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 9

DOMINICAN REPUBLIC

Christoph Sieger and Fabio J Guzmán-Ariza[1]

I INTRODUCTION

The Dominican Republic is a unitary state with a central government. Taxes can only be levied by the Congress of the Dominican Republic,[2] and collected by the Bureau of Internal Revenue (DGII) under the supervision of the Ministry of Finance (Law 227-06). Taxation is governed by Law No. 11-92 of 31 May 1992, commonly known as the Tax Code, as amended, by regulations issued by the Executive Branch, and by resolutions adopted by the DGII. The Dominican Tax Code establishes the general rules for all the administrative and judicial procedures, and established the main taxes – income tax, capital gains tax, value-added tax, property tax, luxury tax, corporate asset tax – based on a simple, territorial system where the taxes are levied at the source.

The Constitution of the Dominican Republic establishes an equal protection clause for non-Dominican citizens and investors:[3] Article 25 of the Constitution expressly states that foreign nationals are entitled to the same rights and duties in the Dominican Republic as Dominican nationals, except – understandably – for the right to take part in political activities.[4] Article 221 of the Constitution sets forth that the government will ensure equal treatment under the law for local and foreign individuals and companies.

1 Christoph Sieger is a partner and Fabio J Guzmán-Ariza is the managing partner at Guzmán Ariza, Attorneys at Law.

2 There are some exceptions; for example, municipalities impose or collect taxes for construction or advertising. The Dominican Congress is bicameral; it is composed of a Senate and a Chamber of Deputies.

3 Individuals or entities.

4 Bases on this principle, the Dominican Constitutional Tribunal struck down an old statute that established a higher inheritance tax for non-resident foreigners.

Although tax evasion is only sanctioned with criminal penalties in cases of intentional tax fraud, tax compliance has been steadily on the rise due to the invoicing system established for the collection of VAT:[5] any expense can only be claimed and deducted if supported by an official invoice with an official number registered and granted by the DGII. This system was introduced in 2007 and has revolutionised the Dominican tax system, providing the tax authorities with a powerful tool to detect evasion of VAT and income tax, both for individuals and entities. Due to this and many other procedures, the DGII is considered by many the most modern and organised of all the public offices in the Dominican Republic.[6]

Tax disputes are usually avoided for the following reasons: (1) any taxpayer can request from the DGII a formal and binding opinion for his or her particular case beforehand;[7] (2) the fines and interest for late payments can very often be negotiated with the DGII;[8] (3) before starting litigation, there is a mandatory administrative procedure that suspends the possible tax obligations and gives both parties the opportunity to explain their positions and settle the dispute. In general, only cases that involve fundamental legal questions[9] or that are clear-cut[10] end up in court: taxpayers are well aware that litigation does not stop interest and fines from accumulating, although it does prevent the tax authorities from collecting while it is pending.

II COMMENCING DISPUTES

The process usually starts without any prior warning with a written notice by the DGII to the taxpayer assessing the taxpayer's liability under a particular statute.[11] The liability could arise from not filing a specific tax return – such as the yearly income tax return, monthly tax return for VAT or a specific declaration in regards to transfer pricing rules[12] – from not paying a specific tax, such as the property tax, corporate asset tax, VAT, capital

5 The Code establishes the ITBIS, the Dominican value added tax (VAT), in the amount of 18 per cent on most services and transfer of goods.

6 The official website of the DGII (www.dgii.gov.do) is one of the most visited websites in the DR, containing the most relevant information for the taxpayers and also allowing them to file their tax returns on line.

7 This can serve as an advanced clearance.

8 The capital gains taxes for the sale of Verizon Dominicana were negotiated directly between the Dominican President, Leonel Fernandez, and the Minister of Foreign Affairs of the US, Condoleezza Rice.

9 For example: Collecting taxes on dividends from the shareholders of Free Zone operators or upholding the US$200 threshold for internet purchases from abroad.

10 For example, imposing taxes by Presidential Decree.

11 Article 64 of the Tax Code.

12 The Dominican Republic has extensive transfer pricing rules and there is a coordinated effort to crack down on transfer pricing schemes, especially in the hotel and tourism industry.

gains tax, etc., or from the DGII disputing a filed return. The notice establishes a new deadline for the pending tax return or the specific amount of tax that is due, assessing the taxpayer with the corresponding fines for the non-compliance.

Upon receipt of this notice, the taxpayer can immediately either start to negotiate a settlement with the DGII or file an objection within 20 days,[13] attaching all the necessary documents and evidence. Once the objection is filed, the payment of the taxes and penalties are suspended until the DGII has ruled on the objection. Upon request by the taxpayer, the DGII can grant an additional 30 days to the taxpayer to substantiate the objection. The DGII has to decide on the objection within three months. After this internal administrative ruling, the DGII can start the collection procedure and attach the assets of the taxpayer.[14]

This procedure applies to all taxpayers and all taxes. The general statute of limitations for tax collection is three years,[15] starting one day after the filing or the payment was due.[16]

III TAX COURTS

If the DGII rejects the objection filed by the taxpayer, a recourse can be filed in the Tax Court against the administrative ruling within 15 days. The decision of the Tax Court, composed of a minimum of three judges, is subject to review as follows: (1) review by the same tax court under specific circumstances;[17] 2) cassation procedure at the Third Chamber of the Supreme Court;[18] (3) Review by the Constitutional Court.[19]

In cases of excessive delays of the DGII to resolve certain matters, the taxpayer can file the writ of *amparo*, a quick and inexpensive remedy for the protection of constitutionally protected rights. In tax matters, this is filed at the same Tax Court as other matters; the decision by the Tax Court is subject to appeal before the Constitutional Court.

In case of urgency when no constitutional issue is involved, the taxpayer can seek an injunction in the Tax Court.

All cases in Dominican courts are decided by judges, not by juries. Judges rule based on the texts of the Constitution and existing statutes, the precedents of the Constitutional Court (which are binding), and the precedents of other courts (which

13 'Recurso de reconsideración' in Spanish (Article 57 of the Tax Code).

14 Article 57 of the Tax Code.

15 Article 21 of the Tax Code.

16 Article 22 of the Tax Code.

17 Decision based on false documents or new documents becoming available after the ruling, etc. (Article 168).

18 The Third Chamber of the Supreme Court, as the other two chambers, is composed of five judges. Three of them have to rule on each case.

19 In case of constitutional issues. The Constitutional Tribunal consists of 13 judges; cases are adjudicated with a super majority of nine or more members.

are not binding). They do not rule in equity, as in some common law countries, but the principle of good faith is recognised by statutory law, which grants courts some discretion.

IV PENALTIES AND REMEDIES

The Tax Code distinguishes between fines, for simple non compliance, and criminal sanctions, in case of intentional tax fraud. According to Article 46 of the Tax Code, the DGII can impose fines on the taxpayer without prior authorisation from the courts. As mentioned before, non-compliance notices usually contain a fine: for example, a fixed amount of approximately US$565[20] for a pending income tax return, or a percentage of the taxes owed per month (11.1 per cent for the first month and 5.1 per cent for each following month). In case of tax evasion, there can be an additional fine of up to twice the amount of taxes owed.

Only in cases of intentional tax fraud[21] are criminal penalties triggered. They consist of penalties between two and 10 times the amount of the evaded tax and imprisonment of between six months and two years. These penalties must be imposed by a court, following criminal proceedings.

V TAX CLAIMS

i Recovering overpaid tax

The Tax Code provides a specific procedure for the return of any amount paid in excess or paid without an obligation to do so. The Tax Code actually obligates the executive branch to set up a special fund to reimburse the taxpayer in these cases.[22] The taxpayer can file for the refund at the DGII in an administrative procedure, provided that he is up to date with all his fiscal obligations. The DGII has to rule on the request within two months. In the normal course of events, the DGII either rejects the request, which can then be appealed before the Tax Court, or just does not respond. In this latter case, the amount of the requested refund automatically becomes a tax credit, allowing the taxpayer to compensate it against future taxes.

ii Challenging administrative decisions

The same procedure applies as described above.

20 The exact amount in Dominican pesos is 25,790.

21 For example, having two sets of books,

22 Article 265 of the Tax Code. The amount is 0.5 per cent of the total amount of taxes collected each month. In reality, this fund does not exist and refunds in cash are very rare.

iii Claimants

The persons liable for the tax obligation, the corresponding possible fines and criminal penalties are, in addition to the taxpayer, their legal representatives, their assistants, their withholding agents and the persons who acquire assets from them in transactions subject to taxation.[23]

VI COSTS

The costs of any dispute, administrative or judicial, consist basically of the legal fees for the attorney. These fees can usually not be recovered from the opposing party, no matter the outcome of the administrative or legal procedure. With the exception of the general procedures at the Tax Court against the ruling of the DGII, all other legal procedures (*amparo*, cassation, reviews) do not generate court costs for any of the parties involved.

VII ALTERNATIVE DISPUTE RESOLUTION

There is no alternative dispute resolution in tax matters in the Dominican Republic. Law 489-08 on Commercial Arbitration explicitly prohibits arbitration in public matters such as tax matters.

VIII ANTI-AVOIDANCE

The Tax Code includes a general anti-avoidance provision whereby the tax authorities may ignore the existence of legal entities or certain transactions when used to secure a tax advantage, based on the substance over form doctrine.[24] However, the provision has been applied only in high-profile cases, such as the sale by Verizon of the largest phone company in the country. Verizon argued that no capital gains taxes were due since the transaction was done through the sale of shares in an offshore company, outside of the territory of the Dominican Republic, that controlled the Dominican subsidiary. The DGII countered that the only purpose of the transaction was the acquisition of the local telecom business of the company, and that, therefore, capital gains taxes had to be paid, the real purpose of the offshore corporate structure being to artificially locate the capital gains in an offshore jurisdiction. The case was settled and Verizon paid a substantial amount of the original sum demanded by the DGII. As a result of this case, the Tax Code was amended and now expressly states that the sale of shares of foreign companies having assets, directly or indirectly, in the Dominican Republic are to be considered as taking place in the Dominican Republic, and therefore subject to Dominican capital gains taxes.[25]

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23 Article 11 of the Tax Code.

24 Article 2 of the Tax Code.

25 From a legal perspective, it is questionable whether this amendment was really necessary. In our opinion, the general anti-avoidance rule was and is sufficient.

With the tax reform of 2012, much more extensive transfer pricing rules were established and, for the first time, rules on thin capitalisation. The later has not yet become an area of focus for the DGII. Transfer pricing instead has become one of its priorities.

IX DOUBLE TAXATION TREATIES

The Dominican Republic has signed and ratified two double taxation treaties: with Canada, in 1977, and with Spain, in March 2014. The treaty with Canada only covers income taxes, and has become obsolete in regards to taxes on dividends since the 2012 tax reform abolished the provision to avoid double taxation on company profits and introduced a 10 per cent dividend tax. The new treaty with Spain deals with all the possible taxes on income, but not with VAT. Considering that many hotel owners and operators in the Dominican Republic are Spanish, the treaty with Spain has much more relevance than the one with Canada.

X AREAS OF FOCUS

The main focus of the DGII is on collecting VAT taxes and income taxes through the invoicing system described above in the introduction. Since only expenses supported by an official invoice can be deducted for tax purposes, businesses are forced to use these official invoices, which are then automatically subject to VAT and income tax. In addition, services rendered by foreigners in the Dominican Republic, for example, in the tourism or mining industry, can now easily be identified and taxed correspondingly.

Capital gains are also being targeted by the DGII in corporate transactions, such as sale of shares, contribution in kinds or acquisitions and mergers. Very often, the necessary approval of the transaction by the DGII already provides an assessment of the capital gains taxes due.

In the area of tax avoidance, the most targeted scheme is transfer pricing. There has been a coordinated effort to crack down on transfer pricing schemes, especially in the hotel and tourism industry. The Dominican Republic now has extensive rules on this matter, and the DGII is determined to find and eliminate any possible schemes. Other schemes of tax avoidance like treaty shopping, dividend stripping or controlled foreign corporation schemes to park dividends abroad are still not targeted by the DGII, mainly because no specific rules exist in this regard.

A final area of focus is the transfer tax for real estate and vehicle sales. During the last decade, the DGII has established minimum fiscal values for these transactions to eradicate the old habit of using two sets of contracts: one with the true price and one with a lower price for tax purposes. Also, there is now a six-month deadline to pay the tax, and fines in the case of non-compliance.

XI OUTLOOK AND CONCLUSIONS

There is no doubt that the authorities in the Dominican Republic are focused on increasing tax compliance and collection. Considering the growing debt of the country, the IMF has for years been pressuring for better results in both areas, and has tried to convince the Dominican Republic to abolish tax exemption laws, especially the ones benefiting the tourism industry (Law 158-01). Considering that the Dominican Republic recently extended these incentives, the pressure by the IMF and the international community to collect taxes is higher than ever. There is still a large part of the economy that is operating in the shadows, outside the official invoicing system. There have been many suggestions and ideas to change that through an extensive tax reform, but so far nothing concrete is on the table.

It is likely that there will be new double tax treaties in the future, especially with the United States and other countries of the European Union.

With these possible developments, tax planning and tax consulting will become more and more important for anyone doing business in the Dominican Republic, confirming once more that tax law shapes the nature of almost every important business transaction and has a significant impact on the way corporations behave.

Appendix 1

ABOUT THE AUTHORS

CHRISTOPH SIEGER

Guzmán Ariza, Attorneys at Law

Christoph Sieger is resident partner of the firm in the Bávaro, Punta Cana office and head of the firm in the eastern region of the Dominican Republic (Punta Cana, Bávaro, La Romana, Bayahibe, Miches). He received his doctorate in law at the Christian Albrechts University in Kiel, Germany (*magna cum laude*). He later did postgraduate studies in international tax law at the Robert Kennedy University in Zurich, Switzerland and obtained his degree in Dominican law at UAPA University in Santiago, Dominican Republic (*magna cum laude*).

His international background and legal training – doctorate in German law, postgraduate studies in international tax law in Switzerland, law degree in Dominican law – provide him with a unique perspective: understanding the needs, expectations and concerns of the foreign investor in the Dominican Republic, while knowing the ins and outs of its legal system and customs.

Dr Sieger is the legal adviser to major international hotel chains, resorts, condominium projects, and real estate developers on real estate, tourism, corporate, construction, labour and tax matters. He is also an expert on international taxation and estate planning.

He lectures nationally on tax and corporate law and internationally on Dominican real estate law. He is currently the President of the Dominican German Chamber of Commerce.

FABIO J GUZMÁN-ARIZA

Guzmán Ariza, Attorneys at Law

Fabio J Guzmán-Ariza is the managing partner of the Guzmán Ariza law firm. He is a graduate of the Massachusetts Institute of Technology and the PUCMM law school in Santiago, Dominican Republic (LLB, *summa cum laude*, 1981), where he headed his law class. Mr Guzmán-Ariza is a former professor of civil law and dean of the Law Faculty at the Universidad Católica Nordestana, and a former judge in the Disciplinary Committee of the Dominican Bar Association. Presently, in addition to his duties at the firm, he is the editor and director of publications of *Gaceta Judicial*, the leading legal journal publisher in the Dominican Republic, arbitrator at the Chambers of Commerce in Santo Domingo and Santiago, Dominican Republic, and one of the most important authors on the Dominican legal system.

Mr Guzmán-Ariza has published extensively on matters of real estate law, civil procedure, company law and legal drafting, including the following books: *Real Property Registration Law 108-05 Annotated*, *Condominium Law 5038 Annotated*, *The Language of the Dominican Constitution*, *The Procedure by Default in Civil and Commercial Matters*, *Company Forms*.

As an expert on legal drafting, he prepared the final text of the Criminal Code of the Dominican Republic, enacted in 2014, and is presently reviewing the text of the proposed new Civil Code of the Dominican Republic. Mr Guzmán-Ariza is a numerary member of the Dominican Academy of Letters, and a corresponding member of the Royal Spanish Academy, and is a coauthor of the *Dictionary of Dominican Spanish*.

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