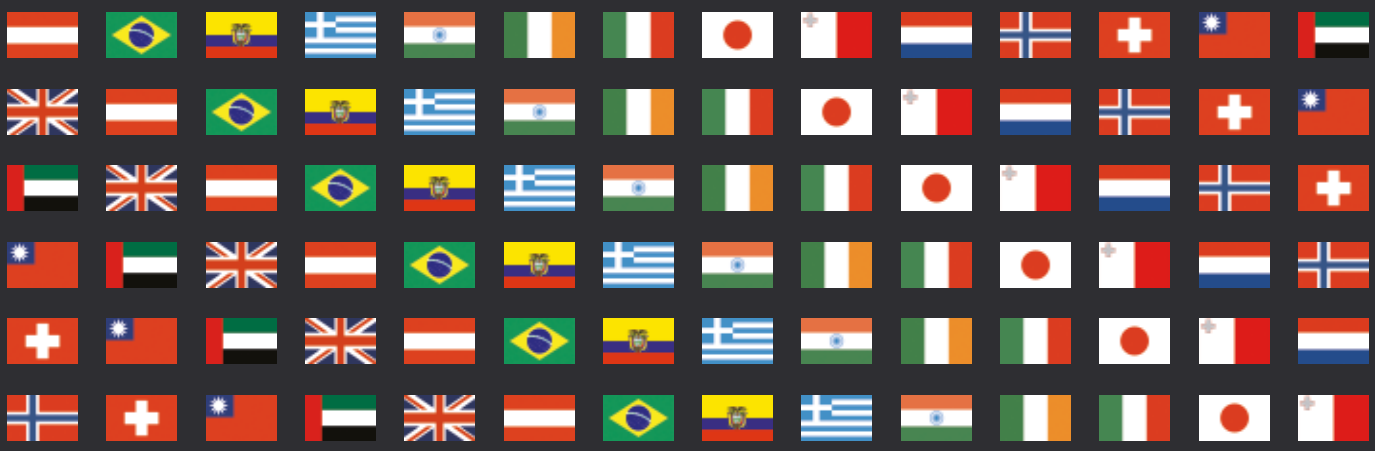
Tax Controversy 2021

Contributing editor
Richard Jeens



LEXOLOGY
Getting The Deal Through

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Lexology Getting The Deal Through is delighted to publish the eighth edition of *Tax Controversy*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Ecuador and Taiwan.

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Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editor, Richard Jeens of Slaughter and May, for his continued assistance with this volume.

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Getting The Deal Through

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Japan

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Anderson Mōri & Tomotsune

OVERVIEW

Legislation

1 What is the relevant legislation relating to tax administration and controversies? Other than legislation, are there other binding rules for taxpayers and the tax authority?

Relevant tax acts

Articles 30 and 84 of the Japanese Constitution require that all taxes be imposed by acts of the Diet. The legislation that is relevant to the procedural aspects of taxes in Japan includes:

- the National Tax General Rule Act (Act No. 66 of 1962), which deals mainly with matters generally related to national taxes, such as time limits for the tax authority to issue tax assessments, penalties for failure to file tax returns and rules on tax audits;
- the National Tax Collection Act (Act No. 147 of 1959), which stipulates the procedures for collection of national taxes; and
- the National Tax Violation Control Act (Act No. 67 of 1900), which sets out the criminal procedures related to evasion of national taxes.

Some pieces of legislation that mainly deal with substantive aspects of national taxes also provide procedural rules related to national taxes, such as the Income Tax Act (Act No. 33 of 1965), the Corporation Tax Act (Act No. 34 of 1965), the Inheritance Tax Act (Act No. 73 of 1950), the Consumption Tax Act (Act No. 108 of 1988) and the Act on Special Measures Concerning Taxation (Act No. 26 of 1957).

Other legally binding rules

Tax treaties

Tax treaties that have been concluded by the cabinet and approved by the Diet are given full force in Japan. As a member of the Organisation for Economic Co-operation and Development (OECD), Japan adopts provisions that are in line with the OECD Model Tax Convention when concluding treaties with other countries. As of 1 July 2020, Japan has concluded 76 tax treaties that are applicable to 139 jurisdictions and designed to avoid double taxation, prevent tax evasion and foster the exchange of information and assistance in collection of taxes. Furthermore, the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting' came into effect in January 2019. As of 13 May 2020, Japan has adopted most parts of this treaty and selected 40 jurisdictions as applicable areas.

Cabinet orders and ministerial ordinances

The cabinet can, within the powers granted to it under the relevant acts, enact cabinet orders to implement the acts. Similarly, ministers can, within the powers granted to them under the acts or cabinet orders, enact ministerial ordinances to implement acts and cabinet orders.

Legally unbinding but practically respected rules

Administrative circular

The Commissioner of the National Tax Agency (NTA) issues circulars, which are directives to officials of the NTA and its subordinate bureaus to provide a uniform interpretation and application of tax laws. However, circulars are merely interpretations by the tax authority and are not binding as a source of law.

Court precedents

The courts' interpretations of tax laws are not binding as a source of law. The interpretations of the courts, especially those of the Supreme Court, are generally respected in practice as an authority to support one's position.

Relevant authority

2 What is the relevant tax authority and how is it organised?

The NTA, which is an extra-ministerial bureau of the Ministry of Finance, is the primary governmental agency with respect to national taxes. The NTA has a three-tier organisational structure: the head office; 11 regional taxation bureaus and Okinawa Regional Taxation Office; and more than 500 tax offices. Local governments, their subordinate prefectural tax offices, city offices and town and village offices handle matters regarding local taxes.

ENFORCEMENT

Compliance with tax laws

3 How does the tax authority verify compliance with the tax laws and ensure timely payment of taxes? What is the typical procedure for the tax authority to review a tax return and how long does the review last?

The tax authority verifies compliance by reviewing filed tax returns and conducting field examinations, which are audits conducted at the taxpayer's site. While reviews are generally handled by tax offices, corporations with over ¥100 million in capital and foreign corporations are subject to review by regional taxation bureaux.

If a review reveals a failure to file tax returns or underreporting of the tax amount, the taxpayer is usually contacted by a tax officer and instructed to file a return stating the correct tax amount and paying the unpaid tax (with a penalty, if applicable). In other cases, taxpayers are subject to field examinations that are conducted at their site. The National Tax General Rule Act requires, in principle, the tax authority to give the taxpayer notification before the tax officer's visit to the taxpayer's site. A field examination can last from a few days to more than a year, depending on various factors, such as the scale of the business operated by the examined taxpayer. A field examination generally involves studying the books, accounting records and inventories of the taxpayer, and

interviewing the taxpayer's employees. These interviews are conducted under the power to access the relevant book records and other materials and to ask questions. In field examinations of business entities or individuals operating businesses, the examiners investigate all income tax concurrently, including tax that should have been withheld, corporation tax and consumption tax. At the end of a field examination, the tax authority issues a disposition to impose the tax that the taxpayer should have reported in the returns for the previous years, or a document that no disposition is imposed on the taxpayer.

Types of taxpayer

4 | Are different types of taxpayers subject to different reporting requirements? Can they be subjected to different types of review?

The reporting requirements for all taxpayers are generally the same. However, upon approval of the head of the relevant tax office, taxpayers can file 'blue returns' for income tax and corporation tax. A taxpayer who has received approval to file a blue return is granted certain privileges, such as a deduction of ¥100,000 or up to ¥650,000 from the amount of income. At the same time, individual taxpayers who file blue returns are obliged to attach their balance sheet, income statement and other documents containing sufficient details to calculate their income, to the returns. In contrast, individual taxpayers who file white returns (ie, tax returns that are not blue returns) are only required to submit documents explaining their gross income and deductible expenses.

There is no substantial difference between reviews of blue returns and white returns. Approval to file a blue return places an obligation on the taxpayer, which is stricter than that imposed on white return taxpayers, to keep book records of its transactions in the manner specified by the relevant ministerial ordinances. The tax authority can request the records from blue return taxpayers in tax audits. In this sense, taxpayers filing blue returns have more obligations at a review than those filing white returns.

Requesting information

5 | What types of information may the tax authority request from taxpayers? Can the tax authority interview the taxpayer or the taxpayer's employees? If so, are there any restrictions?

The National Tax General Rule Act provides that the tax authority may ask the taxpayer and certain persons specified by the Act (eg, persons to whom the taxpayer is or was obligated to pay money) to submit or present the relevant book records and other materials, which generally include business books and records, financial information and copies of transaction documents. The tax authority is likely to interpret the phrase 'book records and other materials' as authorising the auditors to access a wide range of information. However, the power to request information from taxpayers is restricted by the requirement of necessity.

The Act empowers the tax authority to ask questions to the taxpayer and the persons specified by the Act. Under this rule, the tax authority can interview the taxpayer and its employees. As with the power to access book records and other materials, the power to ask questions is also subject to the requirement of necessity.

Available agency action

6 | What actions may the agencies take if the taxpayer does not provide the required information?

The agencies are prohibited from intruding on any private premises or auditing any materials without the consent of the taxpayer. However, a taxpayer is punishable by imprisonment for up to one year or a fine of up to ¥500,000 if the taxpayer fails to provide an answer, provides a false answer or obstructs an audit. If the matter concerns tax evasion, which is subject to criminal punishments, the agencies can obtain court approval to access private premises or materials without the taxpayer's consent.

Protecting commercial information

7 | How may taxpayers protect commercial information, including business secrets or professional advice, from disclosure? Is the tax authority subject to any restrictions concerning what it can do with the information disclosed?

Japanese law does not explicitly protect commercial information or professional advice against tax audits. But the tax agencies are subject to two requirements under the National Tax General Rule Act in their conduct of tax audits: the agencies are allowed to ask taxpayers questions or audit materials only if it is objectively necessary; and taxpayers are criminally punishable only if there are no reasonable grounds to refuse the agencies' request for materials or copies of the materials. These two requirements of necessity and lack of reasonable grounds function, to a certain extent, as protection of commercial information and professional advice. It is an open question as to whether a duty of confidentiality provides professionals, such as accountants or attorneys, with reasonable grounds to refuse the agencies' requests, although a few judicial decisions seem to deny the existence of reasonable grounds.

National public officers who are in charge of tax matters are subject to a duty of confidentiality regarding what they know in relation to the review. A national public officer could face imprisonment for up to two years or a fine of up to ¥1,000,000 if he or she breaches such duty.

Limitation period for reviews

8 | What limitation period applies to the review of tax returns?

The National Tax General Rule Act provides that the statute of limitation on assessment is five years from the statutory due date of tax return. This general rule does not apply to certain cases, such as cases of tax evasion (seven years) and situations to increase or decrease the amount of net loss (10 years). The Act further exempts cases where certain events that occur after the statutes of limitation under the general rule have expired. For example, if a tax had been reported based on a transaction that brought about an income, and the income was later returned due to invalidity of the transaction, the limitation is three years from the day that the income was returned.

Alternative dispute resolution

9 | Describe any alternative dispute resolution (ADR) or settlement options available.

There are three methods for a taxpayer to seek resolution of a tax dispute with the government:

- filing a request for reinvestigation;
- requesting administrative review; and
- filing a lawsuit.

The first two are systems of administrative appeal and the last is a judicial appeal system. Besides these options, there are no other systems to resolve tax disputes with the government. Japanese tax laws do not allow the government to settle with taxpayers. However, there are some cases of de facto settlement, in which the government cancels a disposition in exchange for the taxpayer's concession of a related claim.

A request for reinvestigation is generally filed with the administrative agency that has made the disputed disposition. For example, a request for reinvestigation of a disposition of the head of a tax office is filed with him or her. It must be filed within three months from the date of receipt of the notice of disposition. Execution of a disposition is not

suspended by the filing of a request. If the request is upheld, the disposition is cancelled; otherwise it will continue to be valid.

Taxpayers have an option to file a request for administrative review without having filed a request for reinvestigation. If a taxpayer adopts this option, a request for administrative review is filed with the President of the National Tax Tribunal. It must be filed within three months from the date of receipt of the notice of disposition. Otherwise, a request for administrative review may be filed with the President of the National Tax Tribunal by a taxpayer who is not satisfied with the decision received concerning a request for reinvestigation within one month after the decision issuance date, or who has not received any decision concerning a request for reinvestigation within three months from filing the request.

Collecting overdue payments

10 | How may the tax authority collect overdue tax payments following a tax review?

The general process to collect defaulted tax involves the tax authority first sending a collection letter to the taxpayer within 50 days from the original due date. If a payment is not made despite the demand letter, a disposition for non-payment will be instituted. The tax authority will then initiate a procedure to collect the defaulted tax if full payment of the tax due is not made within 10 days after the notice. Without the need for a court permit, the tax authority is allowed to seize the defaulting taxpayer's assets (including claims to a third party, such as a claim for funds in a bank account), convert the assets into money and seize the proceeds derived from the sales of assets. Such money raised is then used to pay the defaulted tax and any remaining amount is returned to the taxpayer or distributed to other creditors of the taxpayer.

Penalties

11 | In what circumstances may the tax authority impose penalties?

If a taxpayer underreports its payable tax amount, fails to file a tax return by the due date or fails to pay withholding tax by the due date, the tax authority will impose additional tax on the taxpayer as a penalty. In the case of tax evasion, additional aggravated tax will be imposed instead of the general additional taxes. Furthermore, a taxpayer who has violated tax laws may be subject to imprisonment of not more than 10 years, a fine of not more than the amount of tax evasion, or both.

12 | How are penalties calculated?

The additional tax for underreporting is 10 per cent of the difference between the unreported and reported taxes (the 'Difference') plus 5 per cent of the difference between the Difference and the larger of ¥500,000 or the reported tax. In the case of a failure to file a tax return, the additional tax is 15 per cent of the unreported tax plus 5 per cent of the difference between the unreported tax and ¥500,000. The additional tax for a failure to pay withholding tax is 10 per cent of the unpaid amount. If a taxpayer files a tax return with the correct tax amount (after filing an earlier erroneous tax return) without having predicted a disposition by the tax authority, additional tax is reduced or not imposed according to the situation of the taxpayer.

For tax evasion, the rate of additional tax as a penalty is increased to 35 per cent (in the case of underreporting tax or not paying withholding tax), or 40 per cent (in the case of non-filing).

13 | What defences are available if penalties are imposed?

Penalties are not imposed if there are reasonable grounds for the taxpayer's non-compliance with the laws. For example, if a certain interpretation of the laws has been customarily established in practice and the interpretation is later found by the court to be a misinterpretation, a taxpayer may be regarded as having reasonable grounds for underreporting the tax amount due to the misinterpretation. However, mere misunderstanding of the laws or reliance on professional advice (eg, legal or accounting advice) does not constitute reasonable grounds.

Collecting interest

14 | In what circumstances may the tax authority collect interest and how is it calculated?

Additional tax is payable on unpaid taxes as interest. The rate of additional tax on unpaid taxes is: 7.3 per cent per annum for the period up to the due date or the period up to the day on which two months have elapsed from the day following the due date; and 14.6 per cent thereafter until the date payment is completed.

Under the current rule, the 7.3 per cent and 14.6 per cent rates are reduced respectively to: 1 per cent plus a certain rate calculated based on the average rate of banks' new short-term loans; and 7.3 per cent plus the certain rate.

Interest tax is also payable on postponement of tax payment, tax payment in kind (to be made after the initial due date), or postponement of due date of tax return. The rate of interest tax shall be generally 1 per cent (0.5 per cent from 1 January 2021) plus a certain rate calculated based on the average rate of banks' new short-term loans.

Criminal consequences

15 | Are there criminal consequences that can arise as a result of a tax review? Are these different for different types of taxpayers?

Two major types of criminal consequences can arise from a tax review. The first is criminal punishment for obstructing a tax audit. A taxpayer who has failed to provide an answer, provided a false answer or obstructed an audit is punishable by imprisonment for up to one year or a fine of up to ¥500,000.

The second is criminal punishment for tax evasion. If a tax review reveals potential tax evasion, the National Tax Agency (NTA) is authorised to carry out a coercive investigation that is similar to the criminal investigation process. The NTA will report tax evasion that it discovers from such an investigation to the public prosecutors for criminal prosecution. A person who is prosecuted and convicted for tax evasion is punishable by imprisonment, a fine or both. The length of imprisonment and amount of fine depends on the type of tax and conduct, but imprisonment is no longer than 10 years and the fine is not more than the amount of tax evasion.

The above does not vary depending on the type of taxpayer.

Enforcement record

16 | What is the recent enforcement record of the authorities?

The NTA announced that, in operation year 2018, the number of field examinations that it conducted at the sites of individual and corporate taxpayers are, respectively, approximately 73,579 (while 22.22 million individual tax returns were filed) and 99,000 (while 2.92 million corporate tax returns were filed). These field examinations revealed unreported income of ¥602. 4 billion in individual income tax and ¥1,381.3 billion in corporation tax. These figures do not include examinations that involved simply contacting and giving instructions to taxpayers. In addition, the tax authorities conduct examinations of other taxes, such as consumption tax, inheritance tax, gift tax and withholding income tax.

THIRD PARTIES AND OTHER AUTHORITIES

Cooperation with other authorities

17 | Can a tax authority involve or investigate third parties as part of the authority's review of a taxpayer's returns?

The tax authority may ask not only the taxpayer but also certain persons specified by the National Tax General Rule Act (eg, persons to whom the taxpayer is or was obligated to pay money) for relevant materials and ask them questions. By exercising this power, the tax authority can involve third parties. Even though taxpayers or third parties do not have any specific rights with respect to the involvement of third parties, the two requirements of tax audits (ie, necessity and lack of reasonable grounds) apply to tax audits involving third parties. The punishment is applicable to third parties, which means that a third party that has failed to provide an answer, provided a false answer or obstructed an audit is punishable by imprisonment for up to one year or a fine of up to ¥500,000.

18 | Does the tax authority cooperate with other authorities within the country? Does the tax authority cooperate with the tax authorities in other countries?

Except that national and local tax authorities share certain information contained in tax returns or statutory reports, there is no law generally authorising the tax authority to cooperate, or share information that it obtained through its operations, with other authorities in Japan. However, there are some acts that explicitly empower the tax authority to do so in specific cases (eg, the Public Assistance Act (Act No. 144 of 1950)). At the same time, it has been strongly argued that the tax authority should not share such information with other authorities due to the duty of confidentiality of all national public officers. The Supreme Court has not issued a clear position on this matter, and therefore Japanese law on this issue remains unclear.

On the other hand, there are relatively clear rules on the cooperation of the Japanese tax authority with authorities of other countries. Under the tax treaties in force, the National Tax Agency (NTA) exchanges information with foreign tax authorities and collects data and information relating to taxpayers, including foreign corporations. In addition, the NTA cooperates with foreign authorities to resolve international double taxation issues.

SPECIAL PROCEDURES

Voluntary disclosure and amnesties

19 | Do any special procedures apply in cases of financial or other hardship, for example when a taxpayer is bankrupt?

There is no single general rule aimed at dealing with taxpayers' hardship. However, some legislation provides rules that are applicable to specific cases of hardship. For example, there is legislation that provides for postponement of the due dates of taxes if certain conditions are satisfied.

Furthermore, the tax authority may suspend collection of taxes from taxpayers in certain kinds of hardship, such as a disaster, an illness or the closing of the taxpayer's business.

In addition to the postponement of due dates and suspension of collection, certain properties are prohibited from being seized to ensure that taxpayers have a minimum standard of living. Therefore, necessities such as clothes, bedding, furniture and also a portion of taxpayers' salaries cannot be seized for national taxes.

20 | Are there any voluntary disclosure or amnesty programmes?

Additional tax as a penalty that is to be imposed on a taxpayer who timely files a tax return to amend a previously filed tax return in which the tax amount was underreported, is reduced to 5 per cent per annum, as long as the taxpayer has not predicted a disposition by the tax authority. In addition, such additional tax is not imposed if the tax return for amendment is filed before a notice for review.

The rate of the additional tax is reduced to 10 per cent per annum if a tax return is overdue but it was not predicted that the tax authority would issue a disposition. In addition, such additional tax is reduced to 5 per cent per annum if the tax return is filed before a notice for review.

The rate of the additional tax on withholding income tax is reduced to 5 per cent per annum if the taxpayer pays the unpaid withholding tax amount without such a prediction.

RIGHTS OF TAXPAYERS

Rules protecting taxpayers

21 | What rules are in place to protect taxpayers?

The Japanese Constitution requires that all taxes be imposed by acts of the Diet. The tax authority is required to give the taxpayer advance notification of the time, place, and purpose of the audit, relevant taxes, relevant years, books and materials to be investigated, and other items specified by the relevant cabinet order, such as the names of the officers.

Requesting information

22 | How can taxpayers obtain information from the tax authority? What information can taxpayers request?

Taxpayers can obtain information from the tax authority under the Act on Access to Information Held by Administrative Organs (Act No. 42 of 1999). It sets out the right of taxpayers to access information held by the government by filing a claim to the head of the relevant administrative organisation, unless the requested information falls under any of the exempted categories specified by the Act, such as information that, if disclosed, will endanger the government's accurate understanding of the facts pertaining to tax collection.

Tax authority governance

23 | Is the tax authority subject to non-judicial oversight?

Tax authorities are supervised by their superior agencies. For example, a tax office is supervised by the regional taxation bureau that has jurisdiction over the relevant region. In addition, tax authorities have a yearly audit by the Board of Audit.

However, there is no procedure for a taxpayer to request oversight by a superior agency or the Board of Audit. Dispositions of tax authorities can be subject to administrative appeal if requested by taxpayers.

COURT ACTIONS

Competent courts

24 | Which courts have jurisdiction to hear tax disputes?

There are no specialised courts for tax-related matters in Japan. Cases relating to tax matters are decided by ordinary courts. The rules under the Administrative Case Litigation Act (Act No. 139 of 1962) stipulate that more than one court can be specified as the forum of jurisdiction in many cases, and they are designed to include the Tokyo District Court as a forum in all cases in which the national government is the defendant.

Therefore, taxpayers can select the Tokyo District Court as the first instance forum for all cases involving national taxes.

Lodging a claim

25 | How can tax disputes be brought before the courts?

Prior to filing a claim with the court to cancel the disposition, the taxpayer is required to have undergone the administrative procedure, which is requesting administrative review. In particular, a taxpayer may file a lawsuit only if: (i) it files a complaint with the court within six months from the date of notice of the National Tax Tribunal's dismissal of the request for administrative review; or (ii) the National Tax Tribunal fails to give a decision within three months of the taxpayer filing a request for administrative review.

In general, a person with a legal interest in the cancellation of the disposition has standing to bring the claim. In most cases, the taxpayer, including a successor of the taxpayer, to whom the disposition was issued, has standing. There is no minimum threshold amount to bring a claim to the courts.

A disposition will be cancelled if the taxpayer or plaintiff's request for cancellation is upheld in a final and binding court decision. In such a case, the government will usually refund any tax that the taxpayer has paid based on the cancelled disposition after the decision of the court becomes final. However, if the government does not do so voluntarily, the taxpayer must file a separate claim for a refund.

Combination of claims

26 | Can tax claims affecting multiple tax returns or taxpayers be brought together?

Taxpayers can bring to court tax claims affecting multiple tax returns or taxpayers. However, this is subject to the requirement of relevance, which is detailed in statute.

Pre-claim payments

27 | Must the taxpayer pay the amounts in dispute into court before bringing a claim?

A disposition is valid until it is cancelled by an authority, including a court. This means that the taxpayer must pay the amount imposed by the disposition even while it is being disputed in court. If the taxpayer does not pay the imposed amount, the tax authority may collect the amount through statutory measures.

Cost recovery

28 | To what extent can the costs of a dispute be recovered?

At the time of filing, the court fees to file the claim must be paid by the taxpayer or plaintiff (their amounts are calculated based on the claimed amounts). In addition, the court fees for the examination of testifiers and other services are also required to be paid by the taxpayer when the taxpayer petitions for them.

The court usually awards to the losing party the costs that arose from the administrative matters of the case (ie, the court fees above). Administrative costs can therefore be recovered by the taxpayer if the taxpayer or plaintiff is successful. Not all actual costs borne by the taxpayer are recoverable, which means that a successful taxpayer cannot recover any attorneys' fees from the government or defendant.

Third-party funding

29 | Are there any restrictions on or rules relating to third-party funding or insurance for the costs of a tax dispute, including bringing a tax claim to court?

There is no restriction on, or rule relating to, third-party funding or insurance for the costs of a tax dispute.

Court decision maker

30 | Who is the decision maker in the court? Is a jury trial available to hear tax disputes?

Tax litigation is heard and decided by a panel of judges in ordinary courts. With regard to criminal cases, while there is a judicial system known as Saiban-in Seido, under which citizens and judges form a panel that decides a case, this system is not applicable to tax litigation.

Time frames

31 | What are the usual time frames for tax trials?

The Supreme Court published that, for administrative cases (including tax cases), the average period in 2018 for: (i) a first-instance decision was 14.5 months; (ii) an appeal court decision was 6.1 months; and (iii) a Supreme Court decision was 3.2 or 3.5 months (depending on the form of appeal). The time frame for tax trials varies from case to case depending on various factors. However, it tends to take longer if the issues in the case are complicated and the disputed amount is large. For example, a recent case that involved corporate restructuring, in which approximately ¥30 billion was disputed, took around three years between filing and the Tokyo District Court issuing a first-instance decision, and around eight months between the first-instance decision and the appeal court decision of the Tokyo High Court. In that case, the Supreme Court delivered its decision 14 months after the appeal against the decision of the Tokyo High Court.

Disclosure requirements

32 | What are the requirements concerning disclosure or a duty to present information for trial?

As in all litigation concerning civil and administrative matters, a party may file a petition for the court to order the holder of the documentary evidence to submit it (the Petition for Order to Submit Document). A Petition for Order to Submit Document should be filed by clarifying:

- the title of the document;
- a summary of the contents of the document;
- the holder of the document;
- the facts to be proven by the document; and
- the grounds for the obligation to submit the document.

Unless there are statutory reasons otherwise, the holder may not refuse to submit the document. However, in certain cases, a Petition for Order to Submit Document will be dismissed unless this is necessary to make the request to examine documentary evidence.

Coverage of a Petition for Order to Submit Document is limited and there is no broad discovery process in Japan.

Permitted evidence

33 | What evidence is permitted in a tax trial?

As in all litigation concerning civil and administrative matters, testifiers, experts and documentary evidence are permitted in tax litigation.

Tax litigation generally adopts a cross-examination system for examination of testifiers. Under the system, a person examined before

the court is asked questions by the party who has requested the examination, the other party and the judge (in this order). Any person, including the taxpayer or experts, can be examined if the court finds, upon application by either the plaintiff or the defendant, that the person's statement is relevant to the case. There are only clerical differences between examination of a party to the case and examination of a third party.

Under article 138 of the Civil Procedure Regulation (Supreme Court Regulation No. 5 of 1996), a party filing evidence prepared in a language other than Japanese must attach a translation thereof to the evidence.

Permitted representation

34 | Who can represent taxpayers in a tax trial? Who represents the tax authority?

As in all litigation concerning civil and administrative matters, taxpayers can represent themselves in tax litigation. Taxpayers can also be represented by qualified attorneys. A certified public tax accountant can attend hearings and make allegations to the court as an assistant of the taxpayer and the attorney. The tax authority is represented by government officers.

Publicity of proceedings

35 | Are tax trial proceedings public?

Court proceedings in tax cases are generally held at hearings that are open to the public. However, the court can choose to adopt non-public procedures, such as preparatory proceedings. Although case records are generally available to the public, only the parties to a case and third parties with legal interests in the case can obtain copies of the records. Further, the court can restrict the disclosure of the records if the records contain material disclosing a party's private life secret or a trade secret.

Burden of proof

36 | Who has the burden of proof in a tax trial?

In general, the government or defendant has the burden of proof of legality of the disposition at issue. In theory, this requires the government to prove the existence of the facts that form the basis of the tax and the tax amount. In practice, however, a taxpayer or plaintiff cannot be successful in cancelling a disposition unless it presents detailed facts and evidence to support the allegation that the disposition is illegal.

Further, there are exceptions to the general rule that the government or defendant bears the burden of proof. For example, the defence of reasonable grounds, which relieves a taxpayer or plaintiff from the additional penalty tax, is available only to taxpayers who successfully prove the existence of such reasonable grounds. Further, in certain statutorily provided situations, the government is allowed to estimate the taxpayer's income based on general information about the taxpayer, such as changes in the amount of the taxpayer's assets or debts.

Case management process

37 | Describe the case management process for a tax trial.

The process varies on a case-by-case basis, but the usual process is as follows:

- the taxpayer or plaintiff files a complaint to the court with jurisdiction;
- the first hearing date is scheduled to be held one and a half months or more from the filing date;
- several hearings are held before examination and issuance of the court's decision;
- testimony is heard from testifiers or the taxpayer, or both (if necessary);
- during the intervals between the hearings, the parties submit briefs and evidence to the court;
- the court decides on the case; and
- the losing party may file an appeal under a three-tiered judicial system.

Appeal

38 | Can a court decision be appealed? If so, on what basis?

As in other cases, a three-tiered judicial system is applicable to tax cases. Under the system, if a taxpayer is dissatisfied with the judgment of the first instance court, the taxpayer may appeal to one of the High Courts of Japan within two weeks from the date on which the judgment is delivered to the losing party. If the decision of the High Court is unsatisfactory, subject to certain requirements, an appeal may be made to the Supreme Court of Japan within two weeks from the delivery of the judgment.

UPDATE AND TRENDS

Key developments of the past year

39 | What are the current trends in enforcement of tax controversies? What are the current concerns of the authorities and taxpayers in relation to the enforcement and handling of tax controversies and are these likely to change? Are there proposals to change the relevant legislation or other rules?

Current trends in enforcement of tax controversies

Japanese lower courts recently issued two significant decisions concerning the Japanese general anti-abuse rules that apply to corporate restructuring:

- the decision of the Tokyo High Court in *TPR Co, Ltd v Government* (11 December 2019). In this case, the tax authorities disallowed a succession of net operating losses from a merged company pursuant to the Japanese general anti-abuse rules (Corporation Tax Act, section 132-2). The court found in favour of the tax authorities on the ground that the company engaged in corporate restructuring using unusual procedures that were aimed at avoiding taxes; and
- the decision of the Tokyo High Court in *Universal Music LLC v Government* (24 June 2020). In this case, the tax authorities disallowed a deduction of interest on a loan arising as part of a cross-border corporate restructuring (known as a debt push-down scheme, which is widely utilised for M&As) pursuant to the Japanese general anti-abuse rules (Corporation Tax Act, section 132). The court found in favour of the taxpayer on the grounds that the purposes of the corporate restructuring were economically rational for the whole group of taxpayers.

However, prior to these cases, the Supreme Court decision in *Yahoo Japan Corporation and IDC Frontier Inc v Government* (29 Feb 2016) used a certain framework to apply the Japanese general anti-abuse rules (Corporation Tax Act, section 132-2) to corporate restructuring, and the evaluation criteria for these rules were not sufficiently clear to taxpayers. This pair of recent cases will provide helpful precedents for the application of the rules to corporate restructuring.

Revision of the consolidated taxation regime under the 2020 tax reform

Under the repealed consolidated taxation regime, consolidated groups (ie, domestic corporations that chose to adopt the repealed scheme on a whole group basis) had advantages in reporting and paying corporate

income tax on a domestic consolidated basis. However, those consolidated groups were disadvantaged by the administrative burden of calculating the consolidated tax base.

With that burden in mind, the 2020 tax reform introduced a new group relief regime. This regime allows domestic corporations to calculate and file corporate income taxes on an individual corporation basis, but maintains the basic framework of the repealed regime that allows a corporate group to offset profits and losses between group companies.

The revised group relief regime will become effective for companies with fiscal years starting on or after 1 April 2022.

Coronavirus

40 What emergency legislation, relief programmes and other initiatives specific to your practice area has your state implemented to address the pandemic? Have any existing government programmes, laws or regulations been amended to address these concerns? What best practices are advisable for clients?

Due to the covid-19 pandemic, special legislation for an emergency economic package was introduced on 30 April 2020. The package includes several relief programmes or grace systems as follows:

- special provision on the system of deferral of payment of taxes;
- special provision on a tax refund through a tax-loss carry back;
- small and medium enterprises facility investment promotion tax system for teleworking;
- application of deduction for donations to those that waive their rights to refunds for tickets from sponsors;
- flexible operations for requirements of tax credits for residential loans;
- special provision for choice of consumption taxes for taxable business providers; and
- tax exemptions for stamp taxes on certain cash loans for copies of consumption contracts executed between financial institutions and business operators that suffered due to covid-19.

The National Tax Authority website provides further information, especially on the special provision of the deferral of payment of taxes: https://www.nta.go.jp/english/tax_payment/01.htm.

In addition to the special provision on deferral of payment of taxes, taxpayers who face difficulty filing tax returns due to covid-19 will be flexibly granted an extension of the due date of final tax returns.

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