The Tax Disputes and Litigation Review

Fifth Edition

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Simon Whitehead

Law Business Research

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Law Business Research Ltd

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Published in the United Kingdom
by Law Business Research Ltd, London
87 Lancaster Road, London, W11 1QQ, UK

www.TheLawReviews.co.uk

ISBN 978-1-910813-54-6

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: 0844 2480 112

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ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following law firms for their learned assistance throughout the preparation of this book:

ASC LEGAL SOLICITORS & ADVOCATES

BAKER & McKENZIE AMSTERDAM NV

BECH-BRUUN

CHEVEZ RUIZ ZAMARRIPA Y CIA, SC

CUATRECASAS, GONÇALVES PEREIRA

DDTC CONSULTING

DLA PIPER

FLICK GOCKE SCHAUMBURG

GARRIGUES PORTUGAL, SLP

GUZMÁN ARIZA, ATTORNEYS AT LAW

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STAVROPOULOS & PARTNERS LAW OFFICE

SYCIP SALAZAR HERNANDEZ & GATMAITAN

WITHERS KHATTARWONG

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EDITOR'S PREFACE

The objective of this book is to provide tax professionals involved in disputes with revenue authorities in multiple jurisdictions with an outline of the principal issues arising in those jurisdictions. In this, the fifth edition, we have continued to add to the key jurisdictions where disputes are likely to occur for multinational businesses.

Each chapter provides an overview of the procedural rules that govern tax appeals and highlights the pitfalls of which taxpayers need to be most aware. Aspects that are particularly relevant to multinationals, such as transfer pricing, are also considered. In particular, we have asked the authors to address an area where we have always found worrying and subtle variations in approach between courts in different jurisdictions, namely the differing ways in which double tax conventions can be interpreted and applied.

The idea behind this book commenced in 2013 with the general increase in litigation as tax authorities in a number of jurisdictions took a more aggressive approach to the collection of tax – in response, no doubt, to political pressure to address tax avoidance. In the UK alone we have seen the tax authority vested with broad new powers not only of disclosure but even to require tax to be paid in advance of any determination by a court that it is due. The provisions empower the revenue authority, an administrative body, to compel payment of a sum, the subject of a genuine dispute, without any form of judicial control or appeal.

Over the past year the focus on perceived cross-border abuses has continued with action by the European Commission on past tax rulings in Ireland, Luxembourg and Belgium, and the BEPS reaching a crescendo in the announcement of a 'diverted profits tax' to impose an additional tax in the UK when it is felt that a multinational is subject to too little corporation tax even in an EU context. The general targeting of cross-border tax avoidance now has European legislation in the Anti-Tax Avoidance Directive, which came into force in June 2016 with promises of more to follow. The absence of much European legislation in direct tax has always been put down to the need for unanimity and the way in which Member States closely guard their taxing rights. The relatively speedy passage of this legislation (the Parent–Subsidiary Directive before it took some 10 years to pass) and its restriction of attractive tax regimes indicates the general political disrepute with which such practices are now viewed.

These are, perhaps, extreme examples, reflective of the parliamentary cycle, yet a general toughening of stance seems to be being felt. In that light, this book provides an overview of each jurisdiction's anti-avoidance rules and any alternative mechanisms for resolving tax disputes, such as mediation, arbitration or restitution claims.

We have attempted to give readers a flavour of the tax litigation landscape in each jurisdiction. The authors have looked to the future, and have summarised the policies and approaches of the revenue authorities regarding contentious matters, addressing important questions such as how long cases take and situations in which some form of settlement might be available.

We have been lucky to obtain contributions from the leading tax litigation practitioners in their jurisdictions. Many of the authors are members of the EU Tax Group, a collection of independent law firms, of which we are a member, involved particularly in challenges to the compatibility of national tax laws with EU and EEA rights. We hope that you will find this book informative and useful.

Finally, I would like to acknowledge the hard work of my colleague Ramsey Chagoury in the editing and compilation of this book.

Simon Whitehead
Joseph Hage Aaronson LLP
London
February 2017

Chapter 11

FINLAND

Jouni Weckström[1]

I INTRODUCTION

The courts in Finland are divided into general courts dealing with criminal cases, civil cases and petitionary matters, and administrative courts adjudicating administrative acts such as tax decisions issued by the Finnish Tax Administration (FTA). Further, tax litigation in Finland differs from regular administrative appeal proceedings, as the focus in tax litigation is on the rectification of a decision issued by the FTA. In most cases, the taxpayer is primarily required to file a claim for adjustment to a special administrative body, namely the Board of Adjustment (Board), before entering into court proceedings. Only if such a claim for adjustment is dismissed or rejected by the Board can the decision be appealed further to administrative court.

Even though oral hearings may be requested and applied, litigation in tax matters is mainly carried out through written proceedings, which may, in some cases, have an impact on the aspects *de facto* taken into account by the courts and other appellate bodies. Furthermore, the resources of the courts and other authorities engaged in appellate proceedings are often limited, which can lead to longer processing times and prolonged uncertainty. In general, tax litigation proceedings may take several years, which can lead to excessive costs and practical complications for taxpayers.

Tax assessment decisions may in general terms be negotiated with the FTA. For example, taxpayers can enter preliminary negotiations with the Large Taxpayers' Office, which is part of the Corporate Taxation Unit within the FTA. Corporate taxpayers may discuss a variety of tax-related topics with the authority (e.g., the taxation of certain transactions). The guidelines and instructions provided by the Large Taxpayers' Office during these negotiations are only binding, however, if specific requirements set out in procedural tax legislation are

1 Jouni Weckström is a counsel at Krogerus Attorneys Ltd.

met. In practice, whenever the issues negotiated with the FTA are controversial, they end up being resolved in formal tax litigation proceedings. Therefore, a great majority of the complex tax disputes are resolved through extensive tax litigation.

It should be noted that the Finnish legislation governing the appeal proceedings in tax matters will experience some significant changes as of 1 January 2017, which not only extend the above-mentioned mandatory adjustment procedure to all tax types, but also harmonise the time limits and appeal periods in various taxation proceedings.

New legislation will provide longer time limits for self-correction by the FTA, which may cause additional dissatisfaction on the taxpayers' side in the future. In addition, one of the essential elements of the upcoming legal amendments include the incorporation of VAT and transfer tax matters into the mandatory adjustment procedure, that is, when the legal amendments come into force, the primary appeal authority will always be the Board regardless of the type of tax against which the taxpayer is appealing.

The amended provisions will be applied to the taxation of tax year 2017 for the first time, and current provisions will continue to apply to the taxation concerning previous tax years up to and including tax year 2016. Appeal proceedings form an exception, however, as the new provisions will apply to appeals that relate to first-stage tax decisions issued by the FTA after 1 January 2017, even if the decision concerns previous tax years.

II COMMENCING DISPUTES

The most common way to initiate a tax dispute is to file a claim for adjustment against a tax assessment decision issued by the FTA. Claims for adjustment are primarily investigated by the Board. Currently, this procedure is applicable in matters relating to, *inter alia*, income taxation, heritance and gift taxation, and taxation on real estate.

In VAT matters, on the other hand, the appeal is filed directly to an administrative court. The FTA processes all appeals as rectification matters at the first stage. In the event the FTA accepts the claim, the appeal to the administrative court is considered annulled. If, on the other hand, the FTA rejects the claim entirely or partly, the matter is further processed as an appeal matter in the administrative court.

Furthermore, in petition proceedings, a decision by the FTA is always appealed directly to an administrative court. Petition proceedings are applicable in matters relating to, *inter alia*, exemption order decisions regarding tax losses and tax relief decisions regarding non-profit corporations. It is important to note that as of 1 January 2017, the appellate body will be the Board in all tax matters and with regard to all tax types.

Taxpayers may also, on their own initiative, amend or correct tax returns that have already been filed with the FTA even after the deadline for filing a tax return as long as the final tax assessment for the taxable year has not been made.

The current general statute of limitations governing a taxpayer's right to appeal in tax matters is currently five years from the beginning of the calendar year following the tax assessment. For example, the date of completion of tax assessment for tax year 2016 is 31 October 2017. The period of appeal for tax year 2016 will expire on 31 December 2022. This is the last day of the appeal period, and the last day for any appeal. As from 1 January 2017, the general period of appeal will be three years. The former time limit of five years will still be primarily applied to tax decisions and appeal proceedings concerning tax years up to and

including 2016 with the exception of appeal proceedings regarding first-stage tax decisions issued on 1 January 2017 or thereafter based on, for example, tax audits concerning previous tax years.

In cases where the tax recipients (the Tax Recipients' Legal Service Unit) appeal a tax assessment of any given taxpayer, the statute of limitations is currently one year. Furthermore, it is possible that the FTA will seek to reassess a taxpayer's taxation on its own initiative (reassessment). The time limit for this right depends on the blameworthiness addressed upon a taxpayer, and is calculated similarly to the statute of limitations rules applicable to taxpayers. The maximum time limit of five years is applicable in cases where the taxpayer has failed to properly file a tax return, or if the tax return or other document filed with the FTA has been false, incomplete or misleading.

The maximum time limit also applies when the FTA has noticed an error to the taxpayer's detriment and seeks to carry out a reassessment to the benefit of the taxpayer. The time limit is two years in cases where there has been a calculation or typing error by the FTA, or the incorrect taxation has been based on incorrect or incomplete information received from third parties. In other situations, the statute of limitations is one year.

The above-mentioned statute of limitations is applied as a general rule. The statute of limitations may, however, vary depending on the tax matter in question. For instance, in VAT matters a taxpayer must appeal within three years from the end of the financial year in question. Furthermore, a taxpayer may appeal a tax assessment decision or a decision issued by an appellate body within 60 days of receiving notice of the decision, irrespective of whether the statutory limitation is exceeded.

As of 1 January 2017, the statute of limitations periods are, however, largely harmonised. Accordingly, a general time limit of three years will be set for reassessment by the FTA. The three-year limit may be continued for one year, however, for example where the taxation proceedings are considered to have been impeded by the taxpayer or if the matter requires the FTA's cooperation with other officials. In addition, an 'extended time limit' of six years may be applied in matters concerning, for example, transfer pricing or financing arrangements between related companies. In other words, despite efforts to simplify the time limits for reassessment and appeal proceedings, ultimately, the need to consider multiple time limits seems to remain unaltered.

In many cases the taxpayer may seek to obtain certainty with regard to a specific tax question subject to interpretation by applying for an advance ruling from the Central Tax Board or the FTA. The Central Tax Board is an autonomous body within the FTA that specifically issues advance rulings in tax matters. However, unambiguous or less important matters may be examined by the FTA itself. An appeal against an advance ruling by the Central Tax Board is filed directly to the Supreme Administrative Court, whereas an appeal against an advance ruling by the FTA is filed to an administrative court. The time limit for filing the appeal to both instances is 30 days. An advance ruling application may also be rejected, in which case no advance ruling is issued. A decision rejecting an advance ruling application may not be appealed.

A taxpayer has the right to file a complaint to the Chancellor of Justice of the government or to the Parliamentary Ombudsman if the taxpayer considers a civil servant (fiscal agent) to have conducted an unlawful action. The Chancellor and the Ombudsman generally inform the authority of their view on the matter. Additionally, they may recommend that the decision is amended, but they do not have the power to overturn a decision.

III THE COURTS AND TRIBUNALS

The Board is an independent entity within the FTA. The Board functions in different units, each of which resolve appeals relating to income and property taxation, inheritance taxation or taxation on real estate. As previously mentioned, as of 1 January 2017, the primary appeal authority will always be the Board regardless of the type of tax against which the taxpayer is appealing.

The Board consists of members representing taxpayers' organisations, municipalities and the FTA. Much like in administrative courts, proceedings in the Board are mainly written, and in many cases, the tax dispute is finally resolved by the Board without ever entering court proceedings.

The FTA may resolve an appeal addressed to the Board in the event the matter is so unambiguous that it does not require further examination. The request of a taxpayer may be addressed either orally or in writing. Such a decision issued by the FTA may also be appealed to an administrative court.

As explained above, the decision of the Board (adjustment decision) may be appealed to an administrative court. The appeal period is determined in accordance with the general statute of limitations, and in cases where the general statute of limitations has expired, the appeal period is no less than 60 days from the decision by the Board. Administrative courts consist of independent professional judges. In general, all matters are resolved through written proceedings, even though the courts have the possibility to hold oral hearings. Oral hearings may be initiated either at the request of a party or on the court's own initiative.

Decisions by the administrative court may be appealed further to the Supreme Administrative Court, which is the highest court of appeal in all tax matters in Finland. The period of appeal is 60 days from the decision by the administrative court. Appeals to the Supreme Administrative Court require a leave to appeal. Leave to appeal may be granted on the basis of the case's potential importance as precedent, due to a manifest error in the matter, or based on weighty economic or other reasons. The judges of the Supreme Administrative Court include the President and 20 justices, as well as a few temporary justices. As in any other instance, the proceedings are primarily written, oral hearings being even rarer in the highest court instances. The most significant decisions are published annually in the Court's yearbook. Additionally, some decisions are published as short summaries. Instead of granting a final judgment in the matter, the Supreme Administrative Court may also remit the matter to the administrative courts or the FTA for a new hearing.

In exceptional situations, it is possible to appeal a decision by the Board directly to the Supreme Administrative Court. This possibility is available upon decisions made after the beginning of 2014. The Supreme Administrative Court may grant leave to appeal in such cases if granting the leave to appeal is important to establish a precedent for similar cases in the future, or for the uniformity of legal praxis. In cases where the adjustment proceedings at the Board may be followed by an appeal on the grounds of a precedent, the Tax Recipients' Legal Services Unit should always be reserved the opportunity to give a statement in the matter before the case is referred to the Supreme Administrative Court.

As mentioned above, the Central Tax Board also acts as an autonomous advance ruling forum within the FTA, and makes significant tax-related decisions in Finland. It may issue advance tax rulings in matters that have significant precedent value, many of which are also published. The Central Tax Board consists of members representing the FTA, taxpayers' organisations and tax recipients. Rulings by the Central Tax Board are ordinarily issued within a couple of months from the date of the request. The rulings are considered binding

only on those tax questions to which they relate. Therefore, it is important for the taxpayer to consider that the ruling for a previous tax year may not be applicable after the tax year in question.

Advance rulings made by the Central Tax Board are appealed directly to the Supreme Administrative Court, and the appeal period is 30 days from receipt of the Central Tax Board's decision. In these appeals, no leave to appeal is required. It should be noted that matters relating to inheritance and gift taxation as well as transfer tax are excluded from the Central Tax Board's jurisdiction.

IV PENALTIES AND REMEDIES

In income tax matters, the FTA may impose a punitive tax increase on the taxpayer if the taxpayer has failed to fulfil his or her obligations. The administrative tax penalties may reach a maximum of 30 per cent of the unreported income, ranging typically between 5 and 10 per cent of the unreported or erroneously reported income. The tax increase may be adjusted in cases where it is deemed to be at a notably high level. Additionally, if the taxpayer's level of negligence is only minor, the tax increase may be reduced or dismissed.

Imposing a percentage-based tax penalty should, in principal, require wilful or grossly negligent conduct by the taxpayer (i.e., tax evasion). However, the scope of application of the tax increase has been significantly increased in Finnish tax practice, and the FTA frequently applies percentage-based tax penalties in tax disputes concerning large corporate taxpayers.

It should also be noted that, from a human rights perspective, a punitive tax increase is considered a criminal penalty in Finland. The European Court of Human Rights has, on numerous occasions, considered punitive tax increases to be comparable to criminal sanctions. This notion naturally affects the discussion relating to the *ne bis in idem* principle. According to the said principle, the defendant cannot be prosecuted repeatedly on the basis of the same offence. The Finnish Supreme Administrative Court has stated, however, that the *ne bis in idem* principle only applies to individual taxpayers (natural persons) since only physical individuals can be sanctioned for tax crimes. The principle therefore does not apply to companies.

In VAT and payroll withholding-related disputes, percentage-based penalties are available regardless of wilful or grossly negligent conduct, and in cases of wilful or grossly negligent conduct, the penalties may cover the amount of the tax multiple times over. For example, the tax may be increased by 10 per cent in cases where the taxpayer's tax return or other such document contains a minor deficiency and the taxpayer has not complied with the request to correct said deficiency. Furthermore, in cases where the taxpayer has completely failed to carry out due reporting, fulfilled said reporting obligation substantially late, or where the tax return or other such document is manifestly insufficient, the standard maximum penalty is 20 per cent of the amount of the tax. If the above-mentioned dereliction or erroneous report is considered to have taken place for the purposes of committing tax fraud, the tax may be increased by no less than 50 per cent and no more than three times the amount of the tax.

Certain significant tax penalties may also be payable regardless of whether there are any unpaid taxes claimed by the FTA. For instance, a failure to present due transfer pricing documentation in a given time frame may be sanctioned with a tax penalty amounting to a maximum of €25,000.

In addition to actual tax penalties, penalty interest may be payable on unpaid tax amounts. In income tax matters, the general late payment interest is currently 7 per cent per annum. Furthermore, penalty interest is payable for non-reported taxes in the electronic VAT and employer payroll withholding and reporting system at a rate of 7 per cent.

Criminal sanctions may be imposed on taxpayers in cases relating to severe tax evasion. Tax fraud occurs when an individual or business entity wilfully and intentionally falsifies information on a tax return to limit the amount of tax liability. Tax fraud essentially entails cheating on a tax return in an attempt to avoid paying the entire tax obligation. Aggravated tax fraud, being the most serious form of tax-related crime, is sanctioned with imprisonment for a term of at least four months and a maximum of four years. For non-aggravated tax fraud, the sanctions vary from fines to imprisonment for a maximum of two years. As for minor tax offences, they are generally sanctioned with fines. It should be noted that the monetary threshold for aggravated tax fraud is relatively low in Finland. According to legal praxis, monetary interests of some tens of thousands of euros have been considered sufficient for the tax evasion to qualify as aggravated tax fraud.

The statute of limitations applicable in criminal proceedings can be longer than the five-year limit typically applicable in tax matters. For instance, aggravated tax crime becomes time-barred after 10 years. A taxpayer found guilty of a tax crime may also be ordered to pay damages to the tax recipients in respect of all the years that are not time-barred according to the statute of limitations applicable in criminal proceedings. It should be noted that in criminal matters, taxpayers have no responsibility to provide any evidence of their innocence, but the prosecutor has to fulfil its burden of proof.

V TAX CLAIMS

i Recovering overpaid tax

The overpaid income tax is generally refunded to a taxpayer as a tax refund if the taxpayer's tax withholdings or tax prepayments exceed the final amount of tax payable for the tax year in question. The refund is made approximately one year after the end of the relevant tax year or financial period. A refund of overpaid taxes may be possible even before the regular tax refund payment date upon a specific application.

A separate refund application should expressly be filed to the FTA when a non-resident taxpayer has been charged withholding taxes in Finland that exceed the maximum level allowed under an applicable tax treaty and EU principles. A similar refund process also exists in matters relating to transfer taxes.

Additionally, overpaid VAT may be refunded automatically to the taxpayer from the electronic VAT and employer payroll withholding and reporting system based on the periodic tax return filed by the taxpayer. The FTA issues a separate decision on the refund application only if it rejects the periodic tax return partially or entirely. This decision is subject to a separate appeal.

ii Challenging administrative decisions

In Finland, the vast majority of administrative appeals in tax matters relate to the interpretation of the technical tax rules applicable in the case at hand. A recent phenomenon in tax disputes relates to whether a transaction can be re-characterised based on a specific transfer pricing rule in Finnish tax legislation. The approach adopted by the FTA deviates from the approach adopted by taxpayers in general. The matter is further discussed below.

Additionally, there are a number of examples from case law that relate to, for example, the protection of the taxpayer's legitimate expectations in cases where the taxpayer has relied on an established tax practice or advice issued by the FTA. The protection of legitimate expectations secures the realisation of the binding foundations of the Finnish tax system and, as an established norm, must be taken into consideration by the FTA in its decision-making. A claim based on the protection of legitimate expectations may succeed in the event that a decision by the FTA conflicts with its earlier advice or an established practice.

Further, the rules on taxpayers' obligation to provide information to the FTA are currently being broadly discussed, and there are significant pending disputes addressing that issue.

iii Claimants

Parties entitled to bringing tax claims are the taxpayer and anyone whose taxation is directly affected by the assessment decision in question. In practice, this requires that there is an actual tax impact in the specific case at hand. For example, the spouse of an individual taxpayer may have a right to appeal on this basis, and similar cases may arise in relation to partnership and bankruptcy estates. In these cases, a question of consequential change may be applicable. In the event that a tax decision affects the taxation of another taxpayer, the FTA may reassess the latter's taxation accordingly.

In VAT matters, a person subject to VAT may file an appeal in the tax process in relation to a VAT matter reported by him or her. Specific conditions may apply upon a seller and a buyer in sales transactions, and should be considered on a case-by-case basis and accounted for in entering transfer agreements. The applicability of a specific set-off possibility as per the Finnish Value Added Tax Act should be considered in cases where the VAT has been executed erroneously between the parties of a sales transaction.

In general, the tax recipients (the state, local municipalities, the church, etc.) are represented by the Tax Recipients' Legal Services Unit, an autonomous entity within the FTA. The Unit is not bound by the decisions and guidelines of the FTA, and has a right to appeal tax assessment decisions as well as act on behalf of the tax recipients in all tax appeal matters. The Unit is divided into three groups: personal taxation and preliminary taxation, corporate taxation and VAT matters.

It should be noted that the Tax Recipients' Legal Services Unit has the right to appeal tax decisions to the benefit of the taxpayer as well. Respectively, taxpayers may request the reassessment of a tax decision on their own initiative on the basis of not having paid the sufficient amount of taxes.

VI COSTS

Taxpayers have the right to claim compensation for their tax litigation costs. It should be noted, however, that the right only applies to court proceedings; administrative proceedings leading up to the court proceedings, including proceedings in the Board, are excluded from this rule. In addition, a successful claim for compensation usually requires that the taxpayer succeeds in his or her principal claim, the matter has significant value relating to the interpretation of law, or that granting such compensation can be based on another special ground. Tax litigation costs are therefore rarely compensated in practice even in cases where the final decision is in favour of the taxpayer.

This situation stems directly from administrative procedural legislation according to which a party should be held liable for the other party's legal costs only if, in view of the resolution of the matter, it would be unreasonable to make the latter bear his or her own costs. The interpretation of this standard has been strict, and any possibility to recover legal costs has typically required an obvious error by the FTA. Even in these cases, the compensated costs are often limited to a nominal amount.

Respectively, the chances of the FTA recovering any costs from a taxpayer are extremely slim. Under current procedural rules, a private party should not be held liable for the costs of a public authority unless the private party has made a manifestly unfounded claim. The starting point is understandable and pertains directly to the fact that the tax authority is always in a stronger position in such proceedings.

These rules have, however, caused administrative litigation, and especially tax disputes, to significantly differ from civil litigation, and the applied principle of full compensation.

VII ALTERNATIVE DISPUTE RESOLUTION

Currently, means of alternative dispute resolution, such as arbitration or mediation, are not utilised in tax disputes in Finland. However, the European Commission's proposal for a Council Directive on Double Taxation Dispute Resolution Mechanisms in the EU has received positive feedback as an instrument that would increase the range of taxpayers' effective remedies in international tax disputes, which seems to echo the sentiment and aim of the OECD and G20 base erosion and profit shifting (BEPS) project to improve dispute resolution mechanisms and minimise risks of uncertainty and unintended double taxation.

VIII ANTI-AVOIDANCE

Finnish tax legislation includes a general anti-avoidance rule for the purpose of preventing tax avoidance. According to the rule, the legal form of a situation or a measure that does not correspond to the true nature or purpose of the matter shall be taxed as if the correct form had been used. To avoid the application of the anti-avoidance rule, the arrangement in question must have legitimate business-related justifications instead of mere tax-related reasons (i.e., business reasons). When applying the anti-avoidance rule, the legal form of an action may be disregarded for tax purposes, in which case the amount of tax will be assessed as if the transaction had been carried out using the correct form.

The FTA and the courts apply the principle of substance over form as stated in the tax legislation. If the FTA concludes that there is no business reason or no adequate business reason underlying a transaction between related companies, or that a transaction has been given a legal form that does not correspond to its true nature, it may consider the transaction to be null and void for tax purposes and assess the amount of tax as if the real form had been used. Disregarding form for tax purposes does not affect the validity of the transaction as such, but may still be regarded as valid under company law and for other legal purposes.

If it is evident that a company has paid its shareholder more than a reasonable amount as salary, housing benefit, entertainment or insurance, or if the company pays its shareholder interest, lease payments, commission or other such benefits and the amount exceeds what the company would ordinarily pay to third parties, the amount of tax may be assessed based on the amount that the tax authority deems to be in excess of the reasonable amount. This type of conduct is referred to as hidden profit distribution.

If the tax authorities conclude that the arm's-length principle has not been observed in transactions between related companies, the taxation of these companies may be corrected and reassessed to reflect the arm's-length conditions (transfer pricing). This reassessment does not require any evidence of tax-avoidance. Finnish subsidiaries and branches of non-resident companies are treated similarly to resident companies.

IX DOUBLE TAXATION TREATIES

Finland has an extensive network of double taxation treaties in the areas of income and capital taxes. The treaties are based on the OECD Model Convention. Finland's tax treaties are based either on the resident state principle or the source state principle, which is in line with Finnish domestic tax legislation.

Finnish domestic law does not include any special rules concerning the interpretation of tax treaties, but the interpretation is based on the Vienna Convention, the OECD Model Convention as well as basic domestic principles governing the interpretation of Finnish tax legislation. The Supreme Administrative Court acts as the final forum to interpret tax treaties in Finland.

It should be noted that the Supreme Administrative Court has effectively applied the OECD Model Convention in its rulings, due to which the Convention should be considered a source of interpretation for the Court. The role of the OECD Transfer Pricing Guidelines (OECD Guidelines) and its commentaries is more unclear, however, and the question of the relevance of these guidelines as a source of interpretation in Finnish taxation proceedings remains ambiguous. For instance, the FTA has drawn rather far-reaching conclusions in transfer pricing cases from relatively vague statements in the OECD Guidelines, whereas the Supreme Administrative Court has in a recent 2014 ruling stated that the OECD Guidelines cannot extend the scope of national legislation to the detriment of the taxpayer. This statement is currently applied as the general rule in transfer pricing matters.

There have been a number of significant decisions by the European Court of Justice regarding tax matters in Finland, which ultimately serves as proof of the influence that EU principles have on Finnish tax regimes.

It can be noted, however, that the general atmosphere regarding the effect of the EU principles or decisions by the European Court of Justice is somewhat reluctant. For instance, in a 2002 ruling, the Supreme Administrative Court rejected an appeal regarding a tax assessment where a Belgian subsidiary of a Finnish company had been treated as a controlled foreign corporation for Finnish tax purposes without referring the matter to the European Court of Justice. Based on a later ruling by the European Court of Justice in *Cadbury Schweppes*,[2] the Supreme Administrative Court finally annulled its decision in 2011.

The European Court of Justice ruled in July 2013 in its decision in *P Oy*,[3] that the Finnish tax loss carry-forward system, whereby the FTA has its own discretion based on its own guidelines to decide which companies get the permission to use the tax losses forfeited due to an ownership change, was not against the illegal state aid provisions provided by EU law. After the ruling by the European Court of Justice the Supreme Administrative Court has

2 C-196/04.

3 C-6/12.

issued two published decisions on the loss carry-forward system in favour of the taxpayer. First, the Supreme Administrative Court has ruled that the Finnish loss carry-forward system is not prevented by the state aid in question. Second, the Supreme Administrative Court held that a loss carry-forward permission could be granted in a case where the tax-related criteria were fulfilled even though the criteria unrelated to the tax regime were not fulfilled. For the time being, the FTA has not issued any new guidelines on whether loss carry-forward permission decisions should be based on tax-related criteria only. Hence, the future developments in this matter remain to be seen.

As a Member State of the EU, Finland has implemented the VAT Directive in the Finnish Value Added Tax Act. In principle, all resident entrepreneurs who are engaged in the commercial supply of goods or services are subject to VAT, and are required to register for VAT purposes. However, suppliers of selected goods and certain services are exempt. The system is based on self-assessment by registered entrepreneurs. Entrepreneurs are required to pay VAT even when their products are used for private purposes or given as free gifts. The general VAT rate is 24 per cent. Reduced rates of 14 and 10 per cent apply to, for example, restaurant services and transport services. There are a large number of exemptions from VAT, such as financial services and the sale of real property. In addition, a VAT threshold system has been incorporated into the Finnish tax system according to which there is no obligation to register for VAT purposes, and no VAT is levied on the taxpayer if the annual turnover of the taxpayer's business activity does not exceed €8,500. When this threshold is exceeded, the taxpayer receives a relief that gradually decreases with the increase in turnover. The full amount of VAT is levied if the annual turnover is €22,500 or more.[4]

X AREAS OF FOCUS

Following the relatively aggressive approaches taken by the FTA in past years in focusing on transfer pricing matters, there has been something of a change towards the assessment of various procedural rules and regulations. The means applied by the FTA in its aim to intensively collect revenues are being increasingly questioned by taxpayers.

Transfer pricing and allocation of income in a group structure continue to be topical in the Finnish tax practice. In addition, various holding structures, including reinvestments in acquisition structures in connection with mergers and acquisitions, are actively scrutinised by the FTA. Further, regarding private equity, traditional carried interest arrangements are very much the focus of the FTA, and should be carefully considered both looking back as well as going forward to assess and prepare for the potential approaches to be taken by the FTA.

4 As of 1 January 2016, the threshold for the VAT levy was raised to €10,000, and the threshold for the VAT relief was raised to €30,000.

XI OUTLOOK AND CONCLUSIONS

The Supreme Administrative Court has recently issued two important rulings[5] that relate to structuring and financing arrangements applied in corporate structures with Finnish branches as well as tax planning questions therein. The rulings continue the discussion revolving around transfer pricing and tax planning, as well as the substance-over-form tool applied by the FTA in these matters. Contrary to the approach adopted by the FTA, the Supreme Administrative Court has stated that recognising a transaction should be based on its civil law form, disallowing some of the interpretations made by the FTA. Nevertheless, the most recent cases would suggest it is likely that even more transfer pricing-related tax disputes will arise in the near future.

In the light of future challenges in tax matters, it should be noted that a multilateral instrument implementing the OECD measures and transposing the results from the BEPS project into tax treaties worldwide is contemplated to be signed in June 2017. The factual implementation measures following the contemplated signing will take time, however, and it is considered unlikely that the new multilateral instrument would be applicable before year-end 2018. This causes, however, somewhat unpredictable expectations and insecurity in terms of taxation in Finland.

Further, it should be noted that the scope of application of the specific Finnish interest deduction limitation rules are subject to change due to the EU Anti-Tax Avoidance Directive (2016/1164/EU), which is likely to be applied also with respect to activities such as real estate investments and the related structures currently not within the scope of the application of said rules. Accordingly, as Finland is in the process of implementing the most recent BEPS reforms, which will likely give rise to divergent interpretations in the relatively near future, which can lead to an increasing amount of tax disputes.

5 Rulings SAC 2016:71 and SAC 2016:72 relate to the allocation of shares and interest deductibility by a Finnish branch of a non-resident company. In the latter ruling, the Supreme Administrative Court also took a stand on the arrangement's artificial nature under the anti-avoidance provision.

Appendix 1

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Jouni Weckström works as a counsel in Krogerus' tax practice. He has broad experience in various areas of tax law with special focus on tax litigation. Jouni is recognised as one of the leading tax specialists in Finland by international legal directories such as *Chambers Europe* and *Chambers Global*. With a background as a former tax litigator in Helsinki, Jouni has been involved in numerous tax disputes, and consequently his special areas of practice have included complex transfer pricing disputes, fundamental cases related to constitutional tax matters as well as cases with extensive EU dimensions. Jouni has advised various domestic and foreign multinationals in group structuring or restructuring. He has also acted as an adviser for a number of national and international investors in cross-border investment structuring. Jouni has also advised on transaction and real estate-related VAT issues as well as on some complex cross-border VAT arrangements.

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