Federal Act on Direct Federal Tax

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TABLE OF CONTENTS

Art. 10 FDTA 5
Art. 11 FDTA 19
Art. 174 FDTA 25

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COMMENTARY ON

Art. 10 FDTA

A commentary by Nicolas Grieder / Peter Hongler

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Art. 10 Communities of heirs, partnerships and collective investment schemes

[1] The income of communities of heirs is attributed to the individual heirs on a pro rata basis; the income of general partnerships, general partnerships with limited liability and limited partnerships is attributed to the individual partners on a pro rata basis.

[2] The income of collective investment schemes under the Collective Investment Schemes Act of 23 June 2006 (CISA) is attributed to the investors on a pro rata basis; collective investment schemes holding direct real estate are excluded from this.

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CONTENT

I. Overview 7
II. On Art. 10 para. 1 DBG 7
A. Introduction 7
1. Preliminary remarks 7
2. Significance for tax harmonisation 7
B. Covered partnerships 8
1. Partnerships explicitly named in the law 8
2. Equal tax treatment of condominium owners 8
3. Foreign partnerships without legal personality and without tax liability in Switzerland 8
C. Rules and scope of attribution 9
1. Principles of attribution 9
a. In general 9
b. In the case of communities of heirs 9
c. In the case of partnerships 10
2. Scope of the attribution 10
a. Determination of the taxable income of partners in partnerships 10
b. Regarding the share of communities of heirs 11
D. Restriction of the scope of application of Art. 10 para. 1 DBG? 11
1. Background 11
2. Restriction to simple partnerships with the intention of generating income 11
III. On Art. 10 para. 2 DBG 12
A. Introduction 12
1. Principle 12
2. Tax harmonisation 12
3. Development and legislative rationale 13
B. Collective investment schemes covered and the principle of transparency 14
1. Collective investment schemes under the CISA 14
a. Exceptions 14
b. Tension within the tax system 14
2. Foreign collective investment schemes and equivalence 15
C. Distinction from substantive taxability: Art. 10 para. 2 DBG as an attribution rule 16
Bibliography 16
Materials 18

I. OVERVIEW

Art. 10 of the Federal Income Tax Act (DBG) is, in substantive terms, designed purely as an attribution rule. Para. 1 provides for the pro rata attribution of income to groups of persons without legal personality, listed by way of example. Accordingly, the income of communities of heirs is to be attributed proportionately to the heirs, and that of simple partnerships, general partnerships and limited partnerships is to be attributed proportionately to the partners. 1

Para. 2 also provides for the proportional attribution of income from collective investment schemes under the CISA, but expressly limits this to collective investment schemes without direct real estate holdings. 2

II. ON ART. 10 PARA. 1 DBG

A. Introduction

1. Preliminary remarks

The taxes covered by the DBG (income and profit tax) are levied on natural and legal persons in accordance with Art. 1 DBG. Domestic partnerships without legal personality, by contrast, are in principle not liable for federal tax. These are taxed 'transparently' under Art. 10 DBG. For the purposes of income tax, the income from such partnerships is attributed to the individual participants behind them – i.e. the respective heirs or partners – in proportion to their shares. 3

2. Significance for tax harmonisation

A comparable provision on the transparent taxation of partnerships – as provided for in Art. 10 DBG – is, however, absent from the StHG. However, it can be inferred from the converse of Art. 20 para. 1 StHG or on the basis of vertical tax harmonisation that non-transparent taxation of domestic partnerships – i.e. their treatment as legal entities – would be contrary to harmonisation. Accordingly, all cantons follow the model of direct federal tax. The comments on Art. 10 para. 1 DBG are therefore in principle also applicable to cantonal income and profit taxes. 4

B. Covered partnerships

1. Partnerships explicitly named in the law

5 Para. 1 of Article 10 of the Federal Income Tax Act (DBG) specifically names the community of heirs, the simple partnership, and the general and limited partnerships. The latter are thus treated transparently – albeit not always fully so – even though under civil law they may act externally as a single entity under their own name. With regard to the aforementioned groups of persons, reference must be made to their definition under civil law. Provided that, from a civil law perspective, the entity in question constitutes one of the aforementioned groups of persons, this classification is also decisive for the tax provision under consideration here. It is therefore a provision with a civil law basis. A public limited company (AG) or a private limited company (GmbH), for example, does not fall under Art. 10 para. 1 DBG, even if, in individual cases, it exhibits elements of one of the aforementioned groups of persons.

2. Equal tax treatment of condominium owners

6 According to the established case law of the Federal Supreme Court, the individual condominium owners – and not the association – must declare and pay tax on their share of the income and assets of the renovation fund. This suggests that equal tax treatment of the condominium owners' association is justified, even though it is not expressly mentioned in Art. 10 para. 1 DBG and does not possess its own legal personality. This tax treatment applies regardless of whether the condominium ownership qualifies as a (simple) partnership or not.

3. Foreign partnerships without legal personality and without tax liability in Switzerland

7 In the case of foreign entities, the following procedure applies: Firstly, it must be examined whether, for tax purposes, there is a legal entity that is not to be treated as transparent. Reference should be made here to Art. 49 para. 3 DBG, according to which a comparability test must be carried out.

In a second step, it must be examined whether the requirements of Art. 11 DBG are met and, consequently, whether a foreign partnership is to be treated as an enterprise liable for profit tax (so-called 'cooperation fiction'). If the re-

quirements of Art. 11 DBG are not met, the income is attributed to the shareholders, provided that the foreign entity is comparable to one of the entities listed in Art. 10 DBG.

Although Art. 49 para. 3 DBG refers only to legal persons ('treated as equivalent to domestic legal persons'), it must nevertheless be assumed a contrario that if a foreign entity is not comparable to a legal person, the entity falls under Art. 10 DBG provided it is comparable to the entities listed therein.

C. Rules and scope of attribution

1. Principles of attribution

a. In general

Pursuant to Art. 10 para. 1 DBG, the income from the relevant groups of persons is attributed to the individual participants – i.e. the respective heirs or partners – in proportion to their shares. The civil law relationships are decisive for the participation quotas. 8

b. In the case of communities of heirs

In communities of heirs, the shares are determined by the statutory or testamentary shares of the inheritance. There is no allocation of individual items of the estate, as the heirs acquire the estate as a whole by operation of law pursuant to para. 560 of the CC. This may, for example, also apply to additional tax liabilities. 9

In the case of communities of heirs, a problem may arise in practice where the heirs are unknown or only partially known, or where the shares of the estate are disputed due to an unresolved succession. Art. 10 para. 1 of the Federal Tax Act (DBG) contains no explicit provision for such situations. 10

On the one hand, it would seem obvious to refrain from taxation for the time being, as the estate cannot be attributed to a clearly identifiable taxable entity and the community of heirs does not in itself constitute an independent taxable entity. On the other hand, some cantons have adopted a pragmatic interim solution. As long as the uncertainty persists, the community of heirs is taxed as a whole, albeit still in accordance with the rules applicable to natural persons. At federal level, there is no formal legal basis for taxing the commu- 11

nity of heirs as such as long as the circle of heirs or the shares have not been determined.

c. In the case of partnerships

12 In the case of partnerships (in particular general partnerships and limited partnerships engaged in commercial activities), the attribution is governed by the provisions of the partnership agreement. In the absence of such provisions, the share is to be determined in accordance with the relevant statutory rules.

13 If a legal entity holds a stake in a partnership, the partnership's profits and assets are attributed to it on a pro rata basis. This attribution means that the corresponding amounts are subject to profit tax for the legal entity.

2. Scope of the attribution

14 Art. 10 DBG thus merely regulates the question of who is the taxable entity. However, it is not clear from the provision which income is taxable. Whether and to what extent income is taxable is determined instead by the general provisions – in particular Title II of the DBG – on income tax.

a. Determination of the taxable income of partners in partnerships

15 Under the general income clause of tax law, taxable income from a participation in a partnership is understood to mean all income that qualifies as income for tax purposes and which accrues to the individual partner. However, before the profit generated by the partnership can be distributed to the partners, it must first be determined. Ultimately, this is a two-stage process. This demonstrates that partnerships – at least general partnerships and limited partnerships – are not treated as fully transparent in every respect.

16 For partnerships with proper accounting records, the same rules generally apply to the determination of taxable business profit as for corporations. If, however, a partnership does not maintain commercial accounts, only isolated, specific deviations need to be taken into account. An obligation to keep accounts exists under Art. 957 para. 1 no. 1 of the Swiss Code of Obligations (CO) if a partnership achieves turnover of at least CHF 500,000.

b. Regarding the share of communities of heirs

The relevant shares are determined by the statutory or testamentary shares of inheritance. According to the case law of the Federal Supreme Court, a share under matrimonial property law is not to be included. The claims under inheritance law exist regardless of whether the entitled persons are already known. 17

D. Restriction of the scope of application of Art. 10 para. 1 DBG?

1. Background

The application of Art. 10(1) DBG requires the realisation of income by the aforementioned groups of persons. The question of the realisation of income is therefore a prerequisite in relation to Art. 10(1) DBG, insofar as Art. 10(1) DBG merely standardises the attribution of tax factors. If, on the other hand, no income is realised by the partnerships – which are, in principle, taxed on a transparent basis – this income cannot be taken into account for the purposes of tax law. Under these circumstances, the partnership remains irrelevant, at least from a tax law perspective. The treatment of commercial general partnerships and limited partnerships is largely uncontroversial in practice. In principle, every commercial general partnership or limited partnership within the meaning of Art. 552 or 594 of the Swiss CO falls within the scope of Art. 10(1) of the Federal Tax Act (DBG) due to the conceptually necessary requirement to operate a commercial business. This is subject to specific issues arising from comparisons with foreign entities. However, the treatment of simple partnerships under Art. 533 of the Swiss Code of Obligations (CO) is more complex. This will be addressed below. 18

2. Restriction to simple partnerships with the intention of generating income

According to the view taken here, Art. 10 para. 1 of the Federal Tax Act (FTA) does not cover every simple partnership that qualifies as such under civil law. Rather, the decisive factor is whether the partnership is geared towards the joint generation of taxable income and whether this income is the result of coordinated action by the partners involved. 19

20 Not every form of cooperation is therefore sufficient for the applicability of Art. 10 para. 1 DBG. What is required is systematic cooperation aimed at generating income. Activities that primarily serve private life or are merely of a supporting, ancillary nature do not fulfil this requirement. This distinction is significant because, under civil law, a simple partnership may in principle pursue any legally permissible purpose.

21 Furthermore, the proposed restriction of the scope of application also appears appropriate in light of the ratio legis underlying Art. 10 para. 1 DBG. Art. 10 para. 1 DBG specifically aims at the transparent attribution of income to the participating partners. In the case of purely consumptive or privately motivated partnership purposes, there is already a lack of an attributable taxable object.

22 This view is also consistent with comparable concepts in foreign legal systems, which require an intention to make a profit for the tax recognition of partnership structures.

III. ON ART. 10 PARA. 2 DBG

A. Introduction

1. Principle

23 Under Art. 10 para. 2 DBG, the income of collective investment schemes under the CISA is attributed to investors in proportion to their units. This establishes the principle of transparency for collective investment schemes as well – analogous to the provision in para. 1. However, collective investment schemes holding direct real estate and closed-end investment companies (SICAFs) are exempt from this rule.

2. Tax harmonisation

24 Unlike Article 10(1) of the Federal Tax Act (DBG), the provision regarding the pro rata attribution for collective investment schemes under the CISA within the meaning of para. 2, which is the subject of this commentary, is also found in the Federal Tax Harmonisation Act (StHG) – specifically in Article 7(3) of the StHG – and is therefore binding on the cantons. However, the wording is not identical. The harmonisation provision stipulates that income from units

in collective investment schemes with direct real estate holdings is only taxable to the extent that the total income exceeds that from direct real estate holdings. The corresponding reference is not found in Art. 10 para. 2 of the DBG, but in Art. 20 para. 1 lit. e DBG. In substance, however, there is no divergence.

3. Development and legislative rationale

For the interpretation of the present provision, the direct reference to the CISA is of central importance. In this context, it should be emphasised that Art. 10 para. 2 DBG was introduced at the same time as the enactment of the CISA. 25

With the entry into force of the CISA and the simultaneous introduction of Art. 10(2) DBG, the systematic tax exemption of contractual investment funds under the repealed AFG was intended to be continued through the corresponding reference in the DBG provision to the CISA. 26

This is particularly significant as the SICAV is treated for tax purposes – despite its status as a legal entity – in the same way as contractual investment funds and is therefore, in principle, taxed on a transparent basis. Unlike in the case of contractual investment funds, however, this transparency in the case of the SICAV cannot be justified by a trust structure, but is essentially based on the principle of '*same business, same rules*'. Without the corresponding amendment to the tax law framework, the SICAV would instead be systematically taxed as a public limited company. According to the Federal Council's message, consistent and reliable equal tax treatment of collective investment schemes – with the exception of SICAFs – formed the fundamental prerequisite for the system's functionality and acceptance. Had this principle been watered down or called into question, there would have been a risk that the newly created investment forms would scarcely be used in practice and that the legislative reform would fail to achieve its intended effect. 27

B. Collective investment schemes covered and the principle of transparency

1. Collective investment schemes under the CISA

28 Art. 10 para. 2 DBG takes account of the supervisory concept of the CISA. According to Art. 7 para. 1 CISA, collective investment schemes are assets raised by investors for the purpose of joint capital investment and managed on their behalf. According to Art. 7 para. 2 CISA, these may take the form of open-ended or closed-ended collective investment schemes.

29 Under administrative practice, transparent taxation pursuant to Art. 10 para. 2 DBG is applied in particular to contractual investment funds, domestic SICAVs as investment companies with variable capital, and KGKs as limited partnerships for collective investment schemes.

a. Exceptions

30 However, Art. 10 para. 2 DBG provides for two significant exceptions to this principle. Firstly, this concerns collective investment schemes with direct real estate holdings within the meaning of Art. 58 CISA. These are treated in the same way as other legal entities pursuant to Art. 49 para. 2, first sentence, DBG. Taxation therefore does not take place exclusively at the level of the investors, but within the system of profits tax. Secondly, pursuant to Art. 110 CISA, the SICAF, as an investment company with fixed capital, is subject to ordinary profits taxation as a corporation within the meaning of Art. 620 et seq. CO.

31 It is precisely in comparison with the SICAV that the distinctive feature of Art. 10 para. 2 DBG becomes clearly apparent. Although the SICAV, as a legal entity, has its own legal personality and would in principle be liable for profit tax without a special provision, it is treated as fiscally transparent – unlike the SICAF. This exemption is therefore not prescribed by civil law, but rather reflects a deliberate tax policy decision aimed at ensuring a competitive framework for funds and collective investment schemes.

b. Tension within the tax system

32 However, Art. 10 para. 2 DBG and, by extension, Art. 7 para. 3 StHG are in a certain state of tension with Art. 49 para. 2 DBG and Art. 20 para. 1 StHG. The

former provisions stipulate that the income from collective investment schemes under the CISA – and thus, according to the wording, also that of SICAFs – is attributed to investors on a pro rata basis. The only explicit exceptions are collective investment schemes with direct real estate holdings.

Consequently, the tax legislator should have amended Art. 10 para. 2 DBG and Art. 7 para. 3 StHG, particularly as SICAFs are not restricted to investments in real estate but may also invest in other assets. It would, for instance, have been obvious to clarify in Art. 10 DBG or Art. 7 StHG that SICAFs are not to be treated as collective investment schemes for tax purposes. Such a clarification would also have been appropriate in view of the systematic interpretation of Art. 20(1)(e) DBG and Art. 7(3), second sentence, StHG. 33

Indeed, it can hardly be in line with the legislature's intention that income from a SICAF with direct real estate holdings in the so-called 'external phase' – i.e. at the shareholder level – should be taxed only to the extent that the total income exceeds the income from direct real estate holdings. Rather, everything points to this being a legislative oversight. 34

2. Foreign collective investment schemes and equivalence

The CISA also covers – under certain conditions – foreign collective investment schemes distributed in Switzerland. For tax purposes, the question arises as to when a foreign structure is to be treated as equivalent to Swiss collective investment schemes. The Federal Tax Administration (FTA) specifies the relevant conditions for this in Circular No. 25 on the taxation of collective investment schemes and their investors (Circular 25) by means of equivalence rules. This is intended to prevent economically comparable vehicles from being treated inconsistently for tax purposes solely on the basis of their foreign legal form. The equivalence rules used by the FTA have so far also been accepted by the courts. 35

In its case law, the Federal Supreme Court held that, for the application of Art. 10 para. 2 of the Federal Tax Act (FTA) and the tax equivalence of a foreign collective investment scheme with a domestic one, it is sufficient if the requirements of Art. 119 of the Collective Investment Schemes Act (CISA) are met. According to the Federal Supreme Court, there is no additional requirement that the Swiss Financial Market Supervisory Authority (FINMA) has au- 36

thorised distribution to non-qualified investors according to para. 1 of Art. 120 of the CISA.

37 However, if such authorisation has been granted, the foreign investment vehicle is generally recognised as a collective investment scheme under the practice of the FTA, without the FINMA's classification being called into question again for tax purposes. The same applies if the foreign investment vehicle is subject to recognised supervision of collective investment schemes abroad.

C. Distinction from substantive taxability: Art. 10 para. 2 DBG as an attribution rule

38 Like Art. 10 para. 1 DBG, Art. 10 para. 2 DBG does not determine which income is taxable. The provision regulates solely the attribution or the question of at what level taxation is to be applied. Taxability in substance, in and of itself, is in turn determined by the relevant provisions of the DBG.

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Art. 11 Foreign commercial companies and other foreign partnerships without legal personality

Foreign commercial companies and other foreign partnerships without legal personality that are liable to tax on the basis of economic affiliation shall pay their taxes in accordance with the provisions applicable to legal persons.

(Legal text translated by DeepL)

CONTENT

I. Overview 21
II. Partnership 21
III. Foreign Partnership 22
IV. Economic Affiliation 22
V. Legal Consequences 23
Bibliography 23
Materials 24

I. OVERVIEW

Pursuant to Art. 11 of the Federal Tax Act (DBG), foreign commercial companies and other foreign partnerships without legal personality are subject to taxation in accordance with the provisions applicable to legal entities, provided they have an economic presence in Switzerland. Based on the foregoing, this provision applies under the following conditions: 1

- The entity is a commercial company or a partnership without legal personality;
- Which is a foreign partnership; and
- Which establishes an economic presence in Switzerland.

II. PARTNERSHIP

The provision refers to "*and other*" foreign partnerships, thereby implying that the existence of a partnership without legal personality is mandatory. In addition to foreign commercial companies, non-commercial partnerships (such as those engaged solely in asset management) and foreign communities of heirs may also qualify as partnerships within the meaning of Art. 11 DBG. A unilateral act of will (e.g., a trust) as well as sole proprietorships, however, are not covered by the provision. 2

The scope of application of Art. 11 DBG does not include legally independent corporate forms—in particular corporations—but rather partnerships without legal personality. If the entity is a corporation, the same tax consequences apply in any case, since corporations are subject to limited tax liability as legal entities under Art. 49 para. 1(a) in conjunction with Art. 51 DBG if there is economic affiliation. If the requirement of a partnership without legal personality is met, but there is no connecting factor for the economic affiliation of this partnership, it must be examined in a second step whether it is a partnership or other entity that falls within the scope of Art. 10. 3

III. FOREIGN PARTNERSHIP

4 The most controversial criterion is that the partnership must be a "foreign" partnership. According to Weissbrodt, the following possible approaches to determining whether this requirement is met may be considered:

- Link to the registered office of the partnership
- Link to the place of incorporation of the partnership, whereby a further distinction must be made based on
  - the management or a similar characteristic. It would also be conceivable to base the determination on whether the partnership has its management or a similar characteristic abroad;
  - the partners. It would also be conceivable to base the determination on whether the partners are (predominantly) resident abroad;
- combination of various elements: This approach is advocated in particular by Meuter, who, in a first step, requires an analysis based on the incorporation theory. If a foreign entity exists, Meuter examines in a second step whether at least one partner is resident abroad. If the latter is the case, it constitutes a foreign partnership.

5 As far as can be ascertained, neither the Federal Supreme Court has issued a definitive ruling on the classification of foreign partnerships nor has a uniform approach emerged in tax practice. In our view, it is persuasive to take into account the effect of double taxation treaties when interpreting Art. 11 DBG. Where opaque taxation is presumed to occur abroad, such taxation should also be replicated in Switzerland via Art. 11 DBG. Specifically, this means that the application of Art. 11 DBG is particularly appropriate in those situations where, under double taxation treaty law, a business activity exists pursuant to Art. 7 of the OECD Model Tax Convention and the enterprise is taxable abroad based on a connecting factor under Art. 4 of the OECD Model Tax Convention.

IV. ECONOMIC AFFILIATION

6 According to the Federal Supreme Court, Art. 11 DBG refers to the connecting factors in Art. 4 and 5 DBG regarding the criterion of economic affiliation, whereby, in practical terms, Art. 4 para. 1 lit. a–d DBG are primarily relevant.

In this regard, the Federal Supreme Court clarified that these are the connecting factors also covered by Art. 51 DBG. In practice, business operations, permanent establishments, and real property in Switzerland are particularly significant as potential connecting factors. 7

If the foreign entity has no economic affiliation in Switzerland, Art. 11 DBG is inapplicable from the outset. It must be examined whether the income is directly attributed to the shareholders pursuant to Art. 10 DBG. 8

V. LEGAL CONSEQUENCES

If the above conditions are met, a fiction of cooperation applies, whereby the foreign partnership becomes subject to profit tax in Switzerland. Art. 11 DBG results in the partnership being treated as a non-transparent legal entity and, as such, being taxed as a whole—rather than the partners personally. 9

The situation becomes more complex if the partnership, which is classified as foreign, simultaneously has partners resident in Switzerland. In this case, the income is attributed to the domestic partners, so that they are taxed transparently within the meaning of Art. 10 DBG. With regard to the foreign partners, the partnership is subject to limited profit tax liability in Switzerland under Art. 11 DBG. In some cases, tax practice also treats the foreign partners as being taxed on a pro rata basis. If Art. 11 DBG applies, all provisions of profit tax law are generally applicable. This also includes the provisions regarding the participation deduction. 10

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Baselbieter Steuerbuch Band 2 – Unternehmen 10 Nr. 1 Besteuerung von einfachen Gesellschaften, Kollektiv- oder Kommanditgesellschaften, https://kanton.baselland.ch/finanz-und-kirchendirektion/steuerverwaltung-steuerbuch/band-2/unternehmen/downloads-1/band2_010_01.pdf/@@download/file/band2_010_01.pdf, besucht am 16.1.2026.

Model Tax Convention on Income and on Capital der OECD vom 21.11.2017, https://www.oecd.org/content/dam/oecd/en/publications/reports/2017/12/model-tax-convention-on-income-and-on-capital-condensed-version-2017_g1g8769b/mtc_cond-2017-en.pdf, besucht am 16.1.

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COMMENTARY ON

Art. 174 FDTA

A commentary by Jara Fawer / Peter Hongler

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Part Six: Criminal Tax Law

Title I: Breach of Procedural Obligations and Tax Evasion

Chapter 1: Procedural Obligations

Art. 174

[1] Any person who, despite a reminder, intentionally or negligently fails to comply with an obligation incumbent upon them under the provisions of this Act or under an order made pursuant to this Act, in particular:

a. fails to submit the tax return or the required supporting documents,

b. fails to fulfil an obligation to provide a certificate, information or notification,

c. breaches obligations incumbent upon them as an heir or a third party in estate administration proceedings, shall be punished by a fine.

[2] The fine shall be up to 1,000 Swiss francs; in serious cases or in the event of a repeat offence, up to 10,000 Swiss francs.

(Legal text translated by DeepL)

CONTENT

I. General ... 29
A. Description of the offence ... 29
B. Protected legal interest and purpose of the provision ... 29
II. Objective elements of the offence ... 30
A. Overview ... 30
B. Perpetrators, participation, attempt ... 31
C. Procedural obligations ... 31
1. Procedural obligations to be fulfilled directly by virtue of the law ... 31
2. Procedural obligations to be fulfilled pursuant to an official order ... 31
3. Procedural obligations of the taxpayer ... 33
a. General ... 33
b. Duty to file a tax return ... 34
c. Duty to attach documents ... 35
d. Duty to provide information ... 36
e. Duty to produce evidence ... 36
f. Duty to retain records ... 37
4. Procedural obligations of third parties ... 37
a. Obligations to provide certificates, information and notifications in the assessment procedure ... 37
b. Procedural obligations of the payer of the taxable benefit in the withholding tax procedure ... 39
c. Procedural obligations of persons required to cooperate in the inventory proceedings ... 39
D. Breach of procedural obligations ... 40
1. In general ... 40
2. Case studies ... 40
a. Incorrect deduction in the tax return ... 40
b. (Repeated) failure to submit the wage statement ... 41
c. Submission of a tax return containing obvious errors ... 43
d. Submission of a tax return in (deliberately) illegible handwriting ... 43
e. Failure to sign the tax return ... 44
f. Submission of the tax return to an unauthorised authority ... 44
g. Failure to use the official securities register ... 45
E. Reminder ... 45
III. Subjective elements of the offence ... 48
IV. Aggravating circumstances ... 49
A. Serious case ... 49
B. Recidivism ... 49
C. Minor case? ... 50
V. Illegality and culpability ... 52

VI. Penalty 53
A. General 53
B. Sentencing 53
VII. Concurrence 54
Bibliography 56
Materials 60

I. GENERAL

A. Description of the offence

A breach of procedural obligations under Article 174 of the Federal Act on Direct Federal Tax (DBG) (see also Art. 55 of the Federal Act on the Harmonisation of Direct Taxes of the Cantons and Municipalities [StHG]) is committed by anyone who, despite a reminder, intentionally or negligently fails to fulfil an obligation incumbent upon them under the provisions of this Act or under an order issued pursuant to this Act. 1

The breach of procedural obligations constitutes a misdemeanour in the form of a **genuine offence of omission** (as distinct from an offence of commission), since the punishable act is linked to the failure to perform, or the improper performance of, acts required by law or ordered by the authorities. 2

This is a **genuine special offence**, as only those persons subject to procedural obligations in tax proceedings are considered to be offenders. 3

Art. 174 DBG is therefore to be classified as an **offence of omission** (as opposed to an offence of commission), as it is sufficient for the offence to be established that the offender fails to comply with the procedural obligations. The occurrence of a result (in particular a loss of tax revenue) is not required. 4

It is also an **offence of disobedience** (comparable to Art. 292 of the SCC), as only the failure to perform an act within a specified period, i.e. the failure to comply with a demand for payment (see below N. 94 ff. regarding the demand for payment), is made a criminal offence. 5

In relation to the other tax offences, Art. 174 DBG constitutes a **catch-all provision**. 6

B. Protected legal interest and purpose of the provision

The offence of breach of procedural obligations serves primarily to **protect the tax legal system**. 7

The protected legal interest is the **proper conduct of the tax assessment**, which is jeopardised by the recalcitrant behaviour of the taxpayer. The aim is 8

to ensure 'truth and completeness in [the] determination of the facts essential for establishing the lawful tax liability'.

9 The taxpayer's conduct leads to at least an **abstract threat** to the public's tax claim. The offence of breach of procedural obligations therefore ensures an early, success-independent protection of the tax claim. An actual impairment, i.e. a loss of tax revenue, is not a prerequisite.

10 The sanction serves not only to punish the taxpayer, but is intended to compel them to **comply with official orders** if they fail to fulfil an obligation imposed upon them. The sanction is intended to enable the tax authority to determine the taxable elements correctly and completely in order to assess the tax due and thus prevent an unjustified reduction in the tax burden. In this sense, the penal provision also ensures the **equitable distribution of the tax burden** among taxpayers.

II. OBJECTIVE ELEMENTS OF THE OFFENCE

A. Overview

11 The criminal conduct under Article 174 DBG consists of the failure to fulfil or the improper fulfilment (breach) (see below N. 69 ff.) of procedural obligations imposed for tax purposes (see below N. 20 ff.) despite an official, time-limited and penalised request (reminder) (see below N. 94 ff.) .

12 Procedural obligations exist both in the ordinary **assessment and inventory proceedings** and in the **additional tax proceedings** (see Art. 153 para. 3 DBG) and are incumbent upon the **taxable person** (e.g. Art. 124–126 and Art. 136 DBG) (see below N. 31 ff.) as well as – within the limits prescribed by law – **D third parties** subject to certification, information or reporting obligations (e.g. Art. 127–129, Art. 156–158 DBG) (see below N. 59 ff.).

13 Procedural obligations may arise either directly from the **law** (see below, N. 20 et seq.) or be based on a specific **administrative order** (see below, N. 22 et seq.).

14 Art. 174 DBG constitutes a **general clause** for breaches of procedural obligations in tax proceedings. Paragraph 1(a)–(c) contains an illustrative, **non-exhaustive** ('in particular') list of procedural obligations, the failure to comply with which is punishable by an administrative fine.

The obligations to cooperate imposed on the persons concerned must comply with the general **principles of the rule of law**, i.e. they must be based on a statutory foundation, be in the overriding public interest and be proportionate (see Art. 5 of the FC). 15

B. Perpetrators, participation, attempt

Art. 174 DBG is a **special offence** (see above N. 3), which is why only persons upon whom statutory or administrative procedural obligations have been imposed in tax proceedings can be considered as perpetrators. These may be the taxpayer themselves or third parties subject to certification, disclosure or reporting obligations. 16

Joint perpetration is possible where several persons are required to fulfil the same procedural obligations, such as heirs. 17

Aiding and abetting a breach of procedural obligations, as well as **attempt**, are not punishable (see Art. 105 para. 2 SCC).

With regard to **incitement**, legal doctrine assumes a qualified silence on the part of the legislature, as Art. 177 DBG only makes participation in tax evasion a criminal offence, whilst there is no corresponding provision for the breach of procedural obligations. 19

C. Procedural obligations

1. Procedural obligations to be fulfilled directly by virtue of the law

Procedural obligations may arise directly from the law. In such cases, the terms of fulfilment – i.e. which act of cooperation is to be performed, in what form, within what time limit or by what date – must already be **sufficiently specified** in the law. However, this applies to only a few procedural obligations. 20

In such cases, these are procedural obligations to be fulfilled by operation of law **without an official order.** 21

2. Procedural obligations to be fulfilled pursuant to an official order

As a rule, statutory procedural obligations require **specification** in the form of an official order. 22

23 This may be done by means of a **general-specific administrative act** (**general order** or **public notice**), for example by specifying in more detail the group of addressees or the timeframe for fulfilment. Such a general administrative act is, in particular, the official request to submit a tax return for a specific tax period (Art. 124 para. 1 DBG). The same effect is also achieved by the delivery of the tax return form. Furthermore, the official request may also automatically give rise to further procedural obligations, such as the duty to submit the supporting documents for the tax return (Art. 125 DBG).

24 Procedural obligations are generally imposed on persons required to cooperate by means of an official order in the form of an **individual and specific administrative act (decision)**. The order or the required act of cooperation must be based on a sufficient legal basis. An individual and specific decision is, for example, a request to submit certain supporting documents or certificates to the tax authority within a specified time limit (cf. Art. 125, Art. 127 and Art. 129 DBG) or to provide certain information (see Art. 126 para. 2 and Art. 128 DBG).

25 The obligation to carry out the individually ordered act of cooperation arises only upon **notification** to the person addressed. It is therefore a prerequisite that the order has actually been received by the person subject to the obligation or that, due to culpable obstruction of service, a *deemed service* applies. Actual knowledge of the content of the order is – unlike in Art. 292 SCC – not necessary.

26 The administrative orders are merely **acts of application of the law**, with the consequence that they may not require more than what is already required by law upon request. A separate, independent determination procedure regarding the scope of the duty to cooperate is not required.

27 The orders of the tax authority must be **in accordance with the law** and must be **necessary, suitable and proportionate** for the proceedings. In terms of substance and timing, the order must also be sufficiently **clearly defined and reasonable**. The order must therefore specify, by referring to the relevant tax proceedings, which act of cooperation is to be performed, within what time limit, in what form and vis-à-vis which authority. It is sometimes argued that the order must already refer to the **legal consequences** of non-compliance or improper compliance with the procedural obligation in ques-

tion, namely the imposition of a discretionary assessment and the imposition of an administrative fine for breach of procedural obligations.

In the event of an appeal against the fine, the competent criminal tax authority may **freely review, as a preliminary matter,** the lawfulness and appropriateness of the ordered act of cooperation. If, for example, it concludes that a particular order lacks a sufficient legal basis, non-compliance remains unpunished. However, the order remains in force for the time being; it cannot be set aside separately by the taxpayer, but only in appeal proceedings against the assessment (see Art. 132, Art. 140 and Art. 145 DBG). 28

By contrast, orders issued against third parties subject to a duty of cooperation in direct federal tax proceedings are regarded as **separately contestable interim decisions**, as these third parties have no means of challenging the obligations imposed on them in the assessment proceedings. 29

The obligations of the tax authority themselves (e.g. Art. 109–112, Art. 122 et seq. and Art. 130 et seq. DBG). 30

3. Procedural obligations of the taxpayer

a. General

Pursuant to Art. 126 para. 1 DBG (general duty to cooperate), the taxpayer must 'do everything to enable a complete and correct assessment' (**principle of cooperation**). The tax authority may require the taxpayer to provide anything that is appropriate, necessary and reasonable for the taxpayer in the interests of such an assessment. From the perspective of necessity, this includes all information and documents that may be relevant to the assessment of the taxpayer in question and do not relate exclusively to their business partners or intended solely for the assessment of a third party. 31

The general duty to cooperate is **set out** in tax law in various procedural obligations, namely the duty to file a tax return (Art. 124 DBG), the duty to submit supporting documents with the tax return (Art. 125 DBG), the duty to provide information (para. 126(2) DBG), the duty to produce evidence (para. 126(2) DBG) and the duty to retain records (para. 126(3) DBG). 32

The taxpayer's procedural obligations have a **formal** and **substantive aspect**. The formal aspect concerns the performance of the required act of 33

cooperation, whilst the substantive aspect relates to its completeness and truthfulness, i.e. its quality.

34 The **principle of proportionality** (Art. 5 para. 2 and Art. 36 para. 3 of the FC) constitutes a limit to the taxpayer's obligations to cooperate.

35 Sanctioning a refusal to cooperate is impermissible if the action ordered is **from the outset recognisably unnecessary** for a proper assessment. However, the question of which facts are legally relevant is only answered with the assessment decision.

36 During the proceedings, a hypothetical set of facts appropriate to the circumstances is sufficient, and it is within the scope of the duty to investigate and at the **discretion of the tax authority** to determine which acts of cooperation are to be undertaken. If the taxpayer refuses to cooperate because they consider the facts to be clarified to be irrelevant, they run the risk that their view will later prove to be incorrect and that they will have to bear the consequences of their failure to cooperate.

b. Duty to file a tax return

37 The duty to file a tax return (Art. 124 DBG) is the **most significant application** of the procedural obligations applicable by operation of law.

38 The competent tax authority requires taxpayers to submit their tax return by means of a public notice, personal notification or delivery of the form (Art. 124 para. 1 sentence 1 DBG). The public request to submit the tax return constitutes a **general administrative order** (see N. 23 above). Taxpayers who have not received the relevant form must request one from the tax assessment authority (Art. 124 para. 1, second sentence, DBG).

39 The taxpayer must submit the tax return truthfully, in full, personally signed and together with the prescribed enclosures to the competent authority within the prescribed time limit (Art. 124 para. 2 DBG). The taxpayer is responsible for the **accuracy and completeness** of the tax return. If they are unsure of the tax implications of a fact, they must not simply omit it, but must indicate their uncertainty; in any event, they must state the fact as such, fully and accurately.

40 Taxpayers who fail to submit their tax return or submit it with omissions are required to **rectify** the omission within a reasonable period (Art. 124 para. 3

DBG). The request following the expiry of the deadline for submitting the tax return (but not whilst the ordinary submission deadline is still running) is to be classified as a reminder or a grace period within the meaning of Art. 174(1) DBG and Art. 130(2) DBG (see below N. 94 ff. regarding the reminder).

The **B burden of proof** for the submission of the tax return lies with the taxpayer, in accordance with the general rule on the burden of proof (Art. 8 of the CC by analogy). 41

The **appointment of a third party** does not relieve the taxpayer of the obligation to ensure that the documents have been submitted. The careful selection and supervision of agents falls within the taxpayer's sphere of responsibility. 42

c. Duty to attach documents

The duty to attach documents supplements the duty to file a tax return. Natural persons are obliged to attach to their tax return their pay slips, statements of remuneration as a member of the board of directors or another body of a legal entity, and lists of all securities, receivables and liabilities (Art. 125 para. 1(a)–(c) DBG). Self-employed persons must also attach to their tax return the signed annual accounts or, in the case of simplified bookkeeping, statements of income and expenditure, of the financial position, and of private withdrawals and contributions (Art. 125 para. 2(a) and (b) DBG). 43

The obligation to attach supporting documents requires the taxpayer to provide further details regarding the components of income and assets or profit and capital listed only summarily in the tax return (**duty to present the facts**) or to provide evidence of their accuracy (**duty to provide evidence**). At the same time, the attachments enable the tax authority to verify the information provided by the taxpayer. 44

The supporting documents must be submitted either in the form of **official forms** (e.g. salary statement, securities list) or as **statements** prepared by the taxpayer (e.g. annual accounts). 45

The obligation to provide supporting documents encompasses the complete, truthful and formally correct preparation, completion and attachment of the required supporting documents or official forms, as well as their timely sub- 46

mission to the competent authority. The **use of official forms** by the person liable for tax and certification is a procedural obligation.

47 If third-party certificates are required, such as a salary statement, the taxpayer must check these for completeness and accuracy and, where necessary, request corrections or inform the tax authority of any deficiencies.

48 The obligation to submit attachments is duly fulfilled if the taxpayer has provided all attachments required by law or by the authorities in full, truthfully, within the prescribed time limit and in the prescribed form.

d. Duty to provide information

49 The taxpayer must provide information to the tax assessment authority, either orally or in writing, upon the authority's request (Art. 126 para. 2, first part of the sentence, DBG). The purpose of the duty to provide information is to fill any gaps and clarify any ambiguities in the taxpayer's statement of facts, in order to enable a complete and correct assessment.

50 Subject to the principle of proportionality, it is at the **discretion of the tax authority** to determine what information is to be provided and in what form. In principle, all information must be provided that serves to clarify the facts relevant to the assessment and does not entail an unreasonable burden on the taxpayer.

51 From a formal point of view, the information requested must be provided in full and in due time and form, whilst from a substantive point of view, its content must be true.

e. Duty to produce evidence

52 The taxpayer must, upon request by the tax assessment authority, submit business records, supporting documents and other certificates, as well as documents relating to business transactions (Art. 126 para. 2, second clause, DBG).

53 The obligation to produce evidence serves to verify the information provided in the tax return, the enclosures or in statements and, in conjunction with the general duty to cooperate, establishes a **general duty to provide evidence**. Since essential evidence such as the salary statement and the annual accounts must already be attached to the tax return, the obligation to produce evidence

fulfils a subsidiary function and enables an individual, in-depth verification of the return.

Taxpayers must submit all requested evidence that is **suitable as evidence** for establishing the material truth of the legally relevant facts. This is subject to the condition that the evidence is in the taxpayer's possession or can be obtained on the basis of a legal claim. 54

The **principle of proportionality** forms the limit of the obligation to produce evidence, i.e. the suitability and necessity of the evidence for clarifying the legally relevant facts and the reasonableness of requiring the taxpayer to produce it. 55

The obligation to produce evidence is duly fulfilled if, from a formal point of view, the requested evidence has been submitted in full and within the prescribed time limit, and if, from a substantive point of view, it is genuine and complete and true in content. 56

f. Duty to retain records

The duty to retain records requires self-employed natural persons and legal entities to retain business records and statements in accordance with Art. 125(2) DBG, as well as other supporting documents relating to their activities, for a period of ten years (Art. 126(3), first sentence, DBG). The manner in which these are kept and stored is governed by Articles 957–958f of the Federal Act on the Amendment of the Swiss Civil Code (Part Five: Law of Obligations) (CO) (Art. 126 para. 3, second sentence, DBG). 57

The obligation to retain records serves to ensure that the taxpayer keeps available the documents necessary to fulfil their obligations to present the facts and provide evidence, thereby enabling a **subsequent verification** of the substantive truth by the tax authority. 58

4. Procedural obligations of third parties

a. Obligations to provide certificates, information and notifications in the assessment procedure

The group of persons required to cooperate and the scope of their obligation to cooperate are **exhaustively** regulated by law. Third parties – unlike the taxpayer – are not subject to a comprehensive duty to cooperate. They may 59

therefore not be required to cooperate in the assessment procedure beyond the duties to certify, provide information and report provided for in Articles 127–129 of the Federal Tax Act.

60 The statutory obligations of third parties to cooperate serve to **verify** the facts stated by the taxpayer and enable the tax authority to **establish the facts** (at least in part) without the taxpayer's cooperation.

61 **Third parties required to provide certificates** under Art. 127 DBG are persons who are or have been in a contractual relationship with the taxpayer and are obliged to issue written certificates to the taxpayer. These include, for example, employers, creditors and debtors, insurers, trustees, asset managers and agents.

62 An **unlawful request for cooperation** exists where representatives are asked for certificates without the taxpayer having first been unsuccessfully reminded to submit them. The reminder is, in principle, a prerequisite for the right to claim from third parties under Art. 127 para. 2 DBG. Furthermore, the tax assessment authority shall also have a direct right of claim where it is impossible or unreasonable for the taxpayer to submit the certificate, for instance because the third party required to issue the certificate refuses to do so.

63 The limits of third parties' duty to cooperate arise in turn from the **principle of proportionality** and the reservation regarding legally protected **professional secrecy** (cf. Art. 127 para. 2 sentence 2 DBG). However, professional secrecy only limits the obligation to issue a certificate where this obligation is to be fulfilled directly vis-à-vis the tax assessment authority. If, on the other hand, the certificate is owed to the taxpayer – which is the rule – neither the taxpayer nor the third party required to issue the certificate may invoke professional secrecy, as the protection of confidentiality does not apply vis-à-vis the taxpayer as the holder of the secret.

64 The **duty to provide information** under Art. 128 DBG obliges partners, co-owners and joint owners, at the request of the tax authority, to provide information regarding their legal relationship with the taxpayer, in particular regarding their shares, claims and payments. Within the framework of the principle of proportionality, the duty to provide information covers all facts relating to the mutual legal relationship and relevant to the tax assessment of the person concerned.

The **duty to report** under Art. 129 DBG imposes on legal persons, foundations, pension funds, simple partnerships and certain employers the duty to periodically submit certificates regarding benefits relating to the organisation, pension provision or shareholdings to the tax assessment authority. The reporting obligation must generally be fulfilled using official forms. A copy of the certificate must be sent to the taxpayer (Art. 129 para. 2 DBG). 65

b. Procedural obligations of the payer of the taxable benefit in the withholding tax procedure

In addition to the procedural obligations in the assessment procedure, the payer of the taxable benefit is subject to procedural obligations in the **withholding tax procedure**. Under Art. 88 and Art. 100 DBG, they are subject, amongst other things, to an obligation to withhold and collect the tax due (lit. a), the obligation to issue a statement or confirmation of the tax deduction to the taxpayer (lit. b), as well as an obligation to remit and account to the tax authority and an obligation to grant the latter access to all documents (lit. c). Furthermore, the recipient of the taxable supply (as well as the taxpayer) must, upon request, provide the tax assessment authority with information, either orally or in writing, regarding the circumstances relevant to the collection of withholding tax (Art. 136 DBG). 66

Failure to make, or incomplete making of, the withholding tax deduction constitutes – as a variant of tax evasion – the offence of endangering withholding tax (Art. 175 para. 1 subpara. 2 DBG). 67

c. Procedural obligations of persons required to cooperate in the inventory proceedings

The obligations to cooperate in the **inventory proceedings** serve to establish the full extent of the deceased person's assets on the date of death. Art. 157 DBG establishes obligations to cooperate for heirs, their legal representatives, estate administrators and executors. The duty of third parties to provide information and certification – where such third parties held or managed the deceased's assets, or where the deceased had pecuniary rights or claims against them – arises from Art. 158 DBG. 68

D. Breach of procedural obligations

1. In general

69 A breach of procedural obligations may consist of (complete) **non-compliance,** merely partial compliance (**partial compliance)** or improper or defective compliance (**improper compliance**) .

70 Complete **non-compliance** occurs where an imposed procedural obligation is not fulfilled at all (e.g. failure to submit the tax return). **Partial fulfilment** is deemed to have occurred if the required act of cooperation is performed only in part (e.g. submission of only two of the five required attachments, submission of an incompletely filled-in tax return). **Defective fulfilment** is deemed to have occurred if the act of cooperation is performed (in part) but is deficient in form or quality. A distinction must be made between **formally** inappropriate fulfilment (e.g. submission of an unsigned tax return, submission of an incompletely filled-in tax return, failure to use the official forms) and **substantively** inappropriate fulfilment (e.g. submission of a tax return with excessive deductions or insufficient income, provision of false information, submission of forged or untrue supporting documents or business records).

2. Case studies

71 To illustrate and clarify the principles mentioned, various cases of application are examined below.

a. Incorrect deduction in the tax return

72 If a taxpayer makes an impermissible or incorrect deduction in their tax return – such as a travel expense deduction or a donation, even though the conditions for such are not met – this constitutes a **substantive failure to fulfil** the duty of cooperation. In the event of uncertainty regarding the deductibility of expenses, the taxpayer must make the assessment they deem correct themselves and declare it. An incorrect legal assessment of a declared fact does not constitute a breach of procedural obligations.

73 The taxpayer is, however, required to present the facts in the tax return in such a way as to enable the tax authority to **verify** the legal assessment made. If, for example, they are unsure, they may leave a corresponding note for the tax authority and indicate that the facts require further examination. Claiming

an incorrect deduction may also, in the event of an unclear presentation of the facts, lead to a charge of (attempted) tax evasion (Art. 175 and Art. 176 DBG).

However, the duty to present the facts also includes the submission of documents substantiating the relevant deduction. If the taxpayer is requested by the tax authority to submit the relevant documents and fails to comply with this request despite a reminder carrying a penalty, they are in breach of procedural obligations. 74

According to **practice in the Canton of St. Gallen**, the failure to submit supporting documents to substantiate expenses for which a deduction is claimed (e.g. medical expenses, voluntary donations, further education, etc.) does not constitute a punishable breach of procedural obligations. In application of the (objective) allocation of the burden of proof, according to which facts reducing tax liability must be proven by the taxpayer, in such cases only the claimed deduction is refused. 75

The following counterargument applies: Failure to submit supporting documents despite an official request constitutes – where submission is reasonable – a **breach of procedural obligations**. The question of the objective burden of proof only arises if the tax authority fails to obtain the relevant facts despite all reasonable efforts. The reminder to fulfil the procedural obligation and the imposition of a fine for non-compliance serve precisely to encourage the person subject to the duty of cooperation to submit the supporting documents at least once more. If the person subject to the obligation fails to comply with this request, the tax authority will refuse the deduction in accordance with the allocation of the burden of proof *and* impose a fine for breach of procedural obligations. 76

b. (Repeated) failure to submit the wage statement

Under Art. 125 para. 1(a) DBG, a natural person must enclose wage statements for all income from employment with their tax return. If the taxpayer has not received a wage statement, they are obliged to request it from their employer and, if they do not receive it, to inform the tax authority so that the latter can request the wage statement directly from the employer pursuant to Art. 127 para. 2 DBG. If the taxpayer fails to do so and does not submit the required 77

wage statement despite a reminder, they generally fulfil the elements of a breach of procedural obligations.

78 It appears questionable whether prosecution and punishment can be waived in the case of a **first-time failure to submit** the wage statement. Given the importance of the salary statement for the proper assessment of the taxpayer, the assumption that this constitutes a minor offence – which, under the principle of discretion, would justify waiving a fine – cannot be made lightly. The tax authority is, in principle, entitled to impose an administrative fine even in the case of a first-time failure to submit the certificate, despite a reminder carrying a penalty, provided that submission was possible and reasonable for the taxpayer. Minor culpability must, however, be taken into account when determining the penalty (see below N. 133 ff.). Nevertheless, the option to waive a fine should remain available in particularly minor cases where both the degree of culpability and the consequences of the offence are minor. This is the case, for example, where the tax factors to be determined are very low, meaning there is little risk to the state's tax claim, and the taxpayer has failed to submit the return due to inexperience.

79 This example shows that the **practical application** of the provision also requires a certain degree of discretion on the part of the authorities. In the mass processing of income tax, it is virtually impossible to ensure that every taxpayer sufficiently understands their obligations to cooperate, which a strict application of Art. 174 DBG would, however, require.

80 **In the case of repeated failure to submit** the salary statement, however, the situation is different. Here, a penalty appears to be justified in principle; indeed, in the event of a repeat offence, even heavier fines may be imposed if these appear likely to persuade the taxpayer to submit the required documents. However, insofar as the imposition of a discretionary assessment (cf. para. 130(2) DBG) suggests that taxation will be carried out appropriately, multiple fines appear disproportionate. Since the tax authority is entitled – though not obliged – to request the salary statement directly from the employer (see Art. 127 para. 2 DBG), a proper assessment proves possible even without the taxpayer's cooperation. Consequently, repeated failure to submit the salary statement despite a reminder carrying a penalty is likely to result in a fine for breach of procedural obligations and subsequently in an assessment at the discretion of the tax authority.

c. Submission of a tax return containing obvious errors

Under Art. 124 para. 2 DBG, the taxpayer must complete the tax return 'truthfully'. The tax return must enable the tax authority to ascertain the **substantive truth**. The taxpayer bears responsibility for the accuracy and completeness of the tax return. 81

For its part, the tax assessment authority checks the tax return and carries out the necessary investigations (Art. 130 para. 1 DBG). However, the tax authority may, in principle, rely on the tax return being correct and complete. The tax authorities are only obliged to carry out supplementary investigations if the tax return contains **obvious errors**. This is the case, for example, if income has been declared as a deduction – or vice versa. The same applies to formal errors in the return, such as transcription errors where, for example, one zero too many or too few is carried over. Such erroneous returns do not (yet) constitute a breach of procedural obligations, but may, under certain circumstances, constitute attempted tax evasion (Art. 176 DBG). 82

d. Submission of a tax return in (deliberately) illegible handwriting

The submission of tax returns in paper form is increasingly being superseded by the option of **electronic submission** (cf. Art. 104a DBG). Nevertheless, the submission of a handwritten tax return is generally still possible in the cantons. 83

Illegible information in the tax return constitutes a substantive defect and amounts to **substantive non-compliance** with the duty to cooperate. The tax return is deemed to be incomplete in terms of content if individual details cannot be identified. The taxpayer must therefore be requested to correct the incorrectly completed tax return within a reasonable period (see Art. 124 para. 3 DBG). If the grace period granted already constitutes a reminder period (see below N. 97) or if the taxpayer is reminded after this standard request period, the failure to correct the tax return, or the failure to do so properly, constitutes a breach of procedural obligations. 84

If the taxpayer repeatedly uses illegible handwriting to delay or frustrate the processing of the tax return, the assumption of a **serious case** (see below N. 110 ff.) may appear justified in view of the particularly reprehensible nature of the conduct and the pronounced attitude of refusal. This is particularly the 85

case where the illegible handwriting results in a proper assessment being impossible or only possible with great difficulty.

e. Failure to sign the tax return

86 Under Art. 124 para. 2 DBG, the taxpayer must 'sign the tax return personally'. By signing it personally, the taxpayer confirms that the tax return has been completed truthfully and in full, whilst also verifying the authenticity of the tax return and the identity of the signatory.

87 Failure to sign a tax return submitted in paper form results in formal incompleteness and constitutes a **formally non-compliant fulfilment** of the duty to cooperate. In accordance with Art. 124 para. 3 DBG, the taxpayer must be requested to rectify the omission within a reasonable period.

88 The obligation to sign in person constitutes a **procedural requirement**. A tax assessment may also be issued on the basis of an unsigned tax return. Nevertheless, the tax authority should be entitled to insist on the tax return being duly signed and thus on the fulfilment of the procedural obligation. If the taxpayer fails to sign the tax return despite a reminder carrying a penalty, they would thereby fulfil the elements of the offence under Article 174 of the Federal Tax Act (DBG), although the tax authority's insistence on a signature – where the tax return is otherwise complete – borders on **excessive formalism**.

f. Submission of the tax return to an unauthorised authority

89 Under Art. 124(2) DBG, the taxpayer must submit the tax return to 'the competent tax authority'. Which cantonal or municipal authority is competent is governed by **cantonal law** (cf. Art. 104(4) DBG). The addressee of the tax return is usually indicated or pre-printed on the tax return form itself or on the enclosed return envelope.

90 A tax return submitted to an unauthorised authority must be **forwarded** ex officio to the competent authority. The filing deadline is deemed to have been met if the tax return is submitted to the incorrect authority on the last day of the deadline or handed over to Swiss Post for delivery to that authority (see Art. 21(2) of the Federal Act on Administrative Procedure [APA] and Art. 133(2) DBG).

In practice, a fine for breach of procedural obligations is likely to be appropriate only in cases of repeated or, despite instruction, **continued disregard of jurisdiction**. 91

g. Failure to use the official securities register

Under Art. 125 para. 1(c) DBG, a natural person must enclose with their tax return the registers of all securities, receivables and liabilities. Securities, receivables and liabilities registers are **official forms**. Completing and using them is a procedural obligation. Failure to use or complete the securities register therefore constitutes a breach of procedural obligations. 92

In practice, it is permissible to enclose **the bank's own custody account statements**, provided these contain at least the information required in the official securities register and the corresponding totals are transferred to the signed official form. If this transfer is not carried out, the tax return is deemed to have been submitted incompletely, as the securities register forms an integral part of the tax return. The tax authority may therefore request the taxpayer, setting a reasonable deadline, to complete and sign the securities register accordingly (see Art. 124(3) DBG). If the tax authority's request already qualifies as a reminder within the meaning of Art. 174(1) DBG (see below N. 97), a fine for breach of procedural obligations may be imposed once the deadline has expired without action. 93

E. Reminder

According to the wording of Art. 174 para. 1 DBG, the imposition of a fine for a breach of procedural obligations requires a **prior, unsuccessful reminder** to the person obliged to cooperate. The warning may only be issued if the prior official order to fulfil the procedural obligations has remained unsuccessful. In other words, mere failure to fulfil statutory or officially ordered obligations to cooperate does not in itself constitute a punishable offence. 94

The reminder contains the **final (peremptory) request** to the person obliged to cooperate to fulfil the procedural obligations that have hitherto been neglected, either formally and/or substantively. The tax assessment authority sets the person obliged to cooperate a **reasonable deadline** for this. It must be clear to the person obliged to cooperate from the reminder which procedural steps are required of them and within what timeframe (requirement of 95

specificity). If any details are missing, the person concerned must make enquiries, provided that it is at least apparent to which assessment or inventory procedure the reminder relates.

96 If procedural steps are taken only after **the expiry of the set reminder period** (i.e. late), the objective elements of a breach of procedural obligations are fulfilled.

97 A distinction must be made regarding the deadline to be set under Art. 124 para. 3 DBG for the submission or correction of an incomplete tax return. This may be of **a different legal nature**. Where a deadline is set during the ordinary tax return period, the extension qualifies as an ordinary deadline for fulfilling procedural obligations. By contrast, a request and the setting of a deadline after the expiry of the tax return period constitutes a reminder deadline within the meaning of Art. 174(1) DBG and Art. 130(2) DBG.

98 From the perspective of the rule of law, it appears necessary that the reminder – although not explicitly stated in the wording of Art. 174 DBG – must contain a **reference to the threat of a penalty** in the event of non-compliance. This must also apply to cases where a procedural obligation arising directly from the law is at issue. There is, however, no obligation to refer to a possible reminder fee.

99 In recent legal scholarship, the warning is predominantly classified as an **objective element of the offence** of breach of procedural duty and no longer as an objective condition for criminal liability. The wrongful nature of Art. 174 DBG lies precisely in the fact that the person concerned fails to comply with the warning addressed to them. The classification of the warning as an objective element of the offence means that the offender's culpability must (also) extend to the failure to comply with the warning (see, regarding classification as an offence of disobedience, N. 5 above). When determining the sentence (see N. 133 ff. below), therefore, only the conduct of the person concerned following service of the warning is to be taken into account. It follows that any failures prior to the service of the reminder – even if these were deliberate – must not be taken into account in the subsequent sentencing, as they do not yet constitute a criminal offence.

100 The offence under Art. 174 DBG requires the proper service of the reminder. The burden of proof for the service of the reminder lies with the tax authority. **Actual and personal service** on the person required to cooperate is re-

quired. According to the prevailing view, service solely on the representative is insufficient and does not entitle the tax authority to impose a fine for a breach of procedural obligations. Similarly, some legal scholars – in contrast to the service of official orders (see above N. 25) – regard fictitious service as insufficient, since the addressee must at least be able to take note of the content of the reminder in order to fail to fulfil the duty to cooperate despite the reminder. The reminder must therefore demonstrably have come within the addressee's sphere of control. To dispense with the requirement of service would mean bringing forward the punishability to conduct prior to receipt of the reminder, which, however, cannot constitute such conduct 'despite' the reminder. According to another view, and in accordance with the Federal Supreme Court's earlier case law, the fiction of service should apply if the reminder could reasonably be expected to have reached the person required to cooperate, which ultimately presupposes pending or ongoing tax proceedings. Service of the reminder based on the presumption of service is therefore sufficient for criminal liability under Art. 174 DBG. Actual knowledge of the content of the reminder is not required. If the person concerned refuses to accept a reminder delivered in person, service is deemed to have taken place on the day of the refusal, provided this is recorded by the person delivering it.

For evidential reasons, it is advisable to serve the reminder **in writing** by registered post or 'A-Post Plus'. 10 1

According to the case law of the Federal Supreme Court, in the case of registered letter post, there is a **natural presumption** of proper service of the collection notice (in the letterbox or post office box). The same presumption applies to service by 'A-Post Plus'. The addressee's assertion that there has been an error in postal delivery (only) be relied upon if the account of the circumstances is plausible and arises from a certain degree of probability, whereby good faith is to be presumed. Purely hypothetical considerations and the possibility of delivery errors, which can never be entirely ruled out, are not sufficient in themselves to rebut the presumption. Rather, there must be concrete indications of an error. 10 2

The start of the time limit is determined by the **date of service**, provided the addressee was able to take note of the content of the reminder, and not by the time of actual notice. The set reminder period begins to run on the day following service. 10 3

10 4 Failure to comply with a reminder may result in the person required to cooperate being subject to a further, stricter fine. This does not constitute a breach of the '**ne bis in idem' principle** (Art. 4 of Protocol 7 to the ECHR), as each fine relates to a new act and therefore the facts are not identical (lack of identity of the offence). However, repeated punishment is limited by the principle of **proportionality**. Accordingly, the tax authority may not repeatedly link the penalty to the same request without reasonable grounds. A further reminder is only justified if it appears likely to persuade the person obliged to cooperate to fulfil their obligations. Further reminders or fines appear disproportionate if the person required to cooperate demonstrates through their recalcitrant behaviour that these are futile. Repeated fines also prove unnecessary if a discretionary assessment suggests that appropriate taxation can be expected.

10 5 If the person required to cooperate complies only partially with a request addressed to them under threat of a penalty (for example, by submitting only part of the requested documents), this constitutes **partial non-compliance** with the reminder. However, as the person required to cooperate has not allowed the reminder period to elapse entirely without taking action, a renewed, final warning may be appropriate, with reference to the criminal consequences.

10 6 The warning constitutes a procedural **interim order** and is therefore not appealable in its own right, but only in conjunction with the final decision concluding the proceedings.

III. SUBJECTIVE ELEMENTS OF THE OFFENCE

10 7 A breach of procedural obligations is punishable whether committed with **(alternative) intent** or through **negligence**. The terms 'intentional' and 'negligent' correspond to those in Art. 12 para. 2 and 3 of the SCC.

10 8 It is a prerequisite that the perpetrator was objectively capable of performing the required act of cooperation. In the event of **objective impossibility**, the subjective elements of the offence are not fulfilled. Consequently, it is irrelevant whether the impossibility is attributable to the person required to cooperate, as otherwise criminal liability would be shifted to conduct occurring prior to the service of the reminder (see above N. 99).

Due to the requirement under the elements of the offence that the reminder be disregarded, the perpetrator's conduct is generally (alternatively) intentional. A **negligent commission of the offence** is conceivable, for example, if the reminder has come within the addressee's sphere of control but the addressee fails to take note of it out of mere negligence. 109

IV. AGGRAVATING CIRCUMSTANCES

A. Serious case

Whether a serious case within the meaning of Art. 174 para. 2 DBG exists is determined by the **significance of the breached duty** with regard to a proper assessment. A serious case exists in particular where a proper assessment is not possible, or is only possible to a very limited extent, without the cooperation of the person liable. This may be the case, for example, where self-employed persons fail to submit documents, thereby making their assessment considerably more difficult, or where the taxpayer fails to submit a tax return for years. 110

In addition, the assessment of the seriousness of the case must also take into account the presumed **amount of the tax factors** which cannot be reliably determined due to the breach of procedural obligations. 111

Furthermore, the **degree of reprehensibility** of the conduct of the person obliged to cooperate, in particular a pronounced attitude of refusal, must be taken into account. 112

It should be noted that the elements constituting a serious case are not taken into account again when determining the penalty in the context of culpability. 113

B. Recidivism

It is **controversial** in legal scholarship under what conditions recidivism within the meaning of Art. 174(2) DBG is to be assumed. 114

According to Agner/Jung/Steinmann, a person is a repeat offender if they have already been penalised in a previous tax period for a breach of duty, although serving the penalty is not a prerequisite. Behnisch notes that recidivism is to be understood as the breach of procedural obligations in various successive tax periods. According to Locher and Zweifel/Oesterhelt/Opel/Seiler, recidi- 115

vism exists if the offender has already been convicted once previously for a breach of procedural obligations – whether in a previous tax period or for a breach of the same procedural obligation following a further unsuccessful reminder. According to Sieber/Malla, – in line with the old definition of recidivism in the SCC (Art. 67 no. 1 para. 1 aStGB) – not sufficient for recidivism to be established if the offender has already been convicted once for a tax offence. Rather, the assumption of recidivism requires the enforcement of a criminal tax sanction, i.e. the (at least partial) payment of the fine or the enforcement proceedings directed towards it.

116 It is also disputed whether a **time limit** must be observed for the assumption of recidivism. According to Sieber/Malla, recidivism – by analogy with Section 108 of the former SCC – should only be taken into account if the procedural breach occurs within one year of the enforcement of a tax penalty. According to the view taken here, a time limit should be rejected, particularly as Section 108 of the former SCC was in any case repealed without replacement following the revision of the General Part of the SCC.

C. Minor case?

117 Whilst the law provides for a specific offence in the 'serious case' of a breach of procedural obligations, there is no separate provision for the 'minor case'.

118 Due to the constitutional principle of legality, the **principle of mandatory prosecution** also applies in criminal tax procedure law. Where the statutory requirements are met, the tax authorities are, in principle, obliged to take action.

119 Conversely, the question arises as to whether the **principle of discretion** applies to criminal tax offences in the area of direct taxation even without statutory provision, or whether a strict principle of legality must be followed. Under the principle of discretion, it would be at the discretion of the tax authority to refrain from criminal prosecution and thus from imposing a fine in a (very) minor case or where there is no need for punishment due to the insignificance of the culpability and the consequences of the offence.

120 In 2004, the Expert Commission on Criminal Tax Law proposed, amongst other things, the introduction of a provision enshrining the principle of discretion in the prosecution of tax offences in the DBG/ StHG. The proposed Art. 183(4) E-DBG provided that the competent authority may refrain from

initiating criminal proceedings if the degree of culpability is deemed to be minor or if the anticipated effort is disproportionate to the foreseeable legal consequences. However, the Federal Council decided against adopting this provision.

The explanatory report on the Federal Act on the Unification of Criminal Tax Law from 2013 then stated that the tax authority may refrain from initiating criminal proceedings or imposing a penalty if the culpability and the consequences of the offence are minor. The principle of discretion is based on the general part of the SCC and thus corresponds to the Swiss criminal law system (cf. Art. 52 SCC). Art. 52 SCC would be applicable via Art. 2 VStrR on the basis of Art. 180 para. 1 VE-DBG, which refers to the provisions of the Federal Act on Administrative Criminal Law (VStrR) for the procedure for the prosecution and adjudication of tax offences and administrative offences. Despite these efforts, the principle of discretion has not yet been incorporated into the text of the law. 12 1

The canton of Solothurn explicitly provides for minor cases in its tax law and authorises the waiver of a fine. According to Zurich tax practice, for example, punishment is generally waived in the case of a first-time breach of procedural obligations. In the canton of St. Gallen, a fine may be waived in cases of minor culpability or where the procedural act required for the assessment is likely to be of modest significance. The canton of Thurgau also explicitly provides for the waiver of penalties in cases of minor culpability or low fine amounts. Other cantons provide for a reduction or waiver of the fine in cases of (very) minor culpability (see below N. 139). 12 2

In legal scholarship, there are varying views regarding the applicability of the principle of discretion in criminal tax procedure law. An argument against applying the principle of discretion – and thus waiving prosecution in the area of direct taxes – is that this possibility is not provided for in the current Federal Act on Direct Taxes (DBG) and the Federal Act on Indirect Taxes (StHG) – unlike, for example, in VAT law. Conversely, the applicability of the general part of the SCC and thus also of Art. 52 SCC is justified by reference to Art. 333 para. 1 SCC. According to this provision, the general provisions of the SCC apply to acts punishable under other federal laws to the extent that those federal laws do not themselves lay down provisions. It is further argued that the tax authority – due to the limited nature of its human and material resources – is compelled, even without a legally regulated principle of discre- 12 3

tion, to concentrate its efforts in accordance with the principle of proportionality in order to optimise the public interest in criminal prosecution. However, a resource-based 'triage' must not lead to administrative practice resulting in a substantive alteration of the elements of the offence (e.g. through the introduction of a threshold for misconduct). The 'triage' must therefore not be based on the elements of the offence, but must be carried out in accordance with an overall assessment of the interests of criminal prosecution (e.g. based on the seriousness of the offence).

12 4 From a procedural economy perspective, it may seem sensible not to penalise minor offences. However, equal treatment of persons obliged to cooperate must be guaranteed in mass tax collection proceedings. The application of the principle of discretionary prosecution carries the risk of increased effort in distinguishing cases and providing justification, and could encourage inconsistent administrative practice.V. Unlawfulness and culpability.

V. ILLEGALITY AND CULPABILITY

12 5 Where the objective and subjective elements of the offence are fulfilled, conduct constituting the offence is present. For criminal liability to arise, the unlawfulness of the act and the guilt of the person concerned are also required.

12 6 Conduct constituting an offence is not unlawful if a ground for justification exists. The general grounds for justification under the SCC are relevant, namely acts permitted by law (Art. 14 SCC) as well as self-defence or necessity (Art. 15 et seq. SCC). In criminal tax law, however, these grounds for justification play hardly any practical role.

12 7 Examples of statutory justifications within the meaning of Art. 14 SCC include **professional secrecy** or **banking secrecy**.

12 8 Art. 124(4) DBG also contains **statutory justifications** for the late submission of a tax return. These include, amongst other things, illness; however, not every illness is sufficient to justify missing the deadline. Rather, it is a prerequisite that the illness is of such a serious nature that it prevents the taxpayer from acting within the deadline or from entrusting a third party with the submission.

12 9 In addition to the absence of grounds for justification, the imposition of a penalty requires the personal responsibility or culpability of person con-

cerned. The **principle of culpability** also applies in criminal tax law. The legal assessment of liability is based on the criteria of criminal responsibility, awareness of wrongdoing or knowledge of the prohibition, and the reasonableness of lawful conduct.

VI. PENALTY

A. General

The **fine** for a breach of procedural obligations amounts to up to **1,000 Swiss francs**; in serious cases or in the event of a repeat offence (see above N. 110 ff.), it amounts to up to **10,000 Swiss francs** (Art. 174 para. 2 DBG). 13 0

The tax administrative fine procedure is a **genuine criminal procedure** and the sanction to be imposed is a **genuine criminal penalty** (criminal nature). Accordingly, the procedural guarantees under criminal procedure, in particular Art. 6 of the ECHR, must be observed. 13 1

Criminal sanctions are **strictly personal in nature**, i.e. they must be paid by the person fined themselves and are therefore non-transferable and non-heritable. Holding the wife liable for her husband's tax evasion fine pursuant to Art. 13 para. 1 DBG is consequently incompatible with federal law. 13 2

B. Sentencing

Sentencing within the statutory penalty range must be determined on a case-by-case basis, taking into account the general principles of the SCC, i.e. in accordance with the **degree of culpability of the offender** (Art. 47 SCC in conjunction with Art. 333 para. 1 SCC and Art. 106 para. 3 SCC), . In criminal tax law, particular account must be taken of the seriousness of the threat to the legal interest, namely the significance of the breached procedural obligation for a lawful assessment, the modus operandi, the motives, and the personal and financial circumstances of the offender. 13 3

The fine must also be effective, i.e. it must be of an amount that effectively compels the person subject to the duty of cooperation to fulfil their obligations. Effectiveness depends in particular on the **presumed amount of the tax factors** and the resulting tax; the higher these are, the higher the fine must be in order to fulfil its purpose. 13 4

135 Since a fine is already the mildest form of penalty and Art. 174 DBG does not provide for a minimum fine, any grounds for *mitigation* of the penalty (cf. Art. 48 SCC) that allow the penalty range to be reduced (cf. Art. 48a SCC) must be taken into account solely as *mitigating* factors.

136 Since the fines imposed for a breach of procedural obligations tend to be lower, Richner/Frei/Kaufmann/Rohner take the view that sentencing can be carried out in a more **schematic manner**.

137 The cantonal tax and tax judicial authorities have a wide **discretion regarding legal consequences** when determining the penalty in individual cases.

138 Some cantonal tax administrations have **fine tables** which set the amount of the standard fine depending on income and the number of previous fines, in order to ensure a uniform (and thus legally consistent) assessment of fines within the canton. Other cantons provide for a specific **sequence of fines** (e.g. 1st fine: CHF 250, 2nd fine: CHF 500, 3rd fine: CHF 1,000) or differentiate according to the procedural obligation breached (e.g. failure to submit a tax return: standard case: CHF 100; failure to keep proper accounts: CHF 500). However, to do justice to individual cases and the principle of culpability, deviations must be possible.

139 **Mitigating factors** are provided for in some cantons, whereby the fine may be reduced or even waived in cases of very slight culpability, inexperience, clumsiness or advanced age, as well as where there are excusable grounds (for the waiver of prosecution or punishment, see 1 above). The fact that the person required to cooperate subsequently fulfils their procedural obligation, and thus behaves cooperatively, must also be taken into account as a mitigating factor.

140 **Aggravating factors**, on the other hand, may include reprehensible, recalcitrant, quarrelsome or manifestly indifferent behaviour, although it should be noted that behaviour constituting a serious case is not taken into account again as an aggravating factor when assessing culpability.

VII. CONCURRENCE

141 Where **a perpetrator commits several criminal offences**, the question arises as to the relationship between the offences. The doctrine of concurrence in criminal law (cf. Art. 49 SCC) clarifies which of the criminal offences

committed by the perpetrator are to be taken into account when determining the sentence.

Improper concurrence (*legal concurrence*) exists where one or more acts fulfil different elements of an offence, but one element *takes precedence* over the others and *excludes* their application. The displacement or precedence of a penal provision may arise on the basis of speciality, subsidiarity, consumption, alternativity or a co-punished prior or subsequent offence.

True concurrence, by contrast, is to be assumed where one or more acts fulfil different elements of an offence which are not superseded under the rules of false concurrence, but remain applicable *concurrently* (*true concurrence*). 14 3

Ideal concurrence exists where *a single* act fulfils the same element of an offence multiple times or fulfils several different elements of an offence. 14 4

Real concurrence exists where *several* acts fulfil the same offence multiple times or fulfil several different offences. 14 5

There is **genuine concurrence** in the form of **ideal concurrence** between Art. 174 DBG and Art. 55 StHG, as the provisions protect different legal interests. Art. 174 DBG ultimately protects the federal government's tax claim, whilst the cantonal implementing provisions under Art. 55 StHG protect those of the cantons and municipalities. Consequently, there is no prohibited double punishment if two fines are imposed for the same tax period in respect of cantonal and federal taxes respectively. 14 6

There is **disagreement** in legal scholarship regarding the relationship between Art. 174 DBG (breach of procedural obligations) and Art. 175 DBG (tax evasion). Some scholars, on the basis of the classification of the breach of procedural obligations as an offence of disobedience, apply genuine concurrence (i.e. no priority of application). According to this view, the wrongful nature of the breach of procedural obligations, which manifests itself in the failure to comply with a demand for payment, is not fully covered by Art. 175 DBG. Art. 174 DBG therefore has an independent scope of application even in the case of tax evasion. Other schools of thought, however, assume non-genuine concurrence (absorption), as tax evasion also encompasses the wrongful nature of the breach of procedural obligations. 14 7

The Federal Supreme Court ruled, under the old law, that Article 131(1) of the Federal Criminal Code (breach of procedural obligations) and Article 129(1) of 14 8

the Federal Criminal Code (tax evasion) protect **different legal interests**, which is why each offence can be punished separately without a violation of the ' ne bis in idem' principle. Since the criminal conduct of the two offences is not the same, it is possible for both offences to be committed cumulatively and independently. However, in the subsequent punishment of a breach of Art. 129 para. 1 BdBSt, the Federal Supreme Court – the sanction imposed pursuant to Art. 131 para. 1 BdBSt must be taken into account.

14 9 A typical **scenario** illustrating this is the persistent refusal to cooperate despite an otherwise transparent tax return. The taxpayer declares their income correctly but, despite a reminder, refuses to submit the necessary supporting documents. This does not constitute tax evasion, as the declared figures are correct. Disobedience of the official order thus leads to the (exclusive) application of Art. 174 DBG. The reverse may also apply: if, on the other hand, the taxpayer incorrectly declares their income, but submits the required supporting documents upon the first request and thus before a reminder is issued, they can only be punished for tax evasion. This illustrates that Art. 174 DBG only applies where a reminder is not complied with, whereas this is irrelevant to the offence under Art. 175 DBG.

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