any form of judicial control or appeal. Over the past year the focus on perceived cross-border abuses has continued with action by the European Commission on past tax rulings in Ireland, Luxembourg and Belgium and the BEPS reaching a crescendo in the announcement of a 'diverted profits tax' to impose an additional tax in the UK when it is felt that a multinational is subject to too little corporation tax even in an EU context. As we go to press the UK has introduced another measure imposing a ring-fenced super tax to strip away half of any interest received with the refund of overpaid tax where the refund is, in practice, the result of the enforcement of EU rights.

These are, perhaps, extreme examples, reflective of the parliamentary cycle, yet a general toughening of stance seems to be felt. In that light, this book provides an overview of each jurisdiction's anti-avoidance rules and any alternative mechanisms for resolving tax disputes, such as mediation, arbitration or restitution claims.

We have attempted to give readers a flavour of the tax litigation landscape in each jurisdiction. The authors have looked to the future and have summarised the policies and approaches of the revenue authorities regarding contentious matters, addressing important questions such as how long cases take and situations in which some form of settlement might be available.

We have been lucky to obtain contributions from the leading tax litigation practitioners in their jurisdictions. Many of the authors are members of the EU Tax Group, a collection of independent law firms, of which we are a member, involved particularly in challenges to the compatibility of national tax laws with EU and EEA rights. We hope that you will find this book informative and useful.

Finally, I would like to acknowledge the hard work of my colleague Peter Stewart in the editing and compilation of this book.

Simon Whitehead
Joseph Hage Aaronson LLP
London
February 2016

Chapter 7

CHILE

Patricio Silva-Riesco Ojeda and Arturo Selman Nahum[1]

I INTRODUCTION

The Chilean Internal Revenue Service (IRS) is the fiscal authority responsible for implementing and monitoring all local taxes, fiscal or otherwise, as long as the state has an interest in said taxes and control of these is not specifically mandated by law to a different authority. As for tax disputes, they were formerly also under the faculties of the same fiscal authority, the latter acting as a first instance court through its regional directors, who not only acted as tax judges but, also, as the administrative authority from which the contested act emerged.

The second instance fell under the competence of the Chilean Court of Appeals (an ordinary appeals court), whose ruling could be challenged before the Supreme Court through an extraordinary appeal on points of law. However, dispute resolution regarding taxes has experienced great changes over the past decade. At first, starting as a tax dispute system formerly carried out by the regional directors of the Internal Revenue Service, a system in which said directors acted as tax judges and, moreover, whose jurisdictional faculties were commonly delegated to third parties such as lower-ranking public officers. The above situation eventually led to a series of inapplicability procedures over particular cases, as well as the subsequent declaration of unconstitutionality by the Constitutional Court. The above-stated consequently brought about the absolute repeal of the disposition to enable the delegating faculties of the IRS, directly relocating back the above-mentioned jurisdictional faculties to the regional directors.

Outside pressure to modify tax jurisdiction's procedure and management structure resulted in the enactment of Act No. 20,322, enforceable since 27 January 2009. Said legislation gave rise to the most significant fundamental reform of a taxing nature in

1 Patricio Silva-Riesco Ojeda is a director and Arturo Selman Nahum is a senior associate at Philippi Prietocarrizosa & Uría.

Chile since 1960. This act created independent and sovereign courts – known as tax and customs courts – thus replacing the existent jurisdictional authority held for decades by the IRS, opting instead for an independent third party that no longer represented an entity capable of acting simultaneously both as an interested party and judge.

Through the above-mentioned Act, 18 tax and customs courts were created, four of which were installed in Santiago, Chile. These courts were established to rule over taxpayers' claims against any and all actions and proceedings of both the Internal Revenue Service and the National Customs Service. Therefore, the tax dispute system has been transformed into one in which taxpayers can fairly challenge the tax authority in terms of tax assessments and offences.

Before long, and given that the installation of the aforementioned courts was done progressively through four major stages, before the installation of the courts in Santiago, Chile, Congress estimated that the courts were overstaffed and, against specialists' warnings, Congress then proceeded to order staff reductions. The above resulted in extremely slow judicial proceedings and overburdened courts throughout regions with very dense populations.

Meanwhile, and due to the questioning suffered by the IRS regarding the use of its discretionary powers, such as criminal prosecution and remission, or discharge faculties over taxes and penalties, which has resulted in the early departure of several of the IRS's directors and sub-directors, there is currently an increasing tendency within the IRS's officials towards avoiding the administrative settlement of tax disputes, instead opting for their judicialisation.

Notwithstanding the above, and despite there being an existing increase in taxing judicialisation, auditing is not as recurrent as it once was, among other reasons, due to the union-based pressure within the organisation and, furthermore, given the lack of stability regarding its authorities. In turn, 2014's major tax reform, which is to be in force in 2017, has incorporated general anti-avoidance rules. The application of said rules should increase litigation, although the rules' rights-based drafting allows us to foreshadow that the Chilean IRS will avoid said judicialisation, deciding instead on alternative formulas.

II COMMENCING DISPUTES

Tax disputes normally arise from a taxpayer who challenges a positive tax ascertainment, an IRS ruling or an offence notice. In exceptional cases, when facing conduct that constitutes a tax-related criminal offence, the IRS will choose to solely file an administrative complaint, forwarding all records to the tax and customs court for trial and ruling. In regards to offences, the dispute begins when the taxing administration, acting within its auditing faculties, notifies the taxpayer of an offence – usually sanctioned through fines or shutting down of an establishment – whether regarding non-compliance of document issuance duties, upkeep of records or other fiscal obligations. The notified offence may be sanctioned administratively should the taxpayer admit to the offence and also request the discharge of the fines, even if done so electronically. Should the taxpayer file a claim, trial and ruling of the notified offence will fall upon the first instance court, allowing for appeal before the city's court of appeals.

Within the legal tax system, litigation may result from, for example, a fiscal audit resulting in a founded tax authority resolution. The above is referred to as liquidation, an administrative act often contested before the corresponding tax and customs court.

In turn, any taxpayer who has overpaid a certain tax will be entitled to request its return from the tax administration. The ruling regarding said administrative request can also be contested. The same goes for rulings that partially or completely deny requests for refunds, whether based on special or promotion laws, such as the case of the export VAT, change of VAT subject or refund of the VAT endured in the acquisition of fixed assets, among others, as well as with requests for return of taxing remnants formulated in income tax return forms. In turn, if the IRS's audit determines that the loss claimed by a taxpayer is excessive, said entity will render a decision so as to modify said claim. All the aforementioned decisions may be contested before the corresponding tax and customs court.

The procedure contemplated by law for said disputes is of a contentious and administrative nature which, after the stage of examination to its admissibility, calls for the serving of notice to the IRS for answer to the complaint, followed by a probationary period and one for ruling. Said ruling is subject to appeal before the respective Court of Appeals, within 15 business days, and the ruling regarding the appeal may be contested through an extraordinary appeal on points of law before the Supreme Court.

The deadline to present claims against liquidations, transfers, payments or rulings of the Internal Revenue Service is of 90 business days. Said period may be extended to a year should the taxpayer, within said 90 days, request a transfer and pay the corresponding taxes so as to avoid readjustments, fines and interests. Taxing interests are of 1.5 per cent per month and fines may rise up to 60 per cent of the readjusted taxes. By making use of the allowed advance payment, the taxpayer reduces risks associated to litigation and, should the ruling be favourable to the taxpayer, the amounts paid are to be refunded with a readjusted interest rate of 0.5 per cent per month in favour of the taxpayer.

Both the taxpayer and the IRS must stand before court represented by a licensed attorney, and no consignment whatsoever is required for litigation, notwithstanding the aforementioned right. Nonetheless, relative to cases regarding amounts inferior to 32 monthly tax units,[2] the taxpayer may appear in court without attorney representation. The general claims procedure before a tax and customs court (first instance) has an approximate duration of one to two years, a period that may increase if the dispute is brought before courts with competence in Santiago, Chile.

2 Equivalent to approximately US$2,000.

III THE COURTS AND TRIBUNALS

i Administrative stage – Internal Revenue Service

Summons

An inspection or tax audit begins with a request to the taxpayer for all records. If the records are insufficient, the IRS may issue an administrative act referred to as a Summons,[3] before which the taxpayer, within a month,[4] must clarify, rectify, extend or confirm his or her tax filing.

The response to the summons must be in writing and, as so, constitutes a relevant milestone. Should the arguments and records provided by the taxpayer be indeed sufficient, then the challenged entries will be reconciled, and the fiscal authority will issue an end of review notice letter. Otherwise, said entity will dictate a liquidation or tax transfer should there be taxes owed by the taxpayer, or will issue an exempt ruling destined to either deny the return requested by the taxpayer, or modify a tax loss.

Particular care must be observed in attaching all requested records in the stage of response to the summons. Act No. 20,322, which created the tax and customs courts, incorporated a norm of proof inadmissibility referred to as the discovery effect, by virtue of which, should the taxpayer not attach to the summons response all documents specifically requested, the taxpayer will not be able to make use of said documents in the trial.

Administrative motion for reversal

Once the liquidation, tax transfer or ruling which affects payment of taxes is issued, provision No. 123-bis of the Tax Code allows the taxpayer, within 15 business days,[5] to file an administrative motion for reversal before the IRS. The IRS will have 50 business days[6] from the filing of said motion so as to pass a ruling and, should the motion not be resolved within this period, it will be considered denied.

This constitutes the last stage of formal review by the tax authority and, although the standing administrative regulation[7] makes the review of all records provided by the taxpayer mandatory, even allowing for conciliation, this path has not produced the expected impact, nor has it served as a mechanism to avoid the judicialisation we currently face. This is presumably due to the tight deadline provided to pass a ruling on administrative motions for reversals filed by taxpayers. Consequently, Congress is currently debating a bill that, among other things, would extend the deadline to file and

3 Although the summons is optional, and hence it would be natural to conclude its use is minor, the law makes it mandatory in many cases, making it a recurrent act by the tax authority.

4 Deadline that may be extended up to another month, upon the taxpayers request.

5 Deadline according to that established by Act No. 19,880 (Monday to Friday but not including Saturdays, Sundays and legal holidays).

6 Idem.

7 Circular Resolution No. 13 of 2010, whose instructions are mandatory to all IRS officials.

rule over an administrative motion for reversal from 30 to 90 business days, respectively, in addition to suspending the deadline during said period for the filing of tax claims before the tax and customs courts.

ii Tax and customs courts

The tax and customs courts were created by way of Act No. 20,322, in force since 27 January 2009. These courts were entrusted with the jurisdictional function of ruling, in the first instance, over disputes between the IRS or the National Customs Service and taxpayers. In accordance with this Act, said courts maintain their independent nature, under the Ministry of Finance, through an Administrative Unit in charge of the courts' economic and administrative management (as with the judicial power, without being dependent on the latter).

The tax and customs courts are single-judge courts, whose judges are appointed through a competitive bidding process of a mixed nature. In this process, an executive service proposes a list of candidates for judging posts to the Court of Appeals, the court will then propose a slate of three to the President for consequent appointment. These judges will be fixed in their position, keeping their posts until they reach the age of 75, and may only be dismissed on serious grounds.

These courts were installed throughout the country in a progressive manner, a process that ended in February 2013. There are 18 single-judge tax and customs courts, each court with a secretary – attesting minister – and resolution and administrative staff. There is one court per region and four for the metropolitan region, closely following the organic structure maintained by the tax administration at a national level.

Hence, these courts currently function with attorneys who are exclusively dedicated to them. Most of these attorneys come from the taxing administration itself and, although they are not a part of the judicial power, they still exercise jurisdiction, reason by which the courts' officers are not only fixed in a ministerial nature, but also regarding their non-existent possibilities of promotion or change relative to their careers within the structure. Nonetheless, these courts are subject to the directive, correctional and economic constitutional supervision of the Supreme Court.

These courts trial and rule, in the first instance, all claims from taxpayers against the IRS's actions, particularly those consisting of tax liquidations, tax transfers and payments, rulings, complaints and offences, all under procedures whose central characteristics were modified so as to make this process one of litigious tax nature. The following characteristics are the most notable.

Deadlines to file claims before the tax and customs courts will depend on the act being contested, a situation that will also determine the procedure to be followed.

In most procedures attorney representation will be required, notwithstanding that which was already stated regarding cases whose amount does not exceed 32 monthly tax units.

The trial will constitute an adversarial procedure, meaning that all acts contested by the taxpayers shall be defended accordingly by specialised attorneys of either the National Customs Service or the Internal Revenue Service.

The IRS may request the Tax and Customs Court to issue the cautionary action consisting in the prohibition to celebrate acts or contracts over specific goods or rights belonging to the taxpayer, this is to ensure the eventual payment of debt.

The court will call upon the taxpayer to present evidence over material, contested and pertinent facts, assessing said the facts' probative value according to the rules of reasoned judgement.

Taxpayers may not present, as evidence in trial, records requested by the IRS's audit that were not surrendered in due time.

Likewise, these courts shall try and rule over requests by the Internal Revenue Service for the lifting of banking secrecy, as well as over the special procedure regarding violation of rights by the taxing administration – by reason of infringement – of the taxpayer's rights or constitutional guarantees.

By virtue of the modifications introduced by Act No. 20,780, these courts will try any requests made by the IRS regarding abuse or simulation of legal transactions celebrated by the taxpayer, the above in compliance with the procedure established by provision No. 160-bis of the Tax Code.

iii Court of Appeals

Rulings passed by the tax and customs courts are appealable before the courts of appeals, second instance collegiate jurisdictional bodies that are members of the judicial power. Although the law contemplated the creation of specialised chambers for the ruling of tax matters in the country's main courts, during President Sebastián Piñera's administration, a bill was passed that disposed of said specialisation before it was completely carried out, keeping the said chamber only in the Court of Appeals of Santiago. In the remaining second instance courts, trial and ruling over appeals against the tax and customs courts' decisions fall under non-specialised chambers. The Courts of Appeals, in appeal procedures, may modify facts and law established and applied in the first instance.

iv Supreme Court

The rulings passed by the Courts of Appeals may be object to extraordinary appeals on points of law before the Supreme Court. If said recourse is filed based on form, then it claims that there has been a violation of substantive procedural laws and, on the other hand, if filed based on substance, then it claims that an error of law took place that essentially affects the operative provisions of the judgment. The Supreme Court is the country's highest court, a court that tries and rules through chambers, each composed of five ministers of the highest hierarchical range. Currently, these remedies are resolved by the chamber specialised in criminal matters.

IV PENALTIES AND REMEDIES

In Chile, criminal tax offences are matters of private criminal prosecution, hence exclusively falling the entitlement of said actions on the IRS. Regarding this matter, the only way in which a judicial proceeding regarding tax criminal offences may start is through the formulation of a criminal complaint by the Tax Administration. This faculty

keeps the IRS's authorities in constant media fire given the entity's failure to file claims against tax crimes, the uneven response regarding equal offences, the slow response from its authorities, etc.

Questioning of the entity always relates to the alleged political use of the above-mentioned faculty, and the disputes that rise between the body constitutionally mandated to lead the investigation, the Public Prosecution Ministry, and the Internal Revenue Service, the latter enabling the former by way of filing the corresponding criminal claim.

Regarding the above, we must consider that, in Chile, offences against tax legislation may be classified into three types, this depending on the nature of the sanction that the law establishes for the offence: violation, crime or of mixed nature. We are in the presence of a violation in all situations in which the law does not establish a sanction consisting of deprivation or restriction of liberty. In said case, a procedure is started before the tax and customs court, a body that shall sanction the corresponding fine. Within said procedure, the offender possesses diverse mechanisms for defence. The second case, criminal tax offences, are solely those found within provision 97 No. 24 of the Tax Code. In said cases, all records and information are to be turned over to the Director of the Internal Revenue Service, and said officer will decide to either file the criminal claim or, otherwise, to archive the case. However, the cases that hold the utmost interest are those of a mixed nature, meaning said offences that the law sanctions with both a penalty payment (fine), as well as a sanction that deprives or restricts the taxpayer of his or her freedom (imprisonment, confinement or relegation). In this case, once it is established – from a gathering of information and evidence – that there are tax irregularities, the findings will be presented to the Director of the Internal Revenue Service, and said officer will decide whether to file a criminal claim or to forward the case to the corresponding regional bureau. The latter will have to pursue the application of the corresponding penalty payment through the appropriate penal law channels, all in accordance with provision No. 162 Section 3 of the Tax Code. In recent years, and regarding criminal matters, the IRS has increased the number of criminal claims filed before justice courts based on acts that constitute criminal tax offences. This situation has come about given the prosecution of new criminal offences that have progressively been introduced into the Criminal Code, starting in 2001, as well as due to the permanent increase of the number of attorneys within the IRS.

Likewise, the fact that investigations are carried out by the prosecutors of the Public Prosecution Ministry – under the supervision of guarantee judges[8] – has brought about the progressive shortening of the duration of said investigations, as well as the dispute resolution, in many cases leading to alternative outlets – such as conditional suspension, reparatory agreements, summary procedures, among others – instead of starting an oral trial.

Indeed, in addition to traditional tax offences, such as tax evasion (intentional failure to pay taxes), credit fraud (attaching of false invoices so as to increase the VAT's

8 Translator's Note: 'Juez de Garantía' is particular to Chile, the closest figure in the Common Law would be that of a 'Magistrate Judge'.

fiscal credit), and the malicious acquisition of tax returns (such as the case of the export VAT or tax returns due to tax losses), starting in 2001, new criminal offences have been incorporated into the corresponding Code, of which the following stand out:

a Facilitating or surrendering of false invoices or other tax documents.
b Surrendering of false information to the IRS.
c Malicious acquisition of compensation from donation beneficiaries.
d Tax fraud within systems of exemption (free trade zones).
e Intentional loss of tax documentation.

V TAX CLAIMS

i Recovering overpaid tax

Provision No. 126 of the Tax Code contemplates the possibility of requesting, before the IRS, the return of taxes based on: (1) correcting the taxpayer's errors, (2) acquiring restitutions of sums paid twice, excessively, or in an unduly manner in terms of taxes, readjustments, interests and fines, and (3) restitution of burdens mandated by promotion laws or tax exemptions. The deadline to file return requests, based on the aforementioned cases, is of three years after the date in which the act or event which serves as grounds for the request took place.

Should the return request be denied by the IRS, the ruling containing said rejection may be contested before the tax and customs courts in accordance with that set forth by Title III, Paragraph ii, and, furthermore, should said claim also be denied, said rejection may be challenged, as appropriate, before the Court of Appeals or the Supreme Court.

In turn, provision No. 128 of the Tax Code establishes that amounts unduly transferred or increased, or paid in excess by the taxpayers in terms of taxes, will enter the state coffers, denying the possibility to request their return, unless it is reliably proven before the Director of the IRS that said amounts were restituted in favour of those who actually endured the undue burden.

ii Challenging administrative decisions

Provision No. 26 of the Tax Code contemplates a safeguard rule in favour of the taxpayers, by virtue of which, if the taxpayer performed a certain act protected by a previous decision issued by the fiscal authority, no tax charge backs may be collected against said taxpayer. The above, so long as the taxpayer has acted in good faith, based on an official interpretation made by the Director of the Internal Revenue Service or by the Regional Directors, and applying said interpretation to a comparable situation. The above stated, so long as the interpretation is recognised in circular resolutions, judgments, reports, or any other official document destined to issue out instructions.

Notwithstanding the above, in the event that the Internal Revenue Service considers that the taxpayer acted under a declaration that does not apply to his or her particular situation, and as long as a decision is passed by which a liquidation, tax transfer or resolution is issued regarding payment of taxes, the taxpayer may file a claim before

the tax and customs courts, in accordance with that stated by Title III, Paragraph ii, and, furthermore, should said claim also be denied, the taxpayer may challenge said decision before the corresponding appeals court or the Supreme Court, as appropriate.

iii Claimants

In compliance with that stated by provision No. 124 of the Tax Code, anyone with actual interest may file a claim against a liquidation, tax transfer, payment or resolution that may affect payment of a tax, or that affects the elements which serve to determine said payment. In general, it will be the recipient of the administrative act who shall file a claim, a situation that does not prevent others from filing claims, as long as they have an actual interest regarding the administrative act.

However, given that the act will be notified to the affected party (the taxpayer), it is difficult for a situation to present itself in which a third party may challenge the act, even having an actual interest, merely given that said third party will not possess knowledge of the existence and content of the act.

VI COSTS

In Chile, there are no associated costs with the challenging of an act by the fiscal authority before the tax and customs courts, neither are there associated costs in filing appeals before the appeals court nor in filing extraordinary appeals on points of law before the Supreme Court. Nonetheless, in the first and second instance, as with the filing of recourses before the Supreme Court, the losing party may be sentenced to pay all personal legal expenses relative to attorney fees, as well as all procedural costs, such as experts' reports requested by the taxpayer, should the taxpayer lose the trial. In Chile, procedural expenses do not include the judge's fees, but they do include those of other personnel employed in the administration of justice (such as process servers, whose function in general terms – which does not apply to tax claims – is of notifying lawsuits, rulings, carrying out repossessions, etc.).

However, there are no uniform or mandatory criteria to guide the judges in their fixing of attorney fees or court costs that the IRS, as a losing party, may be sentenced to pay (and they rarely cover the taxpayer's actual expenses). The courts will usually set a very low amount for the payment of said costs (and which will either equate to a low percentage of the contested amount (1 per cent)) or, should the contested amount be of higher value, it will be set by other random mechanisms.

VII ALTERNATIVE DISPUTE RESOLUTION

During the auditing stage before the IRS, the usual way in which disputes are solved is to voluntarily or forcibly cause the surrendering of omitted declarations, or the rectification of surrendered declarations, so as to complete the payment of the remaining taxes. During said stage it is possible for auditors to partially go over the taxpayers' justifications, this is so as to reach a prompt end regarding the auditing, as well as to acquire payment of the debt. In this sense, the IRS possesses the necessary faculties to partially or completely

remit the interests and fines associated with the non-payment or the untimely payment of taxes, this becoming an efficient tool in many cases in which surcharges may increase, even doubling, the original debt.

However, and in administrative proceedings, should rectification or surrendering of tax declarations by the taxpayers not be carried out in a satisfactory manner according to the Internal Revenue Service, then said entity will have to reasonably determine what differentials to impose, whether it be through liquidation, tax transfer or resolutions which, once notified to the taxpayer, may be accepted or challenged before the competent tax and customs court.

Before the jurisdictional claim, the taxpayer may file an administrative motion for reversal before the fiscal authority, to correct errors or infringement of requirements in the contested acts. Said instance contemplates the possibility of carrying out a conciliation hearing. In these hearings, the administration may partially agree to the modification of the taxpayer's claims, issue different levels of surcharge remission, agree to the surrendering of rectification declarations, as well as taking any other measures.

Within the jurisdictional procedure there is no alternative system to solve tax disputes. However, a bill is currently being discussed in Congress, which would incorporate, within the actual judicial procedure, a mandatory formality consisting of conciliation before the tax and customs judge.

VIII ANTI-AVOIDANCE

In Chile, tax evasion – an offence subject to private criminal prosecution – constitutes the basic tax offence, and its entitlement falls exclusively on the Director of the IRS. Consequently, the taxing administration is permanently questioned over the manner in which it exercises the above stated power. The tax criminal offence is of a mixed nature, given that its sanction is both depriving or restricting of liberty and, conjointly, of a monetary nature. Given the above is that the tax authority may opt, considering all gathered elements, to deem the offence as one deserving of a criminal claim, in which case the investigation and later application of both sanctions is to be carried out by the Public Prosecution Ministry or, on the other hand, the tax authority may choose to merely serve notice of an administrative claim, so that the tax and customs courts may trial said claim sanctioning solely with a penalty payment.

However, the possibility remains – in the majority of cases – that the IRS may choose not to file a claim to start either a criminal or administrative procedure regarding evasion conducts. Instead, the IRS will choose to merely collect the civil payment of eluded taxes. Said civil collection of payment is carried out through the issuance of a liquidation or tax transfer, as is appropriate. In any case, the collecting of taxes and the corresponding sanction carried by evasion follow separate and parallel paths.

The fact that the gathering of records and information is entrusted to the IRS, so as to afterwards denounce the offences before the Public Prosecution Ministry, results in the situation now faced in Chile, in which the filing of claims for tax evasion hardly exceeds 100 claims a year, hence shifting human and economic resources from their natural auditing function to one of criminal investigation.

In recent years, the IRS has been subject to political questioning and has been seen in constant conflict with the Public Prosecution Ministry, due to the committing of criminal tax offences regarding political financing. The IRS has been accused of unnecessarily omitting or delaying the corresponding filing of claims.

Notwithstanding the above, and outside the criminal scope, through the enactment of Tax Reform Act No. 20,780 a general anti-evasion rule was incorporated, one that has been in force since 30 September 2015. This rule radically changed the Chilean system in which, historically, if the legislator detected recurring evasive manoeuvres by taxpayers, it would call for the norm's particular correction through specific and concrete measures.

Consequently, the general anti-evasion rule has brought about a change in paradigm, and the application of said norm has given rise to a series of questions, such as the prospective decriminalisation of tax evasion – given that the drafting of the norm is similar to that of the tax crime – or its scope of application, particularly regarding those acts or contracts which, although they were concluded before the norm's entry into force, may subsequently create tax effects afterwards.

IX DOUBLE TAXATION TREATIES

Chile has subscribed to a considerable number of double taxation treaties (DTTs), following the OECD's model with certain deviations towards the UN's model. Currently, Chile maintains 25 DTTs in force, as well as six DTTs that it has subscribed to but that are not yet in force. Regarding the latter, the DTT subscribed in 2010 with the USA stands out, treaty which after five years of internal procedures within both countries is on the verge of coming into force.

Upon issues relative to interpretation that come about through the application of the above mentioned treaty, and, furthermore, having exhausted all mechanisms contemplated by the treaty itself, the Internal Revenue Service has made use of the commentaries to the OECD's model. The use of said commentaries is based on that stated by provisions No. 31 and 32 of the Vienna Convention regarding the law of treaties, yet a proviso to the effect that no uniformity exists within administrative declarations regarding the treaty's binding force.[9] However, the OECD's model and its commentaries are a valid source for the interpretation of DTTs, in addition to the application of internal law when it is pertinent to the meaning expressed in the treaty.

X AREAS OF FOCUS

As a result of recent events regarding irregular financing in politics, as well as the questioning suffered by the Internal Revenue Service from public scrutiny given the delay in the filing of claims relative to said acts, there is now particular emphasis placed

9 Administrative declarations which took away value from the OECD's model and commentaries were based on the fact that Chile was not a member of said organisation, situation that changed in 2010 with the incorporation of Chile into the OECD.

on all taxpayers' acts or conducts that constitute tax criminal offences. Hence, a more severe attitude has been perceived regarding said conducts, unlike past times in which offences would have merely been sanctioned with the civil collection of taxes.

From another perspective, there has been a change of criteria regarding the additional tax that the taxpayers residing in Chile must retain in case of purchase or acquisition of broadcasting rights, or the marketing of material to be exhibited in cinema or television. The above, given that the tax authority has established, in recent times, that said cases fall under the royalties included in provision No. 59 Section 1 of the Income Tax Law, with a withholding rate of 30 per cent, although Section 2 of the mentioned provision specifically regulates this situation with a reduced rate of 20 per cent.

Likewise, the IRS focuses much of its efforts on the supervision of tax losses that are used by the taxpayers so as to request tax returns, as well as in processes of investment justification in which taxpayers' – during a determined period of time – concentrate a certain amount of investments that are not in accordance with their declared income.

Finally, during this past year, an aggressive auditing plan has been set forth to fight back-to-back financing (financing made by related companies through financial institutions). Given the above, the IRS, instead of verifying proper compliance with thin capitalisation rules in force specifically for these purposes, is now focusing on directly rejecting expenses associated with this type of financing structure, a stance that openly opposes that established by the Income Tax Law.

XI OUTLOOK AND CONCLUSIONS

Currently Chile is going through profound changes regarding its tax legislation, changes introduced by Tax Reform Act No. 20,780, legislation through which important modifications were introduced to the Income Tax Law, the Sales and Services Tax Act, and the Tax Code. In this sense, alternative taxing systems were established for companies, the first category income tax rate (companies) was increased, limits were established for the return of taxes resulting from loss absorbency, the carryback was eliminated, a general anti-evasion rule was incorporated, the IRS's auditing faculties were extended, controlled foreign corporation rules were incorporated, and thin capitalisation rules were modified, among many other modifications.

However, the tax reform has not been free of criticism, during its promulgation not all commerce and industry sectors were consulted, nor was there the dialogue and consensus necessary to carry out such significant reform. This has resulted in uncertainty regarding the reform's real effects on the local market and investments from abroad. Notwithstanding the above, a change of attitude from the government can be observed, given the existence of a bill destined to improve the tax reform, this time with the participation of actors from the private sector, scholars and experts.

Appendix 1

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Patricio Silva-Riesco is director at Philippi Prietocarrizosa & Uría, and the head of the tax dispute resolution group of the firm. Prior to join Philippi Prietocarrizosa & Uría, he worked in the Chilean IRS since 1992 until 2011. When he left the Chilean IRS he was National Chief of Tax Litigation and Crime Prosecution. In that position he had to implement the transition into the new tax courts, including the litigation of the first cases ever litigated in those tax courts in different parts of the country.

Mr Silva-Riesco gained his law degree in Universidad Central, holds a master's degree in tax management of Universidad Adolfo Ibáñez, a master's degree in tax administration and treasury from the Instituto de Estudios Fiscales (Madrid) and a master's in tax law from the Universidad de Chile.

He is professor of the course on tax prosecution and tax assessments of the master's in tax management of Universidad Adolfo Ibáñez and professor of the master's in tax law of Universidad de Chile. He is also co-author of the book El Delito Fiscal en América Latina (Madrid).

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Arturo Selman is a senior associate at Philippi Prietocarrizosa & Uría. His work focuses on resolving tax disputes in the administrative and judicial stages of the process. Prior to join Philippi Prietocarrizosa & Uría, he worked at the tax litigation office of the legal subdepartment of the Chilean IRS, as attorney of the Chilean IRS before the tax courts and the Supreme Court.

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