CLAIMS FOR THE RECOVERY OF UNDULY PAID TAXES: EMPIRICAL DOMESTIC CASES SHOW THAT PROGRESS IS REQUIRED

Francisco de Sousa da Câmara[1]

I Introduction

Domestic tax provisions are often found to be contrary to EC rules, not only by national courts but also by the European Court. When the domestic tax provisions scrutinized by the European Court affect a broad range of taxpayers, the case is usually followed with enthusiasm in different Member States. This interest arises from the fact that other taxpayers may benefit from a decision handed down to one.

On one hand, it is probable that in the future taxpayers will refuse to pay a tax that has been found to be illegal by the European Court – even if the specific Member State has not yet revoked the relevant legal provision. This behaviour represents the right of resistance against the assessment of an illegal tax and can be accompanied by an administrative claim or an appeal against such assessment. In exercising this right, the taxpayer shows a determination not to pay the tax still considered due by the relevant Member State.

On the other hand, it is possible to identify more audacious and demanding taxpayers – those that will seek a refund of the taxes wrongly paid in the past in these circumstances.

The recent decisions of the European Court reveal that the Court has been prodigious in creating a vast repository of jurisprudence in this area. The Court has consistently held that in the absence of Community rules concerning the refunding of national taxes which have been wrongly levied, it is for the domestic legal system of each

[1] Francisco de Sousa da Câmara, Morais Leitão & J Galão Teles & Associados, Rua Castilho 75 – 1[B] 1250-068 LISBON, Portugal, Tel: 00351 213 817400; Fax: 00351 213 817499; Email: fscamara@mlgt.pt.

Member State to designate the courts having jurisdiction and to determine the procedural conditions governing legal actions intended to ensure the protection of the rights which citizens derive from the direct effect of community law; it being understood that such conditions cannot be less favourable than those relating to similar actions of a domestic nature, and may not make it impossible in practice to exercise rights which the national courts have a duty to protect.[2]

Recently Dr. Kirsten Borgsmidt has illustrated in this *Journal* the manner in which principles of equivalence and effectiveness are being implemented by the European Court and how they are limiting and shaping national laws.[3] Moreover, later European Court cases show that this jurisprudence will continue to develop.[4] In spite of this, practice shows that notwithstanding the tremendous effort of the Court to reconcile general and abstract principles with 'real effective rules', the fact is that the Member States insist on protecting themselves with procedural provisions and continue to shirk their responsibilities by putting up such shields.

Conversely, taxpayers have become more litigious, presenting new cases before the national courts, requesting European Court rulings and trying to push the boundaries of European Court decisions in the direction of straightforward guidelines concerning the possibility to recover wrongly paid taxes. National case law, however, still evidences the existence of doubts in applying the European Court rulings and, when this is not the case, often demonstrates a very strict, not to say an incorrect, understanding of the principles of equivalence and effectiveness. Thus, this means that EC rules fail to garner the same degree of respect within each Member State. In fact, while different substantive and procedural conditions (e.g. regulating the limitation periods and the way to oblige public authorities to comply with EC law, including the need to give reparation for previous loss suffered by taxpayers) apply in Europe, it is not possible to have a uniform compliance with the rule of law. At the end of the day, compliance with EC law continues to be a game where the State holds more trump cards.

The right to repayment of amounts paid to national authorities in breach of Community law is constantly being challenged and the national provisions that could give effect to that right are systematically being reviewed by the Member States –

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2 *Deville v Administration des Impôts*, C-240/87 [1988] ECR 3513 at para. 12. This principle has been reaffirmed several times, including in the *Roquette Frères Case* C-88/99 – see judgment of 28th November 2000 at para. 20.

3 Dr. Kirsten Borgsmidt, 'Principles of equivalence and effectiveness', *ECTJ* 5/1 [2001] 11-21.

4 See *Marks & Spencer Plc* C-62/00 and *Grundig* C-255/00 where the Advocate General delivered his Opinion on 24th January 2002 and 14th March 2002 respectively.

either changing the procedure to be followed, the designation of the authority charged with repayment, or the period within which the claims must be made.

It is for the domestic legal system of each Member State to establish the necessary rules for the administration of justice and the process for rendering them effective, but the Community institutions, and the European Court in particular, is charged with confirming whether the national provisions governing EC matters (e.g. repayment of taxes or charges paid in breach of community law) are compatible with EC law and with Article 6(1) ECHR and Article 1 of the First Protocol thereto. In certain areas (such as custom duties) there are specific common rules stating that duties can be reclaimed within three years of being paid to customs authorities. In other areas (e.g. other taxes and charges) these rules do not exist and the European Court guidelines are still quite open.

Would it not be reasonable to have the same possibility (for example, at least the same number of years) of recovering wrongly paid taxes in each Member State, even if this would necessitate a minimum harmonization of rules, regardless of whether this is achieved by harmonized provisions or by EC rulings? Would this be enough to ensure that taxpayers would really receive their refunds?

Currently, the Member States' experience shows – as the Portuguese example below evidences – that the problems with claiming tax refunds are much deeper than the ones concerned with statutes of limitation, because they may start with the actual taxpayers who obtained the first ruling issued by the European Court, where the statute of limitation cannot even be invoked. The obstacles to getting refunds – of taxes and interest – exist at the first level and the answers cannot rest exclusively on the assumption that this is a merely national issue. Ultimately, the degree of justice or injustice is a national matter, but unless the parameters of freedom available to Member States are effectively controlled by the European Court, Community law will continue to play a different role (and be applied differently) in each Member State.

II Portuguese Experience

A. EC Jurisprudence Concerning Portuguese Taxes

Although not profuse, there are several good examples of cases in which EC jurisprudence has found Portuguese domestic tax provisions to be contrary to EC law. Probably the most relevant situations to have arisen over the last ten years are the following:

B. Portuguese Domestic Response

(a) Introduction

Each of these European Court cases provoked a different type of reaction. To begin with, one should distinguish between the positions assumed by all the parties involved in the litigation that led up to the case before the European Court – namely, the Portuguese Tax Court that submitted the preliminary ruling under article 177 of the EC Treaty, the Portuguese tax authorities that would have to comply with the decision, and the actual taxpayer that made a claim.

Secondly, one should also observe the consequential behaviour of the major players that are, or could be, affected by the decision. The first player is the Portuguese State that, as a rule, is obliged to change its domestic legislation – if it did not do so during the proceedings. The next players are the taxpayers that were subject to the same illegal tax but did not react against it, until this European Court decision came through. Understandably, they now intend to contest the taxes wrongly paid. Obviously, in a case where the 'unlawful' domestic rule was not yet revoked, taxpayers refused to comply with it and, if they already paid the tax according to it, they start reacting against it.

The tax authorities (or other public bodies) play again an important role at this stage in defending legality. Unfortunately, they may be led by the State's immediate financial interest in denying new claims, refusing refunds and, in general, establishing all types of legal or administration barriers to repayment of the tax levied in breach of EC law.

Therefore, not surprisingly, we see that new cases are brought up before the domestic courts and, sometimes, before the European Court, as a consequence of the same original decisions. Unfortunately, these constant waves of protest do not always result in plausible or acceptable decisions which represent an end to the discussion and/or litigation.

Thus, it is interesting to observe what happened in Portugal following the above-mentioned cases – empirical results have the great virtue of speaking for themselves. It will be seen that the three emblematic Portuguese cases cited above evidence the fragility of European Court decisions when Member States raise barriers to their implementation. At the end of the day, the victories achieved at the European Court may leave the taxpayer with the bitter taste of a pyrrhic victory.

(b) The vehicle tax applicable on imported used vehicles: violation of article 90 (formerly article 95) of the EC Treaty.

Following the decision taken in the *Nunes Tadeu* case,[10] the Portuguese Supreme Administrative Court ('ASC') did not decide that the tax concerned was void. Instead it considered that the value of the imported vehicle should still be determined in accordance with the facts and returned the case to the Oporto Court of First Instance. The latter court declared the tax void, but the tax authorities appealed to the ASC which considered itself incompetent to decide the case on the grounds that there were issues of fact involved (while the field of competence of the ASC as the final Court of Appeal is limited to legal issues). Thus, the file was sent to the tax court of second instance which, at the end of the day, decided again that the facts should be re-analysed and an appraisal of the vehicle carried out. Now, in 2002, the Oporto Tax Court has still to decide what to do, taking into consideration that the vehicle was already sold several years ago by Mr Nunes Tadeu and that the importation occurred more than ten years ago. Ultimately, Mr Nunes Tadeu never received a decision of the Portuguese courts or tax authorities that the vehicle tax was void and never received a penny from all this litigation, which began with the importation of the car in 1990.

During this period, the infringing law (Decree-Law 40/93 of 18th February) was amended in order to create some approximation between the tax due on imported vehicles and the residual tax integrated in the price of Portuguese used vehicles. However, the amendment to the method of calculating the value of the imported vehicles still did not prevent discrimination against imported vehicles. This, therefore, led to new litigation and at the end of the day required the European Court to issue a second ruling on 22nd February 2001. The European Court considered that the new legislation was still contrary to Article 95 of the EC Treaty.[11] This gave rise to several new cases, some of them still pending in the Portuguese courts. In some cases, the taxes were already considered null and void by the ASC, but to the best of the author's knowledge, refunds have not yet been made.[12] Other cases are still pending. The offending legislation was again amended but an *ad valorem* vehicle tax was still not introduced. Such a tax would be based on the vehicle's value and would include both new and used (including imported) vehicles.[13]

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10 Case 345/93 *Fazenda Pública and Ministério Público v Amércio João Nunes Tadeu* [1995] ECR I-479.

11 Case C-393/98 *Ministério Público and António Gomes Valente v Fazenda Pública* 22nd February 2001.

12 ASC file nº 22.712, decision of 26th September 2001; ASC file nº 22.644 and decision of 20th February 2002.

13 Portugal refuses to introduce such a system that could be an incentive to the acquisition of imported used vehicles, to the prejudice of the existing total of vehicles circulating in Portugal, and the environment. See *Jurisprudência Fiscal Comunitária* Anotada, Vol. I, pages 250-251, ed. Almedina 2002 - Commentary of Sergio Vasquez.

Law nº 85/2001 of 4th August 2001 again amended Decree Law 40/93 of 18th February 1993 and introduced the possibility for taxpayers to request the application of a method that may determine the tax basis in accordance with the vehicle's true value. This method was recently regulated by Order (Portaria) nº 1291/2001 of 16th November 2001.[14]

Litigation can take more than ten years and even then taxpayers may still not receive a refund of the monies wrongly paid – an unsatisfactory state of affairs.[15]

(c) The withholding tax on the distribution of dividends: violation of article 5(4) of the Parent Subsidiary Directive

Case 375/98[16] was decided by the European Court on 8th June 2000, which overall considered that Portugal could not continue to impose the ISDA in violation of the Parent Subsidiary Directive. The ASC was prompt in endorsing the decision previously reached by the Oporto Tax Court and disallowed the appeal of the tax authorities and the Public Prosecutor on 4th October 2000.[17]

Although compelled to refund the ISDA previously withheld at the time of the distribution of the dividends (PTE 2,039,786) in the following 30 days, in accordance with domestic legal and constitutional provisions, the tax authorities still have not yet reimbursed Epson Europe BV (April 2002). The legislation was only amended at the end of 2001, in order to prevent European parent companies from being subject to ISDA.[18]

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14 This method permits determination of the vehicle's value in accordance with the following formula: IA = (Vie) / VR. 'IA' represents the vehicle tax to be paid, 'V' corresponds to the vehicle value as established by a committee of experts; the 'IR' corresponds to the tax levied on a standard vehicle, similar to the used vehicle, in the year it receives the first plate and, finally, the 'VR' is a standard vehicle of the same trademark and model or a similar vehicle to the one being appraised. This synthesis is presented by Sergio Vasquez, cited above.

15 Although contrary to constitutional provisions stating that definitive court decisions should be respected by the public authorities, it is possible that the tax authorities will still try to apply the appraisal method approved by the Law 85/2001 of 4th August (article 8º) in order to reduce or to avoid vehicle taxes that were considered void by the ASC.

16 *Ministério Público v Epson Europe BV.*

17 File nº 19.730.

18 See Article 34 of Law nº 109-B/2001 of 27th December 2001 that gave a new wording to Article 182 of the Inheritance and Gift Tax Code.

Between 8th June 2000 and the end of 2001, some taxpayers had challenged the ISDA. Although some have observed the domestic limitation period for appealing, the majority did not. The tax authorities already assumed their position in actual cases, stating that they would not accept claims introduced after the end of the domestic limitation period of 90 days.

The Court decisions have not been made public, but it is probable that the ongoing challenges will receive the same answers that have been handed down in the cases concerning capital duties. The path to a refund seems tough and complex. Surprisingly, even the first taxpayer that complied with the limitation period in introducing its petition (Epson BV) and won on all fronts (European Court and domestic courts) still has not received a refund of the monies wrongly paid.

C. Recovering Overpaid Taxes

(a) Notarial and registration fees: Violation of article 10(e) of Directive 69/335/EC

As noted above, on 21st and 26th September 2000, the European Court considered that the Portuguese capital duty legislation contravened EC law.[19] In practical terms, the charges or fees paid by companies to notaries and registered public entities for drawing up a notarially attested act recording an increase in the share capital of a company and an amendment of its statutes, or for entries in the National Register of Legal Persons, were considered illegal and contrary to EC Law, violating Article 10(e) of Directive 69/335/EEC as amended by Directive 85/303/EEC.[20] This case reinforced the rule not only that domestic law has to respect EC law, but also that the European Court may really enforce taxpayers' rights. The Court expressly stated in Cases C-19/99 and C-134/99:

> 'Article 10 of Directive 69/335, as amended by Directive 85/303, creates rights on which individuals may rely in proceedings before the national courts'.

Apart from the cases that motivated the European Court's ruling, other judicial files were pending in Portuguese courts concerning the same issue. Taxpayers continued with their challenges in the pending files and also started new litigation for refunds of taxes overpaid in the previous years. Meanwhile, the Government decided to

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19 Case C-19/99, *Modelo Continente SGPS SA v Fazenda Pública* 21st September 2000, and C-134/99 *IGI-Investimentos Imobiliários SA v Fazenda Pública* 26th September 2000.

20 For a summary, see *European Taxation,* February 2001, EC-7 and EC-8.

change the rules concerning capital duties (establishing a maximum fee as a ceiling for a notarial or registration operation). This change did not prevent taxpayers from continuing litigation against the capital duties collected in accordance with the new provisions (amended in a way that was not exempt from censure).[21] Many of these taxpayers won and started requesting a refund of the overpaid duties from the authorities.

In view of the lack of response, taxpayers came again before the Tax Courts [22] in

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21 In Case C-206/99, *Sonar – Technologic de Informação, SA. v Direcção Geral dos Registos e Notariados*, the Court decided that the existence of a maximum charge (see para. 16 of this decision regarding the legal framework) is not sufficient to qualify the charge as a duty paid by way of a fee, if that maximum is not reasonably established by reference to the cost of the service in respect of which the charge is levied. Domestic Court decisions have also taken this view. See CNP Case, Tax Court of First Instance of Lisbon, Proc. de Impugnação nº 11/2000, decision of 21st June 2001.

22 Currently, the Portuguese authorities (the 'Direcção Geral dos Registos e Notariados – 'DGRN') are indirectly contesting the European Court ruling in the files still pending in Court. The 'DGRN' is refusing to refund taxpayers when the latter already won the domestic judicial files based on the European Court ruling and when the Portuguese Court declared the previous assessments void. Invoking that there are about 200 files pending in Court and that the amounts involved may surmount PTE 3,790,878,599 (Euros 18.90 million), the authorities are obstinately refusing refunds in actions that taxpayers have won based on the fact that domestic law violated EC Law. In accordance with the Portuguese authorities' standpoint, apparently Portuguese public interest – corresponding to the interest in not refunding what is held to be a considerable amount of money – may justify not implementing *in totum* previous Court decisions as well as maintaining EC violations.

From those 200 files it seems that no more than two taxpayers ('the first to obtain success' stress the DGRN) obtained their refunds. Discussions are now continuing under a new judicial file, which is the Execution of Judicial Decisions ('Processo de Execução de Sentença') where taxpayers are trying to enforce the previous judicial decisions, obtaining a new decision stating that the DGRN does not have a legitimate right to refuse to refund taxpayers. Some of these files have already come to an end, but the authorities persisted in appealing against the decision at the time that the Government decided to enact a new law stating that they will pay part of the taxes considered void as indicated in Law nº 85/2001 of 4th August 2001. According to this new law the authorities will refund the wrongly fees in accordance with the following parameters:

(i) provided the amounts have been considered void by a court decision;

(ii) the amount to be refunded is still not the total amount considered void by the court but it will be deducted from the fees initially collected as part of the public notarial or registration wages and from the fees that could have been collected as reasonable (i.e. allowing the application of the new fees retroactively).

See Article 10º (4) of the new law 85/2001 of 4th August 2001, which constitutionally has also been agreed and challenged before the national courts. Although the illegality of this behaviour seems evident, the authorities persist in applying it and up till now they are still

order to obtain a new decision clearly obliging the tax authorities to refund the charges or fees that were previously considered void by a Court decision because of the violations of EC law.[23]

Trying to put an end to new litigation, the Portuguese Government decided to change the domestic law creating a new (third) law to establish notarial and registration fees.[24]

To summarise:

(1) Instead of bringing the domestic regime into line with EC law when the first case was pending the European Court, the Portuguese Government initiated small amendments to that regime, giving rise to lively litigation and to two further European Court rulings. At the end of the day, it was necessary to amend the Portuguese notarial and registration provisions three times;

(2) Concerned with this burden of litigation, the Portuguese Government stopped refunding any amounts to taxpayers even when the latter obtained successful court decisions considering the notarial and registration fees void. Basically, the Government points to the fact that there are more than 200 cases pending in court and that the amounts involved may surpass PTE 3.790 million (approximately Euro 1,890 million). According to the Portuguese authorities, Portuguese public interest – which seemed to be an interest in not refunding what is thought to be a considerable amount of money – may justify not executing previous court decisions *in totum*;[25]

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refusing to grant refunds.

23 One should distinguish between the aim in each case. In the first, one intends to obtain a court decision stating a specific tax is illegal, and void and, therefore, require its refund. In the second, in case such refund is not granted after success in the previous Court Case, the same taxpayer seeks to enforce its right, by once again bringing the case before the Court (see previous footnote).

24 Decree-Law nº 322-A/2001 of 14th December 2001.

25 Recently, in Case C-62/00 *Marks & Spencer Plc,* Advocate General Geelhoed admitted that the UK Government could face a financial risk in relation to the obligation to refund wrongly paid VAT, and went on to say that '... the extent of those risks could logically be no greater than the amount of the unjustified enrichment on the part of the Exchequer by means of VAT levied in breach of the rules of Community law. The desire to retain for the Exchequer amounts paid wrongly by the taxable person can in no event provide satisfactory justification for the retroactive shortening of the period for claiming repayment of unduly paid VAT' – see para. 71.

(3) Taxpayers were obliged to initiate new litigation against the State after winning their first court cases. This time they began execution procedures on judicial decisions ('Processo de execução de sentença'), trying to enforce previous court decisions and obtain a new decision stating that the State or any of its departments did not have a legitimate right to refuse to give taxpayers refunds. Although the illegality of its behaviour seems evident, the authorities persist in refusing to grant refunds;

(4) On 12th June 2001, the Tax Court of First Instance of Setúbal decided, for the first time (to the author's knowledge), on a case dealing with a similar refusal, considering that the State could not invoke any legitimate argument to refuse the granting of refunds;[26]

(5) Nevertheless, the State appealed against this decision to the ASC;

(6) Meanwhile, after two further European Court rulings and several domestic court decisions, the State changed the law concerning notarial and registration fees for the third time and announced that it would refund the fees wrongly collected (provided taxpayers had claimed in due time), during the period of 30 days beginning on the date on which the fees for new notarial and registration operations were published. At this stage, the State announced that the amounts to be refunded would be reduced. The State would only refund the effective surplus after discounting the new fees that would have been collected if these fees had been in force at the time and the part of fees that were reserved to pay the costs of the employees working in the public notary and registrations departments.[27]

(7) The new list of notarial and registration fees was published on 14th December 2001 and has been in force since 1st January 2002. The deadline of 30 days to refund taxpayers has elapsed and the *status quo* did not change ...

At the end of the day, the State will have to make refunds to taxpayers who won their court cases, but new litigation will certainly emerge about the amounts to be reimbursed (namely, if they are deducted from the 'fictional new fees' and the old fees allocated to the public personal, and if they do not include interest). Again, here, even the taxpayers that introduced proceedings in due time (i.e. within the

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26 The grounds used by the domestic court were mere national legal provisions. The Court did not invoke EC principles or EC legal provisions.

27 In the past, a variable part of the notarial and registration fees was allocated to pay employees of the public notary and registration departments. This has now been abolished.

domestic limitation period) have not yet received a refund of the monies wrongly paid.

What does this mean, then, for the others fighting against the limitation period?

The possible ways to recover overpaid taxes based on the European Court ruling, by lodging new judicial actions in accordance with domestic rules, are discussed below in relation to the limitation periods contained in Portugal's procedural rules.
Unlike other Member States, Portuguese legislation does not contain specific provisions stipulating time-limits for the submission of claims to obtain tax refunds as a result of any court decision which finds that a specific tax is illegal. Nevertheless, despite the lack of precise legal provisions indicating the way in which taxpayers should proceed in requesting the refund of taxes illegally assessed and collected,[28] it is possible to identify several administrative and judicial routes to request those refunds under domestic procedural law, as follows:

(1) The usual court procedure against a tax assessment is the appeal; the so-called, 'processo de impugnação'. In accordance with this procedure the taxpayer should appeal to the Tax Court of First Instance and lodge its application within the term of 90 days starting from one of the following dates:[29]

   (a) The deadline to pay voluntarily the tax assessment notified to the taxpayer;

   (b) The date of notification of other tax decisions, even when they do not arise from a tax assessment;

   (c) The date on which a communication is made to the subsidiary responsible in the foreclosure file to the effect that they are responsible;

   (d) The date on which a negative 'tacit' decision is considered to be adopted;

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28 This approach solely intends to discuss the refunds of overpaid illegal taxes, namely taxes based on domestic provisions contrary to EC law. There are several administrative domestic provisions concerning refunds of overpaid 'legal taxes'. These situations are not discussed in this article.

29 Article 102(1) of the Administrative and Judicial Tax Procedural Code ('Código do Procedimento e Processo Tributário') ('CPPT').

(e) The date of notification of other decisions that may be subject to an autonomous appeal in accordance with the Procedure Tax Code;

(f) The date on which the taxpayer becomes aware of the infringement of a legally protected interest not included in the previous items [items (a) to (e) above].

The 'processo de impugnação' is the proper way to contest tax assessments made by the tax authorities and to obtain a court decision determining that such assessment is void, implying that payments already made should be refunded (with or without interest depending on the circumstances, namely, where it is possible to identify which party – the tax authorities or the taxpayer – was responsible for those illegal assessments).

There are also specific legal provisions concerning claims against tax assessments directly made by the taxpayers (i.e., self-assessments and assessments made through the withholding mechanism) and advance income tax payments.[30] As a rule, in these cases a preliminary administrative claim must be presented before the question can be brought to Court.

However, when the grounds to contest a self-assessment or a specific withholding are exclusively legal in nature, taxpayers may immediately present a judicial appeal (under the 'processo de impugnação' rules). In such a case, the law simply states that the file should be lodged within the term (i.e. the 90 day period) foreseen in article 102(1) of CPPT.[31] The moot point is whether or not one may use any of the indents of article 102(1), namely the wording of indent (f) of 102(1).[32]

(2) A judicial alternative is to introduce an action to obtain the recognition of a right – the so-called 'acção de reconhecimento de um direito' (the right to reimbursement of taxes wrongly paid, which implies the right to obtain an administrative decision considering the assessment void and null). The time limit for initiating such action in the Tax Court of First Instance is four years following the date when the existence of such right was recognized. However, this action can only be proposed where this procedure is the most adequate in order to ensure the total, efficient and effective protection of the

30 See Articles 131 to 134 of CPPT.

31 See Articles 131(3) and 132 (6) of CPPT.

32 This issue is referred to again below.

right.[33]

(3) An administrative alternative, that has been stressed by the ASC although not yet used by taxpayers, is for the latter to request that the tax authorities take the initiative of reviewing the tax assessment on the grounds that it is illegal and should be considered void by the authorities. If the authorities deny such request (tacitly or expressly), taxpayers may appeal to the Courts against that decision. As a rule this request should be presented within the term of four years from the date of payment.

(4) Finally, alternatively or cumulatively, one may also introduce an action against the Portuguese State to be indemnified for the illegal act practised by the State and its unjust enrichment ('enriquecimento sem causa').[34] The limitation period for introducing such action in the administrative court is three years from the date on which the taxpayer recognizes that his/her right was violated.[35]

D. National Mazes Prevent Justice From Being Effective

As we have seen, it is for the national legal regimes to give effect to the right or claim to repayment of amounts paid to national authorities in breach of Community law. Apparently, the four legal domestic procedures (in the Portuguese situation) mentioned above would be enough to guarantee the EC right which derives from the direct effect of Community law. In fact, as these four procedures are likely to prove inadequate to obtain the refunds, one would have to assume that Community law was losing effectiveness by being filtered through an intricate and narrow national regime.

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33 Article 145 CPPT stipulates that the actions necessary to obtain recognition of a right or a legally protected interest relating to tax issues should be initiated by whoever evidences title to the recognition of such a right or interest.

34 Advocate-General Jacobs in the Opinion given in Case C-188/95 *Fantask A/S and Others* put it as follows (at para. 81):

'Thus, in those judgments the Court recognised that repayment or entitlement against State authorities and damages claims against the State may co-exist as independent remedies in matters of taxation and social security. Repayment or entitlement claims and damages claims are of a different nature, and what is recoverable under each may differ. For example, interest on arrears of benefit irrecoverable under an entitlement claim may be recoverable under a damages claim' .

35 See Article 71(2) of the Administrative and Tax Procedures Law (lei do Processo de Tribunals Administrative) ('LPTA') and Article 498(1) of the Civil Code.

The European Court has already decided several cases concerning the limitation period in respect of claims for repayment of wrongly paid charges and taxes contrary to Community law, including cases where the limitation period is less favourable for those cases than for actions between private individuals for recovery of sums paid but not due and regulated by *lex specialis* limitation periods.[36]

However, this limitation period may still become more difficult to observe in cases where taxpayers do not have a clear picture of what procedure to follow. The Portuguese experience is a paradigm of this situation.

Nowadays, it is still difficult to state with certainty whether a Portuguese taxpayer should follow the first, the second, the third or the fourth route mentioned above in order to recover the overpaid tax (paid more than 90 days ago), which arose due to provisions considered illegal by the European Court and (eventually) at a later stage by the ASC.

Nevertheless, recent Court decisions provide some guidance for future taxpayers. First, these national decisions show that appeals against a tax assessment filed after the 90-day period beginning on the date of payment or from any other date (first route) are being immediately rejected.[37] In a recent case before the Tax Court of Oporto, however, the Court refused to submit a request for a preliminary ruling to the European Court (on whether or not the limitation period rules contained in Article 123 of CPPT were contrary to European Court ruling in *Fantask*), stating that an appeal in a tax case cannot be suspended pending a European Court reply to this type of question. In addition, the Oporto Tax Court stressed that in this case - where the limitation period has elapsed – the taxpayer should lodge a different type of claim to obtain the recognition of a right.[38] However, in the past, other Court decisions have also rejected actions to obtain the recognition of a right *in limine*, based on the assumption that the taxpayer should have used the conventional appeal

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36 See Dr. Kirsten Borgsmidt, 'Principles of equivalence and effectiveness', ECTJ 5/1 [2001] 11 at page 19 and the jurisprudence quoted.

37 See ASC decisions on Appeal ns. 22.542 and 24.194 of 30th September 1998 and 24th May 2000 respectively. On 31st October 2001, and from such date onwards, in other instances, the ASC overruled a previous decision of the Tax Court of First Instance of Lisbon, and established that the domestic limitation period of 90 days for claiming against any assessment and requesting a refund should begin from the date on which payment occurred. Moreover, the Court considered that this rule respects the principles of equivalence and effectiveness – *Case Sopol,* File nº 26.392, Decision of 31st October 2001.

38 *Futop, SGPS, SA.* Proc. de Impugnação nº 39/2000, of the Oporto Tax Court.

mechanism ('processo de impugnação').[39] These decisions state that otherwise these actions would become an artificial way to increase the 90-day period during which a taxpayer may appeal against a tax assessment.[40]

The ASC also refused to consider that the introduction of an action to obtain the recognition of a right to a refund of the overpaid tax is the most appropriate procedure in the *Futop SGPS* case.[41] In fact, rejecting some appeals where taxpayers used the appeal mechanism (after the 90-day period) the ASC considered that the path to follow should be the administrative request for a refund and then, in case of rejection, a judicial appeal.[42] This would probably deter taxpayers from following the fourth option without trying this one.

The third route is accordingly the current option favoured out by the ASC. In view of this, the ASC:

(i) rejected appeals;

(ii) indicated that Portuguese law respected the principles of equivalence and effectiveness;

(iii) evidenced that, from its point of view, there was no reason to request new rulings from the European Court in this matter.

In the author's opinion it is very unlikely that the tax (or other) authorities will agree with this approach. This will only become clear in a couple of years when taxpayers have taken action against (tacit or express) administrative decisions refusing a refund of taxes wrongly collected.

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39 *Ibid.* In general the courts decided that the contest procedure (acção de impugnação) would have been a more appropriate procedure in terms of ensuring the total, efficient and effective protection of a right.

40 For example, see the ASC decision on Appeal 23.747 of 6th October 1999. The goal of this file is different from the one achieved by the 'processo de impugnação'. While in the latter case, the Court is called to declare void and null a tax assessment, in the former procedure the Court is required to declare that the taxpayer has a right to be refunded and it should be the tax authorities who declare void and null such act, totally or partially. Secondly, the use of this action intends to guarantee that taxpayers have the possibility to exercise effectively the rights conferred by European law, namely that the State may not – time after time – invoke domestic procedure rules and limitation periods that render virtually impossible or excessively difficult the exercise of these rights.

41 See ASC decision of 12th December 2001, File nº 26 233.

42 See ASC decision of 12th December 2001, File nº 26.233.

Nevertheless, some commentary on the arguments put forward by the ASC is required, particularly where they touch on the above mentioned principles.

The Principle of Effectiveness in Each Member State

Firstly, the ASC rejected the idea that the 90 days to lodge the appeal began from the date on which the taxpayer became aware of the infringement of a legally protected interest, considering that article 102(1)(f) CPPT (see above) expressly excluded the cases in which an assessment had occurred.[43] At the same time, the Court stressed that these assessments could not be challenged indefinitely and, in particular, rejected the taxpayer's appeal, stating that the 90 days appeal term had not been complied with.

Secondly, the Court pointed out that Portuguese law respects both the principles of equivalence and effectiveness. *Prima facie*, the Court emphasized that national procedural rules concerning refunds for charges levied in breach of community law are no less favourable than those governing similar actions based on breaches of domestic law. Later, the Court also considers – following previous decisions – that national rules do not render virtually impossible or excessively difficult the exercise of rights conferred by Community law.[44]

The ASC cited the doctrine issued in the *Emmott* case[45] and, in particular, the passage in which the European Court stated that a time limit does not begin to run until the relevant directive has been properly transposed. However, it also invoked more recent jurisprudence, namely *Spac*.[46]

For this purpose the Court considered that 'Community law does not prohibit a Member State from resisting actions for repayment of charges levied in breach of Community law by relying on a time-limit under national law of three years ...'. In addition, the Court also confirmed that 'Community law does not prevent a Member State from resisting actions for repayment of charges levied in breach of a directive by relying on a time-limit under national law which is reckoned from the date of payment of the charges in question, even if, at that date, the directive concerned had

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43 *SIC Case*, decision of the ASC of 20th March 2002, File nº 26.774.

44 *Ibid.*

45 Case C-208/90, *Emmott*, [1991] ECR I-4269.

46 Case C-260/96 [1998] ECR I-4997.

not yet been properly transposed into national law'.[47]

Thus, invoking European Court jurisprudence, the ASC rejected a recent appeal (*SIC* case).[48] However, in reaching this point, the ASC questioned whether the 90-day limit for an appeal was reasonable and considered the possibility of requesting a new ruling from the European Court.

Instead of pursuing such request, however, the ASC decided that:

(a) The appeal mechanism to attain a refund was not the sole way to exercise the rights to receive the repayment;

(b) Taxpayers may also request those refunds directly from the tax authorities within the term of four years;

(c) This decision was already based on other very recent jurisprudence of the ASC, and represented a step forward from the *Sopol* case, which limited itself to stating that the limitation period of 90 days beginning from the date of payment respected the principle of effectiveness because taxpayers could have challenged the assessment. Basically, in the *Sopol* case (the first to determine that the appeal was the most accurate way of reaction and that the term of 90 days should begin from the date of payment), the Court considered that:

    (i) taxpayers should be aware of the Directive provisions;

    (ii) the *Emmott* case was very peculiar as the European Court had already clarified;

    (iii) the 90 days period did not render virtually impossible or excessively difficult the exercise of rights conferred by Community law.

(d) The national deadline reconciles the taxpayer's interest with the need for legal certainty and security necessary to protect the State.

However, these grounds are far from acceptable.

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47 Case C-260/98 *Spac* [1998] ECR I–4997.

48 This decision taken by the ASC was anticipated by other decisions with similar grounds – *Case A. Silva & Silva, SGPS, Lda.*, File 27/02-30 decision of 13th March 2002; File 26.391, decision of 16th January 2002; and *Case Futop*, File 26.235, decision of 16th January 2002.

Firstly, directives are binding upon each Member State to which they are addressed. The State cannot invoke against a particular taxpayer that he should have known the direct effect of a Directive not correctly transposed within the national legal system in order to penalize him. Secondly, the 90-day limit period rendered it almost impossible to lodge an appeal in proper time, unless the domestic tax was paid at the time the European Court decision was adopted. In the writer's opinion, these are, therefore, the main reasons why the ASC (from *Sopol* to the final decision in the *Futop* and *SIC* cases) took a step forward in considering that domestic law admits 'other mechanisms' to request refunds.

The point, however, is that Article 78(1) of the General Tax Law expressly states that the revision requested by taxpayers should be lodged within the 90-day period applicable to administrative claims and judicial appeals. The four-year period is only recognized by law for tax revisions, when the revision is initiated by the tax authorities.[49] Assuming that the four-year period for requesting such refund was granted within the Portuguese domestic legal system, the ASC refused to request a new ruling from the European Court stressing that this period is compatible with the European Court jurisprudence. But at the end of the day, this will lead to litigation without end.

III Conclusions

This article has shown that national procedures continue to be a maze through which taxpayers cannot find a clear route to justice.

Successes at the European Court become at the end of the day hollow victories, sometimes not only for the taxpayers involved in those precise cases, but also for all those that could benefit from the same ruling. The requesting of several successive rulings in similar situations evidences the difficulties faced by both taxpayers and national courts.

Therefore, the European Court has to continue its role as an upholder of EC law. It has already provided a starting point for taxpayers on their road to recovering wrongly paid taxes. Now it needs to go further; by ensuring that taxpayers do not

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[49] The Court tried, therefore, to justify such position with a legal provision exempt from ambiguity. Aware of this problem, the Court also invoked Article 85 of Decree-Law 42/89 of 3rd February 1989 and from 1998 by Article 89(3) of Decree-Law 129/98 of 13th May, that altogether with Decree-Law 155/92 of 28th July 1992, imposed the obligation to refund notarial and registration fees collected in excess within the term of five years. This provision was mainly (or solely) used, until now, in situations where mistakes in calculations have occurred.

subsequently lose their way amidst the sometimes puzzling array of national procedural obstacles. For such purpose, more precise and effective rulings would be welcomed.