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Portugal: Law & Practice
and
Portugal: Trends & Developments

Francisco de Sousa da Câmara, Bruno Santiago and Inês Salema Morais Leitão, Galvão Teles, Soares da Silva & Associados
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Law and Practice

Contributed by:
Francisco de Sousa da Câmara, Bruno Santiago and Inês Salema
Morais Leitão, Galvão Teles, Soares da Silva & Associados

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Morais Leitão, Galvão Teles, Soares da Silva & Associados is a leading full-service law firm in Portugal, with a solid background and decades of experience. Widely recognised, Morais Leitão is a reference in several branches and sectors of the law at national and international level. The firm’s reputation amongst both peers and clients stems from the excellence of the legal services provided. Morais Leitão’s work is characterised by its unique technical expertise, combined with a distinctive approach and cutting-edge solutions that often challenge some of the most conventional practices. With a team comprising over 250 lawyers at its clients’ disposal, Morais Leitão is headquartered in Lisbon and has additional offices in Porto and Funchal. Due to its network of associations and alliances with local firms and the creation of the Morais Leitão Legal Circle in 2010, the firm can also offer support through offices in Angola (ALC Advogados) and Mozambique (HRA Advogados).

Authors

Francisco de Sousa da Câmara is a senior partner at Morais Leitão who has headed the tax teams in Lisbon and Madeira for more than two decades. He specialises in complex tax litigation involving domestic and international tax issues, and focuses on handling files before all types of courts. He is also a CAA-recognised arbitrator. Francisco advises high net worth individuals and family office businesses and structures. He has been involved in drafting tax legislation, including the General Tax Law, the Tax Procedure and Process Code, and a project for a wealth tax reform. Francisco regularly contributes to a range of tax-focused publications, both in Portugal and internationally.

Bruno Santiago is a partner at Morais Leitão who specialises in tax law, with a focus on domestic and international taxation, both in consulting and in dispute resolution. He co-ordinates dedicated teams advising clients on cross-border transactions and transfer pricing, taking advantage of his knowledge of Angolan and Mozambican taxation. Bruno is also very active in the area of tax disputes and arbitration, covering income taxes, value-added tax, property taxes as well as stamp duty on financial operations; and in administrative, judicial and penalties proceedings. Bruno represents clients from sectors including financial services, oil and gas, energy, real estate and construction, media and advertising, and pharmaceuticals, as well as private clients.
Inês Salema is a senior associate at Morais Leitão who practises in the area of domestic and international taxation, both in dispute resolution and in consulting. She has a strong focus on tax litigation (administrative and judicial procedures), across a wide range of issues, but with an emphasis on local, regulatory and port charges. Inês works in the field of tax consultation on various matters, including the taxation of individuals in an employment context (taxation of fringe benefits, stock options and compensation for termination of employment contracts). She has also been actively working on the taxation of fortuitous gains, from both an individual and a business perspective.
1. Tax Controversies

1.1 Tax Controversies in This Jurisdiction
Most tax controversies have their origin in a tax assessment, which may be made by the tax authorities (as is the case with personal income tax and with the tax on the acquisition of immovable property, based on information disclosed by taxpayers) or directly by taxpayers (as is generally the case with corporate income tax (CIT) and value-added tax (VAT)).

Tax controversies may arise for numerous reasons, although in most cases they arise because of an alleged illegality identified by the tax authorities during administrative tax audits that lead to additional tax assessments.

1.2 Causes of Tax Controversies
Most tax controversies arise from corporate income tax disputes, in particular regarding the non-recognition of certain costs for CIT purposes by the tax authorities.

Nonetheless, there are some pending cases related to more cutting-edge topics, such as controlled foreign corporations (CFCs), transfer pricing and the general anti-avoidance rule (GAAR).

Additionally, considering that recent years have seen the creation of sectoral taxes (eg, on banking, pharmaceuticals or the energy industry) that generate very high assessments, such taxes have given rise to a significant number of tax disputes.

1.3 Avoidance of Tax Controversies

Binding Rulings
Through such binding rulings taxpayers may, for instance, request advance clearance on the tax and legal qualification of certain highly complex transactions.

At the request of the taxpayer, and where duly justified, the binding ruling may be provided urgently within 75 days, as long as the taxpayer presents a proposal for the tax treatment considered applicable. A fee ranging between EUR2,550 and EUR25,500 is payable by the taxpayer to the tax authorities in such cases.

If the tax authorities recognise the urgency of the matter and the binding ruling is not issued within 75 days, it is considered that the tax authorities agree with the proposal of the tax treatment presented by the taxpayer.

Non-urgent binding rulings are free of charge and should be given within 150 days after the submission of the request. This deadline is considered merely indicative.

Advance Pricing Agreements
Another way to mitigate tax controversies, considering that in recent years the number of transfer pricing disputes has grown significantly, is to enter into an advance pricing agreement (APA) with the tax authorities. Such agreements may be unilateral, bilateral or multilateral.

APAs give legal certainty to taxpayers when conducting transactions with related entities (including parent companies, subsidiaries or associated companies, branches and other permanent establishments) provided that taxpayers comply with the terms and conditions of the APAs in question.
1.4 Efforts to Combat Tax Avoidance
Over the years Portugal has already put in place a number of measures to combat tax avoidance; these include:

- rules preventing the tax deductibility of payments to entities located in low-tax jurisdictions;
- interest barrier rules;
- CFC rules;
- exit tax rules; and
- the last set of rules (the GAAR and its procedural provisions) that allow the tax authorities to recharacterise operations as purely fictional.

Anti-Tax Avoidance Directives
Nonetheless, in May 2019 and in July 2020 the Portuguese Parliament formally implemented the Anti-Tax Avoidance Directives I and II into Portuguese Law.

Through this legislation the Portuguese tax system adopts the common solutions defined in the context of the EU, in line with the conclusions of the final reports of the G20 and the OECD project on the erosion of the tax base and the artificial shifting of profits (BEPS) to ensure that co-ordinated measures are implemented to discourage tax avoidance practices more effectively; to ensure fair and effective taxation; and to protect tax systems, at a global level, against aggressive fiscal planning.

This legislation includes amendments to the CIT Code and to the GAAR and its procedural provisions, currently provided for in the General Tax Law and the Tax Procedure and Process Code.

1.5 Additional Tax Assessments
The taxpayer may challenge an additional tax assessment through an administrative, a judicial or an arbitration claim.

Tax disputes may involve both an administrative and a judicial or arbitration phase; they can start and finish as an administrative or a judicial or arbitration process, but they can also start as an administrative process that evolves into a judicial or arbitration one if the taxpayer is not satisfied with the final decision of the tax authorities.

Neither of these claims, by itself, suspends the foreclosure file. As a rule, the taxpayer must also pay the tax assessed or render a guarantee to suspend the foreclosure file while the claim is being heard; and if the taxpayer is not successful with the administrative, judicial or arbitration award and the latter becomes res judicata, the foreclosure file is immediately activated and enforced.

In the case of disputes related to additional tax assessments made by the tax authorities, the taxpayer will also be notified of an infraction procedure. Notwithstanding the possibility of immediately paying the administrative penalty or challenging the decision that determined the administrative penalty on its own merits, the law provides that this process may remain suspended until a final decision is reached in the tax dispute concerning the legality of the tax assessment. Usually, taxpayers opt for the latter alternative because the infraction file will be closed if they win the tax dispute.
2. Tax Audits

2.1 Main Rules Determining Tax Audits
Primarily, tax audits follow the general National Plan for tax and customs audits (the so-called PNAITA) that is approved every year by the government. The National Plan defines the programme of action, the criteria to be used and the taxpayers to be audited and establishes the targets to be achieved by the different tax services.

However, other tax audits may also be initiated during the year and the Plan should allocate specific human and material resources to tax audits not previously established. Although the National Plan is confidential, the tax and customs authorities must disclose the general criteria defined to select taxpayers and other entities that will be subject to a tax audit.

Tax audits may, therefore, be initiated following:

• the National Plan for tax and customs audits;
• European or international (eg, OECD) guidelines that tax authorities decide to enforce;
• the application of randomised methods for the selection of taxpayers;
• specific denunciations lodged before the tax authorities; and
• the verification of abnormal behaviour or parameters that do not follow from the ordinary patterns expected of a specific activity or wealth situation.

Heavily Audited Individuals and Companies
Moreover, specific taxpayers are permanently on the radar of the Portuguese tax authorities, in particular large companies and high net worth individuals (HNWI).

Under the current regulations, these entities are accompanied by a special large taxpayers’ unit (LTU) that targets such entities using the following criteria.

• HNWI – individuals with:
  (a) income above EUR750,000 in a specific year;
  (b) ownership, directly or indirectly, of wealth (including assets and rights) worth more than EUR5 million;
  (c) a lifestyle commensurate with the above-mentioned income or wealth and/or possession of the related accoutrements; or
  (d) the existence of a legal or economic relationship with HNWI or with companies or entities that are followed by the LTU.

• Large companies – if:
  (a) they are entities supervised by the Central Bank or by the Insurance and Pensions Funds Authority (with the exception of those that carry out the activity of insurance distribution), or which are collective investment undertakings under the supervision of the Portuguese Securities Market Commission, or if they are entities with a turnover, or total income, in the case of holding companies, exceeding EUR1.2 billion or, in the case of an entity belonging to a group of companies subject to the CbC report, exceeding EUR2.1 billion;
  (b) they have in force an advance pricing agreement on transfer pricing matters;
  (c) they have a total tax bill in excess of EUR20 million per year;
  (d) they are companies that are considered relevant despite not meeting the above-mentioned criteria because of their relationship with entities that do meet the criteria; or
  (e) they make up part of a tax group for corporate income tax purposes and any
Strategic Plan to Combat Tax and Customs Fraud and Evasion
The government also prepares and releases a triennial Strategic Plan to Combat Tax and Customs Fraud and Evasion (the current one concerns the period 2018-20, which was extended by an addendum for 2021-2022 and is still being applied in 2023, despite not being formally extended for this year), and presents an annual report to Parliament, setting out the relevant actions that were put in place to achieve those goals and presenting statistics on different subjects under analysis.

2.2 Initiation and Duration of a Tax Audit
As a rule, a tax audit may be initiated within the statute of limitations period, which in principle corresponds to a four-year period following the taxable event. If a criminal proceeding related to the tax audit is initiated within that period, the statute of limitations is extended and the tax authorities may make a tax assessment until the end of the year following the date on which that proceeding is closed, or a final decision becomes res judicata.

Usually a tax audit that takes place in the taxpayer’s premises should be concluded in a six-month period but, in specific circumstances, that period may be extended for two additional periods of three months each. The tax audit suspends the statute of limitations period during those six months.

When a mistake that may trigger an additional tax assessment was evidenced in the tax return, the statute of limitations period decreases to three years. On the other hand, the statute of limitations period increases to 12 years in two situations, namely when the tax authorities encounter difficulties in making additional tax assessments in the following instances:

- when the tax event, not reported to the tax authorities in due time, is connected with low-tax jurisdictions, as foreseen in the blacklist approved by the Minister of Finance; or
- when the tax event is connected with bank accounts (cash or securities) opened with a non-EU financial institution or branches located outside the EU and those accounts are not mentioned in the tax returns presented by taxpayers.

2.3 Location and Procedure of Tax Audits
The audits may occur in the tax authorities’ headquarters or the taxpayer’s premises. The latter inspection is the so-called external audit and usually occurs in the taxpayer’s head office or other location where the accounting ledgers are maintained; all this information (eg, inventory, assets, VAT registers, any other types of records) is currently kept on computers, but physical documents on paper still exist (eg, invoices). In addition, the board of directors’ minutes and general shareholders’ meeting minutes are also provided in physical books. The tax authorities may also ask to see any specific elements or documents and may make special visits to the taxpayers’ offices, namely, to verify if the records are duly updated and/or to see inventory, etc.

The tax authorities can only make one external audit related to the same tax or year of a specific taxpayer, unless a specific grounded decision is adopted by the head of the tax services, namely invoking new facts.
Under their rights and powers, the tax authorities may:

- ask for all types of elements and documents that reveal the taxpayer’s situation;
- proceed with a physical inventory, including the identification and evaluation of assets;
- analyse and test all computer data and electronic archives either to check compliance matters (e.g., tax return compliance or tax payments), tax accounts and tax reporting, specific operations (e.g., mergers, divisions) or specific matters such as transfer pricing, tax-consolidation rules of a group or specific payments abroad, in particular to low-tax jurisdictions;
- send specific questionnaires to taxpayers or obtain specific oral statements from them;
- obtain information from other taxpayers that relate to the specific taxpayer subject to the tax audit;
- collect information from other tax authorities under the EU directives, bilateral tax treaties or any other international treaties or “arrangements”; and
- in addition to all financial documentation (including invoices, receipts, credit or debit notes, banking information), also ask to see reports prepared by the taxpayer’s accountants, auditors or lawyers, although confidentiality rules may apply and prevent them from being revealed in specific cases.

Taxpayers are often accompanied by their legal and tax advisers during the tax inspections and, in the case of companies, they should also appoint a representative who accompanies the tax auditor within the company’s premises.

2.4 Areas of Special Attention in Tax Audits

Tax audits can be general or specific. The former generally cover all types of taxes, although the most common audits only cover income taxes, VAT, real estate taxes or stamp duty. They may also be very specific, covering one of the taxes above-mentioned or any other.

General tax audits are usually designed to verify the global position of a specific taxpayer, whereas specific tax audits are commonly launched to verify a particular aspect within a sector or activity (e.g., to verify whether and how financial institutions are dealing with a specific stamp duty or VAT issue).

Usually the tax authorities review the company’s accounts and review its financial accounting compliance and tax obligations. Depending on the type of tax audit (a general or a specific one), the tax authorities may ask to examine:

- samples of sale and purchase invoices to verify if they comply with VAT and corporate income tax regulations;
- the information contained in different types of documents, reports and statements to verify if results are consistent;
- the transfer pricing documentation and the intra-group transactions, including the relationships between the company and associated companies and/or permanent establishments;
- formalities observed in specific operations (e.g., neutral mergers, divisions, transfer of
assets or exchange of shares, the transfer of a head office);
• transactions concluded with entities located in low-tax jurisdictions and, in particular, payments made to them;
• the consolidated tax return and the different returns presented by all the companies belonging to a specific group as well as the formalities that those companies are, or are not, observing;
• payments abroad and all matters related to the proper application of withholding taxes;
• intra-community VAT operations or VAT deductions, or financial operations made by financial institutions often subject to stamp duties; and
• customs matters (often related to the qualification of items).

Both formal requirements and substantive issues constitute top priorities for the tax authorities and litigation often arises because the tax authorities consider that taxpayers have failed to observe formal requirements in order to benefit from a specific tax regime (eg, a neutral merger operation, the consolidation tax regime or a waiver of a withholding tax), or reach the conclusion that a specific operation or a sequence of operations cannot produce the tax result intended by the taxpayer, either considering a specific violation of a substantive tax rule or invoking a specific or the general anti-avoidance rule.

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

Cross-border exchanges of information and mutual assistance between tax authorities have been increasing over the years, although the numbers, in some areas, are not yet very significant.

The Portuguese tax authorities’ Report of Activities released in 2021, and referring to 2020, evidences the following number of requests for mutual assistance (MA) in the areas of customs/excises.

• Customs areas – three Portuguese requests for MA from other states, 78 where Portugal was a recipient of requests from other states, 81 in total.
• Excises – One Portuguese request for MA from other states, eight where Portugal was a recipient of requests from other states, nine in total.
• Naples Convention II – 12 Portuguese requests for MA from other states, 26 where Portugal was a recipient of requests from other states, 38 in total.
• Total – 16 Portuguese requests for MA from other states, 112 where Portugal was a recipient of requests from other states, 128 in total.

Moreover, in relation to the co-operation between the Portuguese tax authorities and the EC – mainly the Directorate-General for Taxation and Customs Union (DG TAXUD) and the European Anti-Fraud Office (OLAF) – in 2020, according to the Portuguese tax authorities’ Report of Activities (released in 2021 and referring to 2020), Portugal received a total of 1,845 forms of information of significant risks that required specific analysis and treatment, and 51 specific indications of fraud and serious irregularities detected by OLAF.

The cross-border exchanges of information in relation to income taxes in 2020 may be summarised as follows.

• Requests – 229 received, 317 sent.
• Spontaneous – 65 received, 61 sent.
• Automatic – 1,615,193 received, 2,697,365 sent.

In 2017, under VAT EU Regulation No 904/2010, concerning administrative co-operation and the fight against VAT fraud – through the Central Liaison Office (CLO), participation in the Eurofisc network and participation in Multilateral Controls – 1,417 files were initiated concerning the exchange of information, at the request of member states. Of these, 483 files originated in requests from other tax authorities and 958 in requests made by the Portuguese tax authorities.

The exchange of information between the tax authorities of different member states and their mutual assistance is obviously influencing the growth of tax audits as well as the sophistication and the level of information that the Portuguese tax authorities currently have in relation to taxpayers that do business abroad and/or have cross-border connections.

2.6 Strategic Points for Consideration During Tax Audits

In general, it is important to take the following steps before and during a tax audit.

• To prepare the right documentation to release to the tax inspector and to be able to explain it, including all the relevant facts related to that documentation.
• To know beforehand the legal and formal requirements that the tax authorities and the taxpayer should observe during the tax audit in relation to all relevant aspects (scope, duration, timetables, obligation to provide documents, how to reply to questionnaires, how and when to require deadline extensions, etc).

• To evaluate the tax contingencies at an early stage and to verify whether it is better to regularise the situation immediately (without penalties or with less penalties) or how it might be possible to mitigate and reduce adverse tax and other consequences (e.g., infringement or even criminal penalties).
• To be assisted by a tax lawyer before the tax inspection is initiated and during its course.
• To provide documentation and clarifications to the tax audit accurately.
• To decide what to say (or not to say) after receiving the tax audit draft, considering that, as a rule, the tax authorities will have the possibility to review it before issuing their final report.

3. Administrative Litigation

3.1 Administrative Claim Phase

There are situations where an administrative claim is mandatory before initiating a judicial phase, namely in situations of self-assessment, withholding taxes, payments on account of the final tax due or custom duties, when the claim is related to the origin, classification, or customs value of the product.

However, in situations of additional tax assessment, the administrative claim phase is always optional.

The administrative claim should be presented in the local tax office of the area where the taxpayer is domiciled, or where the tax assessment took place, or of the location of the assets; it also can be sent electronically through the tax authorities’ website. Although the administrative claim should be presented in the local tax office, it should be decided by the regional tax directorate (in Portugal the tax authorities are
formed by the central services, regional tax directorates and local tax offices). The deadline for the presentation of the claim is 120 days, counted from the first day inclusive following the termination of the deadline to pay the additional assessment, which should be around 30 days after the assessment is made. If the additional tax assessment does not give rise to an obligation to pay a certain amount of tax (for instance, the taxpayer had tax losses and the result of the additional tax assessment was a reduction of the available tax losses), the 120-day deadline to present the administrative claim should be counted from the notification of the assessment.

The procedure of the administrative claim, up to the final decision, is determined by law to be simple and without formalities. In this regard it is worth mentioning that, as a rule, in the administrative phase of tax litigation there are no costs or fees due to the administration, but the proof is limited to the documentation made available and only exceptionally will the tax authorities decide to hear witnesses. Moreover, this phase (as well as the eventual subsequent judicial phase) does not, by itself, suspend the enforcement and collection of the tax assessed, which means that to avoid the seizure of assets, the taxpayer should pay the assessment or present a guarantee to the tax authorities (exceptionally, it can be released from this duty, namely if the taxpayer is able to demonstrate economic hardship or that the presentation of the guarantee will cause irreparable damage). Finally, if the tax authorities intend to dismiss the administrative claim, they should notify the taxpayer, allowing them to react to the projected dismissal within a deadline of between 15 and 25 days. In their final decision, the tax authorities should take into consideration the reasons invoked by the taxpayer and the grounds on which they were rejected.

3.2 Deadline for Administrative Claims
Notwithstanding specific deadlines that may apply to specific administrative procedures or claims, the main rule stipulates that any tax procedure (including, therefore, an administrative claim) shall be decided within four months.

The consequence of the tax authorities not complying with this deadline is that the taxpayer may presume that the claim was tacitly denied for the purposes of appealing against that tacit negative decision. The practical effect of this rule is to allow speeding up of litigation; ie, instead of waiting sine diem for a decision from the tax authorities, the taxpayer may presume that the appeal was dismissed at the end of the four-month period and appeal to court against that tacit negative decision.

Taxpayers frequently use this rule in a strategic move because (i) they try to convince tax authorities at the administrative level first, and (ii) the deadlines to lodge administrative claims terminate after the deadlines to go directly to court. Accordingly, it is relatively common to see taxpayers presenting an administrative claim and, at the end of the fourth month, appealing to a court assuming the tacit denial of the claim. Instead of going to court, taxpayers can also make a hierarchical appeal against the tacit negative decision and, on the express or tacit negative decision of the hierarchical appeal, subsequently go to court.

Otherwise – ie, if the tax authorities manage to decide the appeal in the said timeframe – taxpayers can also go to court against an express denial of the administrative appeal.

However, whilst the deadline to lodge a judicial claim is 90 days after the notification of the denial of the administrative claim or after the tacit
negative decision of such claim, the deadline to present the hierarchical appeal is 30 days counting from the same events. According to the law, hierarchical appeals should be decided within 60 days; however, this deadline is considered merely indicative and it is frequently not complied with. Taxpayers may consider that a tacit negative decision has occurred at the end of the 60-day term for the purpose of reacting against that negative decision.

4. Judicial Litigation: First Instance

4.1 Initiation of Judicial Tax Litigation
Judicial tax litigation is initiated with the presentation of the claim in writing to the court of first instance. The claim may be sent by mail or by electronic means through the dedicated website of the tax (and administrative) courts. The claims can be presented directly by taxpayers, except if the value of the claim exceeds EUR10,000, in which case it is mandatory to appoint a lawyer registered with the Portuguese Bar Association. The claim has to be presented in articles, identify the act contested, and expose the circumstances of fact and the law that ground the final request. Moreover, the value of the claim shall also be indicated. Finally, the petitioners shall indicate their witnesses, other means of proof they wish to use and, in an annex to the claim, the petitioners shall attach the documentary evidence at their disposal.

4.2 Procedure of Judicial Tax Litigation
After the presentation of the claim, the court attributes a number to the case and the process is distributed to a judge who notifies the tax authorities of the need to contest the claim within three months. The tax authorities are represented in court by a specific body called Representantes da Fazenda Pública, whose function is to represent the tax authorities in the thousands of files pending in the courts.

Although contestation is not mandatory, the tax authorities normally contest within the said deadline. Within the deadline available to contest the claim, the tax authorities shall also gather the available information related to the process (the administrative file) and present it to the court.

If there is a partial revocation of the act, the tax authorities shall, within three days, notify the taxpayers to confirm, within ten days, if they want to continue with the judicial claim.

If the act is totally revoked, the tax authorities shall contact the person representing the tax authorities in court to promote the termination of the judicial claim.

After the response of the tax authorities to the taxpayer’s petition and if the litigation is related to a strictly legal matter, the judge may decide upon the claim immediately after it has passed through the Public Prosecutor in the court.

If witnesses shall be heard or other forms of proof shall be presented, such as inspections or expert hearings, the judge shall notify the parties of the relevant date to produce those forms. The number of witnesses to be heard in relation to each fact shall not exceed three and the maximum number of witnesses allowed is ten. The hearing shall occur in court and the testimonials shall be duly recorded. If witnesses are resident in an area not covered by the territorial jurisdiction of the court, they may be present in the court of the area where they live and be heard and interrogated through videoconference. The claimant as well as the person representing the tax authorities may directly interrogate the witnesses.
Once the presentation of proof is terminated, the judge shall notify the parties to produce their final written allegations with a minimum deadline of ten days, which shall not exceed 30 days.

Finally, before the decision, the claim shall be presented to the Public Prosecutor in the court who may pronounce on the matters under discussion. The Public Prosecutor’s opinion is not binding upon the judge.

4.3 Relevance of Evidence in Judicial Tax Litigation

In principle, the proof must be presented (in the case of documentation or witnesses) or requested (in the case of inspections or expert witness) immediately with the presentation of the claim in writing to the court of first instance. Exceptionally, mainly if it is demonstrable that it was not possible to present or request the proof earlier, it is possible to present or request such proof afterwards.

Although it is not stated as such in the law, there is a clear preference for documentary evidence in tax litigation in comparison with witness testimony or other types of proof. If there are no witnesses to be heard – and in a considerable number of cases there are not – the entire case from its beginning to its termination will occur without any personal contact between the parties and the judge as all the contact is in writing.

If witnesses are to be heard and questioned by the judge and the parties, it is up to the judge to schedule a hearing after the tax authorities have presented their answer to the taxpayer’s petition. Both the taxpayer and the tax authorities can request the hearing of witnesses. Usually, in the tax authorities’ case, their witnesses will be their agents. Witnesses are first questioned by the judge, then by the party that has requested their hearing and they can be subsequently cross-examined by the other party.

4.4 Burden of Proof in Judicial Tax Litigation

The burden of proof is with the party that invokes a certain fact to be proved. As a rule, the tax authorities invoke and should prove their claims in the audit report, therefore grounding the tax assessment, and it is for the taxpayer to challenge such views and refute those proofs in the administrative or judicial claim.

In criminal tax litigation, the burden of proof rests with the Public Prosecutor.

4.5 Strategic Options in Judicial Tax Litigation

Evidence

From a strategic perspective – and taking into consideration the limitations established by the law of the process as well as the fundamental audi alteram partem principle – it is advisable, as a rule, for all the evidence to be presented or requested at the beginning, as well as all the legal arguments.

Settlement

The possibility of settlement, namely through an agreement whereby both the taxpayer and the tax authorities would retract part of what they are claiming, is not possible. Among other motives this is due to the fact that the law clearly states that the tax authorities’ credit (ie, the amount of tax) is not at their disposal.

Paying Upfront

The option to pay or not to pay the tax while the dispute is pending is mainly a financial issue that the taxpayer has to weigh. In favour of paying the tax one can essentially invoke that, on the one hand, this is reflected on the company’s
financial accounts and, on the other hand, if it wins the case, in principle it will be entitled to interest, currently at the rate of 4% per year. Taking into account the interest rate offered by banks operating in Portugal, it can be quite advantageous from a financial perspective to opt to pay the tax and then receive back the tax paid with interest. If the taxpayer opts not to pay the tax, it will have to constitute a guarantee to the benefit of the tax authorities. In considering this option the taxpayer has to weigh the fact that the guarantee has costs, firstly a tax cost related to stamp duty due on guarantees and then variable costs depending on the type of guarantee chosen (e.g., bank commissions or notary costs). Moreover, in connection with this option, the taxpayer should also consider that while the case is pending, interest will continue to be computed and will be due if the taxpayer loses the case. On the other hand, if the taxpayer wins the case, as a rule, it is possible to recover this cost.

Finally, the taxpayer can also opt to pay the tax in instalments. Depending on the amount due, payment in instalments, to be accepted by the tax authorities, may oblige the presentation of a guarantee.

**Expert Reports**

The presentation of expert reports or professors’ opinions is also something to consider. Their use will depend on the type of case. If the file includes complex non-legal matters, expert reports may be relevant to help the judge to understand the situation. In the case of complex legal matters, opinions from scholars may also be worth considering. Although these reports and opinions are not binding on the judge, they are usually taken into consideration.

### 4.6 Relevance of Jurisprudence and Guidelines to Judicial Tax Litigation

In litigation related to international tax matters, it is common for the courts to take into account relevant jurisprudence (mainly from the ECJ) and international guidelines (mainly the different versions of the commentaries to the OECD Model Tax Convention or to the OECD Transfer Pricing Guidelines).

### 5. Judicial Litigation: Appeals

#### 5.1 System for Appealing Judicial Tax Litigation

There are two appellate courts, the Administrative Central Court (ACC) North and the ACC South, and one Administrative Supreme Court (ASC).

The ACC South is situated in Lisbon and essentially covers the southern area of the country, and the ACC North is situated in Porto and covers the northern area of the country. The ASC is also located in Lisbon and covers the entire country.

Whoever loses the case at first instance – the taxpayer or the tax authorities – or both in the event that both parties lose part of the case, may take the case to the ACCs in the event of a disagreement over the facts and the law decided at first instance, or to the ASC in the event of a disagreement exclusively based on matters of law.

The appeal is only precluded if the value of the case (in cases challenging tax assessments, the amount of tax in litigation) is lower than EUR5,000.
From the decision of the ACCs or of the ASC, the taxpayer or the tax authorities may in exceptional cases still lodge a second appeal to the ASC based on a contradiction of a previous judgment or go to the Constitutional Court in cases where there is a constitutional issue at stake.

If there are uncertainties as to whether a tax assessment violates EU law, the final-instance court shall file a request for a preliminary ruling to the Court of Justice of the European Union. In contrast to the final-instance court, the courts of first instance are not obliged to file such a request and the occasions on which such courts have opted to request a preliminary ruling voluntarily are scarce.

5.2 Stages in the Tax Appeal Procedure
The appeal is launched in the court of first instance within 30 days of a final decision and shall include the appellant’s statements. If the appeal is admitted by the court of first instance (it is only precluded if the value of the case is lower than EUR5,000), the other party will then have 30 days to submit its response. The appeal then goes to the ACCs or the ASC, where it will await a decision. Where the purpose of the appeal is to review recorded evidence, the above-mentioned deadlines are increased by ten days each.

5.3 Judges and Decisions in Tax Appeals
The ACCs and the ASC each have one chamber for tax law appeals and actions, and another chamber that deals only with administrative law appeals and actions.

The decisions of the appellate courts are rendered by the majority decision of a panel of three judges. The judges are appointed by the court randomly. If there is no unanimity, the dissenting judge may publish their reasons for the dissenting vote.

6. Alternative Dispute Resolution (ADR) Mechanisms

6.1 Mechanisms for Tax-Related ADR in This Jurisdiction
Portugal adopted an arbitration regime to settle tax disputes as an alternative dispute resolution (ADR) mechanism in 2011. Tax arbitration courts (TACs) were created to solve domestic tax disputes regardless of whether they involve domestic, EU or international tax law.

TACs must decide the cases based on the written law, being expressly prohibited from resorting to equity. In a nutshell, TACs should decide tax cases based on the same legal framework available to judicial tax courts.

According to this regime, the tax authorities are bound by arbitration decisions for almost all types of tax disputes with a value of up to EUR10 million.

Mediation has not yet been established, although several proposals exist to create a specific regime in some areas.

Moreover, at the international level and where tax disputes involve the relationships between states, tax arbitration becomes the ultimate resort to settle those disputes.

6.2 Settlement of Tax Disputes by Means of ADR
Under the arbitration regime, disputes are settled by TACs that can be constituted by a single arbitrator (usually for controversies of low value – up to EUR60,000) or a panel of three arbitrators (cases up to EUR10 million).

The linchpin of the tax arbitration project was deciding how the judges would be chosen/
appointed by the parties involved or by a third party.

Provided the disputed amount exceeds EUR60,000, or the taxpayer chooses to appoint an arbitrator, the arbitration court is formed by a panel of three arbiters. Otherwise, the case will be settled by way of a decision of a single arbiter. The majority of cases are decided by a single arbitrator appointed by the Ethics Committee of the Centre for Administrative Arbitration (CAA).

Cases are initiated by a specific request filed electronically to CAA, which also indicates whether the taxpayer intends to appoint a specific arbitrator. Cases must be settled in a period of six months following the creation of the TAC, which nevertheless may be extended for a further six-month period.

TACs receive the written arguments of both parties (first taxpayers, usually contesting a tax assessment grounded in an audit report, and then the tax authorities) and analyse the merits of the claim, hear witnesses and eventually the parties or experts, and they decide in writing.

6.3 Agreements to Reduce Tax Assessments, Interest or Penalties

Under the arbitration system it is not possible to reach an agreement to reduce the tax assessment, the interest due or the penalties that may eventually be applied.

However, in an earlier phase (usually during the tax audit), it is possible to regularise situations to reduce the interest due and/or the penalties that may potentially apply.

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

Advance rulings with binding effect may be requested from the tax authorities. See also 1.3 Avoidance of Tax Controversies.

6.5 Further Particulars Concerning Tax ADR Mechanisms

TACs

According to the current arbitration regime, cases may be submitted to TACs as follows.

- As a rule, TACs have the jurisdiction to decide on the legality or illegality of the most common tax acts or decisions.
- All cases with a value up to EUR10 million may be submitted.
- The TAC has a period of six months, eventually renewable by another six months, to provide its final decision.
- Usually, there is no possibility to appeal against a TAC decision, the absence of an appeal in respect of TAC decisions is one of the principal characteristics of the model; there are, however, a few exceptions that contribute to ensuring the harmonisation of court decisions and guaranteeing taxpayers rights at the highest level:
  (a) an appeal to the ASC whenever the TAC decision conflicts with a previous decision issued by another TAC, the ACC or the ASC, provided the same fundamental point of law is at issue; or
  (b) an appeal to the Constitutional Court whenever the TAC’s decision denies the application of a provision based on its being unconstitutional or applies a provision the unconstitutionality of which was raised during the proceedings.
- TACs are formed by one or three arbitrators.
The panel of three arbitrators may be chosen by the CAA, otherwise each party chooses an arbitrator, and both choose the president.

Although precedence is not a binding rule, a previous decision on a specific matter of law may prove to be extremely important.

Decisions must be based strictly on law.

**MLI**

The OECD Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS (MLI), signed on 17 June 2017, was ratified in November 2019, and, on 28 February 2020, Portugal deposited its instrument of ratification before the OECD. The MLI entered into force in Portugal on 1 June 2020.

Under one of the many optional clauses foreseen in the MLI, Portugal opted to apply the arbitration clause to settle international tax disputes; this option and the transposition of the EU Arbitration Directive (ie, Directive (EU) 2017/1852 of 10 October 2017), which is even more relevant in practice, mean that arbitration will be allowed to settle this type of dispute in the near future.

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

In specific areas (eg, transfer pricing) or situations (eg, when the tax authorities calculate income through indirect methods), agreements between the parties (taxpayers and tax authorities) may be signed. See also **1.3 Avoidance of Tax Controversies**.

**7. Administrative and Criminal Tax Offences**

**7.1 Interaction of Tax Assessments With Tax Infringements**

Additional tax assessments typically result from internal or external tax audit procedures conducted by the Portuguese tax authorities. Within the context of such tax inspection procedures, the tax authorities not only evaluate whether the taxpayer has made a correct assessment of the tax paid and whether the taxpayer has paid the full amount of taxes due, but also ascertain if the mistakes eventually detected correspond to tax infringements/crimes.

Therefore, the tax inspection’s final report already contains (i) an assessment regarding possible inaccuracies regarding the taxes paid and the taxes and interest due, and (ii) an assessment respecting any tax infringements that may derive from the mistakes/significant crimes committed by taxpayers.

In these circumstances and because both assessments are made at the same time, typically, additional tax assessments and tax infringement processes begin “side by side”.

However, the tax authorities may initiate an administrative tax offence process independently of a tax inspection procedure whenever there is suspicion that an administrative tax offence has taken place, and regardless of the current status of the tax assessment. The same applies to the Public Prosecutor’s Office regarding tax crimes.

If an administrative tax offence is detected, the tax authorities are competent to initiate an administrative tax offence procedure on their own. In the event of a possible tax crime being
detected, the tax authorities must inform the Public Prosecutor's Office and pass on all the information gathered during the inspection procedure.

7.2 Relationship Between Administrative and Criminal Processes
The administrative process in which the additional tax assessment is being challenged and the tax administrative offence or criminal process regarding the facts that gave rise to such additional tax assessment run in parallel. They are, therefore, independent from one another.

However, when an administrative process, in which the additional tax assessment is being challenged, is pending and the qualification of the facts under dispute as a tax infringement depends on the decision of that administrative process – which determines whether the additional tax assessment was legally issued and if the tax assessed is due – the tax-infringement process (whether an administrative offence or a criminal one) must be suspended until a final decision on the administrative process is adopted and becomes res judicata.

7.3 Initiation of Administrative Processes and Criminal Cases
As described in 7.1 Interaction of Tax Assessments With Tax Infringements, an administrative or a criminal tax offence proceeding is initiated by the tax authorities in any case in which they become aware or suspect that an administrative tax offence or that a tax crime may have taken place. Commonly this awareness arises within the context of tax audit procedures.

The same facts may simultaneously support an indictment in an administrative tax offence proceeding and an indictment in a criminal proceeding. When this happens, the facts are prosecuted as a crime.

If, for some reason, the same facts have given rise to an administrative tax offence proceeding and a criminal one, the first one is extinguished as soon as the defendant is notified of the criminal indictment.

There are far more cases of administrative tax offences, considering that all types of mistakes originate in a file and usually the application of a fine (coima). However, tax criminal law has been aggravated in the last decade and the tax and social security authorities are using criminal sanctions far more often than in the past.

7.4 Stages of Administrative Processes and Criminal Cases
Administrative Tax Offence Proceedings
The administrative tax offence proceedings may be divided into two main stages: the administrative stage and the judicial stage. In the first stage, the tax authorities have broad powers to investigate and to issue a formal bill of indictment against the taxpayer, if it is concluded at the end of an investigation that there are sufficient grounds and evidence to indicate that a tax offence has been committed. Normally the grounds that give rise to additional tax assessments are the ones used by the tax authorities to issue such a bill of indictment.

Subsequently, the defendant may present its defence before the tax authorities.

Thereafter the tax authorities will issue their final decision; if a conviction is rendered at that moment, that decision may be judicially challenged by the defendant. Such judicial appeal marks the beginning of the judicial stage and has suspensive effect: therefore, the decision
reached by the tax authorities at that point will neither become final nor immediately enforceable.

The judicial decision rendered by the first-instance court may still be appealed to the appellate courts if the first-instance court confirms the conviction previously rendered by the tax authorities.

Only the decision rendered by that appellate court would, in principle, be final and fully enforceable, except if constitutional issues are involved and an extraordinary appeal (also with suspensive effect) is presented to the Constitutional Court.

The administrative and tax courts are the competent courts to decide on tax administrative processes.

Criminal Tax Offence Proceedings
Criminal tax proceedings usually consist of four main stages:

• an investigation stage;
• a pre-trial stage (that may or may not occur);
• a trial stage; and
• an appeal (see 7.7 Appeals Against Criminal Tax Decisions).

Investigation stage
The investigation stage, which is conducted by the Public Prosecutor’s Office, has the purpose of gathering all the relevant information and evidence regarding the tax criminal offence allegedly committed. This stage typically ends with a decision of indictment or with a decision to close the investigation. Under certain circumstances, this stage may also give rise to a decision of provisional suspension of the tax criminal proceedings, where the defendants agree to comply with a number of injunctions for a period, after which time the investigation may be closed with no further action, or proceed, if the injunctions are not complied with.

Pre-trial stage
The pre-trial stage is not compulsory. It may take place if requested by the defendant, as regards facts based upon which the Public Prosecutor submitted a bill of indictment.

The pre-trial stage represents a number of preliminary judicial acts that the investigating judge intends to perform and must involve a preliminary hearing, oral and adversarial in character, during which the Public Prosecutor, the defendant and their defence counsel may participate. It ends with a decision to arraign, with the case proceeding to the trial stage, or with a decision not to pursue the case, which brings an end to the proceedings.

Trial stage
At the trial stage, all evidence gathered by the Public Prosecutor’s Office and all evidence gathered by the defendants is brought to the first-instance court to be discussed and analysed. This stage ends with the court issuing a decision, which is, in principle, appealable (see 7.7 Appeals Against Criminal Tax Decisions).

The criminal courts are the competent courts to decide on criminal tax offences.

7.5 Possibility of Fine Reductions
Portuguese law provides for some situations in which the taxpayers may benefit from fine waivers or reductions.

Taxpayers may benefit from a fine waiver if they have not been convicted by a final decision relating to an administrative tax offence or tax crime
proceeding, nor benefited from exemption or payment of a reduced fine.

The fine waiver automatically applies to situations in which (i) it is not the non-payment of taxes that is being discussed; and (ii) the taxpayer has, in the meantime, fulfilled the tax obligations that gave rise to the tax infraction.

If the fine is paid at the taxpayer’s request, they will benefit from a reduction of the fine, which can range from 12.5% of the minimum applicable fine up to 50% of the minimum applicable fine, depending on the stage of the administrative tax offence proceedings.

If the defendant pays the fine before the administrative tax offence proceedings or tax inspection begins, the minimum applicable fine will always be imposed.

When the taxpayer pays the fine after one of those occurrences but before the deadline to be heard within a tax inspection, the penalty shall be reduced to 50% of the applicable fine.

The 50% reduced fine may also be applied at the request of the taxpayer before the deadline for presenting their defence within an administrative tax offence proceeding if they confess their responsibility for the infraction and regularise their tax situation.

7.6 Possibility of Agreements to Prevent Trial

Portuguese law does not allow a defendant to enter a plea bargain. Normally, plea bargains represent agreements between defendants and the Public Prosecutor’s office whereby the defendant agrees to plead guilty and pays the tax assessed plus interest and penalties in exchange for a reduced sentence and avoiding trial.

There are no other procedures for the early resolution of criminal law offences before trial.

However, if the criminal process refers to a crime for which criminal law allows no sentence, the Public Prosecutor’s Office may decide to close the case without further action (ie, no indictment and no trial) after consulting the tax authorities and with the agreement of the investigating judge.

7.7 Appeals Against Criminal Tax Decisions

The judicial decision rendered by the first-instance court is appealable, as a rule, to an appellate court and has suspensive effect in the case of conviction; therefore, the decision reached by the first-instance court at that point will neither become final nor immediately enforceable.

In some exceptional cases, first-instance court decisions are appealable to the Supreme Court.

To appeal against a criminal court decision, the defendant must submit a written application declaring their intention to file an appeal, together with a written appeal statement. The written application must be submitted to the first-instance court, but it will be considered by the second-instance court. The appeal must be submitted within 30 days after the notification of the decision issued by the first-instance court.

If constitutional issues are involved, an extraordinary appeal (also with suspensive effect) may still be presented to the Constitutional Court.
7.8 Rules Challenging Transactions and Operations in This Jurisdiction

As a rule, transactions and operations that have been challenged in Portugal under the GAAR, specific anti-avoidance rules (SAAR), transfer pricing rules or anti-avoidance rules gave rise to administrative tax cases in the same terms as all other tax facts (see 7.1 Interaction of Tax Assessments With Tax Infringements); there are not known to be any criminal cases involving these type of operations, but one cannot exclude such a possibility if the facts were to show the existence of dolus with the evident intent of not paying the due taxes.

Therefore, in principle there are no particular procedures to address these matters.

The largest disputes involving such matters (in terms of the amounts involved, the number of defendants or their public notoriety) produce, however, a great deal of media attention and public pressure to obtain convictions (which do not necessarily occur).

With regard specifically to cases concerning transfer pricing, according to the same source, 35 cases started in 2021 and 17 were terminated in the same year, and the total number of cases pending at the end of 2021 was 60.

The Arbitration Directive and the MLI

In September 2019, Portugal published Law No 120/2019, which implemented the EU Arbitration Directive, and “lays down rules on a mechanism to resolve disputes between member states when those disputes arise from the interpretation and application of agreements and conventions that provide for the elimination of double taxation of income and, where applicable, capital. It also lays down the rights and obligations of the affected persons when such disputes arise”.

According to the European Commission statistics, 10 cases related to Portugal started in 2020 and 5 were terminated in the same year, and the total number of cases pending at the end of 2020 was 31.

8. Cross-Border Tax Disputes

8.1 Mechanisms to Deal With Double Taxation

In situations of double taxation due to additional tax assessments or tax adjustments in cross-border situations, it is common to use domestic litigation, which does not mean that the mutual agreement procedure is not used – either as an alternative to, or together with, judicial litigation. According to the OECD statistics, 80 cases related to Portugal started in 2021 and 47 were terminated in the same year, and the total number of cases pending at the end of 2021 was 119.

With the publication of the 2003 update to the OECD Model Convention, Portugal introduced an observation on the Commentaries to Article 1 stating that the application of GAAR or SAAR could not prevail if they were in conflict with treaty provisions due to the rules of the hierarchy of laws in the Portuguese legal system, according to which double tax treaties prevail over domestic law regardless of whether the latter rules were enacted before or after the former ones. This observation was later eliminated in the 2010 update of the OECD Model Convention.

After the elimination of this observation, Portugal started to negotiate treaties allowing the application of domestic anti-abuse provisions.
Specifically, with regard to the application of the GAAR, taking into account that it may allow the tax authorities to recharacterise, at their discretion, the facts and operations that occurred as facts or operations of an equivalent economic result, it is argued that it could be contrary to the double tax treaty as it may alter the taxing powers of the contracting states. However, as far as is known, this has never been challenged successfully in court.

Times are changing, however. The MLI is introducing more anti-abuse rules and includes the principal purpose test (PPT) in all conventions signed by Portugal. Moreover, Portugal has accepted the principle that tax treaties generally do not limit the right to tax residents of a state to that state, unless this is expressly excluded by the treaty (“saving clause”), which is intended to clarify that SAARs such as CFC rules might be compatible with the convention.

This evolution and other international trends justify taxpayers being particularly cautious in cross-border transactions whenever benefiting from tax treaty measures, although they should not feel deterred by these new rules. In practice, it is likely that the PPT will not have a significantly different impact than the GAAR.

8.3 Challenges to International Transfer Pricing Adjustments
Portuguese tax law allows for correlative adjustments. Although these adjustments can be promoted by the tax authorities in the context of double tax treaties that foresee such a possibility, they should be generally promoted by taxpayers since it is in their best interest to avoid the double taxation originating in the transfer pricing correction made to an associated company in another state. According to the law, the taxpayer shall present, to the tax authorities, a request to make the correlative adjustment. This request has to be presented within the deadline foreseen in the mutual agreement procedure (MAP) of the relevant double tax treaty. If the tax authorities agree with the adjustment made in the other state, the correlative adjustment shall be made within 120 days after the agreement obtained with the tax authorities of the other state.

There is no information available on the number of such adjustments that have been made by the tax authorities or challenged by taxpayers.

The only information available is that 35 transfer pricing cases under the MAP were initiated in 2021 and 17 were terminated in the same year, and the total number of cases pending at the end of 2021 was 60.

See 8.2 Application of GAAR/SAAR to Cross-Border Situations for discussion of the effect of the MLI on cross-border tax disputes.

8.4 Unilateral/Bilateral Advance Pricing Agreements
Whilst detailed rules on transfer pricing have been provided for in the law since 2001, APAs were only introduced in 2008. In the early years, taxpayers were reluctant to initiate APAs, but things have changed in recent years, when they have become more widespread to mitigate controversies and litigation in transfer pricing matters. It is expected that if the number of APAs does not grow, more tax controversies on transfer pricing matters will arise. Although APAs take some time and involve a complex administrative procedure, more and more taxpayers intend to enter into this type of agreement.

The procedure to sign an APA starts with the request presented by the taxpayer to the tax authorities. In the event that taxpayers want to
include operations with associated enterprises resident in countries with which Portugal has entered into double tax conventions, they can request that the APA is bilateral or multilateral, in which case the request will be presented to the other(s) tax authorities under the MAP. The agreement reached between the tax authorities is notified to the taxpayer, to obtain its confirmation on the acceptance of such agreement. The request shall:

- contain a proposal of the methods chosen by the taxpayer;
- identify the period and operations covered;
- contain the signature of all the entities that are to be bound by the agreement;
- contain a declaration stating that the taxpayer will co-operate with the tax authorities and will not invoke any commercial or professional secrecy; and
- supply all the necessary elements so that the automatic exchange of information between the tax authorities can be put in place.

8.5 Litigation Relating to Cross-Border Situations

Taking into account the case law produced by the higher courts, the cases related to cross-border situations that generate the most litigation are those related to withholding taxes. However, transfer pricing and residency matters are increasingly attracting the attention of the tax authorities and several relevant court cases in this domain have recently been initiated or/and decided.

To mitigate this situation, taxpayers should have internal compliance rules that allow them to control these cases. Moreover, they should verify, with particular attention, the different formalities and criteria that the implementation of EU rules and the double tax treaty requires. Particular attention should be paid to facts, documentation, compliance rules and procedures that might prevent or reduce tax contingencies.

9. State Aid Disputes

9.1 State Aid Disputes Involving Taxes

Portugal has a sound relationship with the European Commission in state aid matters, and aims to comply with the applicable European Union Treaty provisions and implementing regulations, soft law and the acquis communautaire of the European Courts and of the European Commission addressed to Portugal.

The majority of cases concern atypical private enforcement cases, including legal actions against taxes, and parafiscal charges and actions by customers of the alleged aid beneficiary. State aid rules were invoked to challenge parafiscal charges imposed on the claimants by the state, based on the argument that the proceeds from those charges were used to finance illegal state aid, or that an exemption from the charge constituted illegal state aid.

For example, there have been numerous legal actions lodged by undertakings active in the wine sector against their obligation to pay a parafiscal charge for the promotion of wine (a system that had been conditionally approved under state aid rules by European Commission Decision No 2011/6/EU).

In the past, there have been Commission investigations into Portuguese tax schemes for supposedly illegal state aid elements. In 2002, for instance, the Commission adopted a decision ruling that Portugal was using an illegal tax regime in Azores (State Aid C 35/2002 (Ex NN
10/2010). Portugal appealed to the ECJ (Case C-88/03) but was unsuccessful.

More recently, in a decision dated 4 December 2020, the Commission declared certain situations related to corporate and other tax exemptions for companies active in Madeira to be illegal and incompatible state aid and ordered Portugal to recover the amounts from the beneficiaries (Case SA.21259 – Portugal, Zona Franca da Madeira, Regime III).

9.2 Procedures Used to Recover Unlawful/Incompatible Fiscal State Aid
There is not a particular legal regime that is used in these matters. Depending on the particular situation, the Portuguese tax authorities request the recovery of specific state aid as they consider appropriate. Sometimes the recovery is carried out by the Portuguese tax authorities according to the usual procedures used for the request of an additional tax assessment. This leads taxpayers to try to challenge such tax assessments.

9.3 Challenges by Taxpayers
As mentioned in 9.2 Procedures Used to Recover Unlawful/Incompatible Fiscal State Aid, there have been instances of taxpayers challenging requests or additional tax assessments. However, in the past, the tax authorities and the courts have maintained that taxpayers cannot challenge such requests as a typical additional tax assessment. This is on the grounds that such requests were mere executory decisions that stem from an EU decision, which is the only decision that can be challenged in court. In other words, the prevailing view is that taxpayers can challenge the European Commission decisions, but if they do not react against them (in the European instances), they have no standing to challenge the enforcement measures taken by the national authorities, either administratively or judicially.

It is obviously very important to ascertain what is really considered illegal or incompatible with the European law; ie, was the legal regime put forward by the state not authorised or forbidden? Conversely, if the taxpayer applied the law but did not respect the European Commission terms and conditions for such aid, they might be obliged to refund the illegal state aid received. However, if the controversy is based on facts (ie, to determine whether the taxpayer fulfilled the criteria required), domestic courts would probably have a different view on their competence to settle the dispute.

9.4 Refunds Invoking Extra-Contractual Civil Liability
There are cases pending on this subject, although no positive decisions have yet been made.

10. International Tax Arbitration Options and Procedures

10.1 Application of Part VI of the Multilateral Instrument (MLI) to Covered Tax Agreements (CTAs)
Portugal opted to apply part VI of the MLI. As a result, an arbitration clause was included in 18 double tax treaties (DTTs). These tax treaties include 12 EU member states (Austria, Belgium, Denmark, Slovenia, Spain, France, Greece, the Netherlands, Ireland, Italy, Luxembourg and Malta) and six states that do not belong to the EU (Andorra, Barbados, Canada, Singapore, the United Kingdom and Switzerland).
Before the signature of the MLI and the modifications introduced by these options, Portugal only had one DTT with an arbitration clause inserted in the MAP regime (ie, the DTT signed with Japan – Article 24). Portugal opted not to apply part VI of the MLI in respect of this DTT.

10.2 Types of Matters That Can Be Submitted to Arbitration
Portugal reserved the right only to apply arbitration in matters related to Articles 5, 7 and 9 of the OECD Model Convention, declining to apply it in cases:

- where no effective double taxation occurs;
- of fraud or any other tax crime;
- that deal with the GAAR or SAAR, including tax treaty anti-abuse rules; or
- that should be dealt with by the EU Arbitration Directive or the Arbitration Convention.

10.3 Application of the Baseball Arbitration or the Independent Opinion Procedure
Portugal reserved the right not to apply the default “final offer” arbitration procedure (“baseball arbitration”), opting instead to apply the “independent opinion” model. Although no official justification was made public, this option seems to be consistent with the position adopted by Portugal in the Arbitration Convention.

Apart from this, one should stress that the sole DTT with an arbitration clause (ie, the DTT signed with Japan) does not provide for a specific mode of arbitration.

10.4 Implementation of the EU Directive on Arbitration
The EU Arbitration Directive (ie, Directive (EU) 2017/1852 of 10 October 2017) has been transposed into Portuguese law. Considering the countries covered by the arbitration clause (see 10.1 Application of Part VI of the Multilateral Instrument (MLI) to Covered Tax Agreements (CTAs)) and the fact that Portugal declined to apply the MLI arbitration procedure if the case might be dealt with by the EU Arbitration Directive or the Arbitration Convention, it seems that the latter instruments will be more relevant in practice than the MLI. Moreover, the matters that may be challenged under an arbitration procedure are much broader in the EU Arbitration Directive than in the MLI.

10.5 Existing Use of Recent International and EU Legal Instruments
Despite the fact that the MLI and the EU Arbitration Directive are very recent, according to the European Commission Statistics, ten cases related to Portugal started in 2020 and five were terminated in the same year, and the total number of cases pending at the end of 2020 was 31, which means that these procedures were being used immediately after the Directive’s approval and the implementation by Portuguese legislation.

10.6 New Procedures for New Developments Under Pillar One and Two
Portugal has supported the implementation of Pillars One and Two during the last years. Thus, it is expected that provided the projects go ahead, Portugal will be one of the states involved under the rules that will be approved at international level (eg, through conventions or directives).

For the time being, no Portuguese rules or drafts exist dealing with the envisaged rules to prevent and/or settle tax disputes as indicated in Blueprint One or related to Blueprint Two. However, Portugal has already ratified the MLI and adopted the domestic rules necessary to trans-
pose the EU Arbitration Directive to settle tax disputes.

10.7 Publication of Decisions
Decisions in international arbitration proceedings are generally not published. Portugal has opted to apply the confidentiality obligation foreseen in the MLI (Article 23.º Nos 4 and 5). However, the EU Directive 2017/1852 and the Portuguese law that implemented it establish the possibility of publication of the final decision if all parties agree, or at least the publication of a summary according to an EU standard form.

10.8 Most Common Legal Instruments to Settle Tax Disputes
Currently international tax disputes are still generally settled under the mutual agreement procedures or, more commonly, in accordance with domestic procedure rules in a litigation procedure between taxpayers and the state.

10.9 Involvements of Lawyers, Barristers and Practitioners in International Tax Arbitration to Settle Tax Disputes
As a rule, taxpayers engage lawyers/barristers during the early stages of a dispute in order to proactively manage potential risks, often even prior to the emergence of a formal dispute. On the other hand, it is rare for the state to hire independent professionals in tax disputes. Given the complexity and significance of these issues, it is advisable for both parties to seek robust legal support and strategic guidance right from the outset.

11. Costs/Fees

11.1 Costs/Fees Relating to Administrative Litigation
As a rule, litigating at the administrative level (by filing an administrative claim to the Portuguese tax authorities) has no associated fees, but the tax authorities may impose a 5% fee if that claim does not seem to be sufficiently grounded.

11.2 Judicial Court Fees
The tax litigation process involves the payment of fees that vary between EUR102 and EUR3,060 depending on the value of the claim, between EUR51 and EUR1,530 in the case of appeals, depending on the value of the appeal, and between EUR204 and EUR6,120 in cases classified by the courts as particularly complex.

Where the value of the claim exceeds EUR500,000, the legal fee is not fixed but variable between EUR2,040 and EUR3,060, between EUR1,020 and EUR1,530 in the case of an appeal, and between EUR4,080 and EUR6,120 in the case of files classified by the courts as particularly complex.

The court may decide not to impose this extra fee.

In general terms, taxpayers must pay the above-mentioned fees in advance (it is the cost of their initiative to litigate), except for variable value legal fees. In these cases, only the minimum fee is paid in advance, and the balance is paid at the end of the case.

The tax authorities are exempted from making advance payments for legal fees, which means they will only be required to pay fees at the end of the case.
Each party is responsible for the payment of the legal fees to the court, ensuring that the court is always compensated for its involvement. However, the winning party may request a refund of the amounts paid in all instances of litigation from the party that lost.

11.3 Indemnities
There are two possible situations to address regarding the possibility of requesting an indemnity if the disputed additional tax assessment is considered absolutely void and/or null.

Where the additional tax assessment has been paid, the taxpayer will be entitled to a full refund of the tax and interest unduly paid, plus an amount of indemnity interest of 4% per year calculated on the value of that tax and interest unduly paid.

If the additional tax assessment has not been paid and the taxpayer has prevented a tax enforcement procedure from seizing their assets by providing a bank guarantee or equivalent to suspend such procedure while the additional tax assessment is in dispute, the taxpayer may request an indemnity related to the costs borne to maintain that guarantee.

The guarantee must have been maintained for at least three years for the taxpayer to be entitled to an indemnity, unless the additional tax assessment resulted from an error on the part of the tax authorities.

11.4 Costs of ADR
Tax litigation in the TAC involves the payment of fees that vary between EUR306 and EUR4,896 depending on the value of the claim. Where the value of the claim exceeds EUR275,000, an extra legal fee is due, equal to EUR306 for each additional EUR25,000 or fraction thereof.

Half of the fees due are paid with the initial request for the constitution of the TAC and the other half are due before the point that the arbitration decision is issued (no decisions are issued without the correspondent fees being entirely paid for).

Where the arbitrators are appointed by the parties, the fees payable by the taxpayer vary between EUR6,000 for arbitration proceedings with a value up to EUR60,000 and a maximum of EUR120,000 for proceedings between EUR7.5 million and EUR10 million.

In the latter case, arbitration fees are entirely borne by the taxpayer and must be paid in full before the filing of the initial request for the constitution of the TAC.

12. Statistics

12.1 Pending Tax Court Cases

First Instance
The following statistics show the number of tax court cases pending in the first instance, indicating the average number of cases attributed to a judge of first instance.

Register of tax court cases (first instance) and their status (2020)
- Pending Cases (31/12/2021): 38,413.
- Total number of first-instance judges (31/12/2021): 97
- Average number of cases per judge (2021): 396.

Source: based on information published by the Conselho Superior dos Tribunais Administrativos e Fiscais in December 2022.
The statistics show that tax judges are still being allocated a significant number of cases despite efforts being made to reduce the number of pending cases with the recruitment of special teams for this purpose.

**Appeal**

The following two sets of statistics reflect the number of cases pending in the second-instance courts and the ASC. There was also a decrease in the level of appeal litigation.

*Register of tax cases at the ACC (second instance) and their status (2020 and 2021)*

- Pending cases (31/12/2020) – north area/Porto: 2,807; south area/Lisbon: 3,066; total: 5,873.
- Pending cases (31/12/2021) – north area/Porto: 2,793; south area/Lisbon: 3,446; total: 6,239.

Source: based on information published online by the Conselho Superior dos Tribunais Administrativos e Fiscais and the Direcção-Geral da Política da Justiça in October 2022.

*Register of tax cases at the ASC (final instance) and their status (2019 and 2020)*

- Pending cases (31/12/2020): tax plenary: 3; tax section: 741; section customs: 196; total: 940.
- Pending cases (31/12/2021): tax plenary: 0; tax section: 636; section customs: 215; total: 851.

Source: based on information published by the Conselho Superior dos Tribunais Administrativos e Fiscais, the Direcção-Geral da Política da Justiça and the Administrative Supreme Court in November 2021.

**Arbitration**

As for tax arbitration, since 2011, 4,300 cases were initiated and, up to 31 December 2018, 3,809 cases were terminated, hence 491 were pending as of 1 January 2019.

**12.2 Cases Relating to Different Taxes**

**Tax Litigation by Region**

The following statistics show the number of tax court cases in the different regions of Portugal initiated and terminated in 2021 in the first instance, although there is no information regarding their value or the taxes to which they relate.

- Almada: 507 cases initiated; 888 cases finalised; 1,799 pending cases.
- Aveiro: 691 cases initiated; 750 cases finalised; 2,571 pending cases.
- Beja: 247 cases initiated; 290 cases finalised; 479 pending cases.
- Braga: 1,981 cases initiated; 1,943 cases finalised; 4,151 pending cases.
- Castelo Branco: 222 cases initiated; 397 cases finalised; 1,072 pending cases.
- Coimbra: 325 cases initiated; 465 cases finalised; 1,117 pending cases.
- Funchal: 179 cases initiated; 202 cases finalised; 483 pending cases.
- Leiria: 1,446 cases initiated; 1,909 cases finalised; 4,151 pending cases.
- Loulé: 423 cases initiated; 498 cases finalised; 899 pending cases.
- Mirandela: 233 cases initiated; 269 cases finalised; 370 pending cases.
- Penafiel: 602 cases initiated; 577 cases finalised; 1,134 pending cases.
- Ponta Delgada: 30 cases initiated; 18 cases finalised; 69 pending cases.
Porto: 2,229 cases initiated; 2,481 cases finalised; 5,053 pending cases.

• Sintra: 719 cases initiated; 1,117 cases finalised; 3,197 pending cases.

• Viseu: 335 cases initiated; 218 cases finalised; 871 pending cases.

• Total cases: 13,089 cases initiated; 15,083 cases finalised; 38,124 pending cases.

Source: based on information published by the Conselho Superior dos Tribunais Administrativos e Fiscais in December 2022 and the Direcção-Geral da Política da Justiça in October 2022.

Tax Litigation Subjects
Based on the data from 2019, the majority of tax-related disputes pertained to CIT, accounting for 34% of all cases. Personal income tax disputes constituted 18.1% of the cases, while disputes over VAT made up 16.2% of the total. Property tax issues were the subject of 12.8% of the cases. Disputes related to stamp duty and property transfer tax were less frequent, representing 6.4% of the cases. Meanwhile, vehicle tax disputes were the least common, only contributing to 3.6% of the total cases.

Arbitration
As for arbitration, the number of cases initiated every year increased until 2014, peaking at 850 new cases, and then decreased slightly until 2017, when it started increasing again. In 2015 there were 789 new cases, in 2016 there were 772 new cases, in 2017 there were 693 cases, in 2018 there were 709 new cases, in 2019 there were 718 new cases and in 2021, there were 862 new cases.

Finally, based on the 2021 data, in arbitration most cases had a value of up to EUR60,000 (58.8%), 24.1% of cases had a value between EUR60,000 and EUR275,000, 7% had a value between EUR275,000 and EUR500,000, 5.2% had a value between EUR500,000 and EUR1 million, and only 4.9% had a value higher than EUR1 million.

12.3 Parties Succeeding in Litigation
According to the OECD statistics (compiled with tax litigation data reported to 2022), around 37% of tax court cases are decided in favour of the Portuguese tax administration.

These results do not seem different to those achieved in arbitration, according to the Administrative Arbitration Centre, based on statistics from 2022, according to which, for the previous five years (2018-2022) the Tax Authorities succeeded in 33.3% of cases (40.8% when considering the amounts in dispute).

13. Strategies

13.1 Strategic Guidelines in Tax Controversies
Throughout the course of a tax controversy there are many strategic options and decisions to be taken. Although each case requires its own strategic considerations, preparation and analysis, there are general guidelines that taxpayers should bear in mind. Below are some of the most relevant issues.

Understanding the factual landscape of the case is crucial. It is vital to thoroughly comprehend all facts pertaining to the case, meticulously examining all relevant documents and related business affairs. This includes the business rationale behind specific transactions or conduct. Such comprehensive knowledge can be instrumental in reframing an initial perspective that might otherwise lead to a misleading conclusion.
Legal aspects often play a decisive role, including:

(a) the formalities to be observed throughout the course of the process (as at an earlier stage, during the tax audit);
(b) the analysis of the burden of proof;
(c) different possible interpretations of legal provisions; and
(d) the proper use of all possible forms of evidence to prove alleged facts (documents, witnesses, experts, etc) or better illustrate a question of law (an option).

Engaging a tax lawyer early on can be a game changer. A competent lawyer can help shed light on the dispute, highlight the strengths and weaknesses of a case, and chart a strategic path forward while assessing all the facts and potential legal outcomes.

Another crucial decision for taxpayers is the selection of the appropriate avenue for resolving the tax dispute. This could be through administrative channels, judicial processes, or arbitration (including potentially referring matters to the ECJ). It is critical to evaluate these options at an early stage, considering potential combinations of these routes (choosing one option initially and switching to an alternative or combination thereof, if necessary). Clearly, the “one size fits all” strategy does not apply here.
Trends and Developments

Contributed by:
Francisco de Sousa da Câmara, Bruno Santiago and Inês Salema
Morais Leitão, Galvão Teles, Soares da Silva & Associados

Morais Leitão, Galvão Teles, Soares da Silva & Associados is a leading full-service law firm in Portugal, with a solid background and decades of experience. Widely recognised, Morais Leitão is a reference in several branches and sectors of the law at national and international level. The firm’s reputation amongst both peers and clients stems from the excellence of the legal services provided. Morais Leitão’s work is characterised by its unique technical expertise, combined with a distinctive approach and cutting-edge solutions that often challenge some of the most conventional practices. With a team comprising over 250 lawyers at its disposal, Morais Leitão is headquartered in Lisbon and has additional offices in Porto and Funchal. Due to its network of associations and alliances with local firms and the creation of the Morais Leitão Legal Circle in 2010, the firm can also offer support through offices in Angola (ALC Advogados) and Mozambique (HRA Advogados).

Authors

Francisco de Sousa da Câmara
is a senior partner at Morais Leitão who has headed the tax teams in Lisbon and Madeira for more than two decades. He specialises in complex tax litigation involving domestic and international tax issues, and focuses on handling files before all types of courts. He is also a CAA-recognised arbitrator. Francisco advises high net worth individuals and family office businesses and structures. He has been involved in drafting tax legislation, including the General Tax Law, the Tax Procedure and Process Code, and a project for a wealth tax reform. Francisco regularly contributes to a range of tax-focused publications, both in Portugal and internationally.
Bruno Santiago is a partner at Morais Leitão who specialises in tax law, with a focus on domestic and international taxation, both in consulting and in dispute resolution. He co-ordinates dedicated teams advising clients on cross-border transactions and transfer pricing, taking advantage of his knowledge of Angolan and Mozambican taxation. Bruno is also very active in the area of tax disputes and arbitration, covering income taxes, value-added tax, property taxes as well as stamp duty on financial operations; and in administrative, judicial and penalties proceedings. Bruno represents clients from sectors including financial services, oil and gas, energy, real estate and construction, media and advertising, and pharmaceuticals, as well as private clients.

Inês Salema is a senior associate at Morais Leitão who practises in the area of domestic and international taxation, both in dispute resolution and in consulting. She has a strong focus on tax litigation (administrative and judicial procedures), across a wide range of issues, but with an emphasis on local, regulatory and port charges. Inês works in the field of tax consultation on various matters, including the taxation of individuals in an employment context (taxation of fringe benefits, stock options and compensation for termination of employment contracts). She has also been actively working on the taxation of fortuitous gains, from both an individual and a business perspective.
Introduction
In 2023 we are witnessing a gradual return to normalcy following the unprecedented years of the pandemic. Local tax offices are gradually reopening their doors to the public, and tax inspections are being conducted on-site once again. An unforeseen factor, however, has been the rise in inflation, which acts as a hidden tax, eroding the purchasing power of families. To counterbalance this impact, an exceptional zero-rate VAT has recently been applied to a list of 46 food items.

In this chapter, we will provide succinct overviews of selected recent rulings from Portuguese courts that are of relevance to an international audience interested in conducting business or establishing a significant presence in Portugal. We will also spotlight other emergent trends and developments in the field of tax controversy.

Banking Sector Contribution from Branches of Foreign Banks Operating in Portugal
The Banking Sector Contribution (CBS) is a “ring-fencing” tax on banking sector entities, imposed from 2011 onwards, and aims to protect the economy from the systemic risk of the banking sector, similarly to the contributions under Directive 2014/59/EU of 15 May 2014.

In 2016, the Portuguese bank levy was extended to cover Portuguese branches of banks domiciled in other EU member states, which has been contested in court by the vast majority of those branches. In recent years, Portuguese arbitral and judicial courts have been issuing contradictory decisions, although the majority of the decisions were rendered in favour of the taxpayer. These decisions largely rested on legal reasoning that the bank levy on Portuguese branches of foreign banks violated EU law.

The key taxpayer argument relates to discrimination between the CBS taxable base for resident banks or subsidiaries of non-resident banks vis-à-vis the taxable base for branches of non-resident banks. In fact, the CBS regime enables resident banks and local subsidiaries of non-resident banks to deduct, from their CBS base, liability items comprising own funds and equity registered in their accounts. This deduction is not available to branches of non-resident banks, primarily because the legal nature of a resident bank allows for its accounts to register share capital, whereas a branch does not have this specific type of accounting register. In this regard, the Portuguese tax authorities have issued guidelines stating that the free capital of a branch does not qualify for the eligible CBS deduction to the base.

There are several appeals pending before the tax courts of appeal and it is possible that the matter will be referred to the ECJ for a preliminary ruling.

Additional Solidarity Tax on the Banking Sector
The Additional Solidarity Tax on the Banking Sector (ASTBS) was introduced in 2020. According to the legislature, the ASTBS was designed to offset the benefit that banking sector entities receive from a partial VAT exemption on most financial services. The proceeds from the ASTBS are allocated to the Social Security Fund.

In terms of structure, the ASTBS is identical to the CBS in both its subjective and objective scope of application. Therefore, many of the legal infringements associated with the CBS have been carried over to the ASTBS.

Both resident banks and subsidiaries of non-resident banks have commenced litigation, alleging
a violation of constitutional law. Notably, subsidiaries of non-resident banks have commenced litigation on the same grounds described above for the CBS, alleging the discriminatory nature of the taxable base.

There are several actions pending before the tax courts and the Tax Arbitral Court (CAAD), and the EU violation has been referred to the ECJ for a preliminary ruling (Case C-340/22).

Energy Sector Extraordinary Contribution (ESEC)

The Energy Sector Extraordinary Contribution (ESEC) is a tax imposed on certain assets of entities operating within the energy sector, introduced in 2014 during a severe economic and financial crisis in Portugal.

The ESEC was created as a temporary measure to reduce the tariff deficit of the National Electric System (SEN) and foster the systemic sustainability of the energy sector.

Recently, on 16 March 2023, the Portuguese Constitutional Court ruled that the ESEC is partially unconstitutional (Case No 101/2023). This judgment followed an appeal filed by energy sector companies in Portugal, which contended the illegality of the ESEC paid by the companies holding the concessions of the activities of transportation, distribution and underground storage of natural gas.

In brief, setting aside specific considerations by the Constitutional Court related to the nature of the entities that initiated the action, the court ultimately ruled that the ESEC, introduced as an extraordinary and temporary measure, should not remain in force once the specific circumstances that warranted its implementation had been resolved.

The Constitutional Court’s decision is likely to trigger litigation by taxpayers regarding taxes that have been introduced in response to extraordinary circumstances that no longer apply.

The Sale of Shares of Small and Micro Companies (SMCs)

The Portuguese Personal Income Tax Code establishes a tax benefit applying to capital gains arising from the sale of shares in SMCs, consisting of a reduction of the taxable base of the capital gains, which means that only 50% of the gains are taxed (the “Special Regime”).

Consequently, these capital gains will be taxed at the effective tax rate of 14% (compared with a tax rate of 28% applied to capital gains from the sale of shares in companies not classified as SMCs).

The Portuguese tax authorities (PTA) took the stance that the Special Regime should only apply to capital gains from the sale of Portuguese tax resident SMCs. However, the Portuguese Tax Arbitral Court (CAAD) has issued decisions upholding taxpayers’ claims, which, in summary, sustain that the EU principles of free movement of capital and right of establishment between EU member states must preclude this restrictive interpretation.

To date, at least five decisions have been published by the CAAD maintaining that the Special Regime must also apply to gains from the sale of shares in non-resident companies and deeming the PTA’s tax position as illegal. A request for a preliminary ruling has been submitted to the Court of Justice of the European Union on this matter (Case C-472/22).

Additionally, in general terms, non-resident individual shareholders realising capital gains from
the sale of shares of Portuguese companies are able to benefit from an exemption from Portuguese personal income tax, either under the terms set forth by domestic tax law or as provided for in a double taxation agreement (DTA).

However, the exemption from Portuguese tax may not apply in certain cases, such as if the company whose shares are being sold holds Portuguese real estate assets of a particular nature or value. In these cases, the domestic exemption may not apply, and the DTA may allow Portugal to tax such gains.

Based on comparable case law, strong arguments exist that the EU principles of free movement of capital and right of establishment should prevent Portuguese law from denying the application of the Special Regime to non-resident individual shareholders in such instances.

Stamp Duty on Bank Fees Regarding Financial Intermediation Services
In the past couple of years, a debate has emerged in the Tax Arbitral Court (CAAD) on whether bank fees charged in relation to certain financial intermediation services rendered to companies are subject to Portuguese stamp duty. Such financial services are related to the issuance of bonds, tender offers for bond acquisitions, and public offers for the subscription or acquisition of shares or other securities.

One of the main arguments is that although there is no doubt that such fees are subject to stamp duty under the domestic law provisions, the imposition of such may constitute a violation of EU law; namely, Council Directive 2008/7/EC of 12 February 2008 concerning indirect taxes on the raising of capital.

A growing number of companies have started to challenge such stamp duty assessments on the grounds that financial intermediation services rendered in the context of those operations are “related formalities” within the meaning of the directive. This interpretation also appears to be supported by some European Court of Justice (ECJ) decisions; namely, the Isabele Gielen (Case No 299/13) and Air Berlin (Case No C-573/16) cases.

On this matter, the first known decisions of the Portuguese Arbitration Court were unfavourable to the taxpayers. However, the latest CAAD decisions have taken a different path, referring the matter for a preliminary ruling from the ECJ.

Execution of the General Court’s decision on the Madeira Free Zone (MFZ)
The Madeira Free Zone State aid scheme – providing corporate income tax reductions and other tax benefits for companies established in the region, was initially approved by the European Commission as compatible regional aid.

The scheme was subject to several successive amendments and approvals by the European Commission. The penultimate successor of the scheme – Regime III – was authorised by the Commission, with approvals explicitly linking the amount of aid granted to jobs created and maintained in the region and to locally conducted activities.

After concerns were raised during standard monitoring of the implementation of State aid decisions, the Commission opened an in-depth investigation into the regime. In 2020, the European Commission communicated the final decision on the formal investigation on the Regime III of Madeira’s FTZ, concluding that the said Regime III constituted state aid abusively applied
by Portugal, alleging violation of European rules on the matter, and ordering the Portuguese state to recover unlawful and incompatible state aid.

The Portuguese state appealed the European Commission’s decision to the General Court, and the latter ruled in favour of the European Commission. The Portuguese State has since appealed the General Court’s Decision to the ECJ.

The Tax Authorities have begun the recovery process, with taxpayers being notified to reimburse the unlawful state aid they have benefited from.

Affected taxpayers may defend themselves using the resources at their disposal, namely through filing an appeal against the decision of the European Commission to the General Court of the European Union. Taxpayers can also demonstrate the lawfulness of the state aid they benefitted from, proving that the relevant requirements were met.

Matters where Litigation May Increase

The cases mentioned above serve as examples of potential issues that may escalate and result in increased litigation in the near future, especially with the advanced tools introduced by initiatives like BEPS, the Anti-Tax Avoidance Directives (ATAD) I and II, the Multilateral Convention to Implement Tax Treaty Related Matters to Prevent BEPS (MLI), the Common Reporting Standard (CRS) and DAC 6.

Given the unprecedented incorporation of these international legal instruments, it will be interesting to see how the courts will protect taxpayers’ rights in situations of abuse or incorrect application of these new mechanisms by the tax authorities.

The targeted taxpayers will probably check whether those measures infringe upon ordinary or constitutional domestic rules, or EU or international agreements. If they believe there is an infringement, they will undoubtedly assert their rights.

GAAR and SAAR

It has been observed in recent years that tax authorities are increasingly diverging from their core duty of conducting tax assessments. Instead, they are framing the discussion of tax liability in the context of criminal matters, thereby subtly coercing taxpayers to accept rather than challenge the tax authorities’ findings. Due to the existence of specialised courts in Portugal for criminal matters that are distinct from those available for tax matters, this trend, if not promptly corrected, could ultimately result in the denial of a fair trial as taxpayers are deprived of their right to have their case heard by a tax tribunal.

In addition to this questionable trend, we also observe the PTA increasingly applying the GAAR and a number of different SAAR to challenge commercial operations made by taxpayers.

DAC 6

The Portuguese Ombudsman (at the demand of the Portuguese Bar Association) presented in the last quarter of 2021 in the Constitutional Court a request to scrutinise the constitutionality of some norms of Law 26/2020, of 21 July 2021, which implements Council Directive 2018/822 of 25 May 2018 amending Council Directive 2011/16/Eu of 15 February 2011 as regards the mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements (commonly known as DAC 6). The request was grounded on a potential violation of the principle of proportion-
ality, the right to a fair trial, the right to privacy and attorney-client professional privilege, all principles and rights protected by the Portuguese Constitution. A decision from the Constitutional Court is expected soon.

**Foreclosures**

During the early stages of the pandemic, the government established measures that allowed for moratoriums on the payment of interest (and in some cases capital and interest) to the banks by companies and individuals in difficult circumstances due to COVID-19. With the discontinuation of this extraordinary measure and with the inflation rate reaching a 30-year high, an increase in foreclosure cases is anticipated as taxpayers grapple with the added challenge of meeting their usual obligations, including taxes. This scenario could potentially lead to a surge in tax foreclosures.

**Final Notes**

Portugal, as an EU and OECD member state, is at the forefront of the international measures that are being implemented as a consequence of BEPS. The implementation of the two pillars that are being developed at the OECD level is eagerly awaited as well as the approval of the Unshell Directive. The Portuguese authorities are better equipped with technical means and supplied with much more information than in the past. BEPS and other recent initiatives will continue to make an important contribution to the monitoring of large companies and high net worth individuals as well as the interaction of different tax systems in cross-border situations.

Clearly, the best strategy for taxpayers is to anticipate and prepare for impending audits by reviewing their most recent operations and any possible weaknesses in order to better identify and mitigate the tax risks, as well as by gathering data and arguments to support their positions.

This is crucial to avoid potential litigation. If litigation cannot be avoided, having a robust and well-prepared case is instrumental in successfully challenging any additional tax assessments.
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