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EDITION
2016

TAX LITIGATION

A GLOBAL GUIDE FROM PRACTICAL LAW

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MILLER THOMSON LLP



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PREFACE

David W. Chodikoff, National Tax Litigation Lead, Partner, MILLER THOMSON LLP

Welcome to the new format. We hope that you find it reader-friendly, practical and a useful resource.

The first edition of Tax Litigation was published in the Fall of 2013. The book had 29 chapters. As I wrote at the time, "Twenty-nine leading law firms in the field of tax litigation provide their respective analysis of the process and procedure for challenging tax assessments and authorities within their respective country". In the second edition, this lofty objective remains the same. The chapters are standardised. Our 30 countries examined in the second edition are well represented by leading law firms and in a few instances, other professionals lend their expertise to provide a thorough overview of the key subjects covered in this work. Each chapter covers the following subjects within a specific nation: significant subjects of tax litigation, the legislative framework for both civil tax litigation and criminal tax litigation, tax evasion and other criminal tax offences, pre-court processes, resolving disputes before commencing court proceedings, the elements of the offence in criminal law, early resolution, the trial process, the role of the judge/arbitrator/tribunal members, the commencement of proceedings for both civil law and criminal law, the government response, the burden of proof, documentary evidence, special rules/considerations, disclosure in criminal proceedings, witness evidence, witness preparation, expert evidence, closing the case in civil and criminal trials, the decision in civil and criminal cases, costs, appeals, recent civil law developments and proposals for reform and recent criminal law developments and proposals for reform.

Writing on behalf of all of those people involved in this project, it is our sincere wish that the users of this book find it to be a helpful source of information concerning both the civil and criminal dimensions of tax litigation around the world.

David W. Chodikoff
May, 2016

ACKNOWLEDGEMENTS

David W. Chodikoff, National Tax Litigation Lead, Partner, MILLER THOMSON LLP

If not for the love and support of my wife and son, I would not have worked on a second edition of Tax Litigation. To begin then, I thank my wife, Tanya, and son, Daniel.

Critical to the production of this second edition was the guidance of the UK based editorial team at Thomson Reuters. My main contact and principal “guidance” director was Vanessa Flatt. Always cheery and helpful, I would have been lost without her steady leadership and guidance. There were also a number of Thomson Reuters personnel that played a pivotal role in bringing this edition to print. My thanks goes to Katie Burrington, Emily Kyriacou, Dawn McGovern, Nicola Pender and Vanessa Flatt.

Leading the effort from day one of the first and second edition has been Katie Burrington, the Commercial Director. I am deeply indebted to Katie for her commanding leadership. Thank you, Katie. I would be remiss if I also failed to mention the continuous and helpful support of Emily Kyriacou, the Commissioning Editor. Thanks, Emily.

In Canada, I want to thank my co-author of the Canadian chapter, Graham Purse. We enjoyed working together to revise the Canadian chapter and to adapt it to fit into the new format for the second edition. Once again, co-ordinating all of the efforts from Canada was my Chief of Staff, Filomena (“Fil”) Mendonca. It is no small secret that Fil as my executive assistant “runs my law practice” and as a result, she has created a window of opportunity for me to work on book projects. Thank you, Fil.

I express my gratitude to the now immediate past Chief Justice of the Tax Court of Canada and the founding president, of the International Association of Tax Judges, the Honourable Gerald Rip, for agreeing to write the foreword for the second edition. Thank you, Chief! (Hey, once a Chief always a Chief, at least in my world.)

I extend my thanks to all of those individuals that made the time to write endorsements for this second edition. Some may be familiar names as a number of those that endorsed the first edition were ready to endorse the second edition. There are also a number of new people that graciously agreed to endorse this second edition. Again, thank you.

Key to the timeliness and success of bringing this work to print has been the efforts of our many contributors. I thank each of them for the hard work and good humour demonstrated throughout the exchange of e-mails as we collectively pushed to complete, review and finalise each chapter of this book. Thank you.

*David W. Chodikoff
May, 2016*

FOREWORD

Gerald J Rip Counsel, SPIEGEL SOHMER, MONTREAL, CANADA

In my Foreword to *Tax Litigation* I remarked that notwithstanding that the resolution of tax disputes varies from country to country, the object of tax litigation is the same in all jurisdictions: to end the dispute between the state and the taxpayer. *Tax Litigation Global Guide 2016/17* adds to what is in the earlier work on tax litigation. But do not misunderstand the book's title: it is more than just a guide to what takes place in a country's court; it is a guide describing how the taxpayers and the state tax authorities end up in court, which court, criminal or civil, and how they present their positions in courts around the world.

All this is done with questions and answers. Novel and quite a convenience to the reader who wants to narrow in on what he or she wants to read at the moment. At any particular time the reader may choose to review the whole chapter on tax litigation in Portugal or the reader may prefer, instead, to turn the pages to understand each country's approach to expert evidence at trial, for example.

Lawyers from 30 countries have contributed to answering questions put to them by the editors of *Tax Litigation Global Guide*. Topics include what current tax issues are taking up much of the court's time, tax offences that are criminal offences, the tax assessment and administrative procedures before getting to court, the trial process in both civil and criminal matters, who has the burden of proof, exchange of documents, *vive voce* evidence, and appeals, among other topics.

I should mention my particular interest in reading a book like *Tax Litigation Global Guide*. Not only lawyers but judges also are interested in how tax litigation is carried out in countries other than their own. In 2009 a group of about ten judges from several jurisdictions in America, Europe, South America and Asia got together in Vancouver to lay the groundwork for the creation of an organisation that would give a forum to judges from countries around the world to discuss subjects of common interest. The International Association of Tax Judges, now having grown to approximately 100 members, have met yearly since then and many of the subjects reviewed in *Tax Litigation Global Guide* have been raised and discussed at its annual meetings. No doubt that *Tax Litigation Global Guide* will be a valuable reference for judges as well as lawyers.

The book will also serve as a first read for countries seeking to reform their own tax litigation rules of procedure. Exchanges of tax litigation processes between different jurisdictions let others learn the good and the bad, in short, the experiences of courts and lawyers around the world. *Tax Litigation Global Guide* will be part of the tax litigation reform toolbox.

The authors and co-authors of *Tax Litigation Global Guide* have rendered an important service to those persons, lawyers, judges, academics, tax administrators and all persons to which tax litigation is their vocation or who are otherwise interested in the subject.

*Gerald J Rip
Counsel, Spiegel Sohmer, Montreal, Canada
Former Chief Justice of the Tax Court of Canada
Founding President of the International Association of Tax Judges
May, 2016*

ENDORSEMENTS

David and his co-authors are to be congratulated for this second edition of *Tax Litigation Global Guide*, which will be a valued practical and quality resource to in-house counsel, who are relied upon to provide effective practical advice and direction to assist internal stakeholders navigate through a broad range of areas of law, including tax law and process.

Brent E. Sabeau, General Counsel, Pita Pit (a national chain of over 200 fast food restaurants across Canada).

In today's vast global marketplace, with international trade growing more and more every year, understanding international tax issues and litigation is increasingly critical to be successful across borders. David Chodikoff's vast experience and expertise, in collaboration with law firms representing 30 countries, makes this second edition of *Tax Litigation Global Guide* a key resource for international tax practitioners and business professionals.

Benjamin J. Detsky, CPA, CA, Partner, Yale & Partners LLP Chartered Accountants.

This volume – the collaborative work product of the globe's leading tax litigators – represents an astonishingly rich resource for anyone wanting to quickly master the similarities and differences in tax litigation around the world.

Benjamin Alarie, Osler Chair in Business Law, Associate Professor, Faculty of Law, University of Toronto.

David and his eminently qualified co-writers from 30 law firms/countries have produced an excellent, insightful synopsis of major civil and criminal tax litigation and specific issues in the respective countries. This book is an invaluable resource to international tax litigators, tax and financial specialists, and company executives on cross-border and country specific tax issues.

James L. Horvath, FCBV, ASA, ICVS, CVA, CPA, CA, MBA, B.Math, Managing Director, ValuQuest Limited, Chair, The International Association of Consultants, Valuators and Analysts (IACVA).

In this increasingly complex environment of taxation, this book represents a rich resource with insightful guidance. *Tax Litigation Global Guide* is a requirement for any individuals involved in global taxation issues.

Lewis S. Weinerman, President, OSP Financial Services Inc.

David Chodikoff and the many contributors are to be congratulated for compiling this second edition of *Tax Litigation Global Guide*. This is an excellent resource book that I have already found useful in my international dealings.

Alon Ossip, Chief Executive Officer, The Stronach Group.

Learning about the tax litigation regimes of other countries is very useful for those involved in tax disputes in such other countries. It is also very useful in obtaining a better understanding of the tax litigation regime in one's own country, both its strengths and weaknesses on a comparative basis. Congratulations to David for providing us with this excellent resource.
Cliff Rand, National Managing Partner, Deloitte Tax Law LLP.

As clients expand their horizons beyond our Canadian borders this book represents an invaluable resource for tax practitioners. Each chapter is structured in a consistent manner allowing the reader to easily navigate through the information. With each new edition David has managed to improve upon the way he delivers this complex information. This well-organised practical guide is a must-have for tax professionals.
John Doma, BBA, CPA, CA, LPA, Honorary Consul General Slovenia.

Tax Litigation Global Guide (2nd Edition) is an invaluable tool for any in-house counsel working within an international context. It is clearly the "go to" book and road map for any professional facing the conundrums, detours and pitfalls following the potentially precarious path of global tax laws.
Alexander Daschko, General Counsel, CCO & CAO, Cygnus Investment Partners Inc.

In the increasing complexity of tax laws and regulations in today's globalised world this book is a critical resource for tax attorneys and advisors as well as businesses and investors. It will assist them in navigating today's increasingly complicated international tax issues. This book should form part of the library of every tax practitioner.
Nick Barisheff, CEO Bullion Management Group Inc., Toronto, Canada.

This book provides a wealth of relevant tax litigation information. The fulsome nature of the information contained in this book and the insightful narrative it provides make this book a must read for anyone trying to navigate the complex world of tax litigation. David Chodikoff and the contributors of this book should be commended for publishing another compelling addition of *Tax Litigation Global Guide*.
Jin Shin, General Counsel, VP of Legislative Compliance and Chief Privacy Officer for NRT Technology Corp.

David Chodikoff's *Tax Litigation Global Guide* (2nd Edition) provides a detailed analysis into understanding how tax assessments are originated and argued across various jurisdictions and tax regimes around the globe. For professionals contributing their expertise in the field of tax dispute resolution and litigation, it will prove itself an invaluable reference source.
Tim Dunham, CBV, CFA, Partner, Kalex Valuations (Former Manager, Toronto Regional Valuations, Canada Revenue Agency).

A comprehensive, well-constructed and easy to navigate resource that will enable you to quickly identify and understand the world of tax litigation across 30 jurisdictions. What would otherwise take hours to research is now at your fingertips. Congratulations David to you and your team for bringing such incredible value to the international community.
James E. Ross, B.A., LL.B, President, Stonegate Private Counsel & SVP, Assante Wealth Management.

ENDORSEMENTS

The 2013 first edition of *Tax Litigation* and 2014 *Transfer Pricing & Tax Avoidance* are very helpful multi-jurisdictional reference guides providing assistance to resolve tax issues. David Chodikoff has a talent for simplifying and navigating difficult and complex matters to identify core issues of law and litigation. These books are reflections of this talent. This current edition continues this pattern of excellence and provides true value to every professional's library. *Jason O'Halloran, CPA, CFP, TEP, CPA (Illinois), Partner, S+C Partners LLP Chartered Accountants, Mississauga, Ontario, Canada.*

The modern global economy, powered by the internet, has created an ever increasingly complicated web of transactions between businesses. These transactions have no sovereign jurisdictions and manifest in a legislative arena with a multitude of different tax considerations. The second edition of *Tax Litigation Global Guide* is an excellent resource for understanding how to comply with the now international scope of tax responsibilities and navigate with success. *Michael Wilson Krista, Managing Director, MWF GROUP, Nassau, Bahamas.*

Tax Litigation Global Guide, the second edition, is an impressive and authoritative compendium of many of the most relevant issues facing international tax experts and business professionals today – and indeed, should remain a unique and timely reference for years to come. Having personally known David Chodikoff for over 35 years, I view *Tax Litigation Global Guide* as yet another impressive achievement in a long and successful career as a prosecutor, litigator and consummate tax professional. *Brad M. Meslin, Ph.D., Senior Managing Director, CSP Associates, Inc. International Aerospace, Defense, and Government Transaction Diligence Advisors.*

PORTUGAL

António Lobo Xavier, Isabel Santos Fidalgo and Frederico Velasco Amaral, MORAIS LEITÃO, GALVÃO TELES, SOARES DA SILVA & ASSOCIADOS, SOCIEDADE DE ADVOGADOS, R.L.



OVERVIEW OF TAX LITIGATION

ISSUES SUBJECT TO TAX LITIGATION

1. WHAT ARE THE MOST COMMON ISSUES SUBJECT TO TAX LITIGATION IN YOUR JURISDICTION?

The most common issues subject to tax litigation in Portugal are tax disputes concerning the legality of additional tax assessments made by the tax authorities.

Recent political developments in Portugal have once again been a cause of legal uncertainty, particularly concerning tax issues. This uncertainty, together with a heavier tax burden, has led to an increase in tax litigation. Generally, the Portuguese tax system consists of a reasonably complete set of rules that govern the relationships and interactions between taxpayers and the tax authorities. Those interactions can include:

- Tax inspections.
- Litigation.
- Infringements and penalties.
- Seizures and the execution of tax debts.

Since the tax rules are clearly laid out, tax litigators must combine a comprehensive knowledge of the substantive regime with the procedural and technical rules to best determine the most suitable strategy to take in any given case.

Although Portugal has been portrayed as a jurisdiction in which tax litigation is both time-consuming and convoluted, the pitfalls can be avoided and the best course of action determined by a tax litigator with a sound knowledge of both:

- Various forms of proof (documentation, witnesses, expert opinion and so on).
- Jurisprudence and tax doctrine at national, international, EU and double taxation treaty (DTT) level.

Tax litigators can also attempt to persuade the tax authorities to follow a particular course of action (for example, to make an immediate payment of a refund with interest, or refrain from asserting a pledge or mortgage over a taxpayer's foreclosing business).

In addition, the tax arbitration courts (introduced in 2011) has proved to be a unique and very efficient mechanism to settle tax disputes (*see Question 5*).

LEGISLATIVE FRAMEWORK

2. OUTLINE THE LEGISLATIVE FRAMEWORK AND PRINCIPAL PIECES OF LEGISLATION GOVERNING BOTH CIVIL AND CRIMINAL TAX LITIGATION.

Civil tax litigation

Portugal is a civil law jurisdiction, subject to a Civil Code. The primary principles and rules of the legal system are codified in legal Acts which are the primary source of law.

The tax rules and procedures must comply with the principle of legality, meaning that the most important aspects of the system (including the determination of what is subject to tax, tax rates, tax incentives and taxpayers' rights and guarantees) must be settled by laws approved by the parliament, or by laws made by the government under the express authorisation of the parliament. The resolution of tax disputes is included as a right of taxpayers and is guaranteed under the principle of legality.

In light of the above, the Portuguese tax system is principally governed by the following legislation:

- General Taxation Law.
- Tax Procedure and Process Code.
- General Regime of Tax Infractions.
- Complementary Regime for Tax Inspection Procedure.
- Tax Arbitration Regime.

There are also further supplementary laws that may apply to the tax litigation procedure, including the following:

- Administrative Process Code.
- Statute of the Administrative and Tax Courts.
- Administrative Procedure Code.
- Civil Procedure Code.
- Civil Code.

Criminal tax litigation

The principal pieces of legislation governing criminal tax litigation are as follows:

- General Taxation Law.
- Tax Procedure and Process Code.
- General Regime of Tax Infractions.
- Criminal Code.
- Criminal Process Code.
- Administrative Infraction General Regime.

TAX EVASION AND OTHER CRIMINAL TAX OFFENCES

3. WHAT ARE THE KEY ELEMENTS THAT CONSTITUTE TAX EVASION AND OTHER MAIN CRIMINAL TAX OFFENCES IN YOUR JURISDICTION?

The most common criminal tax offences are:

- Misappropriation of funds.
- Tax fraud.

Misappropriation of funds occurs when a taxpayer, who was required to withhold tax or charge tax, fails to withhold or charge the tax and remit that tax to the tax authorities (this constitutes an offence where the tax payments due exceed EUR7,500).

Tax fraud occurs when a taxpayer engages in conduct from which he derives either:

- A decrease in tax liabilities that would otherwise not exist but for the taxpayer's conduct.
- Patrimonial gains that would otherwise not exist but for the taxpayer's conduct.

In order to constitute a criminal offence, the decrease in tax liability or the patrimonial gain must exceed EUR15,000. Tax fraud is often committed by either keeping a forged account or engaging in simulated transactions.

The General Regime of Tax Infractions (GRTI) provides both criminal and administrative penalties for criminal tax offences (as well as providing for civil liability). Other legislation governing criminal tax offences includes the:

- Criminal Code.
- Criminal Process Code.
- Administrative Infraction General Regime.
- Civil Code.
- Tax Procedure and Process Code.

For individuals, those committing criminal tax offences can be subject to both:

- A term of imprisonment of up to eight years.
- A fine, imposed over a period of up to 600 days, charged at between EUR1 to EUR500 per day (depending on the severity of the offence).

For collective entities, those committing criminal tax offences can be subject to a fine, imposed over a period of up to 1,920 days, charged at between EUR5 to EUR5,000 per day. In addition, any agent involved can also be subject to accessory sanctions (for example, they can be prohibited from performing certain activities, or be prohibited from practising any activities).

Tax infractions that are not considered to be crimes can be sanctioned with administrative penalties and accessory sanctions (up to EUR165,000 where the tax infraction was committed with intent and up to EUR45,000 where the tax infraction was committed with negligence).

In the case of disputes related to additional tax assessments made by the tax authorities, the taxpayer will also be notified of the commencement of an infraction procedure. The taxpayer can either immediately pay the administrative penalty or challenge the decision that determined the administrative penalty on its own merits. Where the taxpayer challenges the decision, the administrative process is suspended until a final decision on the legality of the original tax assessment has been made. Usually, taxpayers opt to challenge the decision, since, if they win the tax dispute, in principle the infraction procedure will be annulled.

The GRTI also establishes the civil liability of the directors of collective entities in the event that they do not have the means necessary to pay the fines and administrative penalties to which they have been sentenced. However, this regime of establishing civil liability is currently being disputed on the ground that it does not conform with the Constitution.

PRE-COURT/PRE-TRIBUNAL PROCESS

ASSESSMENT, RE-ASSESSMENTS AND ADMINISTRATIVE DETERMINATIONS IN CIVIL LAW

4. OUTLINE THE PROCEDURE FOR TAX ASSESSMENTS, RE-ASSESSMENTS AND ADMINISTRATIVE DETERMINATIONS IN CIVIL LAW.

Tax disputes can have both an administrative and a judicial phase.

The administrative phase is either optional or mandatory, depending on the case, and is characterised by being free of charge and involving less formal requirements than the judicial phase. The administrative phase can have two stages:

- The initial claim to the Portuguese Customs and Tax Authority (*Autoridade Tributária e Aduaneira*).
- In the case of an express or tacit negative decision of the Portuguese Customs and Tax Authority, the possibility to lodge an appeal against the decision of the initial claim to the Minister of Finance before moving to court.

The Portuguese Customs and Tax Authority has no specific deadline to decide these initial claims and appeals. However, taxpayers, to avoid waiting indefinitely for an express decision, can presume a negative decision after a certain time period has elapsed (four months after presentation of the claim (for initial claims), or 60 days after presentation of the appeal (for appeals)) for the purposes of moving the dispute on to the tax courts (the judicial phase). Depending on a number of factors (most importantly, the complexity of the matter), the time frame to receive an express decision by the tax authorities can vary between a few months and several years. However, there is certainly a perceivable trend towards a progressive and swift resolution of disputes in the administrative phase.

For disputes concerning self-assessment (the majority of which tend to be related to withholding tax or payments on account of the final tax due), it is mandatory for the dispute to begin with an initial claim presented to the tax authorities. There are two exceptions to this rule:

- Where there is taxpayer disagreement with the self-assessment.
- Where the withholding is only based on a matter of law and the self-assessment or the withholding was made in accordance with general instructions provided by the tax authorities.

These cases can proceed directly to court within three months of the original assessment by the tax authorities.

In the case of self-assessments and withholding tax, the deadline to submit the claim to the tax authorities is two years after the submission of the assessment. In the case of payments on account of the final tax due, the deadline is 30 days from the date that the tax was wrongfully paid.

In the case of self-assessments and withholding tax, the taxpayer can appeal to court from an express or tacit negative decision of the tax authorities within 30 days from that decision. A tacit negative decision is deemed to occur if the taxpayer does not receive any decision within four months of the presentation of the initial claim. In the case of payments on account of the

final tax due, the claim is considered tacitly approved if the taxpayer does not receive an answer from the tax authorities within 90 days of submitting the claim. In the event of a denial of the taxpayer's claim, the taxpayer has 30 days from the date the denial is issued to go to court.

RESOLVING DISPUTES BEFORE COMMENCING COURT PROCEEDINGS

5. WHAT ARE THE MAIN PROCEDURES USED TO RESOLVE DISPUTES BEFORE COMMENCING PROCEEDINGS IN A CIVIL COURT/TRIBUNAL?

A taxpayer can use the administrative phase outlined in *Question 4* and file an administrative complaint with the tax authorities before commencing proceedings in a tax court. However, it is not possible for disputes between taxpayers and the tax authorities to be decided between the parties purely on the basis of negotiations. The same applies when determining the amount of tax due or any payment conditions. There are no other procedures that can be used before commencing proceedings in a civil court.

ELEMENTS OF THE OFFENCE IN CRIMINAL LAW

6. WHAT ARE THE ELEMENTS OF THE MAIN CRIMINAL LAW OFFENCES IN TAX LITIGATION?

The most common criminal law offences in tax litigation are:

- Misappropriation of funds.
- Tax fraud.

Misappropriation of funds occurs when a taxpayer, who was required to withhold tax or charge taxes, fails to withhold or charge that tax and remit it to the tax authorities. The offence only arises where the tax payment due exceeds EUR7,500.

Tax fraud occurs when a taxpayer engages in conduct from which he derives either:

- A decrease in tax liabilities.
- Patrimonial gains.

In order to constitute the offence, the decrease in tax liabilities, or the patrimonial gain, must arise as a result of the taxpayer's conduct (for example, by keeping a forged account or using simulated transactions). In addition, both the decrease in tax liabilities, or the patrimonial gain, must exceed EUR15,000.

The investigation phase is the first stage in the criminal procedure and occurs before charges are laid. This stage involves an investigation which is carried out by the public prosecutor's office alongside the tax authorities. Where there is sufficient evidence indicating that a tax crime has been committed, the public prosecutor's office will charge the taxpayer. If not, the procedure is immediately closed.

For criminal law tax offences which carry a penalty of either less than five years' imprisonment or another type of penalty (for example, a fine), the public prosecutor's office can suspend criminal procedures and instead impose injunctions and rules of conduct on the defendant as an alternative to imprisonment or another type of penalty. However, this can only be done where the judge consents to this course of action.

EARLY RESOLUTION

7. WHAT ARE THE MAIN PROCEDURES USED FOR THE EARLY RESOLUTION OF CRIMINAL LAW OFFENCES BEFORE 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 where the defendant agrees to plead guilty in exchange for a reduced sentence and avoiding trial. There are no other procedures for the early resolution of criminal law offences before trial.

TRIAL PROCESS

FORMAT OF THE HEARING/TRIAL

8. WHAT FORMAT DOES THE HEARING/TRIAL TAKE?

As a general rule, civil tax and criminal tax litigation trials and hearings are held in public. Only criminal trials in exceptional circumstances may be held in private (for example, cases concerning sexual abuse, trafficking in persons, and so on).

As a general rule, administrative phase hearings are conducted in writing.

ROLE OF THE JUDGE/ARBITRATOR/TRIBUNAL MEMBERS

9. WHAT IS THE ROLE OF THE JUDGE/ARBITRATOR/TRIBUNAL MEMBERS IN BOTH CIVIL AND CRIMINAL TAX LITIGATION?

Civil tax litigation

As with the administrative phase, the judicial phase can also have two stages:

- Initial claim.
- Appeal from the initial claim.

Generally, the role of the judge is to determine the truth of the facts, which requires making all necessary inquiries into the facts of each case to determine the issue(s).

The initial claim is usually decided by a single independent judge in a court of first instance. An appeal (to be presented by whoever loses the case in first instance: the taxpayer, or the tax authorities, or both in the event that both parties lose part of the case) can be taken to either:

- The court of appeal in the event of a disagreement with the facts and the law decided in first instance.
- The Supreme Administrative Court in the event of a disagreement exclusively based on matters of law.

An appeal must be presented in the court of first instance within ten days of its final decision, and is only precluded if the value of the case (in cases challenging tax assessments, that is the

amount of tax in litigation) is lower than EUR1,251. The decisions of the court of appeal are rendered by the majority decision of a panel of three judges.

From the decision of the court of appeal or the Supreme Administrative Court, the taxpayer or the tax authorities can, in exceptional cases, still lodge an appeal to the Supreme Administrative Court based on the following:

- The decision contradicts a previous judgment.
- There is a need to consider an important question from a legal/social perspective.
- An appeal is required to ensure the better application of a law.

Where a case involves a constitutional issue, appeal can also be made to the Constitutional Court.

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

Currently, the majority of disputes are resolved in the court of appeal, as the party that loses the case at first instance usually appeals to the court of appeal. Since the Supreme Administrative Court only deals with matters of law, fewer cases are settled before it. On average, it takes around four to five years to obtain final decisions. However, this time frame is merely indicative, and while it is possible to obtain final decisions in less time, it is more often the case that it will take longer.

Tax disputes are traditionally covered by a special set of courts that deal with administrative and tax matters. Under the current organisation of the judicial system, there are 18 courts of first instance in different regions of the country (including Madeira and the Azores) that deal with administrative and tax matters. Lisbon is the only place where there is a specific court for tax matters alone, and another for administrative matters. The territorial competence of the courts is determined by the local tax office that enacted the tax assessment, which normally corresponds to the local tax office that covers the area of the tax domicile of the taxpayer. Tax assessments of non-resident taxpayers are considered and made by the local tax office of Lisbon. The two courts of appeal are situated in Oporto and Lisbon. The Supreme Administrative Court is also located in Lisbon and covers the entire country. Both the courts of appeal and the Supreme Administrative Court have one chamber for administrative law appeals and actions, and another chamber that deals only with tax law appeals and actions.

In the tax process, taxpayers are represented by lawyers and the tax authorities are represented by officers with a law degree.

Under Portuguese law, tax litigation serves the purpose of establishing whether the illegalities alleged by the taxpayer concerning the tax assessment occurred or not. If the tax court concludes that an illegality does exist, then the tax assessment is either annulled or declared null and non-existent. It should be pointed that the judge does not have the power to instruct the tax authorities to issue another act.

Criminal tax litigation

As is the case in civil tax litigation, the judge is required to determine the truth of the facts, which requires making all inquiries to determine whether the crime was committed or not.

In criminal cases, appeals from a first instance decision are made to a second instance court, comprised of three judges.

COMMENCEMENT OF PROCEEDINGS: CIVIL LAW

10. WHAT IS THE PROCEDURE FOR COMMENCING TAX LITIGATION PROCEEDINGS IN CIVIL LAW AND/OR A TAXPAYER APPEALING A DECISION OF THE TAX AUTHORITY?

In the case of assessments made by the tax authorities (for example, after a tax inspection, as a result of the automatic exchange of information, or in cases of non-assessment by the taxpayer), the taxpayer can choose between either:

- Lodging an administrative claim to the tax authorities within 120 days of notification of the assessment.
- Contesting the assessment immediately in court within three months of the deadline for voluntary payment of the assessment.

Normally, the deadline for voluntary payment of the assessment is 30 days following notification of the assessment. The date of the notification of the tax assessment is of paramount importance, as it establishes the relevant date from which the deadlines must be counted.

If the taxpayer opts for an administrative claim, he will have to wait for an express decision on that administrative claim that, in the case of an express rejection, can either be:

- Challenged in court within 15 days of the decision.
- Appealed to the Minister of Finance within 30 days of the decision.

The taxpayer can also opt to consider the decision tacitly rejected within four months after presentation of the claim where no decision is provided, in which case he can either:

- Opt to go to court within three months of the end of the four-month period.
- Present an appeal to the Minister of Finance within 30 days of the end of the four-month period.

These deadlines are frequently criticised by commentators and in the case law, so it is to be hoped that in a future reform of the Tax Procedural and Process Code, the legislature will work on the harmonisation of these widely differing deadlines.

However, in addition to the above-mentioned administrative claims related to tax assessments, there are other specific tax procedures for different purposes related to taxation that have specific rules concerning deadlines. Among these are the rules regarding:

- Access by the tax authorities to banking information and documentation.
- Advance clearance, where taxpayers can request an audit and the tax authorities become bound by the conclusions reached in that audit.
- Binding rulings and requests for interest due to the taxpayer.
- Determination of the taxable income by indirect methods.
- Application of the general anti-avoidance rules (GAAR).

Within 90 days after being served, the public treasury representative must submit a written reply to the taxpayer's submission. That reply must contain all the necessary elements to support their interpretation of the tax assessment.

11. MUST A TAXPAYER PAY THE DISPUTED TAX BEFORE LEAVE TO APPEAL THE TAX AUTHORITY'S DECISION IS GRANTED?

As a general rule, taxpayers must either pay the disputed tax, or provide collateral (for example, a bank guarantee), before court proceedings can commence. However, in some circumstances (insufficient economic means not caused by taxpayer itself) they may be exempt from providing this collateral.

COMMENCEMENT OF PROCEEDINGS: CRIMINAL LAW

12. WHAT IS THE PROCEDURE FOR COMMENCING TAX LITIGATION PROCEEDINGS IN CRIMINAL LAW?

The process begins with the public prosecutor's office becoming aware of the existence of a crime, either through the tax authority's agents or from a report. When the tax authorities are the first entity to become aware of a crime, they are legally obliged to start an investigation and communicate the alleged crime to the public prosecutor's office.

GOVERNMENT RESPONSE

13. HOW HAS THE GOVERNMENT RESPONDED TO RECENT CIVIL AND CRIMINAL LAW CASES TO IMPROVE THE COURT PROCEDURE?

Civil law

A number of improvements to the civil process have been made. For example, within 90 days after being served, the public treasury representative must submit a written reply to the taxpayer's submission. That reply must contain all the necessary elements to support their interpretation of the tax assessment.

If the public treasury representative's reply contains facts and allegations which prevent the court from deciding the case solely on its merits, the taxpayer has ten days to issue a reply.

It should also be noted that the tax authorities have the power to revoke a tax assessment partially or wholly. This can occur in the period during which documents are prepared for submission and the public treasury is issuing its reply.

Criminal law

There are no recent instances where the government has responded to recent criminal law to improve the court procedure.

BURDEN OF PROOF

14. WHAT IS THE BURDEN OF PROOF IN BOTH CIVIL AND CRIMINAL TAX LITIGATION PROCEEDINGS?

Civil law

In tax litigation, normally, the party claiming a right or fact has the burden of proving it. However, for indirect assessments that are not based on the taxpayer's accounts and records, the tax authorities must justify the use of such methods. The taxpayer, in turn, must demonstrate that the amount of taxable income is excessive. The taxpayer must demonstrate that the declared taxable income corresponds to the reality, whilst also demonstrating that the tax claimed by the tax authorities is excessive (by proving that such income is not liable to tax).

Criminal law

In Portuguese criminal tax litigation the defendant is presumed innocent until proven guilty, and benefits from the privilege against self-incrimination. The criminal court must gather all the necessary evidence to prove the crime, and the burden of proof falls on the public prosecutor to prove the crime occurred.

MAIN STAGES

15. WHAT ARE THE MAIN STAGES OF TYPICAL COURT PROCEEDINGS FOR TAX DISPUTES?

Civil law

The main stages of typical civil tax litigation court proceedings are as follows:

- Initial application (within three months from the expiry of the time limit for voluntary payment of the tax assessment).
- Public treasury reply (within 90 days from the day the public treasury is served).
- Answer to the public treasury reply (if applicable, within ten days from the day the taxpayer is served with the public treasury's reply).
- Closing statements (within 30 days from either the public treasury's reply, or the taxpayer's reply to the public treasury's reply).
- Decision (usually within two years from the submission of the initial application, although this is not a mandatory deadline).
- Appeal (if applicable).

Criminal law

Criminal tax litigation court proceedings usually consist of four main stages:

- Investigation stage.
- Pre-trial stage (if applicable).
- Trial.
- Appeal (if applicable).

DOCUMENTARY EVIDENCE

DISCLOSURE OF DOCUMENTS IN CIVIL PROCEEDINGS

16. WHAT DOCUMENTS MUST THE PARTIES DISCLOSE TO THE OTHER PARTIES AND/OR THE COURT IN CIVIL PROCEEDINGS? ARE THERE ANY DETAILED RULES GOVERNING THIS PROCEDURE?

In the Portuguese judicial system there is no pre-trial exchange of documentary evidence. In fact, this evidence must be presented during the initial application. However, in unique

circumstances, it is possible to submit documents at an advanced stage during the process. In such cases, the party must demonstrate either:

- That it was not possible to submit the evidence upon the initial application.
- That the facts (or knowledge of the facts) contained within the document occurred after the submission of the initial application.

After the taxpayer or public treasury has presented its documentary evidence, the other party has the right to state his opinion on those documents within ten days of being served with the evidence. It should be emphasised that both parties can dispute the authenticity of a given document within ten days after it is presented to the court.

SPECIAL RULES/CONSIDERATIONS

17. ARE THERE ANY SPECIAL RULES OR CONSIDERATIONS CONCERNING THE DISCLOSURE OR DISCOVERY OF DOCUMENTS IN CIVIL TAX LITIGATION?

According to the Statutes of the Portuguese Bar Association, lawyers are bound to professional secrecy concerning the facts communicated to them in the course of their profession. Professional secrecy will also be extended to documents or other things which have a direct or indirect bearing on those facts. In certain circumstances, the court can impose sanctions for a breach of professional secrecy.

DISCLOSURE IN CRIMINAL PROCEEDINGS

18. WHAT DOCUMENTS MUST THE PARTIES DISCLOSE TO THE OTHER PARTIES AND/OR THE COURT IN CRIMINAL PROCEEDINGS? ARE THERE ANY DETAILED RULES GOVERNING THIS PROCEDURE?

Defendants can only gain access to the investigation organised by the public prosecutor's office (alongside the tax authorities) after charges have been laid against them, which derives from the legal obligation to notify the defendant of the elements of proof that have been gathered for criminal proceedings when charges have been made. The defendant is presumed innocent until proven guilty, meaning that each and every one of the criminal elements must be proven before a guilty verdict can be delivered.

The defendant, on the other hand, has the option of either remaining silent or submitting proof to demonstrate their innocence. These rights apply not only during the investigation, but also during the trial.

SPECIAL RULES/CONSIDERATIONS

19. ARE THERE ANY SPECIAL RULES OR CONSIDERATIONS CONCERNING THE DISCLOSURE OF DOCUMENTS IN CRIMINAL TAX LITIGATION?

According to the Statutes of the Portuguese Bar Association, lawyers are bound to professional secrecy concerning the facts communicated to them in the course of their profession. Professional secrecy will also be extended to documents or other things which have a direct or indirect bearing on those facts. In certain circumstances, the court can impose sanctions for a breach of professional secrecy.

WITNESS EVIDENCE

TRIAL CONSIDERATIONS

20. DO WITNESSES OF FACT GIVE ORAL EVIDENCE OR DO THEY JUST SUBMIT WRITTEN EVIDENCE? IS THERE A RIGHT TO CROSS-EXAMINE WITNESSES OF FACT?

Civil law

The number of witnesses that can be appointed is limited:

- There is a maximum of ten witnesses for each tax process.
- There is a maximum of three witnesses for each alleged fact.

Witnesses must be selected by the taxpayer and the public treasury representative on the initial application and their respective replies.

The examination of witnesses occurs in court, through the submission of oral evidence. Though the judge can lead the examination, witnesses are usually questioned directly by the taxpayer's lawyer and the public treasury representative. Witness testimony is recorded and subject to requests for clarification by the judge.

It should be noted that the court can refuse the appointment of a witness. In this case, the affected party can submit an appeal against that refusal.

Criminal law

The examination of witnesses takes place in court, through the submission of oral evidence. Though the judge can lead the examination, witnesses are usually questioned directly by the taxpayer's lawyer and the public prosecutor. Witness testimony is recorded and subject to requests for clarification by the judge.

As with civil trials, the court can refuse the appointment of a witness, and the affected party can submit an appeal against that refusal.

WITNESS PREPARATION

21. PROVIDE A BRIEF OUTLINE OF THE PROCEDURE FOR PREPARING WITNESSES IN BOTH CIVIL AND CRIMINAL CASES. ARE THERE ANY SPECIAL OR UNIQUE FEATURES TO CONSIDER FOR WITNESS EVIDENCE IN CRIMINAL CASES?

Civil law

According to the Statutes of the Portuguese Bar Association, lawyers are prohibited from preparing, influencing, or in any way altering the testimony of witnesses previously appointed.

Criminal law

See above, *Civil law*.

HEARSAY EVIDENCE IN CIVIL AND CRIMINAL TRIALS

22. ARE THERE ANY RULES CONCERNING THE INTRODUCTION OF HEARSAY EVIDENCE IN CIVIL AND CRIMINAL TRIALS?

Civil trials

Hearsay evidence is only admissible if the party that witnessed the event is also heard by the court.

Criminal trials

In general, hearsay evidence is inadmissible in Portuguese criminal proceedings unless the party who witnessed the event is also heard by the court. However, a witness can testify in support of a defendant's statements when the defendant has not taken the stand or chooses to remain silent. In such a case, that witness's testimony is not deemed to be hearsay and is therefore admissible.

EXPERT EVIDENCE

EXPERT REPORTS IN CIVIL TRIALS

23. WHAT ARE THE RULES CONCERNING THE INTRODUCTION OF EXPERT REPORTS IN CIVIL TRIALS?

Experts must submit a report to the court within 30 days after concluding their investigation. In turn, after being served, both parties are able to dispute the major findings of that report. As with other types of evidence, expert evidence is freely assessed by the court.

EXPERT EVIDENCE IN CIVIL TRIALS

24. WHAT ARE THE RULES CONCERNING THE INTRODUCTION OF EXPERT EVIDENCE IN CIVIL TRIALS?

Either party can call an expert in order to express their opinion regarding any technical aspects under analysis. Considering the complex nature of the subject matter, the ability to call an expert is an important aspect of the tax litigation process. If the taxpayer or public treasury intends on using expert evidence, they must give notice of that fact in the initial application and in any replies. Expert evidence is decisive in cases involving the determination of taxable income based on indirect methods. Expert opinion is also common in accounting disputes, principally those involving corporate tax assessments. Experts can be cross-examined by the parties with the judge's permission.

EXPERT EVIDENCE IN CRIMINAL TRIALS

25. WHAT ARE THE RULES CONCERNING THE INTRODUCTION OF EXPERT EVIDENCE IN CRIMINAL TRIALS? IS IT POSSIBLE TO INTRODUCE EXPERT REPORTS?

Expert evidence

Expert evidence is of paramount importance in highly complex criminal tax cases, which often involve charges of tax fraud, money laundering and misappropriation of funds.

The use of expert evidence can be determined *ex officio* by the court. The parties can also request that the judge allow its inclusion.

Expert reports

Expert evidence is not freely assessed by the court in criminal tax proceedings. Therefore, if the court's assessment does not agree with the expert's opinion, such discrepancies must be completely explained in the court's judgment.

SPECIAL CONSIDERATIONS

26. ARE THERE ANY SPECIAL CONSIDERATIONS FOR INTRODUCING EXPERT EVIDENCE/REPORTS IN BOTH CIVIL AND CRIMINAL TRIALS?

Civil trials

In civil trials, expert evidence is freely assessed by the court.

Criminal trials

Unlike in civil trials, expert evidence is not freely assessed by the court in criminal tax proceedings. Therefore, if the court's assessment does not agree with the expert's opinion, such discrepancies must be entirely explained in the court's judgment.

CLOSING THE CASE IN CIVIL TRIALS

27. WHAT ARE THE RULES GOVERNING THE SUBMISSION OF BOTH WRITTEN AND ORAL ARGUMENT IN CLOSING A CIVIL TRIAL?

Final statements are not mandatory, but they are usually submitted, in writing, up to 30 days after the parties have been given notice to submit those statements. These statements are the final procedural stage before the judgment is delivered. Here, the parties can enhance their arguments and make conclusions based on the evidence provided. Despite being optional, final statements are a relevant pleading through which the parties can effectively summarise their positions.

CLOSING THE CASE IN CRIMINAL TRIALS

28. WHAT ARE THE RULES GOVERNING THE SUBMISSION OF BOTH WRITTEN AND ORAL ARGUMENT IN CLOSING A CRIMINAL TRIAL?

In criminal trials, the parties' final statements are provided orally at the end of the trial, before the judgment is delivered.

DECISION, JUDGMENT OR ORDER

CIVIL LAW CASES

29. WHAT ARE THE RULES GOVERNING THE ISSUANCE OF A DECISION IN CIVIL CASES?

Although the Tax Procedure and Process Code sets out a deadline (which is not mandatory) for the duration of first instance trials to last no more than two years, in practice this time frame is exceeded in the majority of cases.

The decision given by the court must:

- Identify the parties and the facts at hand.
- Summarise the claim and provide the reasons for the claim.
- Summarise the position taken by the public treasury representative.
- Determine the matters that the court must decide.

Court decisions must be fully justified in writing. The written decision must be read out in a court hearing.

CRIMINAL LAW CASES

30. WHAT ARE THE RULES GOVERNING THE ISSUANCE OF A DECISION IN CRIMINAL CASES?

There is no deadline for the criminal court to issue a judgment.

Criminal sentences must:

- Identify the parties.
- List the proven and unproven facts.
- Explain the factual and legal grounds for the decision.
- Explain the legal standards applicable.

In the event of a conviction, the decision must underline the grounds behind the determination of the quantum of the penalty.

COSTS

31. HOW IS THE ISSUE OF COSTS DETERMINED IN BOTH CIVIL AND CRIMINAL CASES?

Civil law

Judicial fees vary according to the value of the claim. Where the value of the claim is above EUR275,000, an extra legal fee is due at the end of the process. In some circumstances, the court can award interest on the amount payable. In fact, the court can determine the amount of the reimbursement of amounts paid by the taxpayer, as well as indemnity interest at the legal rate.

The court will usually make a costs award against the losing party.

Criminal law

Generally, judicial fees are due at the end of criminal process.

Provided that there is a conviction, the court will usually make a costs award against the convicted party. The court can also award interest on the amount payable.

APPEALS

RIGHT TO APPEAL IN CIVIL LAW

32. WHAT ARE THE MAIN GROUNDS FOR APPEALING A CIVIL LAW DECISION?

Appeals can be made against points of law or findings of fact. Appeals to the Supreme Court can only be made on points of law.

Where the value of a claim exceeds EUR5,000, the taxpayer can appeal to the Administrative Central Court or the Supreme Administrative Court. Decisions by the Central Administrative Court and the Supreme Administrative Court can only be appealed under exceptional circumstances.

PROCEDURE TO APPEAL IN CIVIL LAW

33. WHAT IS THE PROCEDURE FOR APPEALING A CIVIL LAW DECISION?

Generally, to lodge an appeal, the taxpayer must submit an application to the higher court declaring his intention to lodge an appeal within ten days of the date of the judgment. This pleading will then be admitted by the court of first instance, after which the taxpayer has 15 days to file his written appeal.

Permission is not required to lodge an appeal. The taxpayer must only submit an application to the higher court declaring his intention to lodge an appeal.

RIGHT TO APPEAL IN CRIMINAL LAW**34. WHAT ARE THE MAIN GROUNDS FOR APPEALING A CRIMINAL LAW DECISION?**

Appeals can be made against points of law or findings of fact.

Normally, it is possible to appeal criminal tax decisions at the courts of first instance. There are only a few situations where it is possible to lodge an appeal for second instance judgments.

PROCEDURE TO APPEAL IN CRIMINAL LAW**35. WHAT IS THE PROCEDURE FOR APPEALING A CRIMINAL LAW DECISION?**

To appeal a criminal court sentence, the defendant must submit a written application declaring his intention to file an appeal, together with a written appeal statement. The written application must be submitted to the court of first instance, but will be considered by the second instance court. The appeal must be submitted within 30 days after being notified of the decision.

RECENT CIVIL LAW DEVELOPMENTS AND PROPOSALS FOR REFORM**36. OUTLINE THE MAIN RECENT CIVIL LAW DEVELOPMENTS IN TAX LITIGATION IN YOUR JURISDICTION. ARE THERE ANY PROPOSALS TO REFORM CIVIL LAW TAX LITIGATION?**

The majority of cases that are taken to court are related either to foreclosure processes or to corporate income tax and, in particular, the non-recognition of certain costs for corporate income tax purposes by the tax authorities. Nonetheless, there are some pending cases related to more cutting-edge topics, such as controlled foreign corporations, transfer pricing and the general anti-avoidance rules (GAAR).

GAAR was introduced into Portuguese law more than ten years ago. To apply the GAAR, the tax authorities must follow a strict procedure. The extra requirements established in the law for the application of the GAAR by the tax authorities, combined with the absence of experience and tradition in Portuguese tax law with these types of rules, has contributed to the fact that the first decision from the courts where the applicability of the GAAR was considered was only issued at the beginning of 2011. As a result, this is still an area of tax law which is developing.

RECENT CRIMINAL LAW DEVELOPMENTS AND PROPOSALS FOR REFORM

37. OUTLINE THE MAIN RECENT CRIMINAL LAW DEVELOPMENTS IN TAX LITIGATION IN YOUR JURISDICTION. ARE THERE ANY PROPOSALS TO REFORM CRIMINAL LAW TAX LITIGATION?

The most common tax crimes in Portugal are misappropriation of funds and tax fraud. Misappropriation of funds tends to occur whenever a corporation neglects its payment obligations to the tax authorities, namely as a result of liquidity difficulties. Tax fraud tends to occur where assets and income are concealed and false invoices are issued. There are no current proposals to reform criminal tax litigation.

ONLINE RESOURCES

PORTUGUESE CUSTOMS AND TAX AUTHORITY (*AUTORIDADE TRIBUTÁRIA E ADUANEIRA*)

W www.portaldasfinancas.gov.pt/at/html/index.html

Description. The website of the Portuguese Customs and Tax Authority (*Autoridade Tributária e Aduaneira*).