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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Preface

Introduction

Part 1

General Report

Chapter 1: General Report

1.1. Criminal surcharges

1.1.1. Criminal procedure

1.1.2. Characterization of criminal penalties

1.1.3. Types of criminal penalties

1.2. Administrative surcharges

1.2.1. Administrative procedure

1.2.2. Characterization of administrative surcharges

1.2.3. Types of administrative surcharges

1.2.4. Specific rules for tax shelter and schemes

1.2.5. Administrative surcharge reliefs

1.3. Regulatory offence fines

1.4. Interests

1.5. Enlargement of tax surcharges on third parties

1.6. Accumulation of surcharges

1.7. Recourse to legal protection

1.8. Summary and outlook
# Table of Contents

Preface \hspace{1cm} v  

About the Authors \hspace{1cm} vii  

Introduction \hspace{1cm} xxxix  

Part 1  
General Report

Chapter 1: General Report \hspace{1cm} 3  

*Roman Seer and Anna Lena Wilms*

1.1. Criminal surcharges \hspace{1cm} 3  
1.1.1. Criminal procedure \hspace{1cm} 3  
1.1.2. Characterization of criminal penalties \hspace{1cm} 5  
1.1.3. Types of criminal penalties \hspace{1cm} 6  
1.2. Administrative surcharges \hspace{1cm} 8  
1.2.1. Administrative procedure \hspace{1cm} 8  
1.2.2. Characterization of administrative surcharges \hspace{1cm} 9  
1.2.3. Types of administrative surcharges \hspace{1cm} 12  
1.2.4. Specific rules for tax shelter and schemes \hspace{1cm} 15  
1.2.5. Administrative surcharge reliefs \hspace{1cm} 16  
1.3. Regulatory offence fines \hspace{1cm} 17  
1.4. Interests \hspace{1cm} 19  
1.5. Enlargement of tax surcharges on third parties \hspace{1cm} 20  
1.6. Accumulation of surcharges \hspace{1cm} 21  
1.7. Recourse to legal protection \hspace{1cm} 22  
1.8. Summary and outlook \hspace{1cm} 25
Part 2
Thematic Reports

Theme 1
Administrative Surcharges:
Instruments of Cooperative Tax Compliance Regimes

Chapter 2: Tax Penalties as Instruments of Cooperative Tax Compliance Regimes
Leandra Lederman

2.1. Information from the national reports 32
   2.1.1. Types of penalties used by the countries surveyed 32
   2.1.2. Purposes of tax penalties 35
2.2. How can penalties help tax compliance efforts? 37
2.3. Conclusion 43

Chapter 3: Comment Report: Tax Penalties in a Cooperative Compliance Framework
José A. Rozas

3.1. The fiscal environment of the 21st century 45
3.2. The classical paradigm against the cooperative one 48
3.3. Expressive strategies of cooperative models 49
3.4. Tax penalties in a cooperative framework 53
   3.4.1. Standardization of sanctions 55
   3.4.2. Management of penalties 57
3.5. Conclusions 60

Theme 2
Tax Surcharges and the Proportionality Principle – Accumulation and Interests

Chapter 4: Administrative Tax Surcharges and the Proportionality Principle
Jacques Malherbe

4.1. Nature of administrative penalties 65
4.2. Administrative penalties sanctioning both intentional offences and violations of the law by negligence 65
4.3. Graduation 66
<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>4.4.  Special cases</td>
<td>67</td>
</tr>
<tr>
<td>4.5.  Types of administrative offence</td>
<td>67</td>
</tr>
<tr>
<td>4.6.  Abuse of law</td>
<td>69</td>
</tr>
<tr>
<td>4.7.  Ceilings and floors</td>
<td>69</td>
</tr>
<tr>
<td>4.7.1. Maximum</td>
<td>69</td>
</tr>
<tr>
<td>4.7.2. Minimum</td>
<td>69</td>
</tr>
<tr>
<td>4.8.  Reductions</td>
<td>69</td>
</tr>
<tr>
<td>4.9.  Exemptions</td>
<td>70</td>
</tr>
<tr>
<td>4.10. Remission of penalties</td>
<td>70</td>
</tr>
<tr>
<td>4.11. Time limit</td>
<td>70</td>
</tr>
<tr>
<td>4.12. Proportionality</td>
<td>71</td>
</tr>
<tr>
<td>4.13. A perfect wording</td>
<td>72</td>
</tr>
<tr>
<td>4.14. EU Law</td>
<td>72</td>
</tr>
<tr>
<td>4.15. Judicial application of proportionality</td>
<td>73</td>
</tr>
<tr>
<td>4.16. Conclusions</td>
<td>75</td>
</tr>
</tbody>
</table>

**Chapter 5:** Comment Report: Penalties, Interest and Surcharges under the Perspective of Proportionality 77

*Antonio López Díaz*

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>5.1.  Introduction</td>
<td>77</td>
</tr>
<tr>
<td>5.2.  Proportionality and the nature of surcharges</td>
<td>78</td>
</tr>
<tr>
<td>5.3.  Proportionality and interest</td>
<td>80</td>
</tr>
<tr>
<td>5.3.1. Type of interest</td>
<td>81</td>
</tr>
<tr>
<td>5.3.2. Time for determination</td>
<td>82</td>
</tr>
<tr>
<td>5.3.3. Basis of application</td>
<td>83</td>
</tr>
<tr>
<td>5.4.  Proportionality and sanctions</td>
<td>83</td>
</tr>
</tbody>
</table>

**Chapter 6:** Interests in Light of the Proportionality Principle 85

*Klaus-Dieter Drüen and Philipp J. Butler*

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>6.1.  Introduction: the relevance of appropriate interests</td>
<td>85</td>
</tr>
<tr>
<td>6.2.  Limitation of interests – the principle of proportionality</td>
<td>86</td>
</tr>
<tr>
<td>6.2.1. Origins of the limitation of interests</td>
<td>86</td>
</tr>
<tr>
<td>6.2.2. Purpose, structure and effectiveness of the principle of proportionality</td>
<td>88</td>
</tr>
<tr>
<td>6.3.  Tax interest systems and the principle of proportionality</td>
<td>88</td>
</tr>
<tr>
<td>6.3.1. Applicability of the principle of proportionality upon tax interests</td>
<td>88</td>
</tr>
<tr>
<td>6.3.2. Purposes of tax interests</td>
<td>89</td>
</tr>
<tr>
<td>6.3.3. Proportionality of tax interests</td>
<td>90</td>
</tr>
<tr>
<td>6.3.3.1. Interest level</td>
<td>91</td>
</tr>
</tbody>
</table>
# Chapter 9: Comment Report: Decriminalization of Tax Law by Administrative Penalties on Tax Duties

_Juha Lindgren_

9.1. Perspectives 125  
9.2. *Ne bis in idem* 126  
9.3. Graduated sanctions 127  
9.4. Principle of legality 128  
9.5. Conclusion 129

---

## Theme 4

*Limitation of Administrative Penalties by the European Convention of Human Rights (ECHR) and the EU Charter of Fundamental Rights*

# Chapter 10: Limitation of Administrative Penalties by the European Convention of Human Rights and the EU Charter of Fundamental Rights

_Giuseppe Marino*

10.1. Roles of ECtHR and EU Charter of Fundamental Rights in protecting taxpayers’ rights 133  
10.2. Administrative and criminal tax penalties 137  
10.3. Administrative and criminal penalties: Serving different or identical purposes? 141  
10.4. Qualification of national tax penalties as reactions to criminal offences under article 6 of the ECHR and related consequences 142  
10.5. The EU Charter of Fundamental Rights’ criteria for criminal penalties 147  
10.6. Administrative penalties (I): *Ne bis in idem* as a general principle of international law 149  
10.7. Administrative penalties (II): *Ne bis in idem* in the EU Charter of Fundamental Rights 150  
10.8. Administrative penalties (III): ECtHR case law and current problems in taxpayers’ rights 152  
10.9. Administrative penalties (IV): Possible solutions to make *ne bis in idem* foreseeable 158  
10.10. Conclusions 161
Chapter 11: Comment Report: Limitation on Administrative Penalties by the ECHR and the EU Charter: The View from the Netherlands

Sigrid Hemels

11.1. Introduction
11.2. Far-reaching impact of ECtHR’s case law
11.3. It’s all about cars: ECHR becomes influential in tax disputes in the mid-1980s
11.4. Introduction of second factual court because of human rights treaties
11.5. Terminology: Surcharge or penalty?
11.6. Is interest a penalty?
11.7. Ne bis in idem in a computerized world
11.8. A hot topic in the Netherlands: Nemo tenetur and tax obligations
11.9. Conclusion

Part 3
National Reports

Chapter 12: Austria

Tina Ehrke-Rabel, Sandra Grill and Marcus Schinnerl

12.1. Taxpayer and third-party duties
12.1.1. Tax assessment procedure
12.1.2. General duties within tax assessment procedures
12.1.2.1. Disclosure obligations and duty of truthfulness
12.1.2.2. Reporting requirements
12.1.2.3. Obligation to keep books and records
12.1.2.4. Obligation to file tax returns
12.1.2.5. Self-assessment
12.1.3. Duties regarding clarification, examination and supervision procedures
12.1.3.1. Assistance during official actions
12.1.3.2. Obligation to give information
12.1.3.3. Criminal proceedings
12.1.4. Duties regarding tax collection
12.1.4.1. Income tax
12.1.4.2. Value added tax
| 12.1.4.3. | Local tax on wages | 183 |
| 12.1.5. | Duties regarding tax shelter or tax schemes | 183 |
| 12.1.6. | Other duties | 184 |
| 12.2. | Definition and categorization of different types of surcharges | 184 |
| 12.2.1. | Criminal penalties | 184 |
| 12.2.2. | Administrative tax penalties | 187 |
| 12.2.2.1. | Distinction between criminal penalties meeting the Engel criteria and administrative tax penalties | 187 |
| 12.2.2.2. | The Ne bis in idem principle | 188 |
| 12.2.3. | Interests | 188 |
| 12.2.4. | Other surcharges | 189 |
| 12.3. | Catalogue of attributes of different surcharges | 190 |
| 12.3.1. | Purpose/aim/justification | 190 |
| 12.3.2. | Prerequisites | 192 |
| 12.3.3. | Timely appliance of the surcharge | 193 |
| 12.3.4. | Amount of the surcharge, base on which the surcharge is applied or the duration of imprisonment | 193 |
| 12.3.5. | Maximum limit regarding the surcharge amount or the imprisonment | 194 |
| 12.3.6. | Surcharges depending on fault or not | 194 |
| 12.3.7. | Exceptions from surcharges | 195 |
| 12.3.8. | The imposition of surcharges/penalties and who is in charge | 196 |
| 12.3.9. | Procedures regarding administrative and criminal tax penalties – comparison | 196 |
| 12.4. | Surcharges regarding third parties | 198 |
| 12.5. | Legal protection of the taxpayer/third parties | 199 |
| 12.5.1. | Legal actions in tax law/fiscal criminal law | 199 |
| 12.5.2. | Appeal Procedure | 199 |
| 12.5.2.1. | Administrative surcharges and administrative tax penalties assessed by the tax authority | 199 |
| 12.5.2.2. | Criminal penalties assessed by tax authorities | 200 |
| 12.5.2.3. | Criminal penalties assessed by a court | 200 |
| 12.5.3. | Interim measures regarding legal protection | 201 |
| 12.5.3.1. | Administrative surcharges and administrative tax penalties assessed by the tax authority | 201 |
### Chapter 13: Belgium

*Jacques Malherbe, Bart Peeters and Geoffroy Galéa*

13.1. Introduction 207

13.2. The duties of the taxpayer and third parties 208

13.2.1. Income tax 208

13.2.1.1. Tax returns and forms 208

13.2.1.2. Tax assessment procedure 209

13.2.1.3. Duties of taxpayers 211

13.2.1.4. Duties of third parties 213

13.2.1.5. Tax collection procedure 216

13.2.2. VAT 218

13.2.2.1. Tax returns and forms 218

13.2.2.2. Tax assessment procedure 220

13.2.2.3. Duties of taxpayers 220

13.2.2.4. Duties of third parties 222

13.3. Definition and categorization of surcharges at taxpayer level 224

13.3.1. Criminal penalties 227

13.3.1.1. Tax fraud 228

13.3.1.2. Money laundering 229

13.3.1.3. Forgery 230

13.3.2. Administrative tax penalties 231

13.3.3. Interest 235

13.3.4. Other surcharges 238

13.3.5. *Una via* 239

13.4. Definition and categorization of surcharges at third-party level 242

13.4.1. Criminal/civil penalties 243

13.4.2. Other surcharges 244

13.5. Legal protection of taxpayers/third parties 247

13.5.1. Legal procedures 247

13.5.1.1. Legal principles 247
13.5.1.2. Advance tax rulings 251
13.5.1.3. Procedures 252
13.5.1.3.1. Administrative procedure 252
13.5.1.3.2. Civil proceedings 253
13.5.1.3.3. Criminal procedure 254

13.6. Deductibility of surcharges 255

Chapter 14: Czech Republic 259

Lukáš Moravec and Michal Radvan

14.1. Taxpayer and third-party duties 259
14.1.1. Tax assessment procedures 261
14.1.2. General duties within the tax assessment procedures 262
14.1.3. Duties regarding clarification, examination and supervision procedures 262
14.1.4. Duties regarding tax collection 264
14.1.5. Duties regarding tax shelters or tax schemes 265

14.2. Definition and categorization of different types of surcharges 265
14.2.1. Criminal penalties 265
14.2.2. Administrative tax penalties 266
14.2.3. Interests 268
14.2.4. Other surcharges 269

14.3. Catalogue of attributes of different surcharges 269
14.3.1. Purpose/aim/justification 269
14.3.2. Prerequisites 270
14.3.3. Timely application of the surcharge 270
14.3.4. Amount of the surcharge, the base on which the surcharge is applied, the duration of imprisonment 270
14.3.5. Maximum limit regarding the surcharge amount or imprisonment 272
14.3.6. Surcharges and fault 272
14.3.7. Exemptions from surcharges 272
14.3.8. Imposition of surcharges and penalties 273
14.3.9. Procedures regarding the imposition of administrative tax penalties and criminal penalties 273

14.4. Surcharges regarding third parties 273
14.5. Legal protection of the taxpayer and third parties 274
14.5.1. Recourse to legal actions 274
14.5.2. Authorities and institutions 275
14.5.3. Interim measures regarding legal protection 276
14.5.4. Protection through advance ruling 276
14.5.5. Alternative dispute resolution 276
# Table of Contents

14.5.6. Other tax law safeguards 276  
14.6. Deductibility of surcharges 277  
14.7. Numbers 277  
14.8. Effectiveness 280  

## Chapter 15: Denmark

*Jane Bolander and Inge Langhave Jeppesen*

15.1. Taxpayer and third-party duties 283  
15.1.1. Tax assessment procedures 283  
15.1.2. General duties within tax assessment procedures 283  
15.1.3. Duties regarding clarification, examination and supervision procedures 285  
15.1.4. Duties regarding tax collection 286  
15.1.5. Duties regarding tax shelters and tax schemes 287  
15.1.6. Other duties 287  

15.2. Definition and categorization of different types of surcharges 288  
15.2.1. Criminal penalties 289  
15.2.2. Administrative penalties 289  
15.2.2.1. Late submission of tax assessments 290  
15.2.2.2. Additional tax 290  
15.2.3. Interests 290  
15.2.4. Other surcharges 291  

15.3. Catalogue of attributes of different surcharges 292  
15.3.1. Criminal penalties 292  
15.3.1.1. Imprisonment 293  
15.3.1.2. Fines 293  
15.3.1.3. Fines relating to transfer pricing documentation 295  
15.3.2. Administrative penalties 296  
15.3.3. Interests 296  
15.3.4. Other surcharges 297  

15.4. Surcharges regarding third parties 297  

15.5. Legal protection of the taxpayer/third parties 299  
15.5.1. Recourse to legal actions 299  
15.5.2. Filing an objection 299  
15.5.3. Interim measures regarding legal protection 300  
15.5.4. Protection through advance ruling 300  
15.5.5. Alternative dispute resolutions and settlements 301  
15.5.6. Other tax law safeguards 301  

15.6. Deductibility of surcharges 302  
15.7. Effectiveness 302
# Chapter 16: Finland

*Raimo Immonen and Juha Lindgren*

<table>
<thead>
<tr>
<th>Section</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>16.1.</td>
<td>Taxpayer and third-party duties</td>
<td>303</td>
</tr>
<tr>
<td>16.1.1.</td>
<td>Tax assessment procedures</td>
<td>303</td>
</tr>
<tr>
<td>16.1.2.</td>
<td>General duties within tax assessment procedures</td>
<td>304</td>
</tr>
<tr>
<td>16.1.3.</td>
<td>Duties regarding clarification, examination and supervision procedures</td>
<td>306</td>
</tr>
<tr>
<td>16.1.4.</td>
<td>Duties regarding tax collection</td>
<td>307</td>
</tr>
<tr>
<td>16.1.5.</td>
<td>Duties regarding tax shelters and tax schemes</td>
<td>308</td>
</tr>
<tr>
<td>16.2.</td>
<td>Definition and categorization of different types of surcharges</td>
<td>309</td>
</tr>
<tr>
<td>16.2.1.</td>
<td>Criminal penalties</td>
<td>309</td>
</tr>
<tr>
<td>16.2.2.</td>
<td>Administrative tax penalties</td>
<td>310</td>
</tr>
<tr>
<td>16.2.3.</td>
<td>Interests</td>
<td>316</td>
</tr>
<tr>
<td>16.2.4.</td>
<td>Other surcharges</td>
<td>316</td>
</tr>
<tr>
<td>16.3.</td>
<td>Catalogue of attributes of different surcharges</td>
<td>317</td>
</tr>
<tr>
<td>16.3.1.</td>
<td>Purpose/aim/justification</td>
<td>317</td>
</tr>
<tr>
<td>16.3.2.</td>
<td>Prerequisites</td>
<td>318</td>
</tr>
<tr>
<td>16.3.3.</td>
<td>Timely appliance of the surcharge</td>
<td>318</td>
</tr>
<tr>
<td>16.3.4.</td>
<td>Amount of the surcharge, base on which the surcharge is applied and duration of imprisonment</td>
<td>319</td>
</tr>
<tr>
<td>16.3.5.</td>
<td>Maximum limit regarding the surcharge amount or the imprisonment</td>
<td>320</td>
</tr>
<tr>
<td>16.3.6.</td>
<td>Fault</td>
<td>320</td>
</tr>
<tr>
<td>16.3.7.</td>
<td>Exemptions from surcharges</td>
<td>321</td>
</tr>
<tr>
<td>16.3.8.</td>
<td>Imposition of surcharges/penalties</td>
<td>321</td>
</tr>
<tr>
<td>16.3.9.</td>
<td>Procedures regarding the imposition of administrative tax penalties and criminal penalties.</td>
<td>321</td>
</tr>
<tr>
<td>16.4.</td>
<td>Surcharges regarding third parties</td>
<td>322</td>
</tr>
<tr>
<td>16.5.</td>
<td>Legal protection of the taxpayer/third parties</td>
<td>324</td>
</tr>
<tr>
<td>16.5.1.</td>
<td>Recourse to legal actions</td>
<td>324</td>
</tr>
<tr>
<td>16.5.2.</td>
<td>Authority or institution addressed by the taxpayer/third party</td>
<td>324</td>
</tr>
<tr>
<td>16.5.3.</td>
<td>Interim measures regarding legal protection</td>
<td>325</td>
</tr>
<tr>
<td>16.5.4.</td>
<td>Protection through advance ruling</td>
<td>326</td>
</tr>
<tr>
<td>16.5.5.</td>
<td>Alternative dispute resolutions and settlements</td>
<td>326</td>
</tr>
<tr>
<td>16.5.6.</td>
<td>Other tax law safeguards</td>
<td>327</td>
</tr>
<tr>
<td>16.6.</td>
<td>Deductibility of surcharges</td>
<td>327</td>
</tr>
<tr>
<td>16.7.</td>
<td>Numbers</td>
<td>328</td>
</tr>
<tr>
<td>16.8.</td>
<td>Effectiveness</td>
<td>331</td>
</tr>
</tbody>
</table>
# Table of Contents

## Chapter 17: France

*Ludovic Ayrault and Alexandre Maïtrot de la Motte*

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>17.1. Taxpayer and third-party duties</strong></td>
<td>333</td>
</tr>
<tr>
<td>17.1.1. Tax assessment procedures</td>
<td>333</td>
</tr>
<tr>
<td>17.1.2. General duties within tax assessment procedures</td>
<td>334</td>
</tr>
<tr>
<td>17.1.3. Duties regarding clarification, examination and supervision procedures</td>
<td>335</td>
</tr>
<tr>
<td>17.1.4. Duties regarding tax collection</td>
<td>336</td>
</tr>
<tr>
<td>17.1.5. Duties regarding tax shelters or tax schemes</td>
<td>337</td>
</tr>
<tr>
<td><strong>17.2. Definition and categorization of different types of surcharges</strong></td>
<td>337</td>
</tr>
<tr>
<td>17.2.1. Criminal penalties</td>
<td>337</td>
</tr>
<tr>
<td>17.2.2. Administrative tax penalties</td>
<td>338</td>
</tr>
<tr>
<td>17.2.3. Interests</td>
<td>339</td>
</tr>
<tr>
<td><strong>17.3. Catalogue of attributes of different surcharges</strong></td>
<td>340</td>
</tr>
<tr>
<td>17.3.1. Administrative tax penalties imposed by the tax administration</td>
<td>340</td>
</tr>
<tr>
<td>17.3.1.1. Breach of tax return duty</td>
<td>340</td>
</tr>
<tr>
<td>17.3.1.1.1. Filing of tax declarations (or documents) in delay</td>
<td>340</td>
</tr>
<tr>
<td>17.3.1.1.2. Filing of tax return (or documents) on time but incompletely or incorrectly</td>
<td>341</td>
</tr>
<tr>
<td>17.3.1.1.3. Filing of tax return (or documents) in delay and incompletely or incorrectly</td>
<td>341</td>
</tr>
<tr>
<td>17.3.1.2. Breach of duty of cooperation with the tax administration</td>
<td>342</td>
</tr>
<tr>
<td>17.3.1.3. Breach of the obligation to pay off a tax debt</td>
<td>342</td>
</tr>
<tr>
<td>17.3.1.4. Breach of other duties</td>
<td>342</td>
</tr>
<tr>
<td>17.3.1.5. Administrative tax penalty procedure</td>
<td>343</td>
</tr>
<tr>
<td><strong>17.3.2. Criminal penalties</strong></td>
<td>343</td>
</tr>
<tr>
<td>17.3.2.1. Criminal tax offences</td>
<td>344</td>
</tr>
<tr>
<td>17.3.2.1.1. Tax fraud</td>
<td>344</td>
</tr>
<tr>
<td>17.3.2.1.2. Other criminal tax offenses</td>
<td>345</td>
</tr>
<tr>
<td>17.3.2.2. Criminal tax procedure</td>
<td>345</td>
</tr>
<tr>
<td><strong>17.4. Surcharges regarding third parties</strong></td>
<td>346</td>
</tr>
<tr>
<td><strong>17.5. Legal protection of the taxpayer/third parties</strong></td>
<td>347</td>
</tr>
<tr>
<td>17.5.1. Recourse to legal actions</td>
<td>347</td>
</tr>
<tr>
<td>17.5.2. Competent authority</td>
<td>348</td>
</tr>
<tr>
<td>17.5.3. Interim measures regarding legal protection</td>
<td>349</td>
</tr>
</tbody>
</table>
17.5.4. Advance ruling 350
17.5.5. Alternative dispute resolutions or settlements (dealing) 350
17.5.6. Other tax law safeguards 351
17.6. Deductibility of surcharges 351
17.7. Numbers 353
17.8. Effectiveness 354

Chapter 18: Germany 355
Klaus-Dieter Drüen and Philipp J. Butler

18.1. Introduction: The relevance of surcharges 355
18.2. Taxpayer and third-party duties 355
18.2.1. Tax assessment procedures 356
18.2.2. Duties within tax assessment procedures 357
18.2.2.1. Pre-declaratory and preparatory duties 357
18.2.2.2. Declaratory duties 359
18.2.2.3. Collection duties 359
18.2.2.4. Examination and supervision duties 359
18.3. Definition and categorization of different types of surcharges 360
18.3.1. Criminal penalties 361
18.3.2. Administrative tax surcharges and penalties 363
18.3.3. Interests 366
18.3.4. Other sanctions 367
18.4. Catalogue of attributes of different surcharges 369
18.4.1. Criminal penalties 369
18.4.2. Administrative tax penalties 372
18.4.2.1. General administrative tax penalty 373
18.4.2.2. Pre-declaratory and preparatory surcharges 374
18.4.2.3. Declaratory surcharges 375
18.4.2.4. Payment surcharges 377
18.4.2.5. Other administrative surcharges 379
18.4.3. Interests 379
18.5. Surcharges regarding third parties 381
18.6. Legal protection of the taxpayer and third parties 383
18.7. Deductibility of surcharges 386
18.8. Numbers 387
18.9. Effectiveness 387
# Table of Contents

## Chapter 19: Greece

*Theodore Fortsakis and Petros Pantazopoulos*

19.1. Taxpayer and third-party duties 389  
19.1.1. Tax assessment procedures 390  
19.1.2. General duties within tax assessment procedures 391  
19.1.3. Duties regarding clarification, examination and supervision procedures 392  
19.1.4. Duties regarding tax collection 395  
19.1.5. Duties regarding tax shelter or tax schemes 395  
19.2. Definition and categorization of different types of surcharges 396  
19.2.1. Criminal penalties 396  
19.2.2. Administrative tax penalties 398  
19.2.3. Interests 401  
19.2.4. Other surcharges 401  
19.3. Catalogue of attributes of different surcharges 402  
19.4. Surcharges regarding third parties 403  
19.5. Legal protection of the taxpayer/third parties 404  
19.6. Deductibility of surcharges 405  
19.7. Effectiveness 405  

## Chapter 20: Hungary

*Éva Erdős, Anna Halustyik and Ildikó Szabó*  
20.1. Introductory explanation 407  
20.2. Taxpayer and third-party duties 407  
20.2.1. Tax assessment procedures 408  
20.2.2. General duties within tax assessment procedures 408  
20.2.3. Duties regarding clarification, examination and supervision procedures 409  
20.2.4. Duties regarding tax collection 410  
20.2.5. Some other duties 410  
20.3. Definition and categorization of different types of surcharges 411  
20.3.1. Criminal penalties 411  
20.3.2. Administrative tax penalties 412  
20.3.2.1. Delay penalty 412  
20.3.2.2. Self-audit surcharge 412  
20.3.2.3. Tax penalty 412  
20.3.2.4. Default penalty 413  
20.3.3. Interests 414  
20.3.4. Other surcharges 415  
20.4. Catalogue of attributes of different surcharges 415
20.5. Surcharges regarding third parties
20.5.1. Interim measures
   20.5.1.1. Authorization of deferred payment and
             payment by instalment
   20.5.1.2. Tax abatement
20.5.2. Advance tax ruling
20.5.3. Alternative dispute resolutions or settlements

Chapter 21: Italy

Lorenzo Del Federico, Francesco Montanari,
Pietro Mastellone, Antonio Marinello Silvia Giorgi,
Lorenzo Trombella, Simone Ariatti and Virginia Scalera

21.1. Introduction
21.2. Taxpayer’s and third-party duties
   21.2.1. Taxpayer’s duties
      21.2.1.1. Tax return
      21.2.1.2. Taxpayer’s duties during tax assessment
                 procedures
         21.2.1.2.1. Tax assessment methods: analytical,
                       analytical-presumptive, synthetic
         21.2.1.2.2. Object of the tax assessment
                       procedures
      21.2.1.3. Duty to provide clarifications and answers
                 to specific questionnaires
      21.2.1.4. Accounting duties
      21.2.1.5. Duties regarding clarification,
                 examination and supervision procedures
      21.2.1.6. Duties regarding tax collection
      21.2.1.7. Duties regarding special tax disciplines
   21.2.2. Third-party duties
      21.2.2.1. Financial intermediaries’ duties
      21.2.2.2. Withholding agents’ duties
   21.3. Definition and categorization of different types of surcharges
      21.3.1. Remarks on the constitutional principles
               underpinning the Italian tax system
      21.3.2. Criminal penalties
      21.3.3. Administrative tax penalties
      21.3.4. Default interests
      21.3.5. Other surcharges
   21.4. Catalogue of attributes of different surcharges
Table of Contents

21.4.1. Purpose and justification 449
21.4.2. Prerequisites and exemptions 449
21.4.3. Procedures 454
21.4.4. Amount of the penalty 456

21.5. Surcharges regarding third parties 458

21.6. Legal protection of the taxpayer and third parties 466
21.6.1. Legal remedies available and competent authorities 466
21.6.1.1. Legal remedies against criminal tax penalties 467
21.6.1.2. Legal remedies against administrative tax penalties 467
21.6.2. Interim measures 469
21.6.3. Advance ruling and requirement for its application 470
21.6.4. Alternative dispute resolutions (ADRs) and settlements applicable to surcharges 471
21.6.4.1. Agreement on the notice of assessment 472
21.6.4.2. Mediation for “small” tax controversies 472
21.6.4.3. Conciliation before the Tax Court 473
21.6.5. Final remarks on the general level of taxpayer’s rights protection 473

21.7. Abuse of tax law and penalties 474

21.8. Deductibility of penalties 476

21.9. Statistical data
21.9.1. Tax evasion related to sentenced taxpayers 478
21.9.2. Tax revenue from tax assessment 479
21.9.3. Tax revenue from interests and penalties 479

21.10. Effectiveness 479

21.11. Conclusion 481

Chapter 22: The Netherlands

J.Arnaud Booij, Sigrid Hemels and Charlotte Bikkers

22.1. Introductory explanation 483

22.2. Taxpayer and third-party duties
22.2.1. Tax assessment procedures 484
22.2.2. General duties within tax assessment procedures 484
22.2.3. Duties regarding clarification, examination and supervision procedures 487
22.2.3.1. Administrative procedure 487
22.2.3.2. Criminal procedure 488
22.2.4. Duties regarding tax collection 490
22.2.5. Duties regarding tax shelter or tax schemes 493

xxvi
### Table of Contents

22.2.6. Other duties ........................................... 493
22.3. Definition and categorization of different types of surcharges 493
  22.3.1. Criminal penalties .................................. 493
  22.3.2. Administrative tax penalties ...................... 495
  22.3.3. Interests ............................................ 495
  22.3.4. Other surcharges .................................. 495
22.4. Surcharges regarding third parties ........................ 496
22.5. Legal protection of the taxpayer/third parties ............ 497
  22.5.1. Recourse to legal actions ......................... 497
  22.5.2. Authority or institution addressed ............... 498
  22.5.3. Interim measures ................................. 498
  22.5.4. Protection through advance ruling ............... 498
  22.5.5. Alternative dispute resolutions or settlements (dealing) 499
  22.5.6. Other tax law safeguards ......................... 499
22.6. Deductibility of surcharges ................................ 499
22.7. Numbers .................................................. 500
22.8. Effectiveness .............................................. 500

### Chapter 23: Norway

*Benn Folkvord*

23.1. Taxpayer and third-party duties ............................. 501
  23.1.1. Tax assessment procedures .......................... 501
  23.1.2. General duties within tax assessment procedures .... 501
  23.1.3. Duties regarding clarification, examination and supervision procedures 502
  23.1.4. Duties regarding tax collection ...................... 503
    23.1.4.1. General points ................................ 503
    23.1.4.2. Specific points on wage earners/wage payments 504
    23.1.4.3. Specific points on business operators etc. 505
  23.1.5. Duties regarding tax shelters or tax schemes ........ 505
  23.1.6. Other duties ......................................... 506
23.2. Definition and categorization of different types of surcharges 507
  23.2.1. Criminal penalties .................................. 508
  23.2.2. Administrative tax penalties ...................... 509
  23.2.3. Interests ............................................ 510
    23.2.3.1. Interest on insufficient withholding tax and interest earnings on tax paid in excess 510
    23.2.3.2. Interest in connection with changes to the tax assessment 510
### Table of Contents

<table>
<thead>
<tr>
<th>Section</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>23.2.3.3</td>
<td>Interest on arrears</td>
<td>511</td>
</tr>
<tr>
<td>23.2.4</td>
<td>Other surcharges</td>
<td>511</td>
</tr>
<tr>
<td>23.2.4.1</td>
<td>The legality requirement</td>
<td>511</td>
</tr>
<tr>
<td>23.2.4.2</td>
<td>Discretionary tax assessment</td>
<td>512</td>
</tr>
<tr>
<td>23.2.4.3</td>
<td>Refusal of non-documented tax allowances</td>
<td>513</td>
</tr>
<tr>
<td>23.2.4.4</td>
<td>Abatement</td>
<td>513</td>
</tr>
<tr>
<td>23.2.4.5</td>
<td>Debt settlement</td>
<td>513</td>
</tr>
<tr>
<td>23.3</td>
<td>Catalogue of attributes of different surcharges</td>
<td>514</td>
</tr>
<tr>
<td>23.3.1</td>
<td>Purpose/aim/justification</td>
<td>514</td>
</tr>
<tr>
<td>23.3.2</td>
<td>Prerequisites</td>
<td>514</td>
</tr>
<tr>
<td>23.3.3</td>
<td>Timely application of the surcharge</td>
<td>514</td>
</tr>
<tr>
<td>23.3.4</td>
<td>Amount of the surcharge, base on which the surcharge is applied or duration of imprisonment</td>
<td>514</td>
</tr>
<tr>
<td>23.3.5</td>
<td>Maximum limit regarding surcharge amount or imprisonment</td>
<td>515</td>
</tr>
<tr>
<td>23.3.6</td>
<td>Dependence on fault</td>
<td>515</td>
</tr>
<tr>
<td>23.3.7</td>
<td>Exemptions from surcharges</td>
<td>515</td>
</tr>
<tr>
<td>23.3.8</td>
<td>Imposition of surcharges and penalties</td>
<td>515</td>
</tr>
<tr>
<td>23.3.9</td>
<td>Procedures regarding the imposition of administrative tax penalties and criminal penalties</td>
<td>515</td>
</tr>
<tr>
<td>23.4</td>
<td>Surcharges regarding third parties</td>
<td>516</td>
</tr>
<tr>
<td>23.5</td>
<td>Legal protection of the taxpayer/third parties</td>
<td>516</td>
</tr>
<tr>
<td>23.5.1</td>
<td>Recourse to legal actions</td>
<td>516</td>
</tr>
<tr>
<td>23.5.2</td>
<td>Authority or institution addressed</td>
<td>516</td>
</tr>
<tr>
<td>23.5.3</td>
<td>Interim measures</td>
<td>517</td>
</tr>
<tr>
<td>23.5.4</td>
<td>Protection through advance ruling</td>
<td>517</td>
</tr>
<tr>
<td>23.5.5</td>
<td>Alternative dispute resolutions or settlements</td>
<td>517</td>
</tr>
<tr>
<td>23.5.6</td>
<td>Other tax law safeguards</td>
<td>517</td>
</tr>
<tr>
<td>23.6</td>
<td>Deductibility of surcharges</td>
<td>517</td>
</tr>
<tr>
<td>23.7</td>
<td>Numbers</td>
<td>518</td>
</tr>
<tr>
<td>23.8</td>
<td>Effectiveness</td>
<td>519</td>
</tr>
</tbody>
</table>

### Chapter 24: Poland

*Adam Nita and Andrzej Światłowski*

<table>
<thead>
<tr>
<th>Section</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>24.1</td>
<td>Taxpayer and third-party duties</td>
<td>521</td>
</tr>
<tr>
<td>24.1.1</td>
<td>Tax assessment procedures</td>
<td>521</td>
</tr>
<tr>
<td>24.1.2</td>
<td>General duties within tax assessment procedures</td>
<td>522</td>
</tr>
<tr>
<td>24.1.3</td>
<td>Duties regarding clarification, examination and supervision procedures</td>
<td>522</td>
</tr>
<tr>
<td>Section</td>
<td>Title</td>
<td>Page</td>
</tr>
<tr>
<td>---------</td>
<td>----------------------------------------------------------------------</td>
<td>------</td>
</tr>
<tr>
<td>24.1.4.</td>
<td>Other duties</td>
<td>524</td>
</tr>
<tr>
<td>24.2.</td>
<td>Definition and categorization of different types of surcharges</td>
<td>525</td>
</tr>
<tr>
<td>24.2.1.</td>
<td>Criminal penalties</td>
<td>525</td>
</tr>
<tr>
<td>24.2.2.</td>
<td>Administrative tax penalties</td>
<td>526</td>
</tr>
<tr>
<td>24.2.3.</td>
<td>Interests</td>
<td>531</td>
</tr>
<tr>
<td>24.2.4.</td>
<td>Other surcharges</td>
<td>533</td>
</tr>
<tr>
<td>24.3.</td>
<td>Catalogue of attributes of different surcharges</td>
<td>534</td>
</tr>
<tr>
<td>24.3.1.</td>
<td>Purpose/aim/justification</td>
<td>534</td>
</tr>
<tr>
<td>24.3.2.</td>
<td>Prerequisites</td>
<td>534</td>
</tr>
<tr>
<td>24.3.3.</td>
<td>Timely appliance of the surcharge</td>
<td>536</td>
</tr>
<tr>
<td>24.3.4.</td>
<td>Amount of the surcharge, base on which the surcharge is applied or</td>
<td>537</td>
</tr>
<tr>
<td></td>
<td>duration of imprisonment</td>
<td></td>
</tr>
<tr>
<td>24.3.4.1.</td>
<td>Maximum limit regarding the surcharge amount or imprisonment</td>
<td>537</td>
</tr>
<tr>
<td>24.3.4.2.</td>
<td>Degree of personal responsibility</td>
<td>538</td>
</tr>
<tr>
<td></td>
<td>(dependence on fault)</td>
<td></td>
</tr>
<tr>
<td>24.3.5.</td>
<td>Exemptions from surcharges</td>
<td>538</td>
</tr>
<tr>
<td>24.3.6.</td>
<td>Imposition of surcharges/penalties</td>
<td>539</td>
</tr>
<tr>
<td>24.3.7.</td>
<td>Procedures regarding the imposition of administrative tax penalties</td>
<td>539</td>
</tr>
<tr>
<td></td>
<td>and criminal penalties</td>
<td></td>
</tr>
<tr>
<td>24.4.</td>
<td>Surcharges regarding third parties</td>
<td>540</td>
</tr>
<tr>
<td>24.5.</td>
<td>Legal protection of the taxpayer/third parties</td>
<td>540</td>
</tr>
<tr>
<td>24.5.1.</td>
<td>General principles</td>
<td>540</td>
</tr>
<tr>
<td>24.5.2.</td>
<td>Recourse of the taxpayer/third party to legal actions</td>
<td>542</td>
</tr>
<tr>
<td>24.5.3.</td>
<td>Interim measures regarding legal protection</td>
<td>543</td>
</tr>
<tr>
<td>24.5.4.</td>
<td>Protection through advance ruling</td>
<td>543</td>
</tr>
<tr>
<td>24.5.5.</td>
<td>Alternative dispute resolutions or settlements (dealing)</td>
<td>544</td>
</tr>
<tr>
<td>24.5.6.</td>
<td>Other tax law safeguards</td>
<td>544</td>
</tr>
<tr>
<td>24.6.</td>
<td>Deductibility of surcharges</td>
<td>545</td>
</tr>
<tr>
<td>24.7.</td>
<td>Numbers</td>
<td>546</td>
</tr>
<tr>
<td>24.8.</td>
<td>Effectiveness</td>
<td>547</td>
</tr>
</tbody>
</table>

**Chapter 25: Portugal**

*Nina Aguiar*

<table>
<thead>
<tr>
<th>Section</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>25.1.</td>
<td>Taxpayer and third-party duties</td>
<td>549</td>
</tr>
<tr>
<td>25.1.1.</td>
<td>Tax assessment procedures</td>
<td>549</td>
</tr>
<tr>
<td>25.1.2.</td>
<td>General duties within tax assessment procedures</td>
<td>550</td>
</tr>
<tr>
<td>25.1.2.1.</td>
<td>Bookkeeping duties</td>
<td>550</td>
</tr>
<tr>
<td>25.1.2.2.</td>
<td>Disclosure duties</td>
<td>551</td>
</tr>
<tr>
<td>25.1.2.3.</td>
<td>Filing duties</td>
<td>552</td>
</tr>
<tr>
<td>Section</td>
<td>Title</td>
<td>Page</td>
</tr>
<tr>
<td>---------</td>
<td>-------</td>
<td>------</td>
</tr>
<tr>
<td>25.1.3.</td>
<td>Duties regarding clarification, examination and supervision procedures</td>
<td>552</td>
</tr>
<tr>
<td>25.1.3.1.</td>
<td>Retrospective tax audits</td>
<td>552</td>
</tr>
<tr>
<td>25.1.3.2.</td>
<td>Other audit procedures</td>
<td>554</td>
</tr>
<tr>
<td>25.1.3.3.</td>
<td>Duties regarding general tax supervision</td>
<td>554</td>
</tr>
<tr>
<td>25.1.3.4.</td>
<td>Duties regarding the investigation of tax crimes and tax offences</td>
<td>555</td>
</tr>
<tr>
<td>25.1.4.</td>
<td>Duties regarding tax collection</td>
<td>557</td>
</tr>
<tr>
<td>25.1.5.</td>
<td>Duties regarding tax shelter or tax schemes</td>
<td>558</td>
</tr>
<tr>
<td>25.1.6.</td>
<td>Other duties</td>
<td>558</td>
</tr>
<tr>
<td>25.2.</td>
<td>Definition and categorization of different types of surcharges</td>
<td>559</td>
</tr>
<tr>
<td>25.2.1.</td>
<td>Criminal penalties</td>
<td>559</td>
</tr>
<tr>
<td>25.2.2.</td>
<td>Administrative penalties</td>
<td>560</td>
</tr>
<tr>
<td>25.2.3.</td>
<td>Interests</td>
<td>562</td>
</tr>
<tr>
<td>25.2.4.</td>
<td>Other surcharges</td>
<td>562</td>
</tr>
<tr>
<td>25.3.</td>
<td>Catalogue of attributes of different surcharges</td>
<td>563</td>
</tr>
<tr>
<td>25.3.1.</td>
<td>Justification</td>
<td>563</td>
</tr>
<tr>
<td>25.3.2.</td>
<td>Prerequisites</td>
<td>563</td>
</tr>
<tr>
<td>25.3.3.</td>
<td>Timely appliance of the surcharge</td>
<td>564</td>
</tr>
<tr>
<td>25.3.4.</td>
<td>Amount of the surcharge and duration of imprisonment</td>
<td>564</td>
</tr>
<tr>
<td>25.3.5.</td>
<td>Maximum limit regarding the surcharge amount or the imprisonment</td>
<td>566</td>
</tr>
<tr>
<td>25.3.6.</td>
<td>Modes of culpability</td>
<td>566</td>
</tr>
<tr>
<td>25.3.7.</td>
<td>Exemptions from surcharges</td>
<td>567</td>
</tr>
<tr>
<td>25.3.8.</td>
<td>Responsibility for the imposition of surcharges and penalties</td>
<td>567</td>
</tr>
<tr>
<td>25.3.9.</td>
<td>Procedures for the imposition of administrative and criminal tax penalties</td>
<td>568</td>
</tr>
<tr>
<td>25.4.</td>
<td>Surcharges regarding third parties</td>
<td>568</td>
</tr>
<tr>
<td>25.5.</td>
<td>Legal protection of the taxpayer and third parties</td>
<td>570</td>
</tr>
<tr>
<td>25.5.1.</td>
<td>Recourse to legal actions</td>
<td>570</td>
</tr>
<tr>
<td>25.5.2.</td>
<td>Authorities or institutions to be addressed by taxpayers or third parties in case of an objection</td>
<td>571</td>
</tr>
<tr>
<td>25.5.3.</td>
<td>Interim measures regarding legal protection</td>
<td>571</td>
</tr>
<tr>
<td>25.5.4.</td>
<td>Advance rulings</td>
<td>571</td>
</tr>
<tr>
<td>25.5.5.</td>
<td>Alternative dispute resolutions regarding surcharges</td>
<td>572</td>
</tr>
<tr>
<td>25.5.6.</td>
<td>Overall view on taxpayers’ guarantees provided for in Portuguese law</td>
<td>572</td>
</tr>
<tr>
<td>25.5.6.1.</td>
<td>Systematization</td>
<td>572</td>
</tr>
<tr>
<td>25.5.6.2.</td>
<td>Constitutional principles of greater practical importance</td>
<td>573</td>
</tr>
</tbody>
</table>
25.5.6.3.  Taxpayers’ rights 574
25.5.6.4.  Tax administration’s obligations 576
25.5.6.5.  Other guarantees 576
25.6.  Deductibility of surcharges 578
25.7.  Numbers of proceedings 578
25.8.  Effectiveness of sanctions 579

Chapter 26:  Spain 581

Antonio López Díaz

Introduction 581
26.1.  Taxpayer and third-party duties 582
   26.1.1.  Tax assessment procedures 584
   26.1.2.  General duties within tax assessment procedures 585
   26.1.3.  Duties regarding clarification, examination and supervision procedures 587
   26.1.4.  Duties regarding tax collection 588
26.2.  Definition and categorization of different types of surcharges 590
   26.2.1.  Criminal penalties 590
   26.2.2.  Administrative tax penalties 591
   26.2.3.  Interest 594
   26.2.4.  Other surcharges 595
26.3.  Catalogue of attributes of different surcharges 597
   26.3.1.  Purpose, aim and justification 597
   26.3.2.  Prerequisites 598
   26.3.3.  Timely application of the surcharge 598
   26.3.4.  Amount of the surcharge 599
   26.3.5.  Maximum limits 600
   26.3.6.  Dependency on fault 600
   26.3.7.  Exemptions from surcharges 601
   26.3.8.  Who imposes surcharges/penalties 602
   26.3.9.  Procedures regarding the imposition of administrative and criminal penalties 602
26.4.  Surcharges regarding third parties 603
26.5.  Legal protection of the taxpayer or third parties 603
   26.5.1.  Recourse to legal actions 603
   26.5.2.  Which authority or institution has to be addressed by the taxpayer/third party if he wants to file an objection 603
   26.5.3.  Interim measures regarding legal protection 603
   26.5.4.  Protection through advance ruling 605
   26.5.5.  Alternative dispute resolutions regarding surcharges 605
Chapter 29: Turkey

Funda Başaran Yavaşlar

29.1. Taxpayer and third-party duties

29.1.1. Tax assessment procedures

29.1.2. General duties within tax assessment procedures

29.1.2.1. Determining tax-base duties

29.1.2.2. Duties of keeping and submitting books and documents

29.1.2.3. Duty to submit a declaration

29.1.3. Duties with regard to clarification, examination and supervision procedures

29.1.4. Duties regarding tax collection

29.1.5. Other duties

29.2. Definition and categorization of different types of surcharges

29.2.1. Criminal penalties

29.2.2. Administrative tax penalties

29.2.3. Interest

29.2.4. Other surcharges

29.3. Catalogue of attributes of different surcharges

29.3.1. Purpose/justification

29.3.2. Prerequisites

29.3.3. Timely application of a surcharge

29.3.4. Amount of the surcharge/duration of imprisonment and maximum limits

29.3.5. Fault

29.3.6. Mitigation of penalties

29.3.7. Authority that imposes surcharges/penalties

29.3.8. Procedures regarding the imposition of administrative and criminal tax penalties

29.4. Surcharges regarding third parties

29.5. Legal protection of taxpayers/third parties

29.5.1. Recourse to legal action

29.5.2. Authorities or institutions responsible for objection-based reviews

29.5.3. Interim measures regarding legal protection

29.5.4. Protection through an advance tax ruling

29.5.5. Alternative dispute resolutions regarding surcharges

29.5.6. Other tax law safeguards

29.6. Deductibility of surcharges

29.7. Numbers

29.8. Effectiveness
Chapter 30: United Kingdom

Rita de la Feria and Parintira Tanawong

30.1. Taxpayer and third-party duties

30.1.1. Tax Assessment Procedures and General Duties

30.1.1.1. Personal Income Tax

30.1.1.2. Corporation (income) tax

30.1.1.3. Value added tax

30.1.2. Duties regarding clarification, examination

and supervision Procedures

30.1.2.1. Personal income tax

30.1.2.2. Corporation (income) tax

30.1.2.3. VAT

30.1.3. Duties regarding tax collection

30.1.3.1. Personal income tax

30.1.3.2. Corporation (income) tax

30.1.3.3. VAT

30.1.4. Duties regarding disclosure of tax avoidance schemes

30.1.4.1. Income taxes

30.1.4.2. VAT

30.2. Definition and categorization of different types of surcharges

30.2.1. Criminal penalties

30.2.1.1. Income taxes

30.2.1.2. VAT

30.2.2. Administrative tax penalties

30.2.2.1. Penalties for errors

30.2.2.2. Penalties for failure to notify

30.2.2.3. Penalties for failure to submit returns and

make payments on time

30.2.2.4. Record-keeping penalties

30.2.2.5. Avoidance and aggressive tax planning

penalties

30.2.3. Interest

30.2.3.1. Personal income tax

30.2.3.2. Corporation (income) tax

30.2.3.3. VAT

30.2.4. Comparison of procedures applied to administrative
tax penalties and criminal penalties

30.3. Surcharges regarding third parties

30.3.1. Supply of false information or withholding

information

30.3.2. Promotion of tax avoidance and facilitation of tax
evasion
<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>30.4. Legal protection of the taxpayer/third parties</td>
<td>726</td>
</tr>
<tr>
<td>30.4.1. Recourse to legal action</td>
<td>726</td>
</tr>
<tr>
<td>30.4.2. An authority or institution has to be addressed by the taxpayer/third party if they want to file an objection</td>
<td>727</td>
</tr>
<tr>
<td>30.4.3. Interim measures regarding legal protection</td>
<td>728</td>
</tr>
<tr>
<td>30.4.4. Advance ruling in the United Kingdom</td>
<td>729</td>
</tr>
<tr>
<td>30.4.5. Alternative dispute resolutions</td>
<td>729</td>
</tr>
<tr>
<td>30.4.6. Tax law safeguard</td>
<td>729</td>
</tr>
<tr>
<td>30.5. Deductibility of surcharges</td>
<td>731</td>
</tr>
<tr>
<td>30.6. Numbers and proceedings regarding surcharges</td>
<td>731</td>
</tr>
<tr>
<td>30.7. Effectiveness</td>
<td>733</td>
</tr>
<tr>
<td>Chapter 31: United States</td>
<td>739</td>
</tr>
<tr>
<td>Stephen W. Mazza, Leandra Lederman</td>
<td></td>
</tr>
<tr>
<td>and Steve R. Johnson</td>
<td></td>
</tr>
<tr>
<td>31.1. Taxpayer and third-party duties</td>
<td>739</td>
</tr>
<tr>
<td>31.1.1. Tax assessment procedures</td>
<td>739</td>
</tr>
<tr>
<td>31.1.2. General duties within tax assessment procedures</td>
<td>741</td>
</tr>
<tr>
<td>31.1.3. Duties regarding clarification, examination and supervision procedures</td>
<td>742</td>
</tr>
<tr>
<td>31.1.4. Duties regarding tax collection</td>
<td>744</td>
</tr>
<tr>
<td>31.1.5. Duties regarding tax shelter or tax schemes</td>
<td>746</td>
</tr>
<tr>
<td>31.2. Definition and categorization of various types of surcharges</td>
<td>747</td>
</tr>
<tr>
<td>31.2.1. Criminal penalties</td>
<td>747</td>
</tr>
<tr>
<td>31.2.1.1. Code sections of general applicability directed at taxpayers</td>
<td>747</td>
</tr>
<tr>
<td>31.2.1.2. Code sections of general applicability directed at third parties</td>
<td>749</td>
</tr>
<tr>
<td>31.2.1.3. Code sections of specific, limited applicability</td>
<td>750</td>
</tr>
<tr>
<td>31.2.1.4. USC sections charged in the tax context</td>
<td>751</td>
</tr>
<tr>
<td>31.2.1.5. Categorization</td>
<td>753</td>
</tr>
<tr>
<td>31.2.2. Administrative tax penalties</td>
<td>753</td>
</tr>
<tr>
<td>31.2.2.1. Penalties for taxpayer untimeliness</td>
<td>753</td>
</tr>
<tr>
<td>31.2.2.2. Penalties for taxpayer inaccuracy</td>
<td>754</td>
</tr>
<tr>
<td>31.2.2.3. Penalties to promote regulatory goals</td>
<td>754</td>
</tr>
<tr>
<td>31.2.2.4. Penalties on advisers and others</td>
<td>754</td>
</tr>
<tr>
<td>31.2.2.5. Penalties as to required information</td>
<td>755</td>
</tr>
<tr>
<td>31.2.2.6. Categorization</td>
<td>755</td>
</tr>
<tr>
<td>31.2.3. Interest</td>
<td>756</td>
</tr>
</tbody>
</table>
31.2.4. Other surcharges

31.3. Catalogue of attributes of different surcharges

31.3.1. Purposes

31.3.1.1. Criminal penalties
31.3.1.2. Administrative tax penalties
31.3.1.3. Interest
31.3.1.4. Other surcharges

31.3.2. Prerequisites

31.3.3. Timely application of surcharges

31.3.4. Amounts of surcharges

31.3.4.1. Criminal penalties
31.3.4.2. Civil penalties

31.3.5. Maximum punishment

31.3.6. Surcharge dependent on fault

31.3.6.1. Criminal penalties
31.3.6.2. Civil penalties
31.3.6.3. Interest
31.3.6.4. Other surcharges

31.3.7. Exemptions

31.3.8. Authorities who determine the sanctions

31.3.9. Procedures for imposition of penalties

31.3.9.1. Criminal penalties
31.3.9.2. Administrative tax penalties

31.4. Surcharges regarding third parties

31.4.1. Tax return preparer penalties
31.4.2. Tax-shelter adviser and promoter penalties
31.4.3. Information reporting penalties

31.5. Legal protection of the taxpayer and third parties

31.5.1. Legal actions

31.5.2. Institutions to which taxpayers and third parties address objections

31.5.3. Interim legal protections
31.5.4. Advance rulings
31.5.5. Alternative dispute resolution and settlement
31.5.6. Taxpayer bills of rights and other safeguards

31.6. Deductibility of surcharges

31.7. Numbers

31.7.1. Civil penalties
31.7.2. Criminal Penalties
31.7.3. Interest
31.7.4. Settlements

31.8. Effectiveness
Table of Contents

Part 4
Annexes

<table>
<thead>
<tr>
<th>Annex</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Annex 1</td>
<td>Questionnaire on Surcharges and Penalties in Tax Law</td>
<td>797</td>
</tr>
<tr>
<td>Annex 2</td>
<td>Criminal Penalties – Exemplified Overview</td>
<td>805</td>
</tr>
<tr>
<td>Annex 3</td>
<td>Types of Administrative Surcharges – Exemplified Overview</td>
<td>809</td>
</tr>
<tr>
<td>Annex 4</td>
<td>Interests – Exemplified Overview</td>
<td>813</td>
</tr>
</tbody>
</table>
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

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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. 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. 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), federal withholding taxes (WHT), stamp duties or consumption taxes (e.g. on tobacco, beer, mineral oil). 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, this regardless of the place (in Switzerland) the taxable event has occurred. If irregularities occur, the Federal Act on Administrative Criminal Law (ACL) has to be taken into account additionally.

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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.

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.\(^ {17}\)

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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.
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”). This obligation is a right at the same time, 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.

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. 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. 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. According to these provisions, the tax authority can order examinations of financial statements, make appearances, seek

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18. By the same token, this implies that the principle of proportionality has to be observed; see below at the end of this section.
20. For an overview, see also M. Beusch, in E. Kristoffersson et al. (eds.), Tax Secrecy and tax Transparency (2013), p. 1113 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.
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; and contraventions are acts that are punishable by a fine.

All Swiss tax laws have the same structure with regard to possible crimes: 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. 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. 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. Felonies only exist in one singular constellation: aggravated tax fraud.

30. CHE: art. 10 CC.
31. CHE: art. 103 CC.
33. CHE: art. 174 FIT/DBG; see also art. 64 WHT/VStG.
34. CHE: art. 96 VAT/MWSTG; see also art. 175 FIT/DBG.
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. 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. 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.

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. 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.

37. CHE: art. 305bis, para. 1bis CC (in the version according to the Federal Gazette (BBI) 2014 9689); see also M. Beusch, S. Friedli & M. Borla, “Serious Tax Crimes”:
38. CHE: art. 183, para. 1 FIT/DBG.
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 with 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. 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.

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.

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.”
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— the Swiss courts would not hear the respective complaints.

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. 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. Besides, if payments are repeatedly in arrears, the Federal Tax Authority may require the taxable person to make monthly or half-monthly advance payments.

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. Other contraventions, however, have a “fixed frame” and entail fines of up to CHF 800,000. 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.

45. CHE: art. 190 Const.; W. Haller, The Swiss Constitution in a Comparative Context (2009), N 561 et seq.
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 “\textit{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.


\(^{56}\) For the following differentiated legal protection aspects, see section 28.5.

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. Additionally, they can be punished as participants of the delicts committed by the taxpayer, as inciter or – more commonly – as complice. In such circumstances, the inciter and complice are often also liable for the tax evaded.

28.5. Legal protection of taxpayers and third parties

Legal protection is guaranteed by the Constitution and also by the European Convention on Human Rights (ECHR). In tax and criminal tax law, there is no act of a governmental authority that cannot be brought before an independent court. 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.

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*). 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.

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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.
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
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.  

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).
Contact

IBFD Head Office
Rietlandpark 301
1019 DW Amsterdam
P.O. Box 20237
1000 HE Amsterdam, The Netherlands
Tel.: +31-20-554 0100 (GMT+1)
Email: info@ibfd.org
Web: www.ibfd.org