SPECIAL REPORT

Making a Choice in Portugal: Taking Your Case to the Tax Arbitration Tribunals or Tax Judicial Courts?

by Francisco de Sousa da Câmara

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With the introduction in 2011 of an innovative tax arbitration system, taxpayers in Portugal can now choose to take their cases to the traditional tax judicial courts or to the tax arbitration tribunals. This article looks at the pros and cons of each system, using supporting statistics when appropriate, to evaluate the most significant factors and provide a practical guide in navigating the available options and making an informed choice.

For the last 30 years, I have practiced law in a large firm with a particular focus on dispute resolution. When facing controversial tax assessments, taxpayers could choose between an administrative claim and a judicial claim.

The scenario changed dramatically four years ago, when a new route became available to settle tax disputes — tax arbitration. From mid-2011, taxpayers were able to lodge a tax claim against a tax assessment at a tax arbitration tribunal (TAT), in addition to the two other traditional routes.

One of the main features of the tax arbitration model is that the tribunals must decide the case based on strict law like tax judicial courts (TJCs); a TAT is expressly prohibited from resorting to equity (*ex aequo et bono*). In a nutshell, these tribunals should decide the case based on the same legal framework available to the TJC.

So, invariably clients confront the dilemma of which route to take: a TJC or a TAT.[1]

Based on experience assisting clients in selecting the appropriate route, I have highlighted different features and characteristics of each path that should be evaluated. This article will therefore focus on the different aspects to consider.[2]

Considering the practical use of such method, I have distilled this experience in a pragmatic checklist of key considerations, discriminating between matters of primary and secondary importance. Table 1 shows the principal aspects to which we will dedicate our main attention. A second table is also provided, together

[1]In this article, we will not comment on the administrative route, which may be optional or mandatory depending on the case. As a rule, at the end of each administrative procedure, taxpayers that are not satisfied with the final decision adopted by the tax authorities can lodge an appeal before a TJC or a TAT.

[2]This article does not provide a general overview of the arbitration model. A summary, in English, can be found in Francisco de Sousa da Câmara, ''Arbitration as a Means of Resolving Tax Disputes,'' 54 *Eur'n Tax'n*, Nov. 2014, pp. 491-505.

Table 1. What to Choose: A Tax Judicial Court or a Tax Arbitral Tribunal?

	Principal Aspects to Consider	Tax Judicial Court	Tax Arbitral Tribunal
1.	Basis of the claim (Type of controversy)	Broader	Narrower
2.	Value of the Claim	No Limit	Max. Eur 10 million
3.	Deadline for a decision (Average timing)	Several years (Average 3 years 1st instance)	6 months + 6 months max. (Average 4.5 months)
4.	Possibility to Appeal?	Yes	No, as a rule
5.	Number of judges/arbitrators involved	1 (1st instance)	1 or 3
6.	Judges /Arbitrators expertise (specific backgrounds; lists of specialists)	Less, ab initio (Yes, with practice)	Yes, immediately (Specialization on different tax issues)
7.	Judges/Arbitrators appointment	According to an ''aleatory electronic system'' supervised by the TJC President	By the Parties or according to an ″aleatory electronic system″ supervised by the Ethics Committee of the CAAD
8.	Importance of precedence	Yes	Yes, very relevant
9.	Average number of cases to decide per judge (per year)	Several Hundred	From 0-10, except some chairpersons
10.	Access to the ECJ	Yes	Yes, quicker
11.	Independence & impartiality appraisal	Yes, ''career'' judges	Yes, under permanent scrutiny

with comments on other points that have been considered pertinent, but usually with less relevance.

I. What to Choose

A. Basis of the Claim: Type of Controversy

1. Introduction

The Portuguese Constitution grants taxpayers the fundamental right to access courts to defend their rights and legally protected interests. Theoretically, justice cannot be denied regarding the absence of a specific means or a type of action to entitle the taxpayer to go to court. The design of the judicial system regarding taxation foresees many types of actions to be used by the taxpayer depending on the issue to be decided by the competent court.[3]

As noted above, taxpayers may lodge judicial claims in a TJC or in a TAT, immediately after being notified of an unfavorable tax decision or tax assessment. However, the tax arbitration possibilities are much narrower, and the taxpayer should pay close attention to that crucial point, given the possible consequences.[4]

If a taxpayer submits a case to a TAT that has no jurisdiction over such request, the case will probably be dismissed by the tribunal and the taxpayer may have lost its opportunity to appeal.

Considering the relevance of this issue, let us illustrate the case with some examples from the TATs.

Common to the judicial and arbitration routes, the most common type of action is called ''process of judicial impugnment,'' which is a judicial appeal against a tax assessment or against a tax authority decision rejecting an administrative claim against a tax assessment.

2. Judicial Level

However, at the judicial level, a broader range of options is available, namely a special administrative

[3]*See* articles 26., 27., 38., and 49. of the Administrative and Tax Court Statute and 97. of the Code of Tax Procedure and Process (CTPP). Some types of those actions are defined in the Administrative Court Procedure Code.

[4]The jurisdiction of arbitration tribunals is defined by article 2. of the Tax Arbitration Law (TAL) and by Ordinance (Portaria) No. 112-A/2011 of March 22, 2011, in particular article 2. concerning the binding effect of the tax authorities. For a general analysis of the problem *see* Maria do Rosário Anjos, ''O Âmbito Material da Arbitragem Tributária à Luz da Jurisprudência Arbitral,'' CAAD — Arbitragem Tribunal No. 2, p. 12.

action that is used to challenge, before the courts, the legality of acts of the tax authorities not related to the legality of a tax assessment. Specifically, in tax foreclosure processes, a taxpayer may also bring an action before the judicial courts.

Moreover, tax law also foresees preventive actions in favor of the tax authorities, such as the seizure of assets and an option for the taxpayer to contest the seizure. Although preventive actions in favor of taxpayers are not treated in detail in the tax procedures law, the jurisprudence recognizes such a possibility (for example, the suspension of the effectiveness of acts by the tax authorities), applying the rules foreseen in the administrative and civil procedure codes.

The tax judicial procedures law also includes actions with an ancillary scope. These include the summons to provide documents, the issuance of certificates, the anticipated production of evidence, processes related to overriding bank secrecy, and the process for the execution of judicial decisions if the tax authorities do not voluntarily comply with the court's final decision.

Residually (that is, when any of the remaining types of actions do not provide a suitable means of achieving the results desired by the taxpayer), there is also an action for the recognition of a right or a legitimate interest in tax matters.

Given the wide variety of means available, each with a different scope, procedure, and deadline, and the respective subtleties of each action, taxpayers are strongly advised to seek professional and specialized advice concerning disputes with the tax authorities.[5]

3. Arbitration Level

In contrast, the legislature decided to narrow the limits of the tax arbitration system, probably to avoid overambitious scope and to prevent more interaction with the tax authorities, at least in the start-up phase.

As a rule, TATs have jurisdiction to decide on the legality of the most common tax acts or decisions, with additional tax assessments being the focus of taxpayer challenges.

Currently, TATs have jurisdiction over several types of requests brought by taxpayers to obtain decisions regarding the illegality of acts, such as:

- tax assessments;
- tax self-assessments;[6]
- tax withholdings;[7]
- tax payments on account;[8]
- tax decisions determining the tax base that do not result in the assessment of any tax; and
- tax decisions determining the tax base and defining property values.

In these cases, the tax authorities are bound to the arbitration and cannot refuse to litigate in the TAT or to opt for the TJC. That option remains only with the taxpayer.

For the last 3 1/2 years, TATs have been scrutinizing tax assessments and other tax acts related to the most important Portuguese taxes (corporate income tax, personal income tax, stamp duties, VAT, transfer tax, municipal taxes on real estate, and so forth). Figure 1 shows the number of requests submitted for arbitration based on the respective type of tax.

There are specific acts or decisions, however, that have been specified as being beyond the scope of the TATs, such as decisions determining taxable income based on indirect methods and related to specific customs matters.[9]

In practice, on several occasions, the tax authorities have taken the position that the TATs had no jurisdiction over specific cases that were brought before them, stating that the matters were outside the scope of arbitration.[10]

Although not always successful, as seen in transfer pricing matters, the tax authorities have been successful in some cases in arguing this type of exception based on the matter or on the amount involved; special attention should then be given to these procedural aspects before initiating an arbitration procedure.[11]

Based on the principle of justice and the need for the court to reach a decision on the substantive matters at issue, the Tax Arbitration Law (TAL) also stipulates that whenever the arbitral award concludes the proceedings without a decision on the merits of the claim

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[5]When the value of the tax case exceeds €12,500 or the case is before the Administrative Central Courts (ACC) or Administrative Supreme Court (ASC), the taxpayer must be represented by a lawyer.

[6]Provided these files were preceded by an administrative claim; otherwise the tax authorities would not be bound by the decision; *see* article 2. (a) of Ordinance No. 112-A/2011 of Mar. 22, 2011, and articles 131. to 133. of the Code of Tax Procedures.

[7]*Id.*

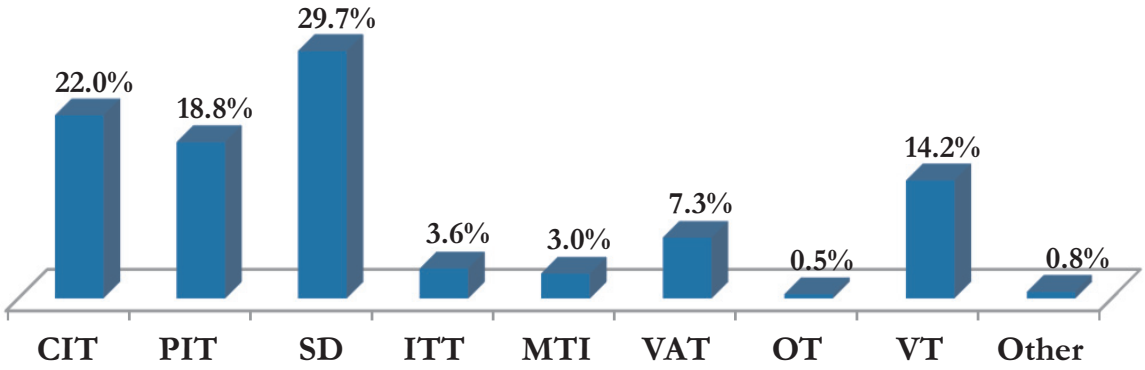
[8]*Id.*

[9]*See* articles 2., No. 1 and 4 of the TAL and article 2. Ordinance No. 112-A/2011, Mar. 22, 2011.

[10]*See*, *e.g.*, TAT, Cases 47/2012-T, 50/2012-T, 94/2013-T, 236/2013-T, and 123/2013-T.

[11]Tax authorities have been keen to invoke exceptions (more than in the tax courts), although generally without success. However, they have been successful in controversial cases such as TAT, Jan. 26, 2012**,** Case 5/2011-T (concerning antiavoidance rules), and in practice they often try to put an end to the controversy by pushing the TAT to dismiss the case without discussing its merits, sometimes with success (TAT, Feb. 18, 2012, 89/2012-T), and sometimes without (TAT July 28, 2014, 178/2013-T; TAT, Jan. 28, 2014, 260/2013-T). These two cases introduced special nuances in the previous arbitration jurisprudence and allowed the TAT to rule on taxes and taxpayers related to the Autonomous Region of Madeira.

Figure 1. Distribution of Cases by Type of Tax



Notes: CIT: corporate income tax; PIT: personal income tax; SD: stamp duty; ITT: immovable property transfer tax; MTI: municipal tax on immovable property; VAT: value add tax; OT: oil tax; and VT: vehicle tax.

Source: Centre for Administrative Arbitration (Jan. 2015), available at Arbitragem Tributária nº 2, Jan. 2015 and at www.caad.org.pt.

for ''reasons alien to taxpayers,'' as a rule, the clock in terms of the complaint, challenge, or reassessment, or request for a new arbitral award would start again on the date of the notice of the arbitral award. Although the definition of the concept ''reasons alien to the taxpayers'' may seem ambiguous, based on the principles outlined above and the spirit of the law, when there is no clear gross negligence on the part of the taxpayer, the decision should lean in favor of allowing the taxpayer to initiate a new case.

B. Value of the Claim

TJCs of first instance are able to hear and decide on cases of any value, although some limitations exist regarding appeals (for example, tax cases related to tax assessments with values below €1,251 do not allow taxpayers to lodge an appeal). Apart from the limitations based on the grounds of the claim and the type of controversy (see Section I.A of this article), the tax and customs authorities are only bound by the tax arbitration decisions if the maximum amount involved does not exceed €10 million.[12] In practice, taxpayers should only lodge an arbitration case if the tax assessment is not higher than €10 million. This threshold also emphasizes the prudence of the tax arbitration model.

As statistics from the Centre for Administrative Arbitration (CAAD)[13] show, at the end of 2014 only 3.9 percent of the approximately 1,400 cases initiated since 2011 had an initial value above €1 million.[14]

Curiously, empirical data show that taxpayers seemingly concur with this legislative restriction, given that few high-value cases have been initiated.

This fact, together with the speed and fast rotation in which cases are decided by TATs (in contrast with cases pending in the judicial system, which can languish for several years with appeals), also explains why the total value of litigation in the TATs is still relatively small compared with the high value of tax judicial litigation in Portugal. As Table 2 shows, at the beginning of 2015, 1,162 tax cases with a value exceeding €1 million were pending in the judicial courts, amounting to almost €8 billion (representing about 4.6 percent of GDP[14]), and these 1,162 cases represented approximately 2 percent of all cases pending in the TJC.[15]

As taxpayers become more confident with the arbitration system while growing weary of the timing involved in the TJC, we may see more high-value cases lodged before the TATs.

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[12]*See* article 4., No. 1 of the TAL and article 3, No. 1 of Ordinance No. 112-A/2011, Mar. 22, 2011.

[13]CAAD is the only arbitration center that promotes the resolution of public disputes in administrative or tax matters — in order to settle these disputes, it is not possible to have an ad hoc arbitration or an arbitration administered by another entity. This center operates under the aegis of the High Council of the Administrative and Fiscal Courts (Conselho Superior dos Tribunais Administrativos e Fiscais, or CSTAF). The CSTAF also appoints the chair of the Ethics Committee of the CAAD.

(Footnote continued in next column.)

[14]In 2010 and 2011 this contingency — €6.8 billion and €6.25 billion, respectively — represented about 3.9 percent of GDP.

[15]There are no public statistics available for the value corresponding to the total pending cases in the TJC or the TAT in December 31, 2014, but the known elements make us presume that the latter should not amount to more than 1 percent of the former.

Table 2. Register of Pending Cases in the TJC With a Value Above € 1 Million

Courts		Number of Cases Pending (Above € 1 Million)			
		May 2011	Dec. 31, 2012	Dec. 31, 2013	Dec. 31, 2014
Administrative Supreme Court (ASC)		19	44	82	58
Tax Section		19	44	82	58
Administrative Central Courts (ACC)		121	176	221	238
AREA		121	176	221	238
ACC North (tax)		55	75	66	77
ACC South-Lisbon (tax)		66	101	155	161
Administrative Fiscal Court		1219	790	758	866
LISBON TEAM	AREAS	749	430	388	452
	ALMADA	64	10	25	23
	BEJA	14	8	10	12
	FUNCHAL	16	15	11	10
	LEIRIA	36	10	24	21
	LISBON	456	344	245	292
	LOULÉ	10	11	8	12
	PONTA DELGADA	3	3	1	1
	SINTRA	140	26	62	75
	C. BRANCO	10	3	2	6
OPORTO TEAM	AREAS	470	360	370	414
	AVEIRO	41	18	42	55
	BRAGA	39	3	12	8
	COIMBRA	25	4	28	25
	MIRANDELA	8	2	1	7
	PENAFIEL	14	9	11	14
	OPORTO	321	311	260	284
	VISEU	22	13	16	21
Total Cases		1359	1010	1061	1162
Total Value €		€ 6,8 Billion	€ 6,25 Billion	€ 7,56 Billion	€ 7,95 Billion

Source: Based on information published by the Conselho Superior dos Tribunais Administrativos.
e Fiscais, available at www.cstaf.pt.

Nevertheless, the rule of the game — in allowing no appeal — is likely to continue to be a deterrent for all but those taxpayers that can contemplate such a loss all at once.

C. Deadline for a Decision: Average Timing

The need to speed up tax proceedings and alleviate the burden on the TJC was important in justifying the creation of the TATs. The main goal was for each case to be decided within six months from the **date of constitution [??? MAYBE ''date of creation''?]** of the TAT. In order to make the time frame realistic in more complex cases, however, another set of rules was

Table 3. Register of Tax Court Cases (First Instance) and Their Status (From 2010 to Dec. 31, 2014)

First Instance Tax Courts AREA	Pending Cases (Dec. 31, 2010)	Pending Cases (Dec. 31, 2011)	Pending Cases (Dec. 31, 2012)	Pending Cases (Dec. 31, 2013)	Cases Initiated (2014)	Cases Finalized (2014)	Pending Cases (Dec. 31, 2014)	Judges allocated	Average number of cases per judge (2014)
ALMADA	2,460	2,655	2,585	2,763	1,305	1,139	2,929	4	732.3
AVEIRO	4,818	3,416	2,867	2,623	960	1,001	2,572	7	367.4
BEJA	706	672	673	608	309	302	615	3	205.0
BRAGA	2,131	2,565	2,751	2,734	2,295	1,575	3,454	7	493.4
CASTELO BRANCO	1,202	1,317	1,360	1,444	496	381	1,559	3	519.7
COIMBRA	2,310	1,865	1,780	1,750	626	664	1,741	5	348.2
FUNCHAL	632	455	387	437	213	183	466	2	233.0
LEIRIA	3,786	3,398	3,427	3,587	1,522	1,224	3,871	7	553.0
LISBON	8,319	9,162	9,991	10,602	3,190	2,389	11,378	18	632.1
LOULÉ	605	618	782	798	782	722	858	3	286.0
MIRANDELA	414	450	521	496	365	250	607	3	202.3
PENAFIEL	1,319	900	672	559	1,186	554	893	3	297.7
PONTA DELGADA	58	81	136	176	95	38	233	1	233.0
PORTO	8,799	9,178	9,240	9,220	2,903	2,263	10,042	14	717.3
SINTRA	3,712	3,680	3,596	3,791	2,457	1,176	5,036	8	629.5
VISEU	2,739	2,382	2,208	1,800	787	900	1,681	5	336.2
TOTAL CASES	44,010	42,794	42,976	43,388	19,491	14,761	47,935	-	

Source: Based on information published by the Conselho Superior dos Tribunais Administrativos e Fiscais in January 2015; the information referring to the allocation of judges available dates of March,1, 2013.

added to allow for the possibility of an extension, which nevertheless should never exceed a further six-month period.[16]

Statistics currently indicate that this objective has been achieved. The average pending period for cases is 4 1/2 months, based on CAAD information available as of January 2015.

In the meantime, note that the situation in the TJCs is different. As a rule, cases do not take less than three or four years (and on many occasions they will take more time) to be decided with a res judicata decision, in particular if they are complex cases. Cases with values in excess of €1 million were given priority at the end of 2011, but appeals are the norm; few cases are definitively decided in the first instance, especially if they have some monetary value.

Under the current organization of the tax judicial system, there are 16 courts of first instance in different regions of the country (including Madeira and the Azores) that deal with tax matters.

As shown in Table 3, in spite of the efforts made in the last years, including with the creation of special teams, the level of pending cases is not decreasing because litigation increased, in particular during 2014.

Superior courts (the Administrative Central Courts (ACC) or Administrative Supreme Court (ASC)) had many more cases to appreciate, apart from those with values above €1 million, as the comparison between tables 2 and 4 shows regarding the ACC.

These tables clearly show the Herculean task requested of these judges who have the impossible task of deciding more than two or three cases per day with a written decision. They also must, at a minimum,

[16]The TAT may extend the six-month term for successive two-month periods, up to a maximum of six months; if the tribunal decides it needs extra time, it must inform the parties of the extension and the respective rationale.

Table 4. Register of Tax Cases at the ACC (Second Instance) and their Status (From 2010 to Dec. 31, 2014)

Second Instance Administrative Central Counrt Tax Section Location	Pending Cases (Dec. 31, 2010)	Pending Cases (Dec. 31, 2011)	Pending Cases (Dec. 31, 2012)	Pending Cases (Oct. 31, 2013)	Cases Initiated (2014)	Cases Finalized (2014)	Pending Cases (Dec. 31, 2014)
NORTH AREA/OPORTO	1240	1545	1696	2036	903	637	2,302
SOUTH AREA/LISBON	823	974	1196	1430	1,043	685	1,788
TOTAL	2063	2519	2892	3466	1946	1322	4090

Source: Based on information published by the Conselho Superior dos Tribunais Administrativos e Fiscais in January 2015; available at www.cstaf.pt.

Register of Tax Cases at the ASC (last Instance) and their Status (From 2012 to Dec. 31, 2014)

Administrattive Supreme Court (ASC) - TAX	Pending Cases (Dec. 31, 2012)	Cases Initiated (2013)	Cases Finalized (2013)	Pending Cases (Dec. 31, 2013)	Cases Initiated (2014)	Cases Finalized (2014)	Pending Cases (Dec. 31, 2014)
Tax Plenary	42	84	68	58	57	75	40
Tax Section	379	1051	862	568	910	854	624
Section Customs	2	1	-	1	0	1	0
TOTAL	423	1136	930	627	967	930	664

Source: Based on information published by the Conselho Superior dos Tribunais Administrativos e Fiscais in January 2015; available at www.cstaf.pt.

analyze and hear other cases, study, and reflect. These figures clearly call for action.

One such measure was taken at the end of 2011 when an extraordinary team of tax judges was appointed to the tax courts of first instance to deal with cases valued at over €1 million.[17]

Tax arbitration as an alternative route to contest tax assessments has also been helpful; the tax courts of first instance were able to reduce their pending backlog, at least for a while (see tables 2 and 4), but the level of litigation in response to a new intense wave of tax assessments increased again in 2014 following an abatement in 2012-2013.

In the meantime, the level of pending cases before the TATs grew, but these tribunals together with the CAAD were able to maintain an average pending period of just 4 1/2 months.

TATs will certainly continue to help address the backlog of cases in the tax courts, but they cannot shoulder the burden alone and be expected to resolve the problems of tax justice in Portugal. Moreover, the shifting of cases from the TJCs to the TATs and the significant increase in cases being heard by the TATs creates new challenges to the CAAD. The TJC structure, in which 52,686 cases were pending at the end of 2014, also requires new actions to be taken in order to ensure timely tax justice. More judges, more administrative support, and more IT equipment and resources, together with specific goals to achieve and a performance system, must be seriously considered in order to solve the current backlog.[18]

D. Possibility to Appeal

As a rule, a decision adopted by the TAT is not subject to appeal, which means that it is binding on the taxpayers and tax authorities.[19]

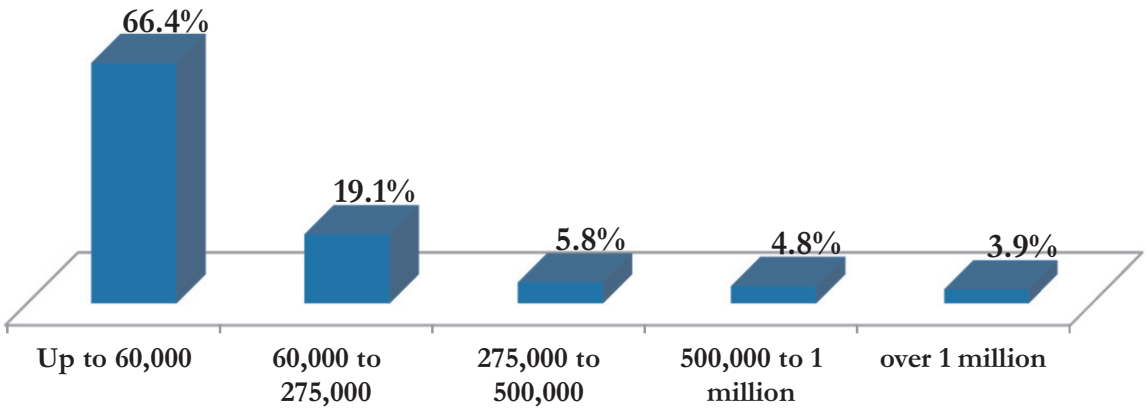
[17]Law No. 59/2011 of Nov. 28, 2011. Under the Memorandum of Understanding on Specific Economic Policy Conditionality of May 17, 2011, and the Economic Adjustment Program negotiated with the European Commission, European Central Bank, and IMF, the Portuguese government also assumed an obligation to address the bottleneck in the tax appeal system. A specific goal was made to streamline the functioning of the judicial system in the interests of the proper and fair functioning of the economy.

[18]It is evident that the current abstract legal provisions concerning the possibility of having teams that support and assist judges (article 4. of DL No. 166/2009 of July 31 and 56.-A of the Administrative and Tax Court Statute) must be enforced with political and administrative power, the allocation of additional funds, and eventual targets and milestones to be achieved.

[19]This represents one of the principal characteristics of the tax arbitration model and enshrines a crucial departure from the

(Footnote continued on next page.)

Figure 2. Distribution of Cases by Value



Source: Centre for Administrative Arbitration (Jan. 2015).

The decision is adopted by a majority of arbitrators (when there is a panel); if the decision is not unanimous, an arbitrator may issue a dissenting opinion as to the arbitral award or partial award. It may be that different dissenting opinions will arise regarding the same arbitration procedure.[20]

On the contrary, and as noted above, appeals are the norm when the judicial route is taken. An appeal (launched by the unsuccessful party in the first instance case or by both if the results are divided) may be brought before the ACC Tax Section for a disagreement over the facts and the law decided in the first instance, or to the ASC for a disagreement exclusively based on matters of law, and is only precluded if the value of the case (in cases relating to tax assessments, the amount of tax in dispute) is less than €1,251.

From the decision of the ACC or the ASC, the taxpayer or the tax authorities may, in exceptional cases, lodge a further appeal to the ASC when the case contradicts a previous decision, or take the case to the Constitutional Court when there is a constitutional issue at stake.

Unless the cases are launched before and decided by the TATs, the majority of disputes are resolved before the ACCs, since the party that loses the case in the first instance often appeals. Since the ASC only deals with matters of law, fewer cases reach this higher court.

E. Number of Arbitrators/Judges[Arbitrators or Judges(?)] Involved

The lynchpin of the arbitration project — creating arbitration tribunals to settle tax disputes — was deciding how these tribunals would be formed and how the arbitrators would be chosen or appointed, either by the parties involved or by a third party.

Under the approved regime, arbitration tribunals may operate with a single arbitrator or with a panel of three arbitrators. If the disputed amount exceeds €60,000, or if the taxpayer chooses to appoint an arbitrator, the arbitration tribunal is formed by a panel of three arbitrators. Otherwise, the case will be settled by a decision of a single arbitrator. The majority of cases (66.4 percent) do not exceed €60,000 and are decided by a single arbitrator. (See Figure 2.)

Each time a case is submitted to arbitration, the Ethics Committee of the CAAD appoints the single arbitrator from the list of CAAD-approved arbitrators (see below).

In contrast with the arbitration system, regardless of the value of the dispute, at the judicial level the initial claim is decided by a single independent judge in one of the 16 tax courts of first instance.[21]

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traditional tax litigation systems. There are, however, two exceptions that contribute to ensuring the harmonization of court decisions and guaranteeing taxpayer rights at the highest level:

- an appeal, to the ASC, whenever the TAC**[WHAT IS ''TAC''? NOT PREVIOUSLY ESTABLISHED (MAYBE ''TAT''?)]** decision conflicts with a previous decision issued by the ASC or the ACC, provided the same fundamental point of law is at issue; and
- an appeal, to the Constitutional Court, whenever the TAC's**[??? (TAT?)]** decision denies the application of a provision based on it being unconstitutional or applies a provision the unconstitutionality of which was raised during the proceedings.

[20]*See* article 23., No. 5 of the TAL.

[21]The CSTAF is the public body that manages and supervises the discipline of the administrative and tax courts. This body has an important role within the arbitration system because it appoints the president of the Ethics Committee of the CAAD, who is important in the creation of the TATs. The CSTAF has a

(Footnote continued on next page.)

Upon an appeal to the ACC or the ASC, the cases are decided by a majority decision of a panel of three judges.

F. Arbitrators Appointment

Taxpayers can initiate arbitration by choosing a specific arbitrator. In this case, since the arbitration tribunal is made up of three arbitrators, the second arbitrator is chosen by the tax authorities and the third by agreement of both parties. Alternatively, if the parties do not reach an agreement, the third arbitrator will be appointed by the Ethics Committee of the CAAD. Otherwise, all arbitrators (single or panel) are appointed by the Ethics Committee of the CAAD.

According to the current regulation, the arbitrators are appointed **on an aleatory basis, by a computer system, on a sequential basis [NOT SURE WHAT YOU MEAN HERE — THAT A COMPUTER RANDOMLY CHOOSES THE ARBITRATORS? NOT SURE HOW ''sequential'' COMES IN TO PLAY??]**. If they cannot be appointed as such (see below), then the Ethics Committee decides.

However, when (i) the arbitrator is currently representing an entity in a case submitted to an arbitration tribunal; or (ii) the special nature of the case requires more expertise, the Ethics Committee may appoint an arbitrator outside such sequential order. When this occurs, the Ethics Committee should use the sequential order in the subsequent appointment.

When the matter is decided by a panel of arbitrators, the appointment of the chair, if not chosen by the other two members of the panel (that is, when the first arbitrator is chosen by the taxpayer and the second by the tax authorities), is made by the Ethics Committee from candidates featured on the list mentioned herein.

The chair must be:

- a former judge from the tax courts (or someone holding an LLM in taxation) for cases with a value from €500,000 to €1 million; or
- a former judge from the tax courts (or someone holding a PhD in taxation) for cases with a value of more than €1 million.[22]

These limitations may need to be reconsidered, notably because the justification for limiting candidates to those with this background is debatable and the number of cases is significantly increasing. However, this model has proved to be reasonable and has delivered results; associating the experience of former judges and their **images of independency [??? 'reputation for independence'?]** together with a high degree of specialization of new arbitrators also helped to ensure confidence and trust in TATs, not only from the parties but also among the different courts, which made the possibility of interactions and cross-referencing more probable and effective.

The vast majority of cases initiated and decided upon were heard by a single arbitrator (66.4 percent). When the TATs were formed by three judges, however, just 2.2 percent of the cases had an arbitrator appointed by the taxpayer.

Judges from the TJC are appointed by the CSTAF, but the distribution of cases in the specific TJC is made **by electronic aleatory means supervised [??? 'randomly' ???]** by the president of the Court, who is a judge from the ACC or the ASC. The judge is appointed to hear and decide the case among the available judges allocated to that court, whether the latter is a court of first instance, the ACC, or the ASC (for example, tax sections). These are career judges within the judicial system that regulates the administrative and tax justice infrastructure.

G. Arbitrators' Expertise: Specific Background — Lists

When the parties appoint an arbitrator, they do not have to select the arbitrator from a previous list of arbitrators available at the CAAD; however, in all other cases, the Ethics Committee of the CAAD must choose those arbitrators from specific lists. The lists of arbitrators include individuals who applied to perform such a task and were accepted by the CAAD as a result of a favorable opinion of its Ethics Committee.[23]

The list of arbitrators is public and is usually renewed every year.[24] The legal regime regarding tax arbitration requires that such arbitrators have proven technical capacity, upstanding moral character, and a sense of public interest.[25] They should be:

- primarily jurists, with at least 10 years of proven experience in tax law, notably as a public servant,

president (that is, the president of the ASC) and other 10 members (two appointed by the president of the Republic, four by the Parliament, and four judges elected *inter pares* **[??? NOT SURE WHO ELECTS THESE FOUR JUDGES? SINCE THE PHRASE MEANS 'first among equals' ARE THEY ELECTED BY THEIR FELLOW JUDGES???].**

[22]The tax and customs authorities are only bound by the jurisdiction of the **TACs[??? (TATs?)]** up to a maximum ceiling of €10 million (Ordinance No. 112-A/2011, of Mar. 22, 2011). However, the same ordinance determines that the president of the Ethics Committee may select a chair without such curriculum in case of the impossibility of appointing an arbitrator with those characteristics (article 3. No. 3 of Ordinance n 112-A/2011).

[23]*See* articles 3. and 4. of the Regulation of Arbitrators Selection in tax matters and articles 8.(g) and 10.(A)(4)(c) of the by-laws of the CAA.

[24]The website (http://caad.org.pt) lists the names of each arbitrator, area of activity (for example, jurist or economist), expertise, as well as a CV and other eventual comments. *See also* Ethics Code of the CAAD, article 3..

[25]The requirements to be an arbitrator are also described in article 2. of the Ethics Code of the CAAD.

magistrate, lawyer, consultant, legal consultant, in higher education teaching or research, in the tax administration, or with relevant scientific work in the area;

- individuals with a degree in economics or management (these may be appointed as arbitrators, though not as the chair), in matters requiring specialized knowledge of an area outside of law; or
- retired judges, provided they make a statement renouncing their retirement status or requesting the temporary suspension of that status.

Those potential arbitrators are allocated in lists of experts by different subjects, such as personal income tax, corporate income tax, VAT, other taxes, transfer pricing, and international tax. As a rule, the majority of these arbitrators spend their professional lives as tax lawyers or tax consultants involved with substantive and procedural tax rules, or tax professors or retired judges and, apart from the latter, their experience in deciding cases is limited. On substantive matters, they usually have great expertise and this is emphatically shown by the existence of sublists of experts with experience in specific tax matters.

In contrast, career judges have a broad expertise on tax if already allocated either the first instance or superior courts and are responsible for thousands of cases, but having less day-to-day contact with the minutiae of substantive law. In fact, career judges are appointed to appreciate the cases at random regardless of the subject.

Under these circumstances, one could generalize that arbitrators have more tax substantive expertise and career judges more knowledge in tax and civil procedures, but like all generalizations, this is not always the case.

H. Importance of Precedence

As the vice president of the ASC stated:

> Although precedent does not exist under the Portuguese legal system as a binding rule . . ., it is a fact that jurisprudence has enormous real and effective weight in future decisions, apart from contributing towards the creation, development and reshaping of legal provisions, *revealing the meaning of the law*.[26] **[AUTHOR, EMPHASIS ADDED OR IN ORIGINAL?]**

An examination of various TAT awards indicates that taxpayers submit novel issues to arbitration as well as cases with precedents, either in the judicial system or under the arbitration model. The motive for the first initiative may also have been to bring forth a test case in order to obtain a precedent, obtain a quick answer, gauge whether arbitrators are more receptive to EU and international tax law, a bit of everything, or something else entirely.

The matters covered included thin capitalization rules, capital gain and capital loss rules, transfer pricing rules, tax groups, reverse mergers that may benefit from tax neutrality, several types of VAT issues, stamp duties including some related to EU directives on concentration of capital, immovable property taxes, residency issues, the application of the Portuguese general antiavoidance rule, and so forth. On many occasions, the rules under analysis were being scrutinized for the first time and the arbitration awards represented a precedent to follow.

Clearly, arbitration can also be used as a quick and effective vehicle by other taxpayers to follow such precedent and overturn tax assessments based on the same grounds rejected by the first decision. It probably is the fastest way to recover tax paid.

Therefore, also because of this, tax arbitration is becoming more appealing as shown in Figure 3.

Over the last three years, taxpayers have opted to litigate approximately 1,400 tax disputes under the arbitration mechanism. There is a clear and exponential evolution each year (from 26 cases initiated in 2011 to 843 initiated in 2014).

Moreover, there are already several cases in which the ASC or the ACC has referred to awards adopted by the TATs[27] and cases in which the latter referred to decisions issued by the ACC or the ASC, and the composition of the TATs and the quality of their awards were decisive aspects in making this possible in such a short time frame. (See Section I.D of this article.)

In making these referrals, the courts reinforce the relevant position but — as said — they are not obliged to follow a previous decision; this is not a given. The safeguard in cases of contradictory awards is the exceptional right to appeal.[28]

I. Average Annual Number of Cases to Decide per Judge

Statistics show an enormous and sometimes disproportionate allocation of cases among judges of first instance, depending on their geographic area. Judges in the ACC or the ASC also have a significant workload and, inevitably, the most complex and high-value cases.

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[26]Juíza Conselheira Dulce Manuel Neto, "A Jurisprudência da Secção de Contencioso Tributário do STA. Notas e reflexões. Velhas questões. Novas soluções," *Revista de Finanças Públicas e Direito Fiscal*, Ano V-4, p. 115 (2012) (author's translation).

[27]*See*, *e.g.*, ASC, Case 779/12 (Sept. 24, 2014), in which the ASC also grounds its judgment about the concept of a deductible tax cost for corporate income tax purposes in abundant doctrine (several authors opinions) and jurisprudence (including a TAT decision — TAT, Case 29/2012-T).

[28]As indicated, one can only make an appeal whenever the TAT decision conflicts with a previous decision issued by the ASC or the ACC, provided the same fundamental point of law is at issue.

As Table 3 shows, most judges in courts of first instance have between 250 and 700 cases to decide per year. Numbers are somewhat lower in higher courts, but the responsibility for the final decision increases significantly.

In contrast, in TATs the vast majority of arbitrators do not have more than 10 cases to decide per year, with the exceptions being the chairs that must be appointed from the list of retired judges or tax professors.

In spite of the usual parallel profession exercised by the arbitrators, note that arbitrators often have more time to dedicate to their cases — clearly because they handle few cases on average. Moreover, the fact that arbitration decisions are published and scrutinized ensures that arbitrators bring their best efforts to the fore.

J. Access to the CJEU

On June 12, 2014, the Court of Justice of the European Union confirmed its jurisdiction to reply to questions referred to it by a TAT under article 267(3) of the Treaty on the Functioning of the European Union,[29] taking into account several factors and criteria that have been emphasized by the CJEU over the years.

If there are uncertainties on whether a tax assessment violates EU law, the court of last instance (including a TAT) must file a request for a preliminary ruling with the CJEU. In contrast to the court of last instance, the courts of first instance are not obliged to file those requests. Indeed, examples of cases in which those courts have opted voluntarily to request a preliminary ruling are relatively rare.[30] This is, however, an important measure to ensure uniformity in the EU legal order; at the same time, it represents an effective way to assist national courts in attaining this goal.

In *Ascendi*, about 18 months elapsed from the creation of the TAT until the CJEU decision was given.[31] Naturally, in this case, the TAT's final decision did not observe the six-month or one-year period time frame (except if one considers that the case was suspended while it was pending — for about one year — at the CJEU level); even so, this still indicates that one may have timely access to the CJEU. In all likelihood, this route has become one of the fastest routes in all Europe to obtain an CJEU ruling and, as such, it is likely this route will be increasingly used by arbitrators and requested by the parties involved in the dispute.[32]

K. Impediments and Duties of Arbitrators

As a rule, career judges are independent and impartial. It is a constitutional principle, reiterated by law and accepted by all judges who take on such profession. In practice, this tends to be right, but judges, being human, sometimes fail to observe these principles. Happily, for the Portuguese tax system, this is rare.

Arbitrators are subject to impartiality and independence principles as well as to the duty of tax secrecy on the same terms as those imposed on officers, employees, and agents of the tax authorities.[33] The arbitrators should expressly accept their appointment, confirming their expertise and recognizing that there are no impediments for them to serve as arbitrators.[34]

There are several possible impediments to acting as an arbitrator. Apart from the general ones foreseen in the Administrative Procedure Code,[35] the tax arbitration regime also foresees a two-year period of ''mandatory leave,'' which means that a person cannot be appointed as an arbitrator if, in the previous two years, that individual was:

- an officer, employee, or agent of the tax administration; a member of the corporate bodies, employee, attorney, auditor, or consultant of a taxpayer who is party to the proceedings or of an entity in a control relationship with the relevant taxpayer as defined in the Companies Code; or a person or entity with an interest in the success of the claim; or

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[29] *See Ascendi* (C-377/13).

[30] For further developments concerning referrals made by Portuguese courts to the CJEU, *see* da Câmara, ''The Meaning and Scope of the *Acte Clair* Doctrine Concerning Direct Taxation: The Portuguese Experience and the Establishment of Boundaries,'' in Ana Paula Dourado and Ricardo da Palma Borges, eds., *The Acte Clair in EC Direct Tax Law* (IBFD 2008).

[31] Ascendi, a concessionaire of several Portuguese motorways, requested a refund of stamp duties it had paid on four capital increases it carried out between December 2004 and November 2006, on the grounds that Portuguese stamp duties were contrary to EU law because capital duties on an increase of share capital — abolished in 1991 — could not have been reintroduced later on (in 2001). The CJEU answered a preliminary ruling requested by a TAT stating, first, that it had legitimacy to present such request and, then, emphatically stated that:

> [I]t is necessary to have recourse to a teleological interpretation of the provisions concerned, by examining the objective pursued by them. [. . .] Directive 69/335 has the objective of limiting or abolishing capital duty. [. . .] The intention of the Union legislature was in fact to abolish capital duty. [. . .] Therefore, even if the loss of budget revenue could justify maintaining capital duty beyond 1 July 1984 (Portugal became part of the EEC on 1 January 1986), it could not justify reintroducing such duty. **[IS THIS QUOTE CORRECT?]**

[32] New cases were already submitted to the CJEU (*e.g., Secil* (C-464/14) (2015/0034/02) submitted on Oct. 8, 2014).

[33] *See* article 9. (1) of the TAL.

[34] *See* article 8. (2) of the TAL.

[35] *See* article 44. (1) of the CPA.**[WHAT DOES ''CPA'' STAND FOR? NOT ESTABLISHED YET. THE CORRESPONDING TEXT ABOVE MENTIONS ''the Administrative Procedure Code''; RELATED TO THAT?]**

(Footnote continued in next column.)

- an employee, collaborator, member, associate, or partner of any entity that has provided auditing, consulting, or legal services or legal counsel to the taxpayer.[36]

Moreover, the law also expressly requires that an appointed arbitrator must decline to intervene when it may reasonably entail suspicion concerning their impartiality and independence.[37] Even with their lay status and considering that as a rule,[38] they have other professional careers, the usual ethical requirements for judges apply to arbitrators — they are obliged to decide the case with objectivity and maintain absolute confidentiality.[39] Also, they should aim for a quick, efficient, and economical arbitration while observing the appropriate procedural guarantees for both parties.[40]

The parties may request that an appointed arbitrator be barred from acting as such, but it is up to the Ethics Committee to decide, based on the grounds specifically outlined in the Ethical Code, after hearing the arbitrator, the other party, as well as the other arbitrators (when there is a panel).[41]

Although no public data exist regarding the number of cases when such a request has been made, unofficial information confirms that these situations are rare. It would, however, also contribute to transparency to make information about situations that have arisen available, together with the petitions and arguments, or at least the final decision adopted by the Ethics Committee. Arbitration gains from an open framework and accessible decisions. Full transparency contributes to a more vigorous system, as the CAAD recognizes.

II. Further Aspects to Consider

The crucial aspects that usually justify an option were already identified. Nevertheless, it is still possible to identify a set of further elements, which we will briefly overview in Table 5.

A. Procedures, Principles, and Formalities

As a rule, the procedural rules and other formalities in the TJC are less flexible than (and do not have the same autonomy granted to) the TATs.

The TAL introduced procedural provisions in order to conduct the proceedings within a six-month time limit while maintaining the ability for all parties to respond to the evidence given. It specifically emphasized the autonomy of the arbitration court or tribunal when conducting the proceedings and determining the rules to be observed in order to obtain a decision on the merits of the claim. It also attributed more relevance to oral submissions and immediateness and to the free analysis of the facts and the free determination of the necessary means of proof in accordance with the rules of experience and the free conviction of the arbitrators.[42]

B. Geographical and Bureaucratic Issues

While the judicial courts of first instance are located in 16 different areas spread throughout the country, and the ACC is based in Oporto and in Lisbon, the ASC and the TATs are located only in Lisbon. Not surprisingly, there is less bureaucracy in the TATs.

Moreover, at the CAAD, **where all the cases are conducted [???]**, simplicity, informality, and a modern and efficient structure with an updated IT system for communication with the parties, work together in order to comply with deadlines. The seriousness and efficient administrative structure in the CAAD should serve as a positive example for administrative support to the TJCs. It is remarkable how the CAAD has been able to support significant growth (from 26 cases in 2011 to 843 cases in 2014), but clear attention should also be paid to the CAAD and the TATs in order to ensure the continuity of those results.

C. Nature of Court: Basis of Its 'Creation' The TJCs have long been part of the legal and judicial system and arbitration tribunals are included in the list of courts in the Portuguese Constitution, while the TATs were established in 2010-2011 by law as an alternative means of judicial resolution disputes dealing with the legality of taxes.

A request for the TAT to solve a specific case is filed by an e-mailed application sent to the head of the CAAD. The TAT is then formed, provided the tax authorities do not revoke these acts or decision in the meantime.

D. Legal Rules and Principles That Apply

Like judicial courts, the TATs decide based exclusively on the statutory law, which means that recourse to equity is prohibited.

Procedural principles are simpler in the TATs, as noted above. Another set of legal provisions may apply, such as:

o the tax procedures and court procedure rules;

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[36] *See* article 8., No. 1 of DL 10/2011, Jan. 20, 2011.

[37] *Id.*, article 8., No. 2. This is a constitutional requirement (Case No. 55/92). Although this rule was not included in the Arbitration Voluntary Law of 1986, this was already accepted by the Jurisprudence of the Constitutional Court. *See* Miguel Galvão Teles, ''Processo Equitativo e Imposição Constitucional da Independência e Imparcialidade do árbitro **[CHANGE ''do árbitro'' TO ''dos Árbitros''?]**em Portugal,'' *Revista de Arbitragem e Mediação,* São Paulo, 2010, Vol. 24, pp. 126-134.

[38] The main exception applies to retired judges.

[39] Articles 1., 10., and 12. of the CAAD Ethics Code.

[40] Article 11. of the CAAD Ethics Code.

[41] *See* article 6. et seq. of the CAAD Ethics Code.

[42] *See* article 16. TAL.

Table 5. What to Choose: A TJC OR A TAT

	Further Aspects to Consider	Tax Judicial Court	Tax Arbitration Tribunal
1.	Procedural formalities	More	Less
2.	Geographical & Bureaucratic issues	Different geographical areas in Portugal (1st instance)	Less bureaucracy
3.	Nature of court: basis of its ''creation''	Law	Law (TAL)
4.	Legal rules & principles that apply	Statutory law	Statutory law - recourse to equity absolutely prohibited
5.	Presentation of evidence	All defined by law	All defined by law (More flexible)
6.	Tax authorities stance in court/tribunal (empirical perceptions)	''More defensive''	''More aggressive''
7.	Public disclosure of decisions & Statistics	Less	More
8.	Costs of litigation	Defined by law	Defined by law. Possible additional costs if arbitrator chosen by taxpayer
9.	Deadlines to react and different procedural options to take into account	Specific rules (different from TAT)	Specific rules (different from TJC)
10.	Possible accumulation of requests & claimants	Yes, specific (different from TAT)	Yes, specific (different from TJC)
11.	Exceptional appeal of revision of decisions	Yes	Less defined but potentially available
12.	Possibility of being found guilty by acting in bad faith	Yes	Yes, theoretically
13.	Responsibility/liability of judges	Yes	Yes, theoretically
14.	Obligation to pay the sum in dispute	After final decision (with appeals, may take several years)	After final decision (6 months 1 year maximum)

- the organization and functioning of the tax administration rules;
- the organization and procedures in administrative and tax court rules;
- the administrative procedural rules; and
- civil procedural rules, which are specifically and expressly recognized as subsidiary law.[43]

No reference at all is made to the voluntary arbitration rules as a subsidiary law, which may indicate that there is some prejudice toward the arbitration model itself or that it was intended to make this model closer to the judicial system. Whether this decision was made to emphasize that normal TAT proceedings and arbitration are fields apart or to try to avoid attacks on the nascent tax arbitration system remains debatable.[44]

E. Presentation of Evidence

There are no particular differences in the presentation of evidence. If the judges, like the arbitrators, decide that no exception prevents the analysis of the merits of the claim, they determine whether they will need to hear the witnesses presented by the parties or whether other means of proof will be analyzed (on request of the parties or on their own initiative).

Considering the enormous relevance of facts, the timelines of the process and that oral submissions are favored over lengthy written ones in the TATs, taxpayers should pay particular attention to this phase of the case.

As a rule, the CAAD's facilities have more IT equipment than the TJC, including many types of videoconferencing software for interviewing witnesses.

[43]Article 29. of the TAL.

[44]From the principles of the free consideration of evidence and the autonomy of the arbitration court in conducting the proceedings, sooner rather than later, more influence from voluntary arbitration will reach the TATs. For an interesting analysis of the

(Footnote continued in next column.)

procedures adopted by arbitration tribunals in accordance with voluntary arbitration law, *see* António Sampaio Caramelo, ''Da condução do processo arbitral (Comentários aos artigos 30.0 a 38. da Lei da Arbitragem Voluntária),'' *Revista da Ordem dos Advogados*, Ano 73, II/III, Lisbon, Apr.-Sept. 2013, pp. 669-742.

The proximity between the parties, the TATs, and the CAAD and the short deadlines for each phase of the process also helps to define whether other means of proof are requested (such as expert testimony).

F. Tax Authorities' Role

Curiously, the tax authorities have been paying particular attention to the arbitration tribunals. Until the end of 2014 the tax authorities decided to revoke 97 tax assessments *ab initio* (about 11.6 percent of the cases that were lodged in the TATs), just after the petition had been lodged by the taxpayer. The same rules are not used as much in the judicial system, although the possibility also exists with different deadlines.

However, the number of cases in which the tax authorities invoked exceptions for the TATs to dismiss the case immediately at the first meeting of the tribunal and to refuse to analyze the merits of the case (sometimes with success) is also unprecedented, if compared with their behavior in judicial courts. In several cases, this behavior is questionable considering the principles they should observe regarding taxpayers, tax procedure, and the attainment of tax justice.

On several occasions, the tax authorities appear in the TATs represented by two or more attorneys (or officials with a law degree) defending the tax assessment, regardless of the arguments presented by the taxpayers and, on many occasions, ignoring contrary precedents.

This type of behavior, invoking exceptions without grounds and ignoring clear precedents is a paradox when compared with the revocation figures. The occurrence is disappointing and should be revisited by the higher instances of the authorities or appraised by the tribunals in accordance with good-faith rules.

G. Publicity and Statistics

The majority of the ACC's and ASC's decisions are available on their website; however, decisions of the tax courts of first instance are not. So taxpayers and their lawyers and consultants only receive information regarding a controversial legal provision several years after the issue is first brought.

The CAAD and the TATs have brought more publicity, transparency, and statistics. All decisions are immediately published,[45] and a complete set of statistics have been collated and organized by the CAAD, as well as by the various interested parties. The statistical analyses that have been conducted (on the type and value of the cases, the substance of the cases, exceptions invoked, breakdown of the percentage of awards in favor of each of the parties, decision-making record of the arbitrators, and so forth) have encouraged a new level of interest in similar analysis of the TJCs. It is important that statistics continue being released and that the website that allows for the analysis of the cases is systematically updated and invigorated with apps that make it more user friendly over time.

H. Costs of Litigation

As a rule, the cost of litigating in TATs — the arbitration fees — must be borne by the parties and include the administrative expenses incurred for the proceedings by the CAAD and the arbitration fees; this payment is made to the CAAD.

There are two main factors that may determine the arbitration fees:

- the value of the case (usually the tax assessment value); and
- the entity appointing the arbitrators.

The value of the case tends to reflect its relative complexity and the level of responsibility involved; however, the allocation of the fees depends on who appoints the arbitrators. This is difficult to understand and justify from a legal and constitutional point of view, because taxpayers, when they choose to appoint an arbitrator, must not only pay the fees up front, but also must bear the full cost of the arbitration even if they are successful (that is, in these cases the arbitration fees are always paid by the taxpayer).

When, however, arbitrators are appointed by the CAAD Ethics Committee, the fees are borne by the unsuccessful party in the arbitration, as is the case in the traditional civil and tax courts and the costs involved are similar to the ones borne in the TJC. The arbitral award may decide the definitive value of the arbitration fees and how it should be borne (or shared if the decision is divided).

Nevertheless, the distribution of payments during the course of the case is different in the TJC (usually lower in the beginning and, potentially, more onerous in the final phase, in particular if one loses) and the TAT, where an initial financial disbursement is higher. One must carry out this analysis on a case-by-case basis.

I. Deadlines

It is not the object of this article to discuss procedural rules related to the deadlines to respond to the TATs or the TJCs. Note that despite the objective to create neutral or identical rules, the fact is that the deadlines to respond and to lodge a tax claim in a TJC are not precisely the same as the ones to submit the request to a TAT.[46] One must pay particular attention to the point. The devil is in the details.

J. Possible Accumulation of Claims and Claimants

Again, in this domain there are also subtle differences between the type of possible accumulation of

[45]Decisions from the Ethics Committee (namely, in matters regarding impediments) should also be published in order to create a base of jurisprudence.

[46]*See* articles 10. and 2(1) of the TAL and 102. of the CTPP.

requests (claims) lodged before a TJC or a TAT, and different criteria are also foreseen regarding the coalition of claimants that decide to litigate under the TJCs and the TATs.[47] Again, particular attention should be paid to this aspect, while hoping that the legislature decides to harmonize the rules and eliminate unnecessary complexity, which may have grave consequences for the less attentive taxpayer.

K. Exceptional Appeal of Revision of Decisions

Apart from the exceptional appeals (see Section I.D above) expressly guaranteed by the TAL, litigants may also avail themselves of an exceptional revisionary appeal (*recurso de revisão*) expressly provided for in the Civil Procedure Code to be applied as a subsidiary law. Under this exceptional facility, the case can be brought before judges — even after the decision has already been decided. The justification for recourse to this form of appeal is solely based on the pursuit of justice in its truest sense.

For instance, an appeal may be allowed when it is shown that the decision was based on false documentation or testimony and in cases when taxpayers can obtain new documents (that were not known or could not have been used before) that on their own may overturn a non-appealable decision.

Even with the absence of a specific provision allowing for this type of appeal under the tax arbitration model, the legal principle of subsidiarity and the constitutional principle of justice strongly imply that this mechanism should be available and valid in the context of tax arbitration. For this purpose, the TAL also could conceivably be amended to expressly allow for the same court that issued the decision to reconsider the appeal.[48]

This type of appeal was already accepted in the tax area.[49]

L. Acting in Bad Faith

As in the TJC, the tax arbitration regime allows for the imposition of sanctions whenever a party, wrongfully and willingly, requests the recusal of the arbitrator. The party may be required to pay a fine, as determined by the president of the Ethics Board of the CAAD.[50] Moreover, as noted above, civil procedural rules are applicable to tax arbitration as subsidiary law and, consequently, procedural sanctions imposed whenever a party acts in bad faith will equally apply to arbitration.[51]

M. Responsibility and Liability of Judges

Under the Portuguese tax arbitration regime, arbitrators are bound to render decisions grounded on the principles of independence, impartiality, and fairness, which also govern the judgment of a magistrate. Arbitrators exercise judicial powers, since they administer justice and render their awards exclusively based on the law. Moreover, a code of conduct binding all arbitrators has established disqualification and recusal rules similar to the ones applicable to judges, bridging the gap between tax arbitration and court procedural rules. The tax arbitration regime determines that procedural rules will apply whenever a legal loophole is in place. Thus, although the liability of arbitrators is not specifically addressed, considering that the role of an arbitrator is for the most part equivalent to that of a judge, liability rules applicable to judges should also apply to tax arbitrators.[52]

N. Pay or Not to Pay the Sum in Dispute

Last, a typical question: Is there any evident impact on the choice of the path to challenge a tax claim (TAT or TJC) from the fact that taxpayers can pay the sum in dispute (that is, the tax assessment)?

In theory, the foreclosure file is absolutely independent from the case in which one responds to a tax claim and there are no points of contact. However, remember that (i) this claim does not suspend the foreclosure file by itself; (ii) as a rule, one also must pay or render a bank guarantee to suspend the foreclosure file while the claim is being heard by the TJC or the TAT; and (iii) If the TJC or TAT award becomes res judicata, the foreclosure file is immediately activated and enforced.

Therefore, if a taxpayer does not have a financial situation that allows for payment in the near future and does not intend to lose any assets in a possible sale of pledged or mortgaged assets (while it is possible that its situation will have already changed in the medium and long term and a possibility to pay already exists), the taxpayer might prefer not to have a quick decision. It may be advisable to prevent an unexpected decision that can cause damage to its business. It would probably be better to lodge the case before the TJCs hoping for the best, but preparing for the worst.

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[47] *See* articles 3. of the TAL and article 104. of the CTPP.

[48] For an in-depth analysis, *see* Juíz Conselheiro Jorge Lopes de Sousa, ''Recurso de revisão de decisões arbitrais tributárias, CAA,'' *Arbitragem Tributária 1*, pp. 34-39 (2014), coordinated by N. Villa-Lobos and T. Carvalhais Pereira. The constitutional principles already mentioned justify this possibility in the absence of the TAL amendment.

[49] *See* ASC, July 2, 2014, Case 360/2014.

[50] *See* articles 5 e) and 6. No. 12 of the Code of Conduct of the CAAD.

[51] *See* articles 29. No. 1 a) and e) of the TA, 104. of the General Taxation Law, and 542. et seq. of the Civil Procedure Code.

[52] Voluntary Arbitration Law, the legal framework governing arbitration in Portugal in areas different than public law (Law No. 63/2011, Dec. 14, 2011), expressly admits such responsibility — article 9. nos. 4 and 5.

III. Conclusions

This article sets out some of the diverse and interwoven factors that taxpayers must consider in deciding how to proceed when they must decide between the TJCs and the TATs. The weight given to each aspect will differ from case to case and client to client.

It is rare to have a sole and unequivocal answer to the question of which route to follow, although in some instances a route may be clearly ruled out. If the arbitration tribunal has no jurisdiction over the topic, or if the value of the tax assessment is higher than €10 million, this will clearly channel the case to the TJC. In some cases, the decision may be nuanced and based on risk assessment; if the taxpayer is not interested in a quick result (preferring to postpone the eventuality of a negative result), the judicial system would be the more attractive option. Conversely, if the taxpayer seeks a quick and final decision, or would like the court to submit a referral to the CJEU, the arbitration courts offer an attractive path.

Moreover, arbitration may be favored when cases are following the pre-cleared path of a precedent (as significant arbitral jurisprudence has already shown), in particular to recover taxes paid based on a specific interpretation of a legal provision already considered illegal by the TJCs or TATs. Although in exceptional cases the TAT will not follow precedent, we have witnessed its importance in deciding a high volume of cases in which the TATs reinforce the precedent as occurred.

For some taxpayers, the fatigue of earlier encounters with the overloaded judicial system (see tables 2, 3, and 4 above) may create an appetite for a fresh approach and more informal proceedings that still offer independence and impartiality, and may grant more detailed and specific expertise in substantive matters.

A myriad of small details and factors (see tables 1 and 5 above) may contribute to the decision to proceed in a direction. Sometimes a seemingly insignificant factor may be decisive in tipping the balance.

Litigation is a far more informed and studied process than simply tossing a coin and hoping for a result. Taxpayers have the right to ask for justice and request a fair and independent judgment, whenever they feel their rights have been infringed. With thorough preparation and solid grounds, they should have a good chance of success using either the arbitration or judicial route. However, those who cannot afford to lose ''in one go'' (without appeal) may feel the odds are too high. Arbitration requires strong nerves and a willingness, in the words of Rudyard Kipling, to ''risk it on one turn of pitch-and-toss.'' Both hard facts and intangible questions of sensibility will play a key role in deciding which path to take. ◆