

Chambers

GLOBAL PRACTICE GUIDES

Definitive global law guides offering
comparative analysis from top-ranked lawyers

Tax Controversy

Rwanda

Maggie Baingana, Isaac Ndahiro and Aimé Mbarushimana
Shield Associates

practiceguides.chambers.com

2021

Law and Practice

Contributed by:

*Maggie Baingana, Isaac Ndahiro and Aimé Mbarushimana
Shield Associates see p.20*



CONTENTS

1. Tax Controversies	p.4	5.3 Judges and Decisions in Tax Appeals	p.10
1.1 Tax Controversies in this Jurisdiction	p.4	6. Alternative Dispute Resolution (ADR) Mechanisms	p.10
1.2 Causes of Tax Controversies	p.4	6.1 Mechanisms for Tax-Related ADR in this Jurisdiction	p.10
1.3 Avoidance of Tax Controversies	p.4	6.2 Settlement of Tax Disputes by Means of ADR	p.10
1.4 Efforts to Combat Tax Avoidance	p.4	6.3 Agreements to Reduce Tax Assessments, Interest or Penalties	p.11
1.5 Additional Tax Assessments	p.5	6.4 Avoiding Disputes by Means of Binding Advance Information and Ruling Requests	p.11
2. Tax Audits	p.5	6.5 Further Particulars Concerning Tax ADR Mechanisms	p.11
2.1 Main Rules Determining Tax Audits	p.5	6.6 Use of ADR in Transfer Pricing and Cases of Indirect Determination of Tax	p.11
2.2 Initiation and Duration of a Tax Audit	p.5	7. Administrative and Criminal Tax Offences	p.12
2.3 Location and Procedure of Tax Audits	p.6	7.1 Interaction of Tax Assessments with Tax Infringements	p.12
2.4 Areas of Special Attention in Tax Audits	p.7	7.2 Relationship Between Administrative and Criminal Processes	p.12
2.5 Impact of Rules Concerning Cross-Border Exchanges of Information and Mutual Assistance Between Tax Authorities on Tax Audits	p.7	7.3 Initiation of Administrative Processes and Criminal Cases	p.12
2.6 Strategic Points for Consideration During Tax Audits	p.7	7.4 Stages of Administrative Processes and Criminal Cases	p.13
3. Administrative Litigation	p.8	7.5 Possibility of Fine Reductions	p.13
3.1 Administrative Claim Phase	p.8	7.6 Possibility of Agreements to Prevent Trial	p.13
3.2 Deadline for Administrative Claims	p.8	7.7 Appeals against Criminal Tax Decisions	p.14
4. Judicial Litigation: First Instance	p.9	7.8 Rules Challenging Transactions and Operations in this Jurisdiction	p.14
4.1 Initiation of Judicial Tax Litigation	p.9	8. Cross-Border Tax Disputes	p.14
4.2 Procedure of Judicial Tax Litigation	p.9	8.1 Mechanisms to Deal with Double Taxation	p.14
4.3 Relevance of Evidence in Judicial Tax Litigation	p.9	8.2 Application of GAAR/SAAR to Cross-Border Situations	p.15
4.4 Burden of Proof in Judicial Tax Litigation	p.9		
4.5 Strategic Options in Judicial Tax Litigation	p.9		
4.6 Relevance of Jurisprudence and Guidelines to Judicial Tax Litigation	p.10		
5. Judicial Litigation: Appeals	p.10		
5.1 System for Appealing Judicial Tax Litigation	p.10		
5.2 Stages in the Tax Appeal Procedure	p.10		

8.3	Challenges to International Transfer Pricing Adjustments	p.15	10.2	Judicial Court Fees	p.18
8.4	Unilateral/Bilateral Advance Pricing Agreements	p.16	10.3	Indemnities	p.18
8.5	Litigation Relating to Cross-Border Situations	p.16	10.4	Costs of Alternative Dispute Resolution	p.18
9.	International Tax Arbitration Options and Procedures	p.16	11.	Statistics	p.18
9.1	Application of Part VI of the MLI to Covered Tax Agreements (CTAs)	p.16	11.1	Pending Tax Court Cases	p.18
9.2	Types of Matters That Can Be Submitted to Arbitration	p.16	11.2	Cases Relating to Different Taxes	p.19
9.3	Application of the Baseball Arbitration or the Independent Opinion Procedure	p.16	11.3	Parties Succeeding in Litigation	p.19
9.4	Implementation of the EU Directive on Arbitration	p.17	12.	Strategies	p.19
9.5	Existing Use of Recent International and EU Legal Instruments	p.17	12.1	Strategic Guidelines in Tax Controversies	p.19
9.6	Publication of Decisions	p.17			
9.7	Most Common Legal Instruments to Settle Tax Disputes	p.17			
9.8	Involvements of Lawyers, Barristers and Practitioners in International Tax Arbitration to Settle Tax Disputes	p.17			
10.	Costs/Fees	p.18			
10.1	Costs/Fees Relating to Administrative Litigation	p.18			

1. TAX CONTROVERSIES

1.1 Tax Controversies in this Jurisdiction

In practice, nearly all tax controversies arise in Rwanda following tax audits carried out by the tax authority. Audits are usually catalysed by one of the following factors:

- if the tax is declared on time but the tax has not been paid;
- if the audit by the tax authority indicates that additional tax ought to be paid; or
- if there are serious indications that the taxpayer concerned prepared their declaration statement with the intention to evade tax.

Additionally, a controversy might arise because of widely interpreting the relevant provisions of the Income Tax Law, which can lead to tax officials determining that tax due was under-declared or under-paid.

1.2 Causes of Tax Controversies

Most commonly, corporate income tax, value added tax, pay as you earn and withholding tax are disposed to give rise to tax controversies. The tax treatment of income earned abroad from holding shares in non-resident companies and the extending of loans to non-resident borrowers is still the subject of considerable uncertainty, particularly with respect to double taxation relief.

Foreign countries from which Rwandan residents derive income will, in most cases, tax such income on the basis that its source is within their territories. This certainly gives rise to double taxation, as the same income would be taxed in both the country of source and the country of residence. Lack of precision or lacuna in the domestic laws creates opportunities for arbitrary and wide interpretation of the law, thereby also giving rise to risks related with the appropriate income threshold to be taxed.

1.3 Avoidance of Tax Controversies

There are four avenues through which the possibility of any tax controversy can be mitigated:

- through monitoring and an evaluation framework – the Rwanda Revenue Authority (RRA) has a department in charge of monitoring the taxes trend, including any risk of tax avoidance, and it creates rules and measures to reduce possible controversies;
- by advising the taxpayers to deal with the Tax Administration at every level of administrative proceedings, from pre-audit and audit-level proceedings to appeals and litigation, in any of the multiple forums where tax cases may be brought;
- by updating the tax laws; and
- by engaging with the taxpayer and encouraging them to carry out voluntary tax disclosures and declarations.

1.4 Efforts to Combat Tax Avoidance

The BEPS recommendations and the EU's recent measures to combat tax avoidance have contributed to reducing tax controversies, especially for multinational enterprises in Rwanda in the following ways:

- expanding the automatic exchange of information to cover all forms of financial income and account balances; and/or
- establishing a platform on good tax governance to deal with issues such as aggressive tax planning and tax havens.

Deductible cross-border payments benefit from a preferential tax regime at the recipient level where the recipient is resident in a jurisdiction that imposes corporation tax at less than half the average rate in the EU or in a jurisdiction included on the EU tax haven blacklist. BEPS Action 14 requires countries to have mutual agreement procedures (MAPs) in their dealings with partner states. Nine double taxation treaties (DTTs) are

in place, of which six are already in force. Article 24 of those DTTs deals with MAPs. Nonetheless, Rwanda has not yet commenced full implementation of the guidelines in the BEPS action plan.

1.5 Additional Tax Assessments

An administrative fine is notified to a taxpayer who is alleged to have committed a fault prohibited under the tax procedure law without the need for prior audit to prove the sanctioned fault. From the time the notice is made known to the respective taxpayer, the taxpayer is expected to pay the tax due or an administrative fine within seven days, as the case might be.

Both the notice of a tax assessment and the notification of an administrative fine constitute enforcement orders to recover tax, fees, interests, administrative fines and enforcement costs. Correspondingly, this might be a cause for the initiation of the protest to the decisions of the tax authority by the affected taxpayer by following the prescribed procedures of administrative appeal, amicable settlement and later the courts for redress.

Fees Related to Administrative Fines

Fees related to an administrative fine can consist of the following:

- lodging an administrative claim to the Tax Administration is free of charge;
- the taxpayer is required to pay 25% of the assessed tax before the payment in instalment is granted – the balance, ie, 75% of the assessed tax, is backed by post-dated checks;
- administrative fines are applied to a taxpayer who fails to declare taxes in due time; and
- late payment penalties and interests are charged on tax not paid in due time.

2. TAX AUDITS

2.1 Main Rules Determining Tax Audits

The following factors may determine a tax audit:

- reputation of the tax adviser;
- nature of business ownership;
- whether taxpayers are under a regulatory framework or not;
- sector risk;
- individual taxpayer profile;
- relative size of the taxpayers;
- relative magnitude of additional tax obtained in the past from the audit;
- relative amount of CIT under-declaration compared to VAT;
- ratio analysis;
- taxpayers not audited for a period of two years or more;
- taxpayers engaged in controlled transactions for the case of multinational companies;
- random selection process;
- referral cases due to suspected tax fraud;
- habitual non-declaration by the respective taxpayer; and/or
- interminable declaration of losses for a period of five years successively.

2.2 Initiation and Duration of a Tax Audit

Initiating an Audit Exercise

Outside scheduled audits, the Tax Administration can initiate an audit exercise by relying on information received or any form of indicative evidences, particularly:

- the failure to carry out a tax declaration;
- if the tax declaration was not certified by a competent person;
- if the tax declaration was not accompanied by all necessary documents;
- if the taxpayer was unwilling to co-operate with a tax audit officer or did not provide the explanations requested;

- if books and records were not filled as prescribed by the law;
- if there are serious indications of tax fraud beyond reasonable doubt; and
- if the taxpayer failed to provide sufficient information on controlled transactions.

Further, where there are serious indications of tax evasion, the Tax Administration may conduct an audit without notice. In such a case, a notice of assessment or a notification of fine is issued to the taxpayer disregarding the limitations stipulated in the law.

Rectification or Draft Assessment

Alternatively, an issue-oriented audit can be initiated when a comprehensive audit is not necessary, or where the Tax Administration discovers a miscalculation, an omission, an understatement, a misrepresentation about tax or any other discrepancies in a tax declaration or assessment. The Tax Administration can send a note for rectification (ie, a draft assessment) to the taxpayer containing the elements which were taken into account for their comment.

In responding to the note for rectification, the taxpayer may request to provide additional explanations orally. When explanations provided by the taxpayer reveal new information that lead to an increase of the tax assessed or unearth a new tax previously not assessed, the Tax Administration issues a new draft note for rectification and seeks further explanations within 30 days.

Auditing Process

The auditor starts with a risk assessment. Should they not be satisfied with the information provided on the tax return submitted to the Tax Administration, they may decide to carry out a field audit.

The audit notification contains the date and time of audit commencement, the place the audit is

to be conducted and the possible duration of the audit, among other information. The duration of the audit is stated in the audit notification for formality purposes, because a tax audit cannot be prevented from being carried out.

The time limit of the power to audit is five years, commencing on January 1st following the concerned tax period. However, if it is established that the taxpayer has concealed information with intent to evade tax, the power to audit instead lapses after ten years. A tax audit does not suspend or interrupt the statute of limitations period.

2.3 Location and Procedure of Tax Audits

A tax audit can occur in either the taxpayer's premises or the RRA headquarters, depending on the nature of tax and the level of information required. Mostly, the data is based on printed documents; however, in some cases, electronic data is utilised; for example, electronic billing machine (EBM) receipts.

Before the audit is initiated, the Tax Administration is required to inform the taxpayer in writing of the following:

- the date of the audit, at least seven days before it commences;
- the place where the audit is to be conducted, and its possible duration; and
- any specific document the Tax Administration wants to see or any specific information it requires.

The taxpayer is required to work effectively with the tax audit team and do the following:

- provide the audit team with suitable premises; and
- give the team the books and records referred to in the law.

2.4 Areas of Special Attention in Tax Audits

Special attention is paid to the risks identified during risk-profiling exercises. Substantive tests, analytical procedures, tests of details of transactions and tests of details of balances are based on risks assessed prior to the audit commencing. The following are some of the special attention areas.

Internal Control Over Financial Reporting

The Centre for Audit Quality (CAQ) report states: “Understanding the flow of transactions and identifying the risks of material misstatement – including the types of potential misstatements that can occur and the likely sources of those potential misstatements – is necessary for the auditor to select appropriate controls to test and to evaluate whether those controls adequately address the risks”.

Professional Scepticism

Auditors should maintain a questioning mind and have the confidence to challenge management representations after gathering and evaluating appropriate evidence, according to the CAQ report.

Engagement Quality Review

The engagement quality reviewer to carry out responsibilities with objectivity and application of due care, with the firm appropriately addressing the reviewer’s findings before issuing the audit report.

Accounting Estimates, Including Fair Value Estimates

When evaluating how reasonable an estimate is, auditors should focus on inputs and assumptions that:

- are significant to the estimate;
- are sensitive to variations;
- deviate from historical patterns; and

- are subjective and susceptible to misstatement and bias.

Substantive Analytical Procedures

Although substantive analytical procedures may be effective tests for relevant assertions related to certain accounts, these procedures may not always be effective in providing the appropriate level of assurance.

Inaccurate or Omitted Disclosures

Auditors should communicate to management or the audit committee, as appropriate, whether the financial statements are presented fairly in all material respects, in conformity with the applicable financial reporting framework.

2.5 Impact of Rules Concerning Cross-Border Exchanges of Information and Mutual Assistance Between Tax Authorities on Tax Audits

While the occurrence of cross-border exchanges of information and mutual assistance between tax authorities is expected to increase with time as a result of deepening regional co-operation initiatives, it has not yet become a popular practice in Rwanda – especially, because exchange of information (EOI) and tax information exchange agreement (TIEA) frameworks are not yet operational. There have not yet been any cases where tax audits have been carried out upon the request of the tax authorities of other jurisdictions.

2.6 Strategic Points for Consideration During Tax Audits

To carry out an effective audit, the following key points ought to be considered:

- it is critical that the officers appointed to carry out tax audits possess high-level skills and professional experience to help them properly understand professionally kept books and records of accounts;

- there should be well-elaborated laws to facilitate the Tax Administration bodies with adequate powers to conduct wide-ranging enquiries;
- the laws should allow delegation of the powers to staff conducting audits;
- it is necessary to allow reconstruction of income and reassessments of tax using a range of methods and techniques within a generous timeframe; and
- the laws should be regularly updated to keep in step with global standards developments – towards this objective, the authorities need to monitor the audits and determine if the legislation is deficient, not understood, or inconsistently applied in any of these areas, and develop plans to address such deficiencies.

3. ADMINISTRATIVE LITIGATION

3.1 Administrative Claim Phase

An individual taxpayer may choose to oppose the tax liability charged against them. However, once the aggrieved taxpayer decides to challenge the assessment, they must follow the procedures outlined in the law. While the Tax Procedure Law is not definitive in stating that the administrative claim phase is a mandatory step before initiating a judicial phase, the courts have set a precedent that appeal procedures must be exhausted prior to accessing the judicial process.

A taxpayer who is subject to assessment, and dissatisfied with the assessment notice or the administrative fine, can appeal to the Commissioner General for review within a period not exceeding 30 days from the date the tax assessment or administrative fine was notified to them. If the appeal decision results in a full or partial success, the Commissioner General

can discharge the taxpayer of the respective tax liability, interest and administrative fine.

If the two parties cannot resolve the dispute amicably, the taxpayer can challenge the Commissioner General's decision by filing a suit to the competent court within a period not exceeding 30 days from the date both parties failed to reach a satisfactory decision.

Notably, the Tax Administration audits a taxpayer only once in respect of a certain tax or in a certain taxable period. A new audit may be necessary if there are concrete reasons as set out by rules issued by the Commissioner General. When the Tax Administration discovers a miscalculation, an omission, a misrepresentation, an understatement of income or any other error in the tax declaration or assessment, it has the right to issue an adjusted assessment.

3.2 Deadline for Administrative Claims

A taxpayer who is dissatisfied with the contents of the tax assessment notice or notification of an administrative fine can appeal to the Commissioner General (CG) within a period not exceeding 30 days from the day of receipt of the tax assessment notice or notification of an administrative fine and request the CG to review the assessed tax.

Thereafter, the Commissioner General is expected to issue a decision on the appeal in a period not exceeding 30 days from the date of receipt of the appeal and communicates it to the taxpayer in writing. The Commissioner General, or a competent member of staff of the Tax Administration designated by the Commissioner General, may extend this period for a further 30 days and inform the taxpayer concerned.

Where no decision is made by the Commissioner General within the stipulated period, the appeal is assumed to be valid. If the appeal is fully or

partially accepted, the Commissioner General discharges the taxpayer from the respective tax liability, interest and administrative fine.

4. JUDICIAL LITIGATION: FIRST INSTANCE

4.1 Initiation of Judicial Tax Litigation

See 3. Administrative Litigation.

4.2 Procedure of Judicial Tax Litigation

If the two parties fail to resolve the disputed assessment amicably, the taxpayer can exercise their legal privilege to challenge the Commissioner General's decision by filing a suit to the first instance of the Commercial court within a period not exceeding 30 days from the date both parties failed to reach a mutually satisfactory settlement. Subject to the amounts involved, the matter may be appealed up to the Supreme Court. During the period in which the claim is subsisting in the court process, the obligation to pay the tax remains. Prior to the final decision in the matter, the tax authorities may commission recovery of the outstanding assessment, including any penalties, and interest thereto.

4.3 Relevance of Evidence in Judicial Tax Litigation

Evidence presentation forms a fundamental requirement, and it should accompany the claim at the time of filing. However, cross-examination, while allowed in the civil procedure rules, is hardly exercised as a matter of custom. This said, a party can request the presiding judicial officer to conduct cross-examination of witnesses, when required. Essentially, matters are determined almost exclusively based on submitted documentary evidence.

A taxpayer is, however, not allowed to provide, at any stage of appeal, any additional document which was not revealed at the time the audit

exercise was conducted, unless it can be proven that the document was not produced due to a valid reason.

4.4 Burden of Proof in Judicial Tax Litigation

Burden of Proof Imposed on the Tax Administration

The Tax Administration has the obligation to provide evidence if:

- it rectifies a tax declaration;
- it can demonstrate indicators of prosperity and the valuation method of the property; or
- it requests a search warrant for residential buildings.

Burden of Proof Imposed on the Taxpayer

The taxpayer has to provide evidence if:

- the tax authority conducts an audit without notice;
- if it proceeds with rectification of the declaration; or
- if it seeks to disapprove the content of the assessment report.

4.5 Strategic Options in Judicial Tax Litigation

When the administrative appeal process has not satisfied the taxpayer and recourse to court is embarked upon, the key strategy is to gather sufficient documentary proof to support the claim before the court. This can include the presentation of independently carried out audit reports and books of accounts and invoices or receipts and bank statements, including the revenue authority's officially issued documents (ie, memos, emails, letters, etc).

Yet, it ought to be recognised that admissibility in court is subject to prior exhaustion of the remedies under the administrative appeal procedure. Correspondingly, settling the controversy

through the administrative process is not only advisable, but is also made compulsory by statute.

4.6 Relevance of Jurisprudence and Guidelines to Judicial Tax Litigation

While litigating the controversies before the court, the use of precedent and recognised jurisprudence can be persuasive. However, factual evidence supported by legal authorities is critical to success in litigation, especially before the domestic courts.

5. JUDICIAL LITIGATION: APPEALS

5.1 System for Appealing Judicial Tax Litigation

As highlighted earlier, in the event a controversy concerning tax assessment or notification of an administrative fine arises, it is statutorily appealable to the Commissioner General of the tax authority/service for review. If, however, the Commissioner General does not issue a decision within the stipulated period, the appeal is assumed to have been found to be valid. But if the Commissioner General finds that the appeal is fully or partially successful, the taxpayer is immediately discharged of the respective tax liability, interest and administrative fine associated with the appeal.

If, however, the controversy can still not be resolved after the request for the “amicable settlement” procedure, the aggrieved taxpayer may file a case to the commercial court’s first instance within a period not exceeding 30 days from the date both parties fail to reach an amicable solution. The case can proceed to the Supreme Court, depending on the amount involved.

5.2 Stages in the Tax Appeal Procedure

The stages of a tax appeal process are:

- the administrative appeal – appeal to the Commissioner General;
- an amicable settlement;
- the Commercial Court;
- the High Commercial Court;
- the Court of Appeal (subject admissibility requirements); and
- the Supreme Court.

5.3 Judges and Decisions in Tax Appeals

Ordinarily, the judges preside over matters filed in court at first, second or third instance. A single judge or a panel of an odd number of judges, as may be determined by the president of the respective court, may preside over appeals. The court’s president has the discretion to determine when to appoint more than one judge to hear a matter. Some of the factors that might influence this decision include:

- the value of the controversy;
- the complexity; and
- the parties involved (ie, international or domestic).

6. ALTERNATIVE DISPUTE RESOLUTION (ADR) MECHANISMS

6.1 Mechanisms for Tax-Related ADR in this Jurisdiction

The domestic laws do not provide for alternative dispute resolution (ADR) mechanisms in resolving tax-related controversies. In practice, there is only the administrative procedure and the court process.

6.2 Settlement of Tax Disputes by Means of ADR

ADR mechanisms and/or procedures are not applicable in the resolution of tax-related controversies/disputes. However, the law and the

Commissioner General's rules provide for amicable settlement of the dispute between the parties.

6.3 Agreements to Reduce Tax Assessments, Interest or Penalties

Despite ADR not being a mechanism provided in the laws for the resolution of tax-related disputes, there is a similar procedure styled as an "amicable settlement". Through the mechanism of an amicable settlement, a taxpayer may request, in writing, that the Commissioner General review the outstanding assessment by following laid-down procedures.

When the tax controversy is not filed to court, the request for amicable settlement must be submitted within 30 days from receipt of the decision of the Commissioner General on the initial appeal. If the matter has been lodged to court, the request for amicable settlement becomes acceptable only before the court makes a ruling.

The above notwithstanding, ad interim the taxpayer compulsorily pays a bond equal to 25% of the disputed tax liability. Moreover, new issues which were not part of the appeal to the Commissioner General are not admissible for amicable settlement. An appeal rejected by the Commissioner General for reasons provided by the law cannot be subject to the procedure for amicable settlement.

6.4 Avoiding Disputes by Means of Binding Advance Information and Ruling Requests

Advance ruling decisions are statutorily binding. Subject to the provisions of other laws, upon request or the Commissioner General's own initiative, the tax authorities can issue a binding decision on advance tax. If this ruling is of interest for the public, it is also published in the media. The rules of the Commissioner General

determine the modalities for advance tax initiation and ruling.

6.5 Further Particulars Concerning Tax ADR Mechanisms

Any tax controversy that arises is treated on its own merits regardless its nature, or value. An aggrieved taxpayer is allowed by law to seek administrative review at first instance by submitting an appeal to the commissioner general. If the controversy persists, it is submitted for an "amicable settlement" procedure, and then also to the courts, as the case may be. Remarkably, neither the initial appeal nor the "amicable settlement" procedure involves selected mediators or arbitrators.

Throughout the stages of the administrative review procedures, the taxpayer continues to confer with the tax authority's officials representing the Commissioner General. While the application of precedence can be useful, often the cases are usually treated independently based on their facts. Thereafter, further appeal is directed to the courts in 30 days following the failure of the administrative procedure.

The regulations state the information to be supplied by the applicant, the period of validity, and reasons for revoking an advance ruling, such as a change in the law or the submission of false information. Furthermore, provisions for administrative appeal procedures also apply to advance rulings as well.

6.6 Use of ADR in Transfer Pricing and Cases of Indirect Determination of Tax

Any tax controversy, regardless of the nature, follows similar legal procedure. An aggrieved taxpayer is privileged by law to seek administrative review at first instance by submitting an appeal to the commissioner general. If the controversy persists, it is submitted to the amicable

settlement procedure, and then on to the courts, if necessary.

7. ADMINISTRATIVE AND CRIMINAL TAX OFFENCES

7.1 Interaction of Tax Assessments with Tax Infringements

The law on tax procedures includes a set of provisions covering specific administrative fines for a range of various sanctionable or wrongful acts. Wrongful acts are broadly construed as any action which is unintentionally carried out with the aim of evading taxes, in whole or in part, in violation of tax laws. However, a taxpayer who rectifies their tax declaration and pays the relevant taxes before they were notified of the imminent audit is not subject to any administrative fines.

Any actions which the tax authority can reasonably contemplate to have been carried out to avoid the appropriate assessment is assumed to constitute an offence of tax evasion and subject to criminal sanctions. Criminal offences officially commence when the state investigative body (the Rwanda Investigations Bureau) is informed by the tax authorities via a formal complaint accompanied by the allegations. Thereafter, when the allegations can be sufficiently confirmed, the state prosecution service will oversee the prosecution of the suspected offenders, beginning at the primary court level.

7.2 Relationship Between Administrative and Criminal Processes

The procedure is such that investigations precede any steps towards making administrative sanctions or initiating criminal charges through a commissioned tax audit, as either option would necessarily need to be backed up with the evidence provided by the audit results. The court process comes later when it is moved to adjudi-

cate upon the matter by the claimant, who may be the tax authority or the aggrieved taxpayer.

As the tax body enjoys disproportionate power over the taxpayer, it is often the latter who goes to court to seek redress against the tax authority's alleged infringement. Prior to the final court decision on the matter, the Tax Administration can recover the assessed tax, the penalties and late payment interest. However, the Commissioner General may, upon the request of the taxpayer, suspend the tax recovery.

7.3 Initiation of Administrative Processes and Criminal Cases

When an authorised officer carries out an audit or investigation related to taxes, they make a statement on a fault or an offence committed in relation to their duties. The tax authorities will initiate administrative infringement actions, process or criminal charges, dependent on the outcome of the audit and investigations. However, an infringement case which initially began as one to be sanctioned by applying administrative action could evolve into a criminal charge if new evidence emerged to sustain it. Previously subsisting administrative procedures would terminate in favour of the criminal processes.

Tax evasion charges seldom occur. Common infractions are dealt with by leveraging administrative penalties – which can be quite hefty depending on the value of the controversy. Prior to the final court decision on the matter, the Tax Administration may recover the tax assessed, the penalties and late payment interests thereto. However, the Commissioner General may, upon request from the affected taxpayer, suspend the tax recovery process to allow them time to comply with the assessment.

7.4 Stages of Administrative Processes and Criminal Cases

Any punitive processes sanctioned by the tax authority, be they of administrative or criminal nature, must be spurred by the audit results in accordance with the law and rules. When an authorised officer carries out an audit or investigation related to taxes, they make a statement on a fault or an offence committed in relation to their duties. Correspondingly, the Tax Administration may rely on and use any information obtained from any sources without relying on the scheduled audit or investigation, and which suggests irregular self-assessment of tax to carry out further and extensive investigations to test the allegations. When the audit and investigations turn in results that support punitive action against the offending taxpayer, the next step will be determined and weighed against the findings and carried out in accordance with the relevant legal provisions.

Specifically, if the findings indicate that tax evasion occurred, the file, including supporting evidence, is forwarded to the state prosecutorial service to commence criminal investigations and proceedings at the primary court level, and later through the appeal process to the Intermediate Court, High Court, Court of Appeal and the Supreme Court.

7.5 Possibility of Fine Reductions

After the consideration of the administrative appeal, the Commissioner General may cancel the initial audit and order a fresh audit be conducted, especially if it was discovered that irregularities committed by the taxpayer were not disclosed by the audit, thereby resulting in a reduction of the assessed tax. The new audit is conducted in accordance with the provisions of the law and rules.

A taxpayer may apply in writing to the Commissioner General for a waiver of assessed tax,

interest for late payment and administrative penalties if they can prove considerable financial difficulties which prevent them from paying the assessed and due taxes. If the Tax Administration finds that the taxpayer's request is justified, it submits a report to the Minister of Finance to decide on administrative fines and interests on late payment, after consulting the Tax Policy Committee.

Moreover, under stated conditions, the Commissioner General may write off tax arrears from books of accounts, upon the approval of the Board of Directors of the Tax Administration. If the application concerns a waiver of the principal tax, the minister submits the report to the cabinet for a decision.

Persons who are identified to have underestimated or evaded tax are ineligible for exemptions.

7.6 Possibility of Agreements to Prevent Trial

Notably, if a taxpayer fails to pay due taxes within the period provided for under the law, they are liable to late payment interest on the amount of principal tax. However, in addition to the waiver highlighted in **7.5 Possibility of Fine Reductions**, the default interests and administrative fine related to delays in payment and non-declaration of taxes referenced under the law may not be applied to a taxpayer who makes a self-disclosure to the Tax Administration and pays the assessed and due taxes before notification of imminent audit.

Self-disclosure qualifies a taxpayer for exemption from the payment of default interests and administrative fine penalties only if it is done by a taxpayer not registered with the Tax Administration or by another registered taxpayer who is no longer audited in accordance with the provisions under the law.

7.7 Appeals against Criminal Tax Decisions

The appeals against tax evasion-related convictions made at First Instance Primary Court are made to the higher-level courts: the Intermediate Court, High Court, Court of Appeal and Supreme Court.

7.8 Rules Challenging Transactions and Operations in this Jurisdiction

Generally, Rwanda has not developed deliberate general anti-avoidance rule (GAAR) or specific anti-avoidance rule (SAAR) codes to curb instances of tax planning schemes. Nonetheless, certain measures reflected in the Income Tax Law can be assumed to have been developed with the aim of minimising instances of tax avoidance.

The relevant provisions are related to the definitions of small businesses, micro-enterprises, permanent establishment, controlled transaction, transfer pricing, or arm's-length principle. While these cannot be said to be SAARs, they and several others reflect the spirit of SAARs. For example, the inclusion of provisions on transfer pricing, dividend stripping, income sources, employment income, deductible expenses, agriculture activities, and bad debts in the Income Tax Law are instances of SAARs. Moreover, the definitions of related concepts are made precise to mitigate any chance of misinterpretation that may result in an unmerited tax benefit.

8. CROSS-BORDER TAX DISPUTES

8.1 Mechanisms to Deal with Double Taxation

Rwanda has DTTs with a handful of countries, including Barbados, Belgium, Jersey, Mauritius, Morocco, Singapore, South Africa, Turkey and the United Arab Emirates. Rwanda operates both

a source and residence-based taxation system. This means that any income from sources within Rwanda will be liable to tax in Rwanda. In addition, resident entities are taxed on their worldwide income. However, where such income is taxed in another country, a tax credit is allowed, which does not exceed the tax that would have been payable on the same income in Rwanda.

Notably, individuals whose home country is Rwanda can claim credits in Rwanda for foreign taxes paid on income made in foreign jurisdictions. The credits are generally limited to the lower of the foreign taxes paid and Rwandan taxes due. The foreign tax incurred must be substantiated by appropriate evidence (ie, tax declaration, WHT certificate, or other acceptable document) for the credit to be granted.

Resident and Non-resident Entities

For the above purpose, companies and entities incorporated in Rwanda are treated as Rwandan resident entities. In addition, companies incorporated overseas are also treated as Rwandan resident companies if they have a place of effective management in Rwanda at any time during the tax period. The term "effective management" is not defined in the tax law.

Non-resident entities are taxed on income sourced in Rwanda through a permanent establishment (PE). The definition of a PE for Rwanda is largely based on the Organisation for Economic Co-operation and Development (OECD) Model Tax Convention definition. According to Rwandan tax law, a PE means a fixed place of business through which the business of a person is wholly or partially carried on.

Therefore, if a double taxation situation occurs due to an additional tax assessment or tax adjustment in a cross-border situation, the common practice is to have recourse to the mutual agreement procedure available under the vari-

ous double tax treaties, as a first instance preference measure before resorting to reference to the municipal laws. Contrastingly, while the measures adopted under the MLI or the EU Tax Disputes Directive are properly construed in the Rwanda jurisdiction, none has been put to application so far.

8.2 Application of GAAR/SAAR to Cross-Border Situations

The principal purpose test (PPT), which is a creation of Action 6 of the BEPS plan, is a recent addition to the OECD Model Tax Treaty and serves as a minimum standard in light of the EU Standard of Good Tax Governance and of Global Tax Governance. Expectedly, while the above instruments may be of relevance in some countries with which Rwanda has a DTT, they have not yet been applied or referenced in Rwanda. Yet, as global trade deepens and FDI continues to expand, it is anticipated that they will soon gain relevance and be adapted by state revenue services to combat BEPS and plug weaknesses in cross-border-related tax transactions.

The continuing work on the 15 actions outlined in the BEPS plan is expected to develop practical measures that developing countries, including Rwanda, can put in place to end double non-taxation and the artificial shifting of profits, which greatly denies them the much-needed revenues for their development.

8.3 Challenges to International Transfer Pricing Adjustments

There is no provision for group taxation in Rwanda. Each individual corporate group member is required to submit their own tax return on a standalone basis. Rwandan transfer pricing legislation and the prescribed transfer pricing methods are generally consistent with OECD guidelines. The law requires that transactions between related parties be carried out under the arm's-length principle.

The tax law empowers the Commissioner General to adjust profits earned between related parties if the Commissioner General considers that the trading arrangements between related parties do not adhere to the arm's-length principle, which requires that transfer prices charged between related parties are equivalent to those that would be charged between independent parties in the same circumstances.

Self-assessment

Rwanda operates a self-assessment system, according to which, taxpayers are obligated to self-assess their compliance with the tax legislation, which includes transfer pricing policy. According to the new Income Tax Law (Law No 016/2018 of 13 April 2018), related persons involved in controlled transactions (ie, any income-generating transaction carried out between related entities) are required to have documents justifying that their prices are applied according to the arm's-length principle. This means that companies are now expected to have transfer pricing policies and documentation.

Failure to adhere to the stated requirements would result in the Tax Administration's adjustment of transaction prices in accordance with the general rules on transfer pricing, issued by an order of the minister. While there is no requirement for the transfer pricing documentation to be submitted to the tax authority along with the annual corporate income tax (CIT) declaration, a controlled transaction schedule must be submitted alongside the annual CIT return.

Jurisprudence

Rwanda has not recorded established jurisprudence on these matters, largely because of the structure of its economy. Nonetheless, the common tendency for resolving transfer pricing controversies, especially when multinational persons are involved, is to address them administratively

following the procedural mechanism stated in the laws. By this assertion, controversies would first be resolved under the mechanisms provided in the DTT concerned, if any existed, the administrative appeal mechanism under the domestic laws and, later, the domestic tax courts as a last resort.

8.4 Unilateral/Bilateral Advance Pricing Agreements

Unilateral or bilateral advance pricing agreements (APAs) have not gained currency in Rwanda.

8.5 Litigation Relating to Cross-Border Situations

The common cross-border situation that generates most controversies is transfer pricing, as it is prone to exploitation, by foreign investors, of the loopholes in the tax system. In general, the controversies can be mitigated by taking measures, including the precise definition of the concept of residency or permanent establishment status, or the characterisation of items of income and their coverage under provisions of the convention. Correspondingly, strict requirements for the financial reporting of the company, accounts and document keeping can be effective discouragement and help to check the motivation for transfer pricing, indirectly acting as mitigation for related litigation.

9. INTERNATIONAL TAX ARBITRATION OPTIONS AND PROCEDURES

9.1 Application of Part VI of the MLI to Covered Tax Agreements (CTAs)

Some have implemented Article 18 of the MLI as a means of resolving potential tax disputes. However, the dominant mechanism provided in most DTTs is the MAP, which is considered less antagonistic and promotes mutual relations.

9.2 Types of Matters That Can Be Submitted to Arbitration

Rwanda is not a member of the OECD and therefore not subject to the application of the Multilateral Convention to Implement Tax Treaty-Related Measures to Prevent Base Erosion and Profit Shifting (MLI). However, as stated, the common practice for dealing with international tax disputes that emanate from bilateral tax treaties is – as a first instance measure – to rely on MAPs, which is an essential element of bilateral treaties. This mechanism empowers the competent authorities to resolve difficulties or doubts emanating from the application of the treaties.

Moreover, the competent authorities can conduct informal mutual consultations towards the avoidance of double taxation, whether or not it is regulated in the treaty. Notably, this informal approach seeks to protect relations, avoiding the sometimes unnecessary and cumbersome formal rules usually employed in inter-governmental communications. This informal administrative mode gives the competent authorities the opportunity to make efficient communication through face-to-face meetings, the exchanging of documents or position papers and other forms of informal contacts.

However, the presence of MAPs cannot oust the normal domestic legal remedies available to a taxpayer. If a taxpayer submits their grievance to a domestic court/administrative tribunal and such court or tribunal renders a decision, the competent authority is bound by the decision and may not be able to provide unilateral relief.

9.3 Application of the Baseball Arbitration or the Independent Opinion Procedure

Characteristically, because a bilateral tax treaty is concluded for the mutual benefit of the parties involved, they are essentially entered into to enhance co-operation between tax adminis-

trations and to facilitate the exchange of information so that tax avoidance or double taxation may be avoided. As such, they represent a move away from competitive relations (where each party seeks to gain as much tax revenue as possible) and instead a move towards a collaborative approach to taxation where taxing rights over different types of income are fairly allocated between treaty members to eliminate double taxation.

Therefore, the common practice is to avoid the emergence of competitive relations in favour of a collaborative approach by conducting informal mutual consultations towards the avoidance of double taxation. Accordingly, the application of procedures of Baseball Arbitration or the Independent Opinion Procedure is not an option in most of the DTAs to which Rwanda is a party.

9.4 Implementation of the EU Directive on Arbitration

For deepening co-operation and to promote relatively fair trade between the concerned countries, uniformity and predictability of responses between them is critical. The implementation of common procedures across the market area is instrumental in reducing compliance costs and administrative burdens. Common procedures can contribute to the broader objective of building a deeper and fairer internal market as well as a fair and efficient corporate tax system.

To this extent, the current trends in the resolution of double taxation controversies championed among the OECD markets will provide a favourable mechanism for settling the most common problems on a uniform basis. The United Nations Model Double Taxation Convention between developed and developing countries (the “United Nations Model Convention”) and the OECD Model Tax Convention on Income and on Capital form part of the continuing international efforts aimed at eliminating double taxation. They both

include a provision on “mutual agreement procedures” (Article 25 in both models), which may involve arbitration.

The MLI has, as one of its impact elements, the provision to allow the tax treaty-related measures of the OECD/G20 BEPS project (BEPS action plan) to be introduced into the existing tax treaties involving the signatories to the convention in a consistent and efficient manner, thereby eliminating the need to renegotiate every bilateral tax agreement separately.

9.5 Existing Use of Recent International and EU Legal Instruments

None of these procedures have yet been applied in Rwanda.

9.6 Publication of Decisions

The publication of decisions related to cross-border tax controversies is not common. Moreover, as the common practice involves MAPs, decisions tend to be informal undertakings between the competent authorities.

9.7 Most Common Legal Instruments to Settle Tax Disputes

The common instrument of reference relied on to settle disputes, if they emerge, is the old DTT. The driving motivation is the prioritisation of co-operation between tax administrations and the facilitation of the exchange of information so that tax evasion may be avoided. As such, MAPs under the old DTT represent a move away from competitive relations (where each party seeks to gain as much tax revenue as possible) towards a collaborative approach to taxation.

9.8 Involvements of Lawyers, Barristers and Practitioners in International Tax Arbitration to Settle Tax Disputes

In practice, independent professionals are hardly officially involved in settling cross-border tax controversies, especially because they hardly

arise. The key reason is because Rwandan incorporated companies or associations are treated as Rwandan resident entities. In addition, companies incorporated overseas are treated as Rwandan resident companies if they have a place of effective management in Rwanda at any time during the tax period. The term “effective management” is not defined in tax law.

Domestic adjudication is often the preferred recourse mechanism, and legal professionals play a dominant role in pleading cases before the courts.

10. COSTS/FEES

10.1 Costs/Fees Relating to Administrative Litigation

The tax codes in Rwanda do not provide, at the first instance level, for quasi-judicial tax appeal tribunals. Rather, taxpayers who may be aggrieved by the assessment may appeal to the RRA against the results of an audit and/or the receipt any assessment notices of taxes or penalty decisions within 30 days following said notification. There is no cost associated with appealing to the RRA. However, the Commissioner General may cancel the audit conducted and decide that a new audit be conducted if there are faults committed by the taxpayer which were not disclosed by the audit and which resulted in a reduction of the tax to be paid.

10.2 Judicial Court Fees

Generally, legal action is allowed against the final administrative and binding decision of the RRA. Having exhausted the available administrative procedures of an appeal or an amicable agreement, the taxpayer may take the appeal further to the Commercial Court, the High Court, the Court of Appeal and the Supreme Court. The applicable court fees are graduated and range

between USD20–USD100 as the cases are filed and appealed through the different court levels.

The plaintiff (the taxpayer or tax authority) pays the court fees before the suit is admitted by the court registry and they are paid at every instance. However, the court may order refund of the fees incurred to the successful party at the end of the proceedings without interest applicable.

10.3 Indemnities

The plaintiff (the complainant, ie, the taxpayer), a party whose right or justified interest is directly affected by the administrative decision, and the defendant (the subject of the power, ie, the Tax Administration) can request the reimbursement of costs and damages at the time of filing the suit. The underlying principle is that the losing party bears the costs of the successful party. A lump sum amount, which is discretionally determined by court, is usually awarded to the winning party.

10.4 Costs of Alternative Dispute Resolution

ADR is not available to the complainant/taxpayer in Rwanda, especially when dealing with domestic tax controversies. The obligatory administrative appeal procedure is the only procedure akin to ADR, and is offered at no extra cost to the taxpayer.

11. STATISTICS

11.1 Pending Tax Court Cases

The number of tax cases currently pending are:

- 24 at first instance;
- 28 before the High Commercial Court; and
- three before the Court of Appeal.

The average value of the cases is approximately USD3 million to USD5 million.

Note: there is no disaggregated data on the number of tax-related cases allocated to a judge of first instance, primarily because there are no exclusive and specialised tax courts. The trial of tax cases is handled together with other commercial cases in commercial courts.

11.2 Cases Relating to Different Taxes

Statistics on cases initiated and terminated relating to different types of taxes for 2019–20:

- CIT/PIT – 20;
- VAT – 14;
- customs duty, stamp duty and transfer taxes – 6;
- WHT – 1;
- seize and caveat (immovable and movable) – 6;
- decentralised taxes – 1; and
- other (tenders, auctions, insolvency, etc) – 6.

The number of cases by each type of tax are as follows:

- CIT/PIT – 21;
- VAT – 19;
- WHT – 2;
- taxes to decentralised units (fees) – 1;
- customs duty – 6;
- PAYE – 1; and
- seize and caveat (immovable and movable) – 14.

11.3 Parties Succeeding in Litigation

Comparatively, the tax authority disproportionately succeeds over the taxpayer at an approximate range of over 85%.

12. STRATEGIES

12.1 Strategic Guidelines in Tax Controversies

Key strategic guidelines to be considered in a tax controversy include:

- the imperative to prepare for the appeal processes by seeking professional advice from qualified accounts and legal experts to assist in organising a robust and properly supported claim;
- conducting a parallel audit to counter the official assessment;
- organising the necessary supporting documents, such as invoices, proof of payment, books of account, financial statements; and
- identifying any key documents which can be used to support appeals following the conclusion of audits (which must have also been provided at the time the subject audit was carried out).

Shield Associates is incorporated in Rwanda and has grown to become a leading provider of excellent legal services to a diverse range of clients in Rwanda and the East African region. With seven lawyers, the firm is intricately networked within Rwanda and the region, and able to broker large-scale deals for clients and resourcefully unlock complex transactions. Major areas of practice are corporate and commercial advisory services and litigation, including negotiating and providing strategic advisory services to corporations and businesses on

taxation, company, investment, labour and land laws, as well as drafting and negotiating large-scale contracts and other legal instruments in energy, agriculture, education and finance. The firm also offers legal services for the acquisition, commercialisation and enforcement of IP in the areas of patents, trade marks, copyrights, trade secrets, data privacy and security for several start-ups and fintechs. Shield Associates is the Rwanda member firm of Mackrell International legal network.

AUTHORS



Maggie Baingana is founder and managing partner of Shield Associates. She has extensive experience in corporate governance and commercial/business transactions. She

utilises her professional networks to provide solutions to the firm's clients. Significant areas of practice include negotiating and providing advisory services to corporations and businesses on tax, company and investment laws. She has 20 years of experience working for government and private sectors and international organisations of Rwanda. Maggie obtained her LLB from Makerere University, Uganda, and an LLM degree in government law and public policy from the University of the Pacific, California.



Isaac Ndahiro is a senior partner at Shield Associates. He is a procurement specialist and leads advisory work on taxation, business transactions structuring, debt and equity

commitments, SPAs, investment and joint venture agreements, public-private-partnerships and tax litigation. With over 22 years of experience, he previously served as an expert for the UN, and a regional adviser for 19 countries comprising the Common Market for Eastern and Southern Africa (COMESA). He holds an LLB degree from Cavendish University Zambia, an MSc in economics management and finance from the University of Birmingham, and a BA in political science and public administration.

Contributed by: Maggie Baingana, Isaac Ndahiro and Aimé Mbarushimana, Shield Associates



Aimé Mbarushimana is a partner at Shield Associates in charge of the litigation department. He is a distinguished litigator and arbitrator with over 15 years of experience. He is a member of the Kigali International Arbitration Center and the Chartered Institute of Arbitrators (MCiarb). He is an international accredited mediator with the Centre for Effective Dispute Resolution (CEDR) of London and an accredited court-annexed mediator with the Supreme Court of Rwanda. He holds an LLM in international economic and business law from the Kigali Independent University, and an LLB from the National University of Rwanda.

Shield Associates

KG 7th Avenue
3rd Floor Kigali Heights Complex, East Wing
P.O. Box 155
Kigali
Rwanda

Tel: +250788302926
Email: info@shield-associates.co
Web: www.shield-associates.com

