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The odds in tax proceedings: 10/1 against the taxpayer

Dear Sir or Madam,

What are the odds for tax payers in taxation procedure law? The following article analyses all procedural steps, with special emphasis on Basel-Stadt.

During the assessment process it is as follows:

- Assessment according to tax declaration: 95% in favour of the taxpayer
- During appeal procedures, however, it is quite the opposite: appeal: 5-10% in favour of the tax payer
- Tax appeal committee: 15-20% chance of approval
- Court of appeal: 5-10% chance of approval
- Federal Supreme Court: 10% chance of approval

The tax administration for tax law purposes is the cantonal authority. Tax legislation is part of public law, i. e., the state is the authority for its citizens. Once the tax declaration has been received, the revenue officer will fix the amount of tax. He or she will determine how much tax the tax payer must pay. Very often, the revenue officer needs to determine this based on insufficiently completed tax declaration forms. Quite often it is not a tax payer's main priority to hand in accurately filled in tax declaration forms; however, these self-assessments are very often accepted, especially when there is not much deviation from the amount of tax that had been due the previous year. Wherever the taxpayer actively shows an interest, the assessment process is characterised by a favourable dialogue, and the revenue officer will make an effort to consider the taxpayer's concerns seriously. The result of this mutually understanding attitude is that the tax assessments generally find approval. In only a few cases there will be an appeal. A reasonable appeal will lead to reconsideration by the revenue officer. Without appeal the assessment becomes legally binding and executable (legal value or even illegal value).

Tax assessment

To explain whether the tax assessment corresponds with the submitted tax declaration, I have selected as a basis the tax declaration submitted by artax Fide Consult AG. This company, on whose board I have been an active member for over 20 years, and for which I am in charge of the tax department, submits around 1'200 tax declarations per year – around a third of them are on behalf of legal entities and two thirds on behalf of individuals. We have noticed that to a very large extent, the assessments exactly correspond to the submitted tax declarations. The percentage of deviation amounts to

less than five percent. The reasons for these deviations are mainly down to the margin of appreciation and partly down to taxation law issues.

Conclusion: with professionally completed tax declarations a very high figure of approval can be expected.

Appeal

Lodging an appeal will lead to an appeal decision which can change the assessment, either in favour of, or of disadvantage to the taxpayer. In the canton of Basel-Stadt, this decision will be made by the legal department of the tax administration. This is where everything turns around. Almost all appeals are dismissed, and only clearly blatant mistakes will be corrected.

Within the framework of my doctoral thesis "Tax appeals in the canton of Basel-Stadt" (1985) I gained an academic insight into appeal decisions and could record the high figure of dismissals. Many of those dismissals were the result of "protest appeals" that were either insufficiently substantiated or were merely based on claims. The appeals in these cases were all legally sound. Within the framework of my doctoral thesis I had been able to analyse around 1'500 appeal decisions.

It is a different picture when it comes to justifying reasons. The main tenor: "We have done everything right and do not rectify." As a tax lawyer with 20 years of experience in tax, having studied law with degree subject tax law, a doctoral thesis in tax law and as author of several textbooks I am taking the liberty to make the judgement that, by and large, the justification of the dismissals has, from a tax law point of view, no leg to stand on. It is rather about maintaining the power structure and to celebrate the dogma of infallibility. Such decisions will not be rectified in subsequent instances.

The tax administration does not publish any statistics. To update this article with current figures I asked for a new insight; however, the tax administration refused my request.

Conclusion: 95% of all appeals will be dismissed.

Only partly independent appeals commission

The next step, when the appeal decision results in a dismissal, is to take recourse to the Tax Appeal Commission. However, this next-higher instance is not fully neutral, either. Its members have been appointed by the government. Such legal authority structures are often found in administrative proceedings. They are not compatible with modern constitutional perceptions. Into this body, lawyers are appointed who only rarely deal with tax laws. Among the body of judges within the tax appeals commission, there is not a single judge that deals with aspects of tax law on a full-time basis. As a consequence, the tax administration, a professional authority with a bureaucracy of over 200 employees, has gained an inordinate importance. A counterbalance by specialist professionals is completely missing.

The Tax Appeals Commission has published its decision-making practice (as a first in 2014, for the years 2011 to 2013).

Conclusion: 75-80% of all tax appeals are dismissed (130 decisions per year).

First and only independent instance

If we take a look at the third and next instance, we notice that only now do we have an entity unrelated to any administrative authority that makes independent judgments: the Administrative Court of Basel-Stadt (Court of Appeal). A legal authority has now been called upon which already is the highest court in the canton. It has to deal with the whole legal system (and not just with taxes) and has to make judgements within the framework of comprehensive and complex legal matters.

Due to very high costs involved for the tax payer and to the high rate of case dismissals, there are only a small number of judgments (around 35 per year). The Court of Appeal publishes its statistics in its annual review. During an amicable meeting with the current president of the court, I had been able to analyse the tax decisions.

Conclusion: Over 90% of all decisions go against the appellant (2011 – 2013)

Federal Supreme Court

The last instance is the Federal Supreme Court. It makes judgements about tax law in the field of arbitrariness. Only arbitrary cantonal judgements will be reprimanded. Thus any appeal against incorrect judgments is excluded. Only blatantly incorrect and affronting judgments can be rectified. Thus, de facto, cantonal tax jurisdiction ends with the canton. Gion Clopath has compiled and published statistics of verdicts (Clopath, Gion: Is it worth going to Lausanne? StR 60 (2005), pp. 100 ff – German or French).

Conclusion: 90% of all decisions go against the appellant.

The need for reform

The legal means system in tax law is helping tax payers only to a limited extent. It is in need of reform. Within the administration, more independent structures need to be created. After the appeal proceedings, an independent tax appeal commission is required, with its members appointed by an independent body. A specialist tax court as subsequent instance is to be highly recommended. Additionally all judges (of such tax courts) should neither be government employees nor should they receive their salaries from the state sector. After all, who likes to make judgments against their employer? The principles of the rule of law should be observed; impartiality, duty of documentation, transparent dispensation of justice, a dialogue with the taxpayer and no arbitrary dispensation of justice à la Louis XIV or Nero, compliance with duties of further training, quality control and peer review, visits to courts abroad and away from the Federal hymn sheet of high-handed jurisdiction to judgments in line with reality, and subject to self-critical examination. Whether a taxpayer will experience fair taxation very much depends on the tax administration and the particular tax officer. What is available next is of little help.

Kind regards

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