TAX LITIGATION
JURISDICTIONAL COMPARISONS

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1. OVERVIEW

1.1 Significant subjects of tax litigation

Tax procedural law is established civil law in Switzerland and comprises all the legal principles that govern the collection of taxes. These rules mainly concern the establishment of tax liability, legal protection and the enforcement of tax payment. Criminal tax prosecution law differs from tax procedural law understood as a form of administrative procedural law; the former is dominated entirely by the principles of criminal procedure (eg, in particular the presumption of innocence) and will be dealt with only marginally in this chapter.

Switzerland is a federal State. As a result, not only the Confederation but also the 26 member states (cantons) are authorised to raise tax. The cantons are responsible for the assessment of direct taxation (in particular income and net wealth taxes), including that of the Confederation – in principle at the domicile or registered office of the taxpayer. As a result, the procedure is governed by the particular cantonal law; in other words, 26 different bodies of tax procedural law are observed in Switzerland (hereinafter, reference will always be made to the Canton of Zurich by way of example). In addition, the procedural law of the Confederation governs direct federal tax.

For the purpose of this publication, the observations below are confined to the procedural law concerning direct taxation.

1.2 Identification of legislative framework

The main legal basis is the tax procedural law of the relevant canton, which is primarily embodied in the particular Cantonal Tax Law, eg, the Tax Act of the Canton of Zurich (StG-ZH). To contain the variety of cantonal tax legislation, the Confederation has also enacted the Federal Act on the Harmonisation of Direct Taxation at Cantonal and Communal Levels (StHG) of 14 December 1990, which sets certain boundaries and minimum requirements regarding procedural law on the cantons in its Article 39 ff. In parallel with the 26 bodies of cantonal rules, the procedural provisions for levying the federal tax are to be found in Article 102 ff. of the Federal Act on Direct Federal Taxation (DBG) of 14 December 1990.

In addition, the general procedural laws of the Confederation and cantons

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1 In principle, direct taxes in Switzerland are levied on the federal, cantonal and communal levels. Municipalities, however, are entitled to levy taxes only to the extent authorised by the cantons. Communal direct taxes are in most cases levied as a percentage or multiple of the basic, cantonal tax rate scale.

2 The procedural provisions are found in section 106 ff.
apply subsidiarily in so far as, and to the extent that, no special provisions exist for the area of taxation. 3

Procedural guarantees are also contained in constitutional and international law which must likewise be respected. These aspects are embodied in Article 29 ff. of the Swiss Federal Constitution (BV). If the tax procedure is of a criminal nature, the guarantees of criminal prosecution enshrined in the international human rights conventions signed by Switzerland – in particular Article 6 ECHR and Article 14 UNO-Pact II – also apply.

1.2.1 Administrative tax procedure and criminal tax procedure
For the application of the principles of procedural law, the key factor is whether the tax procedure is (strictly) an administrative procedure or whether it also involves a criminal procedure. Under Swiss law, tax assessment and enforcement are matters of administrative law, but so, too, is action against tax offences, in particular tax evasion. On the other hand, tax crimes, specifically tax fraud, are prosecuted according to the principles of the Federal Code of Criminal Procedural of 5 October 2007 (StPO).

The cantonal tax authority is therefore responsible for the prosecution of tax offences, while tax crimes are dealt with by the cantonal criminal authorities. Unlike the criminal prosecution authorities, the tax authorities do not in principle have any means of enforcement at their disposal, for example banking secrecy cannot be lifted.

In Swiss tax law, the nature of the procedure is therefore essentially determined by the distinction between offences (in particular tax evasion) on the one hand and crimes (in particular tax fraud) on the other. Tax evasion is committed by anybody who, being a taxpayer, either deliberately or negligently causes an assessment to be wrongfully omitted, or who deliberately or negligently causes a legally valid assessment to be incomplete. 5 Tax fraud is a combination of tax evasion and falsification of documents. 6 For the reduction of taxes to be qualified as tax fraud, fraudulent, falsified or untruthful documents such as business records, balance sheets, income statements or salary certificates etc. must have been used for the purpose of tax evasion.

According to the case law of the European Court of Human Rights (ECHR), 7 contrary to the domestic interpretation, tax evasion also has to be regarded as a criminal matter. 8 Both in tax evasion and in tax fraud proceedings, the accused is therefore entitled to the minimum guarantees under criminal procedure which are guaranteed by the convention law (such as the right not to have to testify against oneself), even if the procedure is still conducted according to the principles of administrative law at the

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3 In the Confederation: Federal Act on administrative procedure of 20 December 1968 = VwVG; in Zurich Canton: Administrative Law Implementing Act of 24 May 1959 = VBG-ZH.
4 An exception is constituted by the special investigative measures of the Federal Tax Administration which – with the consent of the Head of the Federal Finance Department – allow the Administration to use means of enforcement (Article 190 ff. DBG). For this to be possible, justified suspicion of a serious tax offence must exist (Article 190, para. 2 DBG). There is no equivalent at the cantonal level.
5 Article 175 DBG; Article 56 StHG.
6 Article 186 DBG; Article 59 StHG.
7 ECHR of 3.5.2001 in re JR versus Swiss Confederation, No. 31827/96.
8 Within the meaning of Article 6 ECHR.
domestic level (ie, the tax authorities do not have access to the means of enforcement which are otherwise normal in criminal proceedings).

‘Tax litigation’ in Switzerland in the area of direct taxation therefore to a large extent concerns administrative procedural law, on which we will focus in the following chapter. However, Swiss penal tax law is currently undergoing a process of substantial change: there is a trend towards increasing criminalisation which goes hand in hand with the extension of official investigative measures (see also the remarks in section 6, hot areas of interest).

2. THE PRE-COURT PROCESS

2.1 Tax rulings

In view of the complexity of tax law, taxpayers or their tax advisers regularly consult the appropriate tax authorities to obtain a binding opinion before adopting a particular course of action (eg, taking up residence in Switzerland) or performing specific legal transactions (eg, restructuring). These opinions of the tax authorities are commonly referred to as ‘Rulings’. Their binding effect is derived from the principle of good faith.9 The practice of rulings in Switzerland is of significant importance and creates legal certainty for the persons concerned.

Authority to issue rulings lies with the tax authority which is competent to issue the subsequent assessment (see section 2.2.3). Under the case law of the Supreme Court, binding effect presupposes that

- the information referred to a specific, complete and correctly described circumstance;
- the authority which gave the incorrect information was entitled to give such information or the citizen had adequate grounds to consider that the authority was competent in the matter;
- the citizen could not readily have detected the fact that the information was incorrect;
- trusting in the information given, he made arrangements which could not be cancelled without prejudice to him; and
- the legal situation at the time of implementation remains the same as it was at the time when the information was given.10

Contestable declaratory orders can only be requested in exceptional cases in the area of direct taxation.

2.2 Assessment procedure

2.2.1 Nature

Direct taxes of the Confederation and cantons are assessed by what is known as the mixed procedure. This (strictly administrative) assessment procedure is characterised by the link between an official assessment by the tax authority and self-assessment by the taxpayer: the tax authority must clarify the circumstances which are relevant for tax purposes and, if necessary, seek information from the taxpayer or third parties (principle of examination);

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9 Article 9 BV, See eg, BGE (Federal Court Decision) 121 II 473, E. 2c.
10 See eg, BGE 121 II 473, E. 2c.
however, the taxpayer simultaneously has an obligation to take part in
the assessment of the circumstances, in particular by completing the tax
return in the requisite manner (principle of participation). The assessment
procedure is closed by the competent authority with an assessment decision
that is notified to the taxpayer in writing; the determining tax bases and the
amount of tax due are specified in this decision.

If, despite a written reminder, the taxpayer fails to discharge his
procedural obligations or if the tax factors cannot be unambiguously
determined for want of reliable documentation, the assessment authority
makes what is known as a discretionary assessment. This is not to be
understood as a penalty imposed on the taxpayer, but as a means of
enforcing the state tax claim on persons who do not provide assistance or
fail to provide sufficient assistance with an ordinary assessment (regardless of
whether they are at fault in this regard). The tax authorities must make this
assessment at their diligent discretion. The aim is to achieve taxation that
reflects the true circumstances (even though it is based on an estimation).

2.2.2 Competent assessment authority
As we have seen, the cantonal authorities must assess and collect direct
taxes of the Confederation and cantons; with regard to direct federal tax,
the Confederation has a supervisory role. Natural and legal persons who
are subject to unlimited tax liability in Switzerland are assessed by the tax
authorities in the canton in which, at the end of the tax period, they have
their tax domicile or place of residence, or else their registered office, or,
under certain circumstances, their effective place of management.

2.3 Objection to the assessment decision
2.3.1 General remarks
The taxpayer may file an objection to contest the assessment decision.
The objection is a remedy which is addressed to the assessing authority
and requests a review of the assessment decision and, if necessary, an
amendment of the assessment procedure. The filing of an objection is a pre-
requisite for bringing the subject matter to the cantonal judicial authority.

2.3.2 Procedure and decision on the objection
In principle, the taxpayer is entitled to file an objection. As a rule, his
successors-in-title (e.g., heirs, legal entity which takes over the business) are
also entitled to file an objection. The authorities themselves have no right to
object to assessments of direct federal tax. The cantonal provisions regarding
the authorities’ right to object vary from canton to canton.

The objection is always directed against the cantonal assessment authority

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11 Article 130 para. 2 DGB; Article 46 para. 3 StHG; section 139 A para. 2 StG-ZH.
12 Article 2 DGB.
13 Article 216 para. 1 DGB; Article 68 para. 1 StHG.
14 Article 216 para. 3 DGB; Article 68 para. 1 StHG.
15 Article 140 ff. DGB; Article 50 StHG; section 147 StG-ZH.
16 Article 132 DGB; Article 48 StHG; section 140 para. 1 StG-ZH.
17 In Zurich Canton, for instance the communal authorities that levy tax are entitled to make an objection: section
140 para. 1 StG-ZH.
that issued the assessment.\textsuperscript{18} The DBG and some cantonal tax laws also provide for the possibility of what is known as a direct appeal.\textsuperscript{19} The objection to an assessment decision may be treated directly as an appeal with the consent of all the parties concerned and notified to the competent cantonal court.

The assessment decision is the object of the contestation. Under the case law of the Supreme Court, preliminary decisions on Swiss or cantonal tax sovereignty can also be contested; the same applies to decisions on the (subjective and possibly even objective) tax liability and on the tax exemption of legal entities, in so far as they are admitted as preliminary decisions.

The taxpayer may contest all deficiencies, of both a factual and legal nature.

The level of justice to which the objection is addressed is the cantonal assessment authority that issued the contested assessment decision.\textsuperscript{20} However, it is not necessary for this authority to decide on the objection with the same staff composition as in the assessment procedure: the cantons often entrust this task to a special committee.

The objection must be made in writing.\textsuperscript{21} At the federal level, there is no need for substantiation of the objection; a clear intent to contest the assessment is all that is required. This is explained by the fact that the assessment decision does not have to contain any justification either. At the cantonal level, an explanatory statement is required in some cases.\textsuperscript{22}

If the objection is directed against discretionary taxation, it can only be founded on a manifest inaccuracy (this limits the power of the objecting authority to examine the matter); reasons must be stated and possible evidence produced.\textsuperscript{23}

The time limit for filing an objection is 30 days after receipt of the assessment decision and cannot be extended.\textsuperscript{24} Under certain highly restrictive conditions, the period for the objection may be reinstated.\textsuperscript{25} One point to be noted is that the cantons may, because the time limits are not conclusively listed in the StHG, order a standstill of these periods (eg, in summer and over the Christmas holiday period). However, such a provision is not valid for direct federal taxation, as the DBG provides for binding time limits with no possibility of suspending them.

Provided that the tax authority examines the objection, it will either confirm the original assessment or approve the objection in whole or in part.\textsuperscript{26} The authority to which the objection is made is not bound by the applications of the parties to the procedure; in other words, the decision can be to the benefit ‘reformatio in melius’ or to the detriment ‘reformatio in peius’

\textsuperscript{18} Article 132 DBG; Article 48 StHG; section 140 StG-ZH.
\textsuperscript{19} Article 132 para. 2 DBG
\textsuperscript{20} Section 140 para. 1 StG-ZH.
\textsuperscript{21} Article 132 para. 1 DBG; Article 48 para. 1 StHG; section 140 para. 1 StG-ZH.
\textsuperscript{22} But not so in the Canton of Zurich.
\textsuperscript{23} Article 132 para. 3 DBG; Article 48 para. 2 StHG; section 140 para. 2 StG-ZH.
\textsuperscript{24} Article 132 f. DBG; Article 48 StHG, section 140 StG-ZH.
\textsuperscript{25} See Article 133 para. 3 DBG.
\textsuperscript{26} Article 135 DBG, Article 48 para. 4 StHG; section 142 StG-ZH.
of the objecting party.\footnote{Article 135 para. 1 DBG; Article 48 para. 4 StHG; section 142 para. 1 StG-ZH. Before a 'reformation in peius', however, the taxpayer must be heard.} The decision on the objection must be accompanied by written reasons and replaces the assessment decision. Information on means of appeal must always be given.\footnote{Article 116 para. 1 DBG; Article 41 para. 3 StHG.}

3. THE TRIAL PROCESS: FROM COMMENCEMENT TO JUDGMENT

3.1 Sequence

For cantonal income and net wealth tax and also for the direct federal tax, the means of appeal are designed with the following sequence: the objection to the assessment authority is followed by a possibility of appeal/complaint to a judicial authority that is independent from the tax authority. Depending on the particular canton, its verdict may be referred to a further independent cantonal judicial authority. The decision of the final cantonal judicial authority can then be contested by an appeal in matters of public law to the Federal Court – which is the Swiss Federal Supreme Court.

For the direct federal tax and the cantonal and communal taxes, a parallel but still separate means of appeal thus exists. These are two independent procedures, which, if they are processed simultaneously, are generally combined for procedural purposes because of the identical nature of the issues that are to be resolved.

Federal legislation leaves it to the cantons to decide whether to have two or just one judicial authorities independent from the administration.\footnote{Article 50 para. 3 StHG.} The cantons of ZH, BE, OW, GL, BS, TG, VS, GE, SG, AG, NE and JU each have two courts (the first means of appeal is generally referred to as an 'appeal' while the second is called a 'complaint'). On the other hand, the cantons of LU, UR, SZ, NW, ZG, FR, SO, SH, AR, AI, GR, TI, BL and VD have only one such court. According to the Supreme Court, the possibility of choice on the part of the cantons is restricted insofar as a canton that has two different courts to deal with cantonal tax matters must also use this same system for the direct federal tax.\footnote{BG 130 II 65 (referring to Canton of Jura).}
Chart showing the procedure within a tax dispute:

<table>
<thead>
<tr>
<th>Canton</th>
<th>Objection</th>
<th>Procedure within the authority</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Cantonial assessment authority</td>
<td></td>
</tr>
<tr>
<td>Canton</td>
<td>Appeal/Complaint</td>
<td>Court procedure</td>
</tr>
<tr>
<td></td>
<td>(First) Cantonal Court Instance</td>
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<tr>
<td></td>
<td>Complaint</td>
<td></td>
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<tr>
<td></td>
<td>(Second) Cantonal Court Instance</td>
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<tr>
<td>Confederation</td>
<td>Complaint</td>
<td>Court procedure</td>
</tr>
<tr>
<td></td>
<td>Federal Supreme Court</td>
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</tr>
</tbody>
</table>

The time limit for an appeal is 30 days in each case

3.2 Parties to the proceedings, deciding authority and procedural matters
The person who can be a party to the proceedings depends on the particular stage reached in the proceedings. In the assessment and objection procedure, it is not yet possible to speak of a two-party procedure in which two parties represent their respective positions before a decision-making judicial authority: the opposing party of the taxpayer is, of course, one and the same with the decision-making authority. This situation changes if the route of an appeal or complaint is taken, i.e., an independent judicial authority decides on the matter. Apart from the taxpayer, in respect of the direct federal tax, the cantonal administrations and the Federal tax administration may file appeals and complaints or become parties to the proceedings. The right to complain or take part in the proceedings in the matter of cantonal and communal taxes, on the other hand, differs from one canton to another.

Every tax dispute is assessed by the independent judicial tax authority designated as competent under the applicable law. The cantonal appeals commissions, the cantonal administrative courts and the Swiss Federal Supreme Court are the deciding judicial authorities in tax proceedings. The
term independent judicial authority means a court body that fulfils the requirements of Article 30 para. 1 BV. The cantons enjoy a considerable degree of scope to organise their judicial authorities (eg, competence of a single judge for decisions of substantive law up to a certain value). The judicial tax authority is also responsible for conducting the proceedings: it assigns duties to the parties to the proceedings and supervises fulfilment. It must likewise ensure that the procedural rights of the parties (in particular to a legal hearing) are respected. The parties to the proceedings must be enabled to submit all factual and legal matters that they regard as essential to the outcome of the proceedings to the court authority. On the other hand, the legal assessment of these submissions is a matter for the authority handing down the judgment, exclusively.

The principle of written form applies to the proceedings themselves. The parties to the proceedings must present their application to the judicial authority with substantiation set down in written documents (appeal submission, answer to the appeal, complaint document, answer to the complaint). If newly-asserted facts or newly-cited means of evidence are presented in the answer to the appeal or complaint, the appellant/complainant must be granted an opportunity to state his position to preserve his right to a legal hearing. This can be done by a second exchange of documents or an oral hearing. If only new legal questions are raised in the answer to the appeal or complaint, no second exchange of documents will usually take place. Hearings of parties and other persons do, however, take place orally. The public are regularly excluded as the economic and business circumstances of the taxpayers are dealt with in tax proceedings and must be kept secret in their own interest. On the other hand, an appeal to the Supreme Court is heard in public on principle.

3.3 Means of appeal at the cantonal level
As we have seen, the question whether a two-stage or single-stage appeal channel exists depends on the law of the particular canton. The legal redress sought in the first and possibly sole instance is referred to hereinafter as an 'appeal' and the referral in the second instance as a 'complaint'.

3.3.1 Appeal
The taxpayer concerned is entitled to appeal as a matter of principle. As to the direct federal tax, the cantonal administrations responsible for the direct federal tax and the federal tax administration may likewise file appeals. The right of the cantonal and communal authorities to appeal differs from one canton to another: in Zurich, only the communal authorities are permitted to appeal in matters involving cantonal and communal taxes.

The opponent of the appeal, when lodged by the taxpayer, is the canton in question, which also defends the interests of the communal authority concerned, without the latter acting as the defendant in the appeal. On the

31 Article 59 BGG. See in particular EGE 135 1 198.
32 Article 140 para. 1 DBG; Article 50 para. 1 StHG.
33 Article 141 para. 1 DBG.
34 147 para. 1 StG-ZH.
other hand, if the communal authority, the cantonal administration for the
direct federal tax or the federal tax administration has filed the appeal, both
the canton and the taxpayer may oppose the appeal.

The law refers to decisions on objections as contested matters. In
addition, decisions settling proceedings against which no objection is
possible must also be open to an appeal or complaint. Partial decisions that
determine specific issues (eg. subjective tax liability) in advance are also
appealable. Interim decisions may, of course, be contested if they cause
prejudice to the party concerned that can in all probability no longer be
remedied at a later date. If a decision not to examine the matter is contested,
the object of the appeal procedure is simply the question as to whether the
previous judicial authority rightly or wrongly regarded the objection as
inadmissible. Reference has already been made to the possibility of a direct
appeal (see section 2.3.2).

All deficiencies in the contested decision and previous procedure, both of
a legal or factual nature, can be the subject of an appeal.

In the cantons that have two separate courts, the appeal instance is the
Cantonal Appeals Commission. In the other cantons, the first and sole
instance is the Cantonal Administrative Court.

The time limit for appeal by the taxpayer is 30 days from submission
of the contested decision on an objection. The time limit for appeal is
time-barred and cannot be extended. Under highly restrictive provisions,
the initial period may be reinstated. Note: any cantonal rules on the
suspension of time limits do not apply in the area of direct federal taxation.

The appeal must be submitted in writing. The appeal document also has to
contain requests, showing to what extent and in respect of which tax factors
the assessment should, in the appellant’s view, be amended or changed. In
addition the constituent facts and means of evidence must be indicated and
documentary proof attached or designated in detail. When an appeal is made,
all deficiencies in the contested decision and in the previous procedure may
be the subject of objections (see eg, section 147 para. 3 StG-ZH).

The requests made by the parties are not binding for the appeals
commission. The appeal decision may be changed both to the advantage
and to the disadvantage of the taxpayer. An amendment of the assessment
which is adverse to the taxpayer does, however, require him to be heard
beforehand. The appeal decision replaces the decision on the objection.
Only in exceptional cases will the matter be referred back to the cantonal tax
administration for a new assessment. The appeal decision is notified to the
parties in writing and must be substantiated. In addition, the decision must
contain information on the right of appeal. If direct federal tax, together
with cantonal and communal taxes, are involved simultaneously the appeals

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35 Article 140 para. 1 and 141 para. 1 DBG; Article 50 para. 1 StHG; section 147 para. 1 StG-ZH.
36 Article 140 para. 3 DBG; section 147 para. 3 StG-ZH in conjunction with section 20 VBG-ZH.
37 Article 140 para. 1 DBG; Article 50 para. 1 StHG; section 147 para. 1 StG-ZH.
38 See Article 140 para. 4 in conjunction with Article 133 para 3 DBG.
39 Article 140 para. 1 DBG; Article 50 para. 1 StHG; section 147 para. 1 StG-ZH.
40 Article 143 para. 1 DBG; section 149 para. 2 StG-ZH.
41 Article 143 para. 2 DBG; Article 41 para. 3 StHG; section 150 para. 1 StG-ZH.
42 Article 116 para. 1 DBG; Article 41 para. 3 StHG; section 150 para. 1 StG-ZH.
commission must take two separate decisions even if the procedures were combined.

3.3.2 Complaint
Around half of all the Swiss cantons have a second independent court to which the decision on appeal can be referred. As we have seen, this possibility of referral must then be provided both for cantonal taxes and for federal tax. In such case, the body to which the complaint must be submitted is the cantonal administrative court. The principles governing the appeal procedure equally apply to direct federal tax. The cantonal tax laws, as well, regularly refer to the provisions governing the appeal procedure. Reference is therefore made to the previous remarks (see section 3.3.1).

3.4 Means of appeal at the federal level: complaints in matters of public law
A complaint in matters of public law may be filed with the Supreme Court against the cantonal decisions of last instance. The procedural provisions are set forth in the Federal Act on the Supreme Court (BGG) of 17 June 2005. Only disputes concerning the suspension and waiver of levies are an exception. In addition, decisions concerning international mutual administrative assistance in tax matters can only be contested if the case is particularly important.

Moreover, if, by way of exception, a complaint is not permitted in matters of public law, a further means of appeal to the Supreme Court exists by way of the subsidiary constitutional complaint which can, however, only be used to contest a breach of constitutional rights. This aspect will not be considered in more detail below.

A person who took part in the proceedings at the previous instance who is particularly affected by the contested decision and also has a justified interest in its annulment or amendment is empowered to appeal in matters of public law. In other words, the taxpayer and possibly the affected public body are primarily entitled to make a complaint. In addition, the right to complain is also granted to certain authorities.

Only decisions of the final cantonal court instance can be contested. The possibility that existed before the enactment of the BGG of referring matters of inter-cantonal double taxation directly to the Supreme Court, even without using all the possibilities available with the cantonal courts, is not continued under the BGG.

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43 Article 145 para. 1 DBG; Article 90 para. 3 StHG.
44 Article 145 para. 2 in conjunction with Article 140 ff. DBG.
45 Section 153 para. 4 StG-ZH.
46 Article 146 DBG; Article 73 StHG.
47 Article 82 ff. BGG.
48 Article 83 lit. m BGG.
49 Article 84a BGG.
50 Article 113 ff. BGG.
51 Article 89 BGG.
52 Article 89 para. 2 BGG in conjunction with Article 146 DBG and Article 73 para. 1 StHG.
53 Article 86 BGG.
54 Double taxation between cantons is prohibited by Article 127 para. 3 BV.
55 The various instances at the cantonal level must be consulted before an appeal can be made to the Supreme Court (Article 86 para. 1 letter d in conjunction with para. 2 BGG). In that case together with the decision reached at final
According to Article 95 BGG, admissible reasons for complaint include, in particular, a breach of federal law (including constitutional rights) and international law (including bilateral treaties such as double taxation agreements). An appeal can only be made against an incorrect establishment of the circumstances if it is manifestly incorrect or based on a breach of law and the remedy of the defect can play a decisive part in the outcome of the procedure.\textsuperscript{56} The reasons for appeal must be stated specifically in the complaint (referred to as the complaint principle) – otherwise the Supreme Court will not examine the matter.

The time limit for a complaint is 30 days from receipt of the written decision taken by the previous judicial authority.\textsuperscript{57} This time limit cannot be extended. A reinstatement of the time limit is possible under highly restrictive conditions.\textsuperscript{58} The rules on suspension of the time limit are to be observed\textsuperscript{59} as well.

The complaint document must contain the requests and their underlying reasons with indication of proof and is to be signed by the complainant. The contested decision must be attached to the complaint, together with evidence insofar as this is in the complainant’s possession.\textsuperscript{60} To the extent necessary, the Supreme Court submits the complaint to the previous instance and to any other parties concerned for consultation purposes.\textsuperscript{61} As a rule, no further exchange of documents takes place.

If the Supreme Court approves the complaint, it takes its own decision on the matter or refers it back to the previous judicial authority for further consideration.\textsuperscript{62} The legal remedy is therefore in principle of a reforming nature. When taking its decision, the Supreme Court cannot go beyond the requests lodged by the parties.\textsuperscript{63} A ‘reformatio in peius’ is therefore excluded. The judgment is to be issued in writing and submitted to the parties, to the previous judicial authority and to any other parties concerned.\textsuperscript{64}

\textbf{3.5 Cognition and scope of judicial review}

Within the framework of the appeal procedure, the cantonal appeal authority hands down its judgment on the basis of extensive cognition, ie, all the factual and legal issues are freely reviewed. The contested decision can be reviewed not simply to determine whether the verdict goes too far or is abusive, but also to consider whether it is merely inappropriate.\textsuperscript{65}

The cognition of the administrative court in the complaint procedure, ie, when it acts as a second judicial authority, equally extends to both legal and factual issues, but it does not review the appropriateness of the previous decision. Complaints can only refer to actual breaches of the law. In other

\textsuperscript{56} Article 97 para. 1 BGG.
\textsuperscript{57} Article 100 BGG.
\textsuperscript{58} See Article 50 BGG.
\textsuperscript{59} See Article 46 BGG.
\textsuperscript{60} Article 42 BGG.
\textsuperscript{61} Article 102 BGG.
\textsuperscript{62} Article 107 para. 2 BGG.
\textsuperscript{63} Article 107 para. 1 BGG.
\textsuperscript{64} Article 69 para. 1 BGG.
\textsuperscript{65} Article 1-2 para. 4 DBG; section 148 para. 3 StG-ZH.
words, only qualified errors of assessment are reviewed, ie, excessive or insufficient use and abuse of discretion.\textsuperscript{66} The Supreme Court has specifically approved that cantons restrict the cognition or scope of judicial review by the second judicial authority.\textsuperscript{67}

The Supreme Court applies comprehensive cognition only within the framework of the admissible reasons for complaint and insofar as these have been actually raised (known as the complaint principle). This includes any infringements of the law (including qualified errors of assessment) and only exceptionally an incorrect ascertainment of the facts. The application (appealed against as being incorrect) of the harmonised cantonal tax law is reviewed by the Supreme Court at its discretion while it restricts cognition to arbitrary decisions where the harmonisation law grants the cantons a certain discretion.\textsuperscript{68}

3.6 New facts and evidence (nova)

The term \textit{nova} denotes legal applications, facts and means of evidence which were not submitted to the previous instance and are therefore new. A distinction is drawn between non-genuine and genuine \textit{nova}: the former were already existent before the decision was taken at the previous instance and the latter only thereafter.

In the appeal and complaint procedures, new factual assertions and evidence are permitted within the framework of the cantonal procedural orders and new requests of a legal nature may also be presented.\textsuperscript{69} In principle, both non-genuine and genuine \textit{nova} may be submitted. Some cantons (including Zurich\textsuperscript{70}) do, however, limit the right to cite \textit{nova} to genuine \textit{nova} if the administrative court decides in the second instance. To that extent a prohibition of \textit{novum} can be said to exist. A restriction of the right to cite \textit{nova} makes sense to ensure that in the two-stage cantonal appeals procedure the lower body is not reduced to a mere consultative instance. In addition to the restriction of cognition (section 3.5), the Supreme Court has also declared this to be specifically admissible.\textsuperscript{71}

In principle a ban on \textit{nova} also applies in Supreme Court proceedings. New facts and evidence may only be introduced to the extent that the first decision of the previous judicial authority gives occasion to do so; new pleas may not be made.\textsuperscript{72} According to constant practice, the genuine \textit{novum} is an exemption from this ban.

3.7 Allocation of the burden of proof

The purpose of evidence is to convince the authority of the existence of a fact. The (objective) burden of proof determines who bears the consequences of a possible lack of evidence. According to the ‘theory of norms’ which is acknowledged in Swiss procedural law, the tax authorities must give

\textsuperscript{66} Section 153 para. 3 StG-ZH.
\textsuperscript{67} BGE 131 II 548 (concerning the Canton of Zurich).
\textsuperscript{68} See eg. BGE 2C_337/2012 of 19.12.2012 (concerning Lucerne Canton), E. 1.4 with further references.
\textsuperscript{69} For the Canton of Zurich, see section 20a para. 2 VRG-ZH.
\textsuperscript{70} Section 52 Abs. 2 VRG-ZH.
\textsuperscript{71} BGE 131 II 548 (concerning the Canton of Zurich).
\textsuperscript{72} See Article 99 BGG.
evidence of the facts which either give rise to or increase taxes while the taxpayer himself must provide evidence of circumstances which reduce or dispense with the need to pay tax. An exemption is made to this rule if the taxpayer refuses to cooperate in the ascertainment of facts which give rise to or increase tax liability or if this is impossible. In such case, the tax authorities may make an assessment at their own discretion.

As to the periods during which a legal action is allowed, the principle is that the burden of proof for the timely nature of a submission rests with the party making the appeal, while the authority whose decision is contested must provide evidence of completion and of the time of service.\textsuperscript{73}

4. AMENDMENT OF LEGALLY ENFORCEABLE DECISIONS

A reconsideration of legally enforceable decisions\textsuperscript{74} is possible only by way of exception and for a limited period of time both in favour of\textsuperscript{75} and to the disadvantage\textsuperscript{76} of the taxpayer. Finally, proven calculation mistakes and typing errors can be corrected.\textsuperscript{77}

4.1 Revision

In the following cases,\textsuperscript{78} a legally enforceable decision may be revised to the advantage of the taxpayer if excessive taxation has been imposed:

- Subsequent discovery of material facts or evidence: the false or incomplete facts on which the assessment to be revised is based shall be corrected or supplemented after the event.
- Breach of essential procedural principles: the authority may not disregard significant facts or decisive evidence which was or should have been known to it, nor may it commit significant procedural errors (e.g., breach of the right to a legal hearing).
- Crime or offence: a revision is possible if a crime or an offence has influenced the decision.
- Further circumstances for revision: the list of reasons for revision in the tax laws is not exhaustive. Further reasons (limitation of the tax claim because of a double taxation conflict, official assurance, reasons of proportionality etc.) may be taken into account.

However, a revision is excluded if the claimant cites as the reason for revision something which with due diligence could already have been cited in the ordinary proceedings.\textsuperscript{79}

The petition for revision must be made in writing and submitted to the authority that took the legally enforceable decision. This must be done within 90 days of discovery of the reason for revision, but no later than 10 years after publication of the decision.\textsuperscript{80}

\textsuperscript{73} See BGer 1P54/2000 of 5.7.2000 concerning the service of mail sent without being registered.
\textsuperscript{74} ie. assessments which have not been contested or decisions against which no appeal can be made any longer.
\textsuperscript{75} Known as revision; Article 147 ff. DBG; Article 51 StHG; section 155 ff. StG-ZH.
\textsuperscript{76} Known as the retroactive tax procedure; Article 151 DBG; Article 53 StHG; section 160 ff. StG-ZH.
\textsuperscript{77} Known as correction; Article 150 DBG; Article 52 StHG; section 159 StG-ZH.
\textsuperscript{78} Article 147 para. 1 DBG; Article 51 Abs. 1 StHG; section 155 para. 1 StG-ZH.
\textsuperscript{79} Article 147 para. 2 DBG; Article 51 para. 2 StHG; section 155 para. 2 StG-ZH.
\textsuperscript{80} Article 148 DBG; Article 51 para. 3 StHG; section 156 StG-ZH.
4.2 Retroactive tax procedure
The purpose of levying retroactive tax is to correct a loss of revenue to the tax authority because of an incorrect assessment to the detriment of the taxpayer.\textsuperscript{81} For the levying of retroactive tax to be permissible, the public authority must have suffered a tax loss. At the same time, there must be a fact justifying the retroactive levying of tax.\textsuperscript{82}

- New facts or evidence: facts or evidence which were not known to the tax authority with the result that an assessment was not made when it should have been made or that a legally enforceable assessment was incomplete.
- Crime or offence against the tax authority: retroactive taxation is possible if an assessment was not made or was incomplete due to a crime or an offence against the tax authority.
- Conduct of the taxpayer in abuse of rights: according to previous case law of the Swiss Supreme Court, retroactive tax may also be levied if the taxpayer has been in breach of the law (e.g., fails to report a manifest error).

If the taxpayer has stated the components of his income and his assets and liabilities in full and accurately and the tax authority acknowledges the valuation, retroactive tax cannot be levied even if the amount paid subsequently turns out to have been insufficient.\textsuperscript{83}

The taxpayer (or his heirs) are informed in writing of the opening of retroactive tax proceedings.\textsuperscript{84} The right to open retroactive tax proceedings is time-barred 10 years after the end of the tax period for which an assessment was either wrong or incomplete; the procedure must have been completed in a legally enforceable form within 15 years.\textsuperscript{85}

The opening of proceedings for tax evasion and tax fraud simultaneously initiates the retroactive tax procedure for the direct federal tax.\textsuperscript{86}

4.3 Correction
What are known as ‘clerical errors’ made by the tax authority may be corrected for the benefit or to the disadvantage of the taxpayer.\textsuperscript{87} The term ‘clerical errors’ means errors of an arithmetical or drafting nature. Incorrect application of the law on the other hand does not fall under this heading.

The correction of typing and arithmetical errors is made without any specific formal requirement. The law stipulates an absolute time limit of five years for this purpose.\textsuperscript{88}

5. COSTS
While procedural costs in respect of the direct federal tax are governed by the DBG, the StHG contains no specific criteria. Cantonal law alone prevails.

\textsuperscript{81} The taxpayer does not have to be at fault for this to be possible: BGer 2A.300/2006 of 27.2.2007, E.3.3.
\textsuperscript{82} Article 151 DBG; Article 53 StHG; section 160 para. 1 StG-ZH.
\textsuperscript{83} Article 151 para. 2 DBG; Article 53 para. 1 StHG; section 160 para. 2 StG-ZH.
\textsuperscript{84} Article 153 para. 1 DBG.
\textsuperscript{85} Article 152 DBG; Article 53 StHG; section 161 StG-ZH.
\textsuperscript{86} Article 152 Abs. 2 DBG.
\textsuperscript{87} Article 150 DBG; Article 52 StHG; section 159 StG-ZH.
\textsuperscript{88} Article 150 Abs. 1 DBG; Article 52 StHG; section 159 Abs. 1 StG-ZH.
The cantonal provisions largely coincide with those of the DBG – this is exemplified again by the regulations contained in the Zurich tax law.

5.1 Tax rulings
The tax authorities generally do not charge for negotiating tax rulings – subject to the reservation of excessive expenditure. However, the taxpayer will have to pay the fee of any tax expert consulted by him/her.

5.2 Assessment procedure and objection procedure
The assessment procedure and the objection procedure are basically free of charge. However, if costs are incurred because of a culpable breach of procedural obligations by the taxpayer, such costs are charged to the taxpayer in whole or in part. Any consultants’ costs must be borne by the taxpayer himself.

5.3 Cantonal appeal procedure
The costs of the appeal or complaint procedure comprise the court costs and potential compensation for the parties.

The court costs are allocated in the first instance according to the winner and loser principles. They are therefore imposed on the losing party or, if a partially favourable verdict has been handed down, an apportionment will be made. However, if the winning party has caused unnecessary costs through his/her own fault, they must pay them. Under special circumstances, no costs may be charged (eg. proceedings in the public interest). The amount of the costs is determined solely by cantonal law. In the Canton of Zurich, court costs consist of the court fee and additional costs, such as the costs of service or costs of consulting experts. As a rule, the court fee is determined by the value in dispute.

Compensation for the parties is also primarily determined according to the winner and loser principles, ie, costs are imposed upon the losing party. The imposition of costs is excluded if in the previous proceedings a party did not secure their rights through their own fault. When it comes to party compensation, only ‘appropriate’ costs are made good, ie, those which, in the view of the judging authority, are reasonable in view of the legal proceedings. Experience shows that party compensation very seldom covers the costs incurred. It must be noted that some cantonal procedural rules make the grant of party compensation conditional on an express request. However, within the area of the direct federal tax, compensation must be granted ex officio to the extent that the requirements are properly met. It is necessary to clarify that the tax authorities never get any party compensation.

80 Article 123 para. 2 DBG; section 132 para. 2 StG-ZH / Article 135 para. 3 DBG; section 142 para. 2 StG-ZH
81 Article 144 para. 1 DBG; Article 145 para. 2 DBG; section 151 para. 1 StG-ZH; section 153 para. 4 StG-ZH.
82 See Article 144 para. 2 DBG; Article 145 para. 2 DBG; section 151 para. 2 StG-ZH; section 153 para. 4 StG-ZH.
83 Article 144 para. 3 DBG; Article 145 para. 2 DBG; section 151 para. 3 StG-ZH; section 153 para. 4 StG-ZH.
84 Article 144 para. 5 DBG; Article 145 para. 2 DBG / In the Canton of Zurich, the rules are laid out in the Fee Ordinance of the Administrative Court dated 23 August 2010.
85 Article 144 para. 4 DBG in conjunction with Article 64 para. 1 VwVG; Article 145 para. 2 DBG; section 152 StG-ZH in conjunction with section 17 VBG-ZH; section 153 para. 4 StG-ZH.
86 See eg, section 8 of the Fee Ordinance of the Canton of Zurich.
Under certain circumstances a needy party is entitled to exemption from
the procedural costs or to free legal service — this may also include an
entitlement to legal aid if the party is unable to safeguard his own rights in
the proceedings.  

5.4 Complaint procedure in the Supreme Court
In the complaint procedure, court costs and party costs are also imposed on
the losing party as a matter of principle. Unnecessary costs must be paid by
the person who causes them. Comparable principles analogously apply to
party compensation.  

Under certain conditions, the right to free legal aid also exists before the
Supreme Court.  

6. HOT AREAS OF INTEREST
6.1 Special procedure within a tax amnesty
As of 1 January 2010, the Swiss Tax Laws allows a ‘once in a lifetime’ tax
amnesty for income and wealth tax evasion provided:
(i) that the disclosure is spontaneous; and
(ii) full cooperation is given to the tax authorities; and
(iii) the taxpayer makes serious efforts to pay the subsequent taxes which are
due.  

The principal amount of tax evaded and of interest thereon still have to
be paid (for a period of 10 years); however, no criminal proceedings will
ensue. Any further self-denunciation does not go unpunished but the fine is
reduced to one-fifth in each case.

In addition, in case of tax evasion on income and wealth committed by
a taxpayer deceased after 1 January 2010, heirs can spontaneously report
formerly undisclosed income and wealth, with the consequence that closed
tax years will be reopened retroactively, but up to a maximum of three years
prior to the death (instead of the ordinary period of 10 years). In this case,
as well, it is assumed that:
(i) the evasion is not known to any tax authority;
(ii) that the heirs cooperate fully with the tax authorities; and
(iii) make serious efforts to pay the subsequent tax which is due.

Apart from the heirs, the executor or administrator of the estate may also
apply for simplified subsequent taxation.

6.2 Review of national criminal law in tax matters
Since 2013 reform endeavours have been under way to adopt new provisions
of national penal tax law. Apart from adjustments in substantive criminal
law (see also section 1.2.1), the principal aim is to unify the procedures

96 Article 29 para. 3 BV
97 See for example section 16 VRG-ZH.
98 See Article 65 ff. BG.
99 See Article 68 BG.
100 Article 29 para. 3 BV / for details, see Article 64 BG.
101 See Article 175 para. 3 and 4 DBG; Article 56 para. 1bis and 1ter StHG; section 235 para. 3 and 4 StG-ZH.
102 See section 4.2.
103 See Article 153a DBG; Article 53a StHG; Article section 162a StG-ZH.
for the different types of tax (direct and indirect taxes). Under currently
valid law, information may as a rule only be sought from the banks in
indirect tax matters (lifting of banking secrecy). With the unification of
criminal procedures, the cantonal tax authorities will also gain access
to such information for direct taxes. However, access is to be confined
to criminal tax proceedings and will presuppose authorisation by the
head of the cantonal tax administration in every case; in the assessment
procedure, banking secrecy is upheld even in relation to the tax authorities.
The cantonal authorities are likely to remain responsible for direct tax
proceedings (while the Federal Tax Administration has primary responsibility
for indirect taxation).

6.3 Developments in the area of money laundering: serious tax crimes
as predicate offences to money laundering
In order to implement the recommendations of the Financial Action Task
Force (FATF) of February 2012, Switzerland is discussing a proposal to
improve the combating of money laundering. One of the key points of this
proposal is the introduction of a new predicate offence to money laundering
in the form of qualified tax fraud. This would involve an aggravated form
of tax evasion committed either by making use of forged documents or
through deliberate deception of the tax authorities. Where the undeclared
taxable elements amount to at least CHF 600,000, the offence should
constitute a crime and would therefore be classed as a predicate offence to
money laundering (while the simple form still counts as a misdemeanour).

6.4 Mutual agreement procedure and arbitration in international
relations
Since 2008, Switzerland has been renegotiating its double tax treaties,
mainly in order to adopt the Organisation for Economic Cooperation and
Development (OECD) standard on administrative assistance in fiscal matters.
In this context, many new or renegotiated double tax treaties now also
include a new arbitration clause, on the basis of Article 25 (5) of the OECD
Model Tax Convention. The arbitration procedure is not independent, ie,
it is regarded as part of the amicable settlement procedure. It comes into
effect only if the previous amicable settlement procedure has failed, either
in whole or in part (‘two-step approach’). However, for the first time the
arbitration clauses give the taxpayer concerned enforceable claims to the
settlement of double taxation disputes instead of a referral to the ‘toothless’
understanding procedure. At all events, the arbitration clauses are likely to
encourage the contracting states to give early consideration to the procedure
seeking an understanding and also a real outcome.