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SURCHARGES AND PENALTIES IN TAX LAW

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Surcharges and Penalties in Tax Law

Why this book?
The power to design tax procedure law still rests with the national states. Apart from an exchange of information, it is not harmonized within the EU. Therefore, tax surcharges, penalties and the respective procedures vary widely between different states. Comparative works on the topic of surcharges are practically absent. This project aims to fill this gap.

The same applies to criminal tax law. Usually, only criminal lawyers are dealing with it from a criminal scientific and procedural point of view. A synopsis with the tax proceeding is frequently lacking. The holistic approach of this book intends to overcome this differentiation of tax law and criminal law and pay particular attention to the interface of these fields of law. In this regard, the application of article 6 of the ECHR is interesting because the ECtHR goes beyond just measuring penal sanctions with respect to article 6 of the ECHR and applies this to administrative sanctions if these have the material importance of penalties or penalty surrogates.

With 20 national reports this book provides an extensive legal comparison of the national tax procedures, as well as of the criminal tax laws regarding which kinds of tax surcharges are applied and the relationship with criminal tax sanctions. These reports are accompanied by a general report, five thematic and five corresponding comment reports depicting the structure of the Annual EATLP Congress in 2015 in Milan.

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Switzerland

Michael Beusch

Preliminary remarks

Switzerland is not a Member State of the European Union. Therefore, Community law is not binding on Switzerland, unless Community law has been implemented into Swiss law by a bilateral treaty.[1] Although it is not easy to see how this aspect could play a crucial role with regard to the topic being discussed at the EATLP Congress 2015, it must – as matter of form – be stated, since certain issues might not be discussed in the same way as they are in other national reports. However, even with regard to these cases, this report will focus on questions that might be of interest for the actual purpose.

Furthermore, as English is not an official language of Switzerland, no official documents concerning domestic law are available in English, and, as a consequence, legal doctrine in general, and on procedural and criminal issues in particular, is usually published in German and French, and sometimes also in Italian. In order to ensure traceability, the official German title of any document cited will hereinafter be mentioned as well.

General setting

Switzerland is a confederation of twenty-six cantons with about 2,350 municipalities. Taxes are levied not only by the Confederation but also at the cantonal and municipal level. The Swiss Federal Constitution defines

1. For example, the Agreement between the European Community and its Member States, of the one part, and the Swiss Confederation, of the other, on the free movement of persons (Swiss systematic compilation of federal legislation SR 0.142.112.681; European OJ L 114, 30 Apr. 2002), or the Agreement between the European Community and the Swiss Confederation providing for measures equivalent to those laid down in Council Directive 2003/48/EC on taxation of savings income in the form of interest payments and the accompanying Memorandum of Understanding (SR 0.641.926.81; OJ L 385, 29 Dec. 2007).

the taxes that may be levied by the federal government.[2] Within the limits of the Federal Constitution and the Tax Harmonization Act, the cantons are free to establish their own tax systems and to fix their tax rates.[3] They are thus entitled to levy any tax except the taxes remaining within the exclusive domain of the federal government. As a rule, each governmental body assesses and collects those taxes that it is entitled to levy.

Levied at federal level are important taxes such as the Value Added Tax (VAT),[4] federal withholding taxes (WHT),[5] stamp duties[6] or consumption taxes (e.g. on tobacco,[7] beer,[8] mineral oil[9]). They are assessed and collected by federal authorities and are therefore subject to identical rules, to be found in the respective Tax Act or the common procedural acts as far as court proceedings are concerned,[10] this regardless of the place (in Switzerland) the taxable event has occurred. If irregularities occur, the Federal Act on Administrative Criminal Law (ACL)[11] has to be taken into account additionally.

2. P.M.: Each and every amendment to the Federal Constitution (*Bundesverfassung der Schweizerischen Eidgenossenschaft vom* 18. April 1999, SR 101) must be put to the vote of the people and the Cantons (art. 140 Const.; mandatory referendum). This means that no new federal taxes can be introduced without the approval of the population. Furthermore, (changes to) federal legislation is generally subject to an optional referendum: in this case, a popular ballot is held if 50,000 citizens so requested. The required signatures have to be collected within the period allotted by the Constitution (100 days from publication; art. 141 Const.). Eventually, the two most important federal taxes, the federal income tax and the VAT, are subjected to a "sunset," as they are limited until the end of 2020 (art. 196 para. 13 and 14 Const.). This means that at the latest in the year 2018, the Swiss people and cantons will have to vote on the aforementioned two taxes again.
3. Taxation at the communal level is based on the cantonal tax legislation. However, the municipalities fix their rates of tax by themselves. For a short summary in English, *see* J. Salom, Switzerland and European Union – A common search for harmonization, in M. Lang et al. (eds) EU-Tax (2008), p. 515 et seq.
4. CHE: *Bundesgesetz vom 2. September 1999 über die Mehrwertsteuer* (MWSTG), SR 641.20.
5. CHE: *Bundesgesetz vom 13. Oktober 1965 über die Verrechnungssteuer* (VStG), SR 642.21.
6. CHE: *Bundesgesetz vom 27. Juni 1973 über die Stempelabgaben* (StG), SR 641.10.
7. CHE: *Bundesgesetz vom 21. März 1969 über die Tabakbesteuerung* (TStG), SR 641.31.
8. CHE: *Bundesgesetz vom 6. Oktober 2006 über die Biersteuer* (BStG), SR 641.411.
9. CHE: *Mineralölsteuergesetz vom 21. Juni 1996* (MinöStG), SR 641.61.
10. CHE: *Bundesgesetz vom 17. Juni 2005 über das Bundesverwaltungsgericht* (VGG), SR 173.32; CHE: *Bundesgesetz vom 20. Dezember 1968 über das Verwaltungsverfahren* (VwVG); SR 172.021; CHE: *Bundesgesetz vom 17. Juni 2005 über das Bundesgericht* (BGG), SR 173.110.
11. CHE: *Bundesgesetz vom 22. März 1974 über das Verwaltungsstrafrecht* (VStrR), SR 313.0.

As with regard to the other taxes, cantons are – as mentioned before – competent to levy the tax. The proceedings may thus vary considerably from one canton to another (harmonization is still in progress and, for example, has not yet resulted in common deadlines for filing tax returns) and from one tax to another. An exception to this rule is the Federal Income Tax (FIT):[12] although it is assessed and collected by the cantons (on behalf of the Confederation), it is the federal tax administration that determines the rules and regulations applicable to the cantonal administrations of the federal tax and supervises the cantonal authorities in order to ensure uniform application. The cantonal authorities' scope of interpretation regarding this topic is therefore limited; under prevailing circumstances, the application and interpretation of the law by a cantonal authority may thus be rejected and legal proceedings launched against it.

Sources of procedural law are either the relevant tax acts themselves, for example, with regard to the assessment procedures, or – as already mentioned – the common procedural acts as far as court proceedings are concerned. As a result of the Swiss federalism, the applicability of procedural rules may depend on the place the tax in question has been assessed. However, with the real entry into force of the Tax Harmonization Act (THA)[13] on 1 January 2001, a basic harmonization for direct taxes (as the taxes on income and gain) has been implemented for the cantons. These harmonizations cover surcharges and penalties as well.[14] If criminal aspects are in question, procedural rules can be found either in the aforementioned ACL or in the Swiss Criminal Procedure Code (CPC).[15] Different to other countries, the ordinary Criminal Code (CC)[16] does not contain specific criminal penalties for tax offences.[17]

12. CHE: *Bundesgesetz vom 14. Dezember 1990 über die direkte Bundessteuer* (DBG), SR 642.11.
13. CHE: *Bundesgesetz vom 14. Dezember 1990 über die Harmonisierung der direkten Steuern der Kantone und Gemeinden* (StHG), SR 642.14.
14. M. Beusch, in M. Lang et al. (eds.), *Procedural Rules in Tax Law in the Context of European Union and Domestic Law* (2010), p. 632 et seq. Since these regulations set forth a legal framework that is quite similar to the legislation of the federal direct tax, the legal situation in the cantons is basically comparable to the federal one. Hence, and in order to facilitate the readability of the following, for the direct taxes only, the provisions of the DBG are taken into account and discussed.
15. CHE: *Schweizerische Strafprozessordnung vom 5. Oktober 2007*, SR 312.0.
16. CHE: *Schweizerisches Strafgesetzbuch vom 21. Dezember 1937*, SR 311.0.
17. The CC, however, is – as to be shown – important for terminology aspects and the determination of the sentence.

28.1. Taxpayer duties and third-party duties

In Switzerland, taxes are perceived according to different regimes. Whilst VAT and withholding taxes, for example, are levied in a self-assessment system, direct taxes follow other rules. They are levied through a "mixed system," which means that the taxpayer will file a tax return in which they have to supply all necessary information ("self-declaration").[18] This obligation is a right at the same time,[19] since it shows that Swiss taxpayers are still primarily seen as being fair and trustworthy citizens.

In general, the taxpayer is obliged to provide extensive details about his personal financial situation to the tax authority. Furthermore, it is not only the taxpayer who is supposed to deliver information; third parties have corresponding certification, information and reporting obligations as well.[20]

First of all, taxpayers are required to fill out the tax return truthfully and completely, personally sign it and file it on a timely basis.[21] Individuals must attach documents as exhibits to the tax return, in particular salary statements (relating to all income from gainful employment), statements of contributions to private restricted pension plans, certificates relating to all earnings as a member of a board of directors or other executive organ of a legal entity and schedules of all securities, claims and debts. If there is income from gainful self-employment or a legal entity is involved, signed annual accounts (balance sheets, profit and loss accounts) or, if no commercial accounts are kept, a schedule of assets and liabilities, earnings and expenditures and private withdrawals or, as the case may be, deposits have to be attached.[22] Generally, the taxpayer must do everything possible to facilitate a complete and accurate assessment. At the request of the authorities, he must, in particular, provide oral or written information and produce business accounts, receipts, further certificates and documents relating to the course of business.[23] According to these provisions, the tax authority can order examinations of financial statements, make appearances, seek

18. By the same token, this implies that the principle of proportionality has to be observed; *see* below at the end of this section.
19. M. Zweifel & H. Casanova, *Schweizerisches Steuerverfahrensrecht Direkte Steuern* (2008), p. 107 et seq.
20. For an overview, *see also* M. Beusch, in E. Kristoffersson et al. (eds.), *Tax Secrecy and tax Transparency* (2013), p. 1113 et seq.
21. Art. 124 para. 2 FIT/DBG. M. Beusch & R. Rohner, *Möglichkeiten und Grenzen der elektronischen Einreichung von Steuererklärungen bei den direkten Steuern*, in Beusch (ed.), *Steuerrecht 2007* (2007), p. 179, p. 200 et seq.
22. CHE: art. 125 FIT/DBG.
23. CHE: art. 126 FIT/DBG.

expert advice and request any information that is required for a correct assessment.

As already briefly mentioned, it is not only the taxpayer who is supposed to deliver information; third parties have corresponding certification, information and reporting obligations as well. Those duties are not all of the same nature: while, for example, legal entities have to file a certificate relating to payments made to members of the board of directors *motu proprio* and regardless of whether the taxpayer cooperates or not,[24] other duties of third persons only take place upon request, e.g. the obligation of partners and joint owners concerning their legal relationship to the taxpayer.[25] Lastly, the tax authorities can demand the information needed for the assessment directly from third parties if the taxpayer does not present this information despite having been requested to do so.[26] Among the information/certificates that can be obtained subsidiarily and directly by the third party are those regarding the payments of the employer to its employees.[27]

Based on the information obtained, the tax authorities make an assessment. If this has become final, either because it has not been challenged before the courts or a non-appealable decision of a court exists,[28] the amount of taxes still due is invoiced to the taxpayer.[29]

24. CHE: art. 129, para. 1, letter a FIT/DBG.
25. CHE: art. 128 FIT/DBG.
26. CHE: art. 127 FIT/DBG.
27. CHE: art. 127, para. 1, letter a FIT/DBG.
28. M. Beusch, in M. Lang et al. (eds.), *Procedural Rules in Tax Law in the Context of European Union and Domestic Law* (2010), p. 632 et seq.
29. Usually, the taxpayer would not wait for the final invoice to pay his taxes. Since, according to the relevant law, periodical direct taxes are due on 1 Mar. (art. 161, para. 1 FIT/DBG; art. 1, para. 1 *Verordnung vom 10. Dezember 1992 über Fälligkeit und Verzinsung der direkten Bundessteuer* (SR 642.124)) and interest at the momentarily quite high rate of 3% is imposed, it is foreseen by the law that the taxes are perceived on a provisional basis before maturity or in rates (CHE: art. 161, para. 1 and art. 162, para. 1 FIT/DBG). Hence, receiving the final invoice normally implies that "only" the difference resulting from the amount due and the amount already paid has to be remitted to the tax authority. If an amount has been paid in excess, it must be refunded (CHE: art. 162, paras. 2 and 3 FIT/DBG).

28.2. Definition and categorization of different types of surcharges

28.2.1. Criminal penalties

Swiss criminal law distinguishes three types of crimes according to the severity of the penalties that the offence carries. Felonies are offences that carry a custodial sentence of more than 3 years; misdemeanours are offences that carry a custodial sentence not exceeding 3 years or a monetary penalty;[30] and contraventions are acts that are punishable by a fine.[31]

All Swiss tax laws have the same structure with regard to possible crimes:[32] the least substantial delicts are administrative offences. With regard to direct taxes, for example, whoever intentionally or negligently fails, despite a warning notice, to comply with a duty to which he is subject under either the provisions of this law or an order issued hereunder (e.g. failing to file the tax declaration or the required exhibits thereto or failing to comply with a certification, informational or reporting duty), shall be punished with a fine of up to CHF 1,000.[33] Next are tax evasions. Although still contraventions, these offences carry a more severe penalty, for example in VAT: Any person who wilfully or negligently reduces the tax claim to the detriment of the state by not declaring in a tax period all receipts, declaring receipts from supplies exempt from the tax that are too high, not declaring all supplies subject to acquisition tax or by declaring expenses entitling to an input tax deduction that are too high; by obtaining an incorrect refund; or by obtaining an unjustified tax abatement shall be liable to a fine not exceeding CHF 400,000.[34] The structure of both described delicts shows that not only the taxpayer can commit these crimes ("whoever"; "any person"). In the next category, the "misdemeanours," different types of tax fraud exist.[35] Felonies only exist in one singular constellation: aggravated tax fraud.[36]

30. CHE: art. 10 CC.
31. CHE: art. 103 CC.
32. *See*, for a comprehensive overview, M. Beusch & J. Malla, *Steuerstrafrecht – ein Entwirrungsversuch unter vertiefter Betrachtung der Tatbestände von Abgabe- und Steuerbetrug*, *Schweizerische Zeitschrift für Strafrecht*, (2012), p. 251 et seq.
33. CHE: art. 174 FIT/DBG; *see also* art. 64 WHT/VStG.
34. CHE: art. 96 VAT/MWSTG; *see also* art. 175 FIT/DBG.
35. CHE: art. 186 FIT/DBG; CHE: art. 14 ACL/VStrR. *See also* Beusch & Malla, *supra* n. 32, p. 265 et seq. For the international aspects of this distinction, *see* M. Beusch & A. Misic, *The Case of UBS – Mutual Administrative Assistance in Tax Matters*, in M. Lang et al. (eds.), Tax Treaty Case Law around the Globe – 2011 (2011), p. 487 et seq.
36. CHE: art. 14, para. 4 ACL/VStrR.

However, it is worth mentioning in this context that recent legislation enacted in December 2014 has defined that serious tax crimes, though not being classified as felonies, are to be treated as if they were felonies, thus making it possible for them to lead to a liability for money laundering.[37] This is as a result of the work of the OECD's Financial Action Task Force (FATF).

All described penalties are considered to be criminal according to the European Convention of Human Rights. Hence, all respective guarantees, such as the "*nemo tenetur* principle" and the presumption of innocence, apply. In all of these procedures (i.e. also in those regarding tax evasion), the so called "Miranda Warning" has to be given and the taxpayer is to be advised of his right to remain silent and to refuse cooperation.[38] This results in the fact that, in a proceeding concerning the subsequent assessment of a tax in which – like in the ordinary tax proceedings – the obligation to cooperate basically would apply, the taxpayer is to advise of the possibility of a later initiation of such a criminal procedure if it cannot be excluded for sure.[39]

This, however, does not mean that all criminal penalties would be prosecuted in the same way. Tax evasion and tax fraud are prosecuted and punished in separate proceedings. The procedure regarding tax evasion is led by the tax authority. Thereby the procedural principles of tax law are pertinent which means that under current law no coercive measures against the taxpayers can be arranged. In particular, tax authorities have no access to bank records.[40] If, however, tax fraud is at stake, the situation is different. Then, the Federal Act on Administrative Criminal Law (ACL) or the Swiss Criminal Procedure Code (CPC) apply and the procedures are led by law enforcement criminal justice agencies respectively. The arrangement of coercive measures – in particular the access to relevant bank records – is therefore, in principle, possible.[41]

37. CHE: art. 305bis, para. 1bis CC (in the version according to the Federal Gazette (BBl) 2014 9689); *see also* M. Beusch, S. Friedli & M. Borla, *"Serious Tax Crimes": come i delitti fiscali sono divenuti improvvisamente dei "crimini"*, in S. Vorpe (ed.), *Contravvenzioni e delitti fiscali nell'era dello scambio internazionale d'informazioni* (2015), p. 532 et seq.
38. CHE: art. 183, para. 1 FIT/DBG.
39. S. Raas & M. Winiger, national report Switzerland, *The practical protection of taxpayer's fundamental rights*, CDFI 100b (2015), p. 771 et seq.
40. An exception exists in the case of a so-called serious tax offence (amongst others, the repeated evasion of large amounts of taxes) in the sense of art. 190 et seq. FIT/DBG (CHE).
41. Raas & Winiger, *supra* n. 39; *see also* section 28.3.

28.2.2. Civil penalties

If the taxpayer fails – despite a warning notice – to comply this his obligation to help to establish the facts, the tax authorities are both allowed and obliged to make an assessment according to their best judgement.[42] This is often called "taxation on a discretionary basis" and does not depend on the fault of the taxpayer; the mere fact of not complying is sufficient. The goal would be to make an assessment that is as accurate as possible. It is, however, not uncommon that in such circumstances the tax burden is (slightly) higher than it would have been otherwise, since it is not acceptable that a non-complying taxpayer would benefit from his misbehaviour. Besides, in cases of objection, the burden of proof shifts. It is no longer the authority that has to prove the accurateness of its best judgement; it is up to the taxpayer to prove the opposite.[43]

If in a subsequent assessment of a piece of tax evidence is obtained after a warning that in the case of withholding evidence a discretionary assessment could take place, such evidence may not be used in a criminal proceeding concerning tax evasion.[44]

28.2.3. Interests

All Swiss tax laws have interest provisions. If a tax due is paid after the legally stated term, interest is to be paid. Since the interest rate laid down in the Law is not a market rate but, at the moment, much higher than this (3% (FIT) to 5% (WHT)), the interest is considered to be a real surcharge by the taxpayers. Given that tax procedures often last quite a long time, considerable amounts are at stake – in 2014 interests of more than CHF 170 million were subject to judicial review – and even constitutional issues arise. However, since the interest rates are covered by the law and Switzerland has a very limited constitutional jurisdiction – federal statutes have to be

42. CHE: art. 130, para. 2 FIT/DBG; CHE: art. 79, para. 1 VAT/MWSTG: "If no records or only incomplete records are available or if the results reported obviously do not reflect the true circumstances, the FTA shall make an assessment according to its best judgement of the tax claim."
43. M. Zweifel & H. Casanova, *Schweizerisches Steuerverfahrensrecht Direkte Steuern* (2008), p. 237 et seq.; J. Steiger in M. Zweifel & M. Beusch et al. (eds.), *Kommentar* MWSTG (2015) art. 79; Raas & Winiger, *supra* n. 39, p. 766.
44. CHE: art. 183, para. 1bis FIT/DBG; Raas & Winiger, *supra* n. 39, p. 771 et seq.

applied even when they conflict with the Constitution[45] – the Swiss courts would not hear the respective complaints.[46]

28.2.4. Other surcharges

Measures to secure the taxes can have an equivalent effect, like a surcharge. In this area, the following scenario could be given as an example: when the buyer of real estate has to bear a real security for the real estate tax due by the vendor.[47] In VAT, so-called "collateral measures" exist, i.e. measures to prevent abuse. A surplus on the tax return in favour of the taxable person may hence be set off against debts from prior periods or be credited to be set-off against anticipated amounts payable for subsequent periods if the taxable person is in arrears with the payment of tax or for other reasons it appears probable that the tax claim is at risk.[48] Besides, if payments are repeatedly in arrears, the Federal Tax Authority may require the taxable person to make monthly or half-monthly advance payments.[49]

28.3. Catalogue of attributes of different surcharges

All penalties and surcharges aim at the proper, correct assessment of the taxpayer. They take place when the prerequisites set forth in the law are fulfilled. Whereas, in such circumstances, penalties and interests do not need an additional "warning," the civil penalty of the "taxation on a discretionary basis" requires a prior notification and a "last chance" to be given to the taxpayer.

Certain fines and interests depend on the amount due. The penalty for the tax evasion of direct taxes, for example, is up to three times the amount of the evaded tax.[50] Other contraventions, however, have a "fixed frame" and entail fines of up to CHF 800,000.[51] Tax fraud, a misdemeanour, can be punished with a custodial sentence not exceeding 3 years or a monetary penalty of up to CHF 1.08 million.[52]

45. CHE: art. 190 Const.; W. Haller, *The Swiss Constitution in a Comparative Context* (2009), N 561 et seq.
46. E.g. CH FAC, 30 July 2015, A-1405/2014.
47. CHE: § 228 Zurich Tax Law (*Steuergesetz des Kantons Zürich vom 8. Juni 1997*).
48. CHE: art. 94, para. 1, letters a and b VAT/MWSTG.
49. CHE: art. 94, para. 3 VAT/MWSTG.
50. CHE: art. 175, para. 2 FIT/DBG.
51. CHE: art. 96, para. 2 or 4 VAT/MWSTG.
52. CHE: art. 10, para. 2 and 34 para. 1 and 2 CC.

Criminal penalties require personal fault on the part of the trespasser; civil penalties and interests do not. Criminal and civil penalties can be imposed cumulatively. If, for example, a taxpayer does not deliver the legally requested information, this can lead both to a fine and "taxation on a discretionary basis." More surprising might be that even criminal penalties can be cumulated. Whereas in the scope of the ACL, the minor offence is consumed by the major one – tax fraud consumes thus tax evasion[53] – direct tax law explicitly states that a punishment for tax fraud does not exclude a penalty for tax evasion.[54] Hence, if a taxpayer deceives the authority with falsified documents to obtain a more favourable assessment (than legally being entitled to), there is penalization for tax fraud and tax evasion. Since this happens for the very same action, this turns out to be highly problematic with regard to the "*ne bis in idem*"-principle.[55] At the very least, the second fine has to take into account the first. Yet, in practice, this not as easy as it might seem, since different authorities are involved.

As previously mentioned in section 28.2.1. in fine, surcharges are imposed by the tax authorities. This is the same for fines for contraventions.[56] Penalties for any misdemeanours and fines for indirect taxes, however, are imposed by the criminal authorities. With regard to criminal penalties, the actual situation is considered to be ineffective and confusing. Pending legislative work thus aims to abolish the double jeopardy situation, "tax fraud-tax evasion," and tends to unify the procedural rules.[57] It is expected that the Swiss parliament will deliberate the new bill in 2016.

28.4. Surcharges regarding third parties

A distinction must be made between criminal penalties and other surcharges. With regard to the latter, faults or the non-compliance of third parties are attributed to the taxpayer who is the person ultimately responsible for his proper assessment. If, for example, due to the lack of proper records taxation on a discretionary basis has to take place, it does not help the taxpayer if he hired an accountant to keep the books and this person failed to do so

53. CHE: art. 61, para. 1 WHT/VStG.
54. CHE: art. 186, para. 2 FIT/DBG.
55. For the respective discussion in Swiss legal doctrine, *see* A. Donatsch, in M. Zweifel & P. Athanas (eds.), *Kommentar DBG*, 2nd edition (2008) art. 186, N 49 et seq.
56. For the following differentiated legal protection aspects, *see* section 28.5.
57. L. Unseld, *Revision des Steuerstrafrechts: Lösungsansätze für eine Neuregelung der strafrechtlichen Zuständigkeit bei den direkten Steuern*, *Archiv für Schweizerisches Abgaberecht* (ASA) 83 (2014/2015), p. 433 et seq.

properly. Any damages occurred have to be claimed by the taxpayer in a civil liability procedure launched against his accountant.

With regard to criminal penalties, however, third parties can be sanctioned themselves for failure to fulfil their proper certification, information and reporting obligations.[58] Additionally, they can be punished as participants of the delicts committed by the taxpayer, as inciter or – more commonly – as complice.[59] In such circumstances, the inciter and complice are often also liable for the tax evaded.[60]

28.5. Legal protection of taxpayers and third parties

Legal protection is guaranteed by the Constitution[61] and also by the European Convention on Human Rights (ECHR).[62] In tax and criminal tax law, there is no act of a governmental authority that cannot be brought before an independent court.[63] The system, however, is fairly complicated and a distinction must be made between surcharges in general and fines for contraventions for direct taxes, and between penalties for misdemeanours and fines for indirect taxes.[64]

The former are issued by the tax authorities and may be challenged by objection with the *iudex a quo*, i.e. the tax authorities themselves. This administrative review is compulsory yet can be skipped in some cases if both parties agree to do so (*Sprungbeschwerde*).[65] The decision to reject an objection may be subject to an appeal with a cantonal court (direct taxes and other cantonal taxes) or with the Federal Administrative Court (surcharges of VAT, consumption taxes and other federal taxes). These courts are administrative courts. The decisions of these courts of first instance are subject to an appeal with the Federal Supreme Court, in which the administrative chamber will deal with the case.

58. *See* section 28.1. for the description of the structure of the delicts.
59. Whereas the inciter faces the same penalty as the wrongdoer himself, the complice is liable to a reduced penalty; art. 24 et seq. CC (CHE).
60. *See* e.g. art. 177 2 FIT/DBG (CHE).
61. CHE: art. 29a Const.
62. *Konvention vom 4. November 1950 zum Schutze der Menschenrechte und Grundfreiheiten*, SR 0.101.
63. M. Beusch, *Auswirkungen der Rechtsweggarantie von Art. 29a BV auf den Archiv für Schweizerisches Abgaberecht* (ASA) *Rechtsschutz im Steuerrecht*, 73 (2004/2005), p. 733 et seq.
64. For a comprehensive overview, *see* Beusch & Malla, *supra* n. 32, p. 256 et seq.
65. CHE: art. 132, para. 2 FIT/DBG; art. 83, para. 4 VAT/MWSTG.

The latter, however, are – at least if the respective "proposal" by the prosecutor (direct taxes) or the tax authority (indirect taxes) is not accepted – handled by the criminal authorities and are to be decided by a (cantonal) criminal court, hearing the case in public.[66] They can be appealed to a higher criminal court and then to the Federal Supreme Court, in which the criminal chamber will deal with the case.

As already described in section 28.3., the actual situation is considered to be ineffective and confusing.[67] Interim legal protection exists in the sense that surcharges (fines, interests) can only be executed when they have come into force. However, there is one major exception in VAT: a tax being collected in a self-assessment system. If the taxable person makes no payment or a payment that is obviously insufficient, the Federal Tax Authority, after issuing a reminder, shall seek to enforce its claim for the tax amount provisionally payable for the reporting period in question. If no return has been filed for the taxable person or the return is obviously inadequate, the Federal Tax Authority shall first make an assessment according to its best judgement of the tax amount provisionally payable. By filing his opposition, the taxable person instigates the procedure to have his opposition set aside. The Federal Tax Authority is responsible for setting aside the opposition in the ruling and appeal procedure. In these cases, the ruling on the opposition may be contested by filing an objection with the Federal Tax Authority within 10 days of it being issued. The objection decision is final, unless the tax amount provisionally payable that is the subject of the enforcement proceedings is the result of an assessment made by the Federal Tax Authority according to its best judgement. Then, an appeal may be filed in the Federal Administrative Court against the objection decision. This appeal, however, has no suspensive effect, unless the court so orders on justified application. The Federal Administrative Court makes the final decision.[68] Arbitration does not exist.

28.6. Deductibility of surcharges

Whether certain surcharges can be deducted from the tax base is currently being debated among scholars. Whereas it is undisputed that real criminal penalties imposed by tax or criminal authorities are in no way deductible, it is different as regards penalties that are imposed on Swiss taxpayers by

66. CHE: art. 6, para. 1 ECHR.
67. *See* section 28.3.
68. CHE: art. 86, paras. 2-5 VAT/MWSTG.

foreign authorities such as, for example, the US Department of Justice or the European cartel authorities. A respective case is currently pending before the Swiss Federal Supreme Court.[69]

28.7. Numbers

It is almost impossible to obtain figures. Yet, it can be said that, compared to the large amount of taxpayers, very few criminal procedures are launched. The main goal of the Swiss tax authorities is to obtain the amount legally due. However, what happens on a relatively regular basis is assessment on a discretionary basis.

28.8. Effectiveness

The most powerful "weapons" of the Swiss tax authorities are the assessment on a discretionary basis. When the authorities investigate the factual circumstances of a case and are not satisfied with the answers received, they proceed with such an assessment and rather slightly overestimate the real sum. If the prerequisites of such an assessment are met, the burden of proof shifts and it is hardly possible for the taxpayer to prove the opposite anymore. Also quite effective are interests which, due to their rate, have the effect of a real surcharge.

69. The (majority of the) lower instance, the Administrative Court of Zurich, held that such cartel penalties can be deducted (SB.2014.00011 of 9 July 2014, with dissenting opinion).

Notes

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