

LATIN LAWYER REFERENCE TAX LITIGATION 2021

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# Guatemala

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## 1 What is the tax authority in your jurisdiction, and can you give a general description of its structure? Provide a general assessment of the authority?

The Tax Administration Superintendency (or Tax Administration) is the current Guatemalan tax authority. It was created through a 1998 Congressional Decree called the Organic Law for the Tax Administration Superintendency catalogued as Congress Decree No. 1-98; its higher authority is the Tax Administration board of directors, which is integrated by the Finance Ministry, two directors appointed by the President of Guatemala and the Tax Administration Superintendent. This board is managed by the Tax Administration Superintendent.

Tax Administration performs its functions through its five sub-divisions or intendancies: (i) the Revenue Intendancy, manages tax collection and implements collection policies, (ii) the Custom Intendancy is in charge of custom matters, (iii) the Audit Intendancy controls and audits of taxpayers, (iv) the Legal Intendancy is in charge of legal and judicial matters, and (v) the Taxpayers Intendancy, which provides assistance to taxpayers. Specific operations of the Tax Administration Superintendency are performed by its management offices.

A Tax and Custom Administrative Court reviews administrative challenges and may issue tax and customs administrative rulings.

The Tax and Custom Administrative Court was created in 2016 and became operational in 2017 through an amendment to the Tax Code (Congressional Decree 6-91). This Tax and Custom Administrative Trial Court was created to have an expert and professional body to resolve administrative disputes before the Tax Administration.

Guatemalan Constitution determines that administrative rulings and government Acts shall be later judicially reviewed, thus administrative dispute courts are subject to a posterior judicial review through a judicial administrative dispute procedure, a judicial ruling is issued as a consequence of these proceedings. The administrative dispute courts are considered part of the Guatemalan tax authorities.

In recent years, several different Superintendents have changed office. The annual budget law originates an agreement between the Minister of Finance and the Tax Superintendent for a yearly tax collection goal. In the past, failure to reach this target has been used as a reason to remove the Tax Superintendent (as permitted by law) from his or her post. Among other factors, this has led to aggressive collection strategies being implemented, that included the filing of criminal accusations for tax fraud, in some cases as a strategy to bypass a four-year statute of limitations on administrative cases. Additionally, some tax planning structures were challenged as sham and fraudulent structures, some rightfully so, resulting in an abnormal collection rate for the first year but declining for the subsequent years. In several cases, the practice has been denounced as abusive and many questionable cases are still subject to the previous criminal procedural system that is more designed for violent crimes than white-collar crimes or technical tax matters, which are normally the jurisdiction of tax courts. Unfortunately, more complex cases are stuck for years in criminal courts, without being resolved due to lack of knowledge or concern that a dismissal may generate an internal investigation or responsibility for tax authorities or special prosecutors. An estimate of two to three years for a criminal tax case to be resolved is optimistic. The practice of filing tax fraud accusations has diminished considerably, although it is not infrequent.

In 2016, the board of directors for the Tax Administration Superintendency created the Tax Investigation Management Office, as the competent authority to manage, perform, direct and complete Tax Compliance Investigations to prevent tax fraud, tax evasion, customs evasion and customs smuggling. This office was questioned by the private sector and Guatemalan Congress because its function was more in line with investigations from the District Attorney's Office and some procedures were suggested to require a court order. This office is currently operating as the new Tax Administration Superintendency investigation office.

At present, the Tax Administration has made efforts to modernise and make better use of technology to update tax procedures, activities and services; among these efforts are the implementation of the Uniform Central American Custom Tax Return, electronic invoices and use of the Taxpayer Web Portal. After a constitutional challenge was dismissed, bank secrecy for tax purposes was repealed and currently the Tax Administration Superintendency is empowered to request bank information through a request filed before criminal tax courts without the obligation to notify the taxpayer (which was the challenge brought to the Constitutional Court).

Since 2017, the Tax Administration Superintendency has been issuing and uploading in its web portal a compilation of tax opinions or interpretations through which the Tax Administration has addressed recurring issues and tax practices. Tax opinions have been used as guidelines to avoid possible tax adjustments. The validity of such tax opinions has been questioned, since in some cases such opinions create regulation not contained in law or relevant regulatory provisions that require high-level governmental authorisation. Notwithstanding, such opinions are not binding but shed light on situations that may lead to an audit. Such opinions may be challenged in court, although in practice, they create the appearance of constituting an authoritative standard on the matter.

In 2020, with the election of the new President, a new Tax Administration Superintendent was appointed by the new President, along with a new Finance Ministry and Tax Administration board members.

The covid-19 pandemic has caused the government to implement certain measures that have directly influenced tax judicial and administrative litigation, as well as some regular tax collection operations. Tax contributions have significantly declined. Tax pressure and collection efforts are bound to increase; but no modification has been made to the General Budget or tax collection goals. A return to aggressive tax collection policies is widely expected.

Also, under covid-19 measures, the Tax Administration has operated irregularly and administrative rulings have been issued during the pandemic on a sporadic basis. The Tax Administration and the court system have worked intermittently, thus a delay on rulings is expected. Administrative and judicial terms have been suspended; the judicial branch has issued ordinances through which it has ordered courts to only process urgent and constitutional matters during the general lockdown, which has slowly started to be eased at the time of writing.

In the meantime, Tax Administration has promoted the implementation of digital and web tax tools (eg, electronic invoice, web communications, web portal for taxpayers registration and information updates). The Tax Authority's digitalisation process began three years ago has now become relevant and its implementation has been accelerated.

Controversial information (eg, shareholders, beneficiaries) is requested through the Tax Web Portal. Such information might be requested without a legal basis and tax adjustments and legal proceedings shall arise.

The only tax benefit authorised during the pandemic is a term extension on solidarity tax payments and vehicle circulation tax, no other tax relief has been authorised. Force majeure is provided for in the Tax Code as legal exemption for tax breaches, even though the Tax Administration has declared that tax collection continues normally; tax administrative or judicial cases might derive from a tax payment breach under circumstances in which it could be argued that covid-19 generated a force majeure event that caused a breach of tax obligations (eg, lack of cash flow).

## **2 Can you outline the typical process involved with tax disputes in your jurisdiction, from filing, to notice of deficiency, to litigation? Are there alternative procedures?**

Tax disputes in Guatemala have an administrative phase and a judicial phase, originated from tax adjustments and/or denial of requests filed by taxpayers (eg, value added tax credit reimbursement, tax refunds, tax benefits, tax exemptions). Tax adjustments procedures begin with the appointment of a tax auditor from the Tax Administration Superintendency. They originate with an information request that is addressed by the Tax Administration to taxpayers (who must comply in a tight three-day period). Information requests can also be made to banks and third parties. Non-compliance with the request may be followed with a criminal accusation (resistance to a tax investigation) and it is recommended that all books and records be maintained in order and in a single facility, preferably in the same address as declared in the Tax Registry so that initial documentation can be immediately exhibited conveying a clear message of compliance and order.

After a review of information, the Tax Administration may issue tax adjustments, and Taxpayers are granted a hearing. Taxpayers must file defence arguments and evidence during a 30-day period, after notice of a hearing otherwise the adjustments will be considered consented and a claim may be directly filed in a tax collection process in a special collections court. At any time in the process the Tax Administration, considers that there are signs of criminal activity, a criminal complaint may be filed. The administrative process may or may not continue; nevertheless, continuing the administrative process may yield a procedural defence to the taxpayer so often the administrative process is suspended or avoided altogether (see criminal cases below).

After the hearing, the Tax Administration Superintendency issues an administrative resolution through which it shall confirm or revoke the tax adjustment.

If taxpayers disagree with the Administrative Resolution, an administrative challenge might be filed before the Tax and Custom Administrative Trial Court, which shall confirm or revoke the tax adjustment through a tax and custom administrative ruling. Altogether, this process may take more than six months.

Nullity requests can also be filled by taxpayers if a formal procedure requirement on an administrative case has been breached by the tax administration.

Administrative Rulings shall be judicially reviewed by the Administrative Dispute Trial Courts. For such purpose, the taxpayer shall file a claim and administrative dispute trial courts issue a judicial administrative dispute ruling in which tax and custom administrative ruling is confirmed or revoked.

Lastly, judicial administrative dispute rulings may be challenged by taxpayers and/or the Tax Administration Superintendency through a Special Appeal before the Supreme Court.

Additionally, if an authority breaches a constitutional right during an administrative proceeding, judicial administrative dispute or appeal proceeding, a constitutional action (amparo), may be filed.

Interests in favour of Tax Administration Superintendency will continue to accrue while administrative and judicial proceedings continue unless the taxpayer has made an advance payment and reserved the right to challenge. As stated elsewhere, official interest will apply which is considerably higher than commercial interest, so the option to pay and challenge should be initially discussed. Nevertheless, pursuant to the Guatemalan Tax Code, interest in favour of the Tax Administration accrues until tax, fines and interest are fully paid.

If the administrative procedure arises from a denial of a request made by the taxpayer, a challenge may be brought before the Tax and Custom Administrative Trial Court. A tax and custom administrative ruling is also issued in this case and a complaint can be filed before an administrative dispute trial court. A special appeal, with limited scope, before the Supreme Court may also be filed under special circumstances.

Taxpayers should be aware that final rulings based on previous precedent set by the Supreme Court have been repealed by the current Constitutional Court, and precedent from this court should be reviewed, if available, before assessing the likelihood of success from a court case. More recently, the Constitutional Court has repealed rulings that constitute official legal precedent issued by the Supreme Court, through Constitutional Injunctions filed by the tax authorities. The Constitutional Court precedent has influenced administrative dispute trial courts and Supreme Court decisions as well.

Criminal cases. If the Tax Administration considers the existence of criminal activity, and the Administrative Proceeding is interrupted and suspended, such situation will probably not be made known to the taxpayer. In such case, the Tax Administration issues an audit report and a criminal complaint is filed before the District Attorney's Office and preliminary injunctions to secure the payment of the taxes, tax penalties and interests are requested before a criminal court (eg, bank account seizure, assets seizure, company judicial intervention, legal representative arrest warrant).

Usually, the taxpayer is alerted of the criminal complaint when the preliminary injunctions are executed. It is advisable that the possibility of a criminal complaint is reviewed early on to avoid a surprise complaint or injunction. Personal responsibility for a corporate crime falls into the legal representative. The law determines that his or her responsibility is determined when participation in the activities deemed as criminal are determinant in the crime. More often than not, the request is made against the registered representative and participation is questioned during the criminal investigation phase. Rarely is a preventive prison order issued before having a first hearing.

### **3 Are there alternative dispute resolution mechanisms prior to trial, such as mediation or arbitration? Are such processes mandatory or contingent on the agreement of the parties?**

Alternative dispute resolution mechanisms are not applicable by law to tax controversies. Guatemalan Tax Code, Congressional Decree Number 6-91, provides that if a tax adjustment is accepted at the administrative phase, discounts on fines and interest will apply.

The Tax Code also provides that payments be made under a challenge. This permits a taxpayer to challenge the Tax Administration Superintendency's decision and interest will not accrue. Payment agreements can be executed with the Tax Administration Superintendency for payment instalments.

### **4 What is the process for appealing trial court decisions?**

Judicial administrative dispute rulings issued by administrative dispute trial courts may be challenged by taxpayers or the Tax Administration Superintendency through a special appeal before the Supreme Court. Special Appeals before the Supreme Court must be filed within the following 15 days from the issuance of a judicial administrative dispute ruling, and theoretically can only challenge procedural matters or flaws in the legal reasoning or applied norms.

Additionally, Special Appeals before the Supreme Court may only challenge matters that have been disputed during the administrative dispute process. Recent precedent from the Supreme Court is that new issues cannot be brought before the Supreme Court and the Supreme Court may not issue a ruling regarding issues not previously discussed in the trial court. Often, the administrative phase is defended by the same adviser that proposed the initial tax strategy and the case is not reviewed in its entirety because a preconceived recommendation has already been made. It is advisable that a thorough risk analysis be performed and that all available remedies are used from the onset to avoid the possibility of bringing forward a valuable defence in later phases.

Both, taxpayers and the Tax Administration can file a special appeal before the Supreme Court. If an unfavourable ruling is issued to the Tax Administration by administrative dispute trial courts, it is most likely that Tax Administration Superintendency will file a special appeal before the Supreme Court. More often than not, the Tax Administration will follow an unsuccessful ruling by the Supreme Court with a constitutional injunction filed in the Constitutional Court. Although this is considered anti-technical, the Constitutional Court has sided with the tax authorities, regrettably, more for political reasons than technical ones.

### **5 Is there a formal discovery process in tax litigation and controversy in your jurisdiction, and is it the same as that for general litigation?**

The Tax Administration Superintendency may request information from the taxpayer, banks and third parties that acts as a discovery period. This is a specific proceeding that applies only to tax matters.

## **6 Is attorney–client privilege recognised in your jurisdiction? Does it cover drafts of tax documents? Do any similar forms of privilege protect communications between other professionals, such as accountants, and their clients?**

The Guatemalan Civil Code and the Attorney Ethics Code determine the obligation to treat client provided information as confidential. Revealing confidential information may constitute a crime under the Criminal Code. Nevertheless, recent constitutional rulings have established that attorney-client privileged information may not apply before the Tax Administration in certain cases. Additionally, although challenged, information has been seized from attorneys' offices in criminal tax cases.

## **7 Are there formal rules of evidence and procedure? Are they different from general litigation rules?**

Pursuant to the Administrative Dispute Law and Tax Code, general litigation rules of evidence and procedure apply for proof and evidence period on judicial administrative disputes. During a judicial administrative dispute procedure before administrative dispute trial courts the administrative file is part of the evidence presented to administrative dispute trial courts.

In a benchmark case, we successfully challenged the obligation to retain certain books and records that constituted original support documentation for a balance sheet ledger. The upheld principle is that the timing of the creation of the ledger marks the obligation to retain records rather than the date when tax obligations apparently originate.

General litigation evidence rules and period (30 days) apply for tax litigation.

## **8 Does the judge or opposing counsel question witnesses in tax litigation?**

Witness participation in tax proceedings is unusual. Nevertheless, should a witness be called a judge and opposing counsel may also question such witness.

## **9 Can criminal charges be levied under tax law, and how often are criminal sanctions sought?**

If evidence of a crime arises during the administrative tax proceeding phase, the Tax Administration Superintendency must file a criminal complaint and prosecute taxpayers through a criminal proceeding. For certain accusations, first-time offenders may benefit from a special procedure where, under the agreement, the taxpayer pays the tax owed for the persecution to cease.

Usually, the Tax Administration Superintendency seeks mainly the payment of taxes, fines and taxes; nevertheless, in certain cases criminal sanctions are pursued through criminal proceedings.

## **10 Does the same agency prosecute both criminal and civil tax litigation?**

A specialist agency of the District Attorney prosecutes tax crimes. The Tax Administration Superintendency is also a party to a tax criminal proceeding. The Legal Matters Intendancy of the Tax Administration Superintendency prosecutes in criminal and civil tax litigation for the Tax Authority.

The Special Agency of the District Attorney Office prosecutes in tax crimes through its Economic Crimes Agency and Custom Crimes through its Custom Agency.

The Legal Matters Intendancy of the Tax Administration Superintendency has attorneys who specifically prosecute in tax and custom crimes, specific attorneys are party to the administrative dispute judicial proceedings and specific attorneys promote tax collection proceedings. Current attorneys who prosecute tax crimes have little financial or tax experience and often focus on creating an environment of suspicion to support an allegation of criminal activity with the main objective of maintaining pressure on injunctions and forcing payment. It is recommended that a strong technical case be made but that it be explained in an obvious and simple manner. Accusations will eventually be evidenced as unfounded, but that may take some time to prevail, including for complex cases, the need to obtain an opinion from a technical body within the Prosecutor's Office that has better technical skills and formal tax and accounting training. Courts and prosecutors often seek out third-party expertise to support any decision on behalf of a taxpayer.

## **11 Are trials heard by the general courts, or are there specialist tax courts?**

There exist specialised administrative, judicial and more recently criminal tax courts. Judicial administrative disputes are handled by administrative dispute trial courts, which are specialist tax courts. Administrative tax challenges are handled by a tax and custom administrative trial court. Specialist criminal tax courts were created, but if the accusation involves additional crimes, other than strictly tax crimes, then these cases are assigned to regular criminal courts.

Tax collection proceedings are also heard by specialised tax courts. Special appeals before the Supreme Court are evaluated by the Civil Chamber of Supreme Court and Constitutional Injunctions on tax matters by the Constitutional Court. Constitutional Court rulings are unappealable.

## **12 Which party has the initial burden of proof on common tax issues? What level of proof must be established?**

There is no specific burden of proof rules on common tax issues, nevertheless, pursuant to general law procedure rules, a tax adjustment and the commission of a crime shall be proved by Tax Administration Superintendency or District Attorney Office. However, in practice, courts require the taxpayer to evidence payment, expenses, contractual support or any other evidence that contests the claim.

Recently, the Tax Administration Superintendency and court criteria for burden of proof have obliged taxpayers to prove the absence of a breach in tax obligations, validity of fiscal credit or absence of any evidence of criminal activity. Scrutiny by the tax authorities has enhanced the compliance of corporations as well as encouraging additional diligence on transactions, expenses, structuring and operational documentation. Enhanced tax due diligence on M&A as well as financing activities is assumed by the Tax Administration, as it continues to challenge complex structures, divestitures and reverse mergers that had frequently been recommended by larger accounting firms.

## **13 Is interest available to the taxpayer following a successful claim for overpayment? If so, how are the rates calculated, and when do they begin to accrue?**

The Tax Code provides that taxpayer is entitled to claim interest over a successful claim for overpayment. This interest begins to accrue from the filing of the overpayment claim and are calculated over the tax rate provided yearly by the Guatemalan Monetary Board (currently approximately 13 per cent).

## **14 Which is the competent authority for resolving tax treaty claims in your jurisdiction? Outline how the authority operates in practice.**

Guatemala is a party to hardly any tax treaties. If a dispute were to arise, there is no specific authority and interpretation would be left to administrative authorities and general tax courts.

## **15 Can tax law or regulations be applied retroactively, and under what circumstances?**

The Guatemalan Constitution prohibits law and regulation to be applied retroactively. Retroactivity only applies for criminal matters and when it is to the benefit of the defendant. This retroactive law application may be applicable on tax criminal proceedings.

## **16 What is the statute of limitations on tax claims, and what are some common ways it can be tolled? Are there exceptions to tolling?**

The Guatemalan Tax Code provides a statute of limitations of four years on tax claims for both the Tax Administration Superintendency and taxpayers; this term may be disrupted by specific acts. The statute of limitations for tax crimes is higher (at least eight years) and is a common way for the Tax Administration Superintendency to circumvent the administrative statute of limitations.

Taxpayers can request that a claim be time-barred through a declaration from the Tax Administration Superintendency but may also seek such a declaration, as it is more often obtained, within the administrative or judicial procedure originated by a claim from the tax authorities, including a criminal prosecution.

## **17 Is litigation over VAT or other non-income taxes significant in your jurisdiction?**

Litigation over VAT is significant in Guatemala in two ways: tax authorities often challenge VAT credits by arguing that the expense may not be relevant to the revenue-generating activities of the taxpayer, and challenging its validity, thus increasing the VAT debt that the taxpayer must transfer.

Additionally, VAT litigation is common for exporters that request VAT credit reimbursement. The tax administration has narrowed its criteria to agree to such reimbursements and prolonged the time that it takes to process and agree to a payment that is backlogged for years. In recent years, solidarity tax (a tax on assets or sales, that may be credited to income tax) has also been the subject of litigation.



**José Quiñones**  
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José has extensive experience in financial, tax planning compliance matters banking, mergers and acquisitions, commercial litigation and arbitration.

He has advised foreign financial institutions in structured finance deals, sovereign bond offerings in international capital markets, cross-border transactions and their tax implications, mergers and acquisitions and complex project finance deals, involving local and foreign banks and financial institutions and/or borrowers.

He is often retained on business and corporate strategy matters, serves as adviser to boards of financial institutions and is frequently appointed as arbitrator regarding these matters.

Among José's advisory work, he has acted as director to insurance and surety companies, and has been retained by insurance companies and reinsurance syndicates to advise on complex claims and reinsurance disputes, involving agreements or dealings governed by Guatemalan or foreign laws.

José is a designee arbitrator for the International Centre for Settlement of Investment Disputes (ICSID), and member of the ISO Technical Committee on Governance (compliance and anti-bribery).

He has also served as director for several financial and industrial institutions, such as the Centre for Corporate Social Responsibility and actively participates in pro-bono activities that work for the transparency and advancement of the Guatemalan justice system.

José actively advises corporations in implementing effective compliance and governance programmes and leads a team of compliance experts that provide consulting and training to corporations and their officers. He has also been a professor of finance and commercial contracts.



**Otto Ardón**  
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Otto has experience in tax law, including advising on transaction structuring, analysis of tax implications in operations linked with Guatemala, counselling in matters related to transfer pricing and defence of tax adjustments at an administrative and judicial level.

He is knowledgeable in data privacy and information protection laws and has experience with administrative litigation, constitutional litigation, civil, commercial and criminal litigation, civil and commercial contracting, banking, financial, stock market and insurance, case law, consumer protection and antitrust law.

Otto has advised in transactions related to regulatory matters, energy sector, energy matters litigation, due diligence proceedings and tax aspects of energy projects, as well as hydrocarbons, mining, telecommunications, forestry, environmental, municipal and construction.





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