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Arbitration as a Means of Resolving Tax Disputes

Tax arbitration courts were introduced as a means of addressing the backlog of cases in the tax courts, as well as a lack of resources. This article analyses this innovative mechanism against the backdrop of the traditional court system. The article cites statistics regarding the workload of the tax courts and, moreover, on the initial three-year period of existence of the tax arbitration courts.

1. Introduction

Difficult times can, on occasion, be the mother of invention. For years, the Portuguese administrative and judicial systems have heaved under the weight of a backlog of cases and a lack of resources. In the midst of this complicated scenario, the tax arbitration courts (TACs) have stepped up, providing a new route and a fresh option for taxpayers. Although the TACs are still a relatively new phenomenon, sufficient time has elapsed since their introduction to allow for statistics to be gathered and experience/results to be analysed. Essentially, this article considers a three-year period of operation in this respect.[1]

The timing of such an assessment is particularly relevant given the decision in June of this year to grant TACs the possibility to request a preliminary ruling from the Court of Justice of the European Union (ECJ).[2]

Arbitration, as a means of resolving international tax disputes, is well known, as well as the different types of procedures that have been adopted at the EU, OECD and UN levels. More and more tax treaties include arbitration clauses and many studies have been published, illustrating that international tax arbitration is moving forward apace.

From a domestic tax perspective, however, tax arbitration courts are not available, except in Portugal. The TACs, which were created to solve domestic tax disputes regardless of whether they involve domestic, EU or international tax law, are innovative not just from a Portuguese perspective but also internationally, as the comparative analysis in this article reveals. Under the auspices of the CAAD (Centre for Administrative Arbitration, hereafter referred to as CAA)[3] the Portuguese tax arbitration court system provides an interesting template and a potential model of alternative dispute resolution.

Within the scope of this article, the author begins by explaining the tax dispute context, illustrating the discussion with statistics relating to the three judicial instances of courts considering tax disputes, the volume of disputes, the number of courts, the number of judges, the number of cases being initiated and concluded each year, etc. (section 2.). Thereafter, the article analyses the recent tax arbitration law and the TACs, *grosso modo* (section 3.), drawing upon the experience of the three years from the summer of 2011 to 2014 (section 4.). In section 5. the author examines the usual process of law followed by a TAC and, in section 6., explains the exceptional appeal process in matters decided by TACs. Section 7. discusses the costs of litigating before TACs, which is followed by some concluding remarks in section 8.

2. Settlement of Tax Disputes in Portugal

2.1. Different options available: Administrative and judicial disputes related to tax assessments

2.1.1. General overview

Tax disputes may arise for a myriad of reasons, although, in the majority of cases, a tax dispute arises because of an alleged illegality identified by the tax authorities.

The majority of tax disputes have their origin in a tax assessment. Tax assessments may be made by the tax authorities (as is the situation in respect of personal income tax and the tax on the acquisition of immovable property, based on information disclosed by taxpayers) or directly by taxpayers (as is generally the situation in respect of corporate income tax (CIT) and value added tax (VAT)). The tax authorities, however, also raise additional tax assessments in CIT and VAT matters when they consider that the taxpayer has not self-assessed accurately. The vast majority of litigation regarding CIT and VAT matters originates in administrative audits and additional tax assessments made by the tax authorities.

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1. The Tax Arbitration Law (TAL) was approved by PT: Decree Law No. 10/2011, 20 January 2011. The tax and customs authorities have been bound by the law since 1 July 2011, in accordance with Ordinance (*Portaria*) No. 112-A/2011, of 22 March 2011. For an overview of the early stages of the introduction of arbitration, *see Mais Justiça Administrativa e Fiscal – Arbitragem* (N. Villa-Lobos & M. Brito Vieira eds., CAA 2010). For a commentary on the TAL, *see Guia da Arbitragem Tributária*, with commentary by J. Lopes de Sousa and an analysis of practical aspects by T. Carvalhais Pereira (N. Villa-Lobos & M. Brito Vieira eds., Almedina 2013). *See also* an interesting and critical overview by J. Miguel Júdice & R.M. Fernandes Ferreira, *A arbitragem fiscal: defeitos e virtudes – Liber Amicorum Alberto Xavier*, in *Estudos em Homenagem ao Professor Doutor Alberto Xavier*, vol. I, p. 811 et seq. (Almedina 2013).
2. PT: ECJ, 12 June 2014, Case C-377/13, *Ascendi Beiras Litoral e Alta, Auto Estradas das Beiras Litoral e Alta, S.A. v. Autoridade Tributária e Aduaneira*, ECJ Case Law IBFD.
3. The Conselho Superior dos Tribunais Admninistrativos e Fiscais (CSTAF) appoints the president of the Ethics Committee of the CAA, who is of pivotal importance in the creation of the TACs.

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

2.1.2. The administrative phase

The administrative phase is either optional or mandatory, depending on the case. The process is free of charge and involves less formal requirements than the judicial phase.[4] The administrative phase may involve two stages and is reviewed and decided upon by the tax authorities: the initial claim and, in respect of an express or tacit negative decision, the possibility to lodge a hierarchical appeal against the decision on the initial claim (usually, with the Minister of Finance) if one does not intend to immediately bring the matter before the courts. The tax authorities should decide upon these claims and appeals (within a four-month or 60-day period, respectively – which is the abstract period in which decisions should be taken – but silence may not be taken as tacit acceptance); however, taxpayers, to avoid waiting indefinitely for an express decision, can presume that the decision is negative (four months after the claim is initiated or 60 days in relation to appeals) for the purpose of bringing the dispute before the tax courts. Depending on a number of factors, but most importantly the complexity of the matter, the timeframe for an express decision by the tax authorities may vary between a few months and several years. Nevertheless, there is an identifiable trend towards a progressive and swifter resolution of disputes in the administrative phase.

Regarding self-assessment, in the majority of cases related to withholding tax and cases regarding payments on account of the final tax due, the dispute must begin with a claim presented to the tax authorities, except for cases where the withholding is only based on a matter of law and the self-assessment or the withholding was made according to general instructions provided by the tax authorities. Such cases may be brought directly to the courts within 90 days of the original assessment.

In respect of self-assessment and withholding tax, the deadline to submit a claim to the tax authorities is two years from the submission of the assessment. In respect of payments on account of the final tax due, the deadline is 30 days from the date of the tax being wrongfully paid.

In respect of self-assessment and withholding tax, the taxpayer may appeal to the courts from an express or tacit negative decision of the tax authorities within 30 days from that decision. A tacit negative decision is deemed to have been made if the taxpayer does not receive a decision within four months of making the administrative claim. With regard to payments on account of the final tax due, the claim is deemed to be denied if the taxpayer does not receive an answer from the tax authorities within 90 days. In the event of a denial, the taxpayer has 30 days to go to court.

As is readily apparent, these rules seem like a complex road with many pitfalls, where minor negligence or ignorance may prevent justice from being done. If these deadlines and itineraries are not followed the case is immediately dismissed without being heard.

2.1.3. The judicial phase

The Portuguese Constitution grants taxpayers the fundamental right to access courts to defend their rights and legally protected interests. In theoretical terms, justice cannot be denied with reference to the absence of a specific means or a type of action to entitle the taxpayer to go to court. The design of the judicial system in relation to tax foresees a myriad of types of actions to be used by the taxpayer depending on the issue to be decided by the court.

Apart from the possibility to attack administrative decisions that put an end to the administrative phase (either at the first or second hierarchical level), taxpayers may lodge judicial claims in the tax courts immediately after the tax assessments are made.

The most common type of action is called a "process of judicial impugnment", which is a judicial appeal against a tax assessment or against a tax authority decision rejecting an administrative claim against a tax assessment. There is also a special administrative action that is used to challenge, before the courts, the legality of acts of the tax authorities not related to the legality of a tax assessment. These deadlines are usually 90 days, dating from several specific events.

Specifically, in the context of tax foreclosure processes, a taxpayer may bring an action before the courts within a period of 30 days from notification of the beginning of the foreclosure process.

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

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

In addition, residually (i.e., in cases where any of the remaining types of actions do not provide a suitable means of achieving the results desired by the taxpayer), there is also an action for the recognition of a right or a legitimate interest in tax matters. As a rule, the deadline is four years from acknowledgment of the constitution of the right or acknowledgment of its violation.

4. In some cases, taxpayers may have to pay a fee of up to 5% of the tax assessment if the tax authorities find that there was no reasonable basis to justify the administrative claim. Taxpayers may challenge this decision.

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

2.2. Tax courts and tribunals

2.2.1. Judicial tax courts; the organization of the courts and tribunals

The judicial phase may also involve two stages. The initial claim is normally decided by a single independent judge in a court of first instance.

Tax disputes are traditionally covered by a special group of courts that deal with administrative and tax matters.

Under the current organization of the judicial system, there are 15 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 raised the tax assessment, which normally corresponds to the local tax office that covers the area of the tax domicile of the taxpayer. The Lisbon Tax Court is also competent to handle and hear the tax assessments of non-resident taxpayers that do not appoint a tax representative.

As shown in Table 1, the statistics show that tax judges are continuously being allocated cases and that the level of litigation is not decreasing.

Table 1: Register of tax court cases (first instance) and their status (2012)

First instance tax courts	Cases initiated (2012)	Cases finalized (2012)	Pending cases (2012)	Number of judges	Judges allocated by (30 June 2012)	Judges allocated by (31 Dec. 2012)	Average number of cases per judge (2012)
Area	15,909	15,173	41,932	52	58	68	(1)
Almada	829	899	2,585	4	4	4	646
Aveiro	895	1,384	2,867	3	6	5	637
Beja	266	317	673	1	1	2	449
Braga	1,401	1,212	2,751	5	3	5	550
Castelo Branco	314	271	1,360	2	2	3	544
Coimbra	483	568	1,780	3	4	4	509
Leiria	1,193	1,164	3,427	4	6	6	671
Lisbon	5,192	4,417	9,991	11	16	16	666
Loulé	507	343	782	2	2	2	391
Penafiel	632	860	672	2	2	2	336
Porto	2,825	2,108	9,240	9	5	11	840
Sintra	951	1,035	3,596	4	5	5	799
Viseu	421	595	2,208	2	2	3	883
Tax	521	566	1,044	-	-	-	(2)
Funchal	182	250	387	-	-	-	(-)
Mirandela	263	195	521	-	-	-	(-)
Ponta Delgada	76	21	136	-	-	-	(-)
Total	16,430	15,639	42,976	-	-	-	(-)

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

(1) Based on the average number of judges during the year (2012).
(2) No information is available for the courts of Funchal, Mirandela and Ponta Delgada.

Table 2: Register of tax court cases at the ACC (second instance) and their status (2012)

Second instance Administrative Central Court (tax section)	Cases initiated (2012)	Cases finalized (2012)	Pending cases (2012)
North area/Oporto	834	683	1,696
South area/Lisbon	1,019	797	1,196
Total	1,853	1,480	2,892

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

5. Where the value of the tax case exceeds EUR 12,500 or the case is before the Administrative Central Courts (ACC) or Administrative Supreme Court (ASC), the taxpayer is required to be represented by a lawyer.

These tables clearly evidence the herculean task requested of these judges who, in the first instance, have approximately two cases to decide per day. Their days also require the analysis and hearing of others cases, study and reflection. These figures clearly call for action(s).

One such measure was taken at the end of 2011; in order to accelerate the analysis and conclusion of pending first instance cases valued at over EUR 1 million, an extraordinary team of tax judges was appointed for the purpose of dealing with these cases.[6] Initially, this team of judges (four in Lisbon and three in Oporto) focused on the cases pending in Almada, Aveiro, Braga, Coimbra, Leiria, Lisbon, Oporto and Sintra. After 4 December 2012, the team also took over the tax cases pending in the other jurisdictions that exceeded a value of EUR 1 million.

This measure arose in the context of the Memorandum of Understanding on Specific Economic Policy conditionality signed by Portugal on 17 May 2011. The Portuguese government assumed a commitment to expedite the resolution of tax cases by: (1) creating a special procedure for high-value cases; (2) establishing criteria for priorities; (3) extending statutory interest in respect of the entire court proceeding; and (4) imposing a special statutory interest payment on late compliance with a tax court decision.[7]

At the beginning of 2013, 1,008 tax cases with a value exceeding EUR 1 million were pending, amounting to a total value of EUR 6,227,976,801.63, including cases pending before the Administrative Supreme Court (ASC) and the Administrative Central Courts (ACC) (North & South). The distribution of the cases is indicated in Table 3.

Table 3: Register of pending cases with a value above EUR 1 million

Courts	Number of cases pending on 1 January 2013 (above EUR 1 million)	Total value in EUR
Administrative Supreme Court (ASC)	**44**	256,431,244
Tax section	44	256,431,244
Administrative Central Courts (ACC)	**176**	**1,326,458,320**
ACC – North Lisbon (tax)	75	341,037,326
ACC – South Lisbon (tax)	101	985,420,994
Extraordinary teams	**788**	**4,654,087,237**
Lisbon team	**427**	**2,394,045,876**
Almada	27	175,897,358
Beja	8	46,380,147
Funchal	15	45,523,256
Leiria	27	69,817,393
Lisbon	283	1,727,082,584
Loulé	11	62,523,226
Ponta Delgada	3	7,483,791
Sintra	50	254,643,569
C. Branco	3	4,694,551
Oporto team	**361**	**2,251,041,361**
Aveiro	41	97,716,555
Braga	25	45,885,982
Coimbra	18	54,237,560
Mirandela	2	5,266,665
Penafiel	9	75,656,807
Oporto	253	1,917,560,143
Viseu	13	54,717,648
		6,227,976,802

* The number of cases pending on 1 January 2013 as of the last report of 2013 issued by the CSTAF (T4/2013).

Source: Based on information published by the *Conselho Superior dos Tribunais Administrativos e Fiscais.*

6. Pursuant to PT: Law No. 59/2011 of 28 November 2011. Under the Memorandum of Understanding on Specific Economic Policy Conditionality of 17 May 2011 and the Economic Adjustment Programme negotiated with the European Commission, European Central Bank and International Monetary Fund, the Portuguese government also assumed an obligation to address the bottleneck in the tax appeal system. A specific goal was made to streamline the functioning of the judicial system in the interests of the proper and fair functioning of the economy.

7. *See* Memorandum signed on 17 May 2011, Id., para. 7.14.

Table 4: Evolution of tax disputes over EUR 1 Million (2012 – 2013)								
	Pending cases		Decided cases		New cases		Pending cases	
Courts	1 Jan. 2012	1 Jan. 2013	1 Jan. 2012	1 Jan. 2013	1 Jan. 2012	1 Jan. 2013	31 Dec. 2012	31 Dec. 2013
Courts of first instance	910	788	517	329	397	275	790	734
ACC*	121	176	194	162	249	208	176	222
ASC**	34	44	90	102	100	140	44	82
Total cases	1,065	1,008	803	593	746	623	1,010	1,038
Value (in EUR billions)	5.3	6.22	3.54	3.1	4.51	4.5	6.23	7.5

* ACC North area (Oporto) currently has 10 judges (*Juizes desembargadores*) in the tax section and ACC South area (Lisbon) has 9 judges (Juizes desembargadores) in the tax section.
** The ASC currently has 10 judges (*Juizes Conselheiros*) in the tax section.

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

The specific analysis and management of these high-value cases became a priority. Further, a shift of cases to the higher courts can also be noted. Courts of first instance are starting to clean up their backlog but the value at issue has often led the parties to push the cases forward to the ACC and ASC, as Table 4 indicates.

In 2013, 593 decisions were made by these courts; of these, 329 were decided by courts of first instance, 162 by the ACC (tax sections) and 102 by the ASC (tax section). Of these decisions, 431 become *res judicata*, 219 in the tax courts of first instance, 118 in the ACC and 99 in the ASC, with an approximate value of EUR 2.2 billion.[8]

In the same 2013 period, however, 623 new cases were initiated at the three levels of court; of these, 275 new cases were lodged before courts of first instance, 208 before the ACC and 140 before the ASC, with an approximate total value of EUR 4.5 billion.[9]

By the end of 2013, 1038 tax cases were still pending, 734 of these before courts of first instance, 222 before the ACC and 82 before the ASC, amounting to an approximate total value of EUR 7.5 billion.[10] As seen in Table 4, these values clearly indicate the crucial importance of these courts, where a significant number of cases and considerable amounts of money are still a contingency for the state.[11]

2.2.2. Tax arbitration courts

In 2011, Portugal pioneered a new regime, which was unparalleled both in the European Union, as well as at the OECD level,[12] which provides for tax arbitration to settle domestic tax disputes, i.e. disputes between the Portuguese tax authorities and taxpayers, regardless of whether the taxpayer is an individual or corporate entity, resident or non-resident. Using a legislative authorization granted by the Portuguese parliament, approximately one year before (the State Budget for 2010), the Portuguese government adopted the legal regime for tax arbitration in the form of the TAL.[13]

On 17 May 2011, the Memorandum of Understanding signed between Portugal and the Troika specifically stated that the government should adopt measures for the orderly and efficient resolution of outstanding tax cases, including taking the necessary steps to implement the TAL in order to facilitate effective out of court resolution of tax claims.[14]

Although arbitration tribunals were already included in the list of "national courts" in article 209 of the Portuguese Constitution, it was not until this date that the state decided to allow tax disputes between the Portuguese state and its taxpayers to be challenged before the TAC.

According to the current tax procedures, as a rule, taxpayers may choose to lodge a tax claim against a tax assessment at the administrative level, judicial level or before a TAC.

The TACs can be constituted by a single arbitrator or a panel of three arbitrators, as explained in more depth hereafter.

The majority of cases submitted to date have been allocated to a single arbitrator (approximately 62.5% of the cases). The remaining cases were heard by a panel of three arbitrators, chosen by the CAA Ethics Committee or by the parties (the tax authorities also choose their arbitrator and both appoint a third arbitrator, who acts as a chairman).[15]

2.3. Tax appeals

An appeal (launched by the unsuccessful party in the first instance case – the taxpayer or the tax authorities – or by both in the event that the results are divided) may be brought before the ACC (tax section) in the event of a disagreement over the facts and the law decided in the first

8. Source: *Relatório T4/2013. Processo Tributários Superiores a 1 milhão de Euros (Janeiro a Dezembro de 2013) – Conselho Superior dos Tribunais Administrativos e Fiscais*, available at www.cstaf.pt.
9. Id.
10. Id.
11. Of this EUR 7.5 billion only a fraction represents previous payments or guarantees given in relation to the corresponding enforcement procedure initiated by the tax authorities.
12. An alphabetical analysis of countries, ranging from Australia to the United States, confirms that no similar domestic tax arbitration model exists – *see Tax Disputes and Litigation Review* 2nd ed. (Simon Whitehead ed., Law Business Research Ltd 2014).
13. *See* PT: Law No. 3-B/2010 of 28 April 2010 (art. 124) and the TAL, *supra* n.1, as amended by PT: Law No. 66-B/2012 of 31 December 2012 (State Budget for 2013), arts. 228 and 229.
14. *See* Memorandum signed on 17 May 2011, *supra* n. 6, para. 7.14 (i).
15. In the absence of agreement this decision would fall to the chairperson of the Ethics Committee of the CAA who, for the current year and since the inception of tax arbitration, has been a former and retired judge of the ASC.

instance, or to the ASC in the event of a disagreement exclusively based on matters of law. The appeal must be launched in the court of first instance within 10 days of its final decision and is only precluded if the value of the case (in cases relating to tax assessments, the amount of tax in dispute) is less than EUR 1,251. Decisions of the courts of first instance are adopted by a single judge and decisions of the Court of Appeal are decided by way of a majority of a panel of three judges.

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

Currently, unless the cases are launched before and decided by the TACs, the majority of disputes are resolved before the ACCs, as the party that loses the case in the first instance often appeals to this level of Court. Since the ASC only deals with matters of law, fewer cases reach this higher Court.

The two Courts (ACC South and ACC North) are situated in Lisbon and Oporto. The ASC is also located in Lisbon and covers the entire country. Both the ACCs and the ASC have one chamber for administrative law appeals and actions and another chamber that deals only with tax law appeals and actions.

On average, it takes around three to four years to obtain a final decision from the date the taxpayer lodges a judicial claim before the court of first instance. This timeframe is, however, merely indicative; it might be possible to obtain a final decision in less time. In order to resolve their tax dispute faster, taxpayers may lodge their petitions before the TACs. As a rule, tax arbitration does not allow for an appeal.

Taxpayers in the appeal process are represented by lawyers and the tax authorities by officials with a law degree.

3. Tax Matters Submitted and Decided upon by TACs

3.1. Submissions of law: Specific matters and EUR thresholds

As a rule, TACs have the jurisdiction to decide on the legality or illegality of the most common tax acts or decisions, with additional tax assessments being the focus of taxpayer challenges. There are specific acts/decisions, however, that have been specified as being beyond the scope of the TACs, such as decisions determining taxable income based on indirect methods and related to specific customs matters.[16]

One of the main features of the tax arbitration model is that the courts must decide the case based on the written law; the TACs are expressly prohibited from resorting to equity. In a nutshell, these courts should decide the case based on the same legal framework available to the tax courts.

Moreover, the tax and customs authorities are bound by any express decision they make only in respect of the specific matters addressed and provided the maximum amount involved does not exceed EUR 10 million.[17] In practice, in certain instances, the tax authorities have taken the position that the TACs had no jurisdiction over specific cases that were brought before them, stating that the matters were outside the scope of arbitration.[18]

Although not always successful, as seen in transfer pricing matters, the tax authorities have been successful in certain cases in arguing this type of exception based on the matter or on the amount involved; special attention should be given to these procedural aspects before initiating an arbitration procedure.[19]

Based on the principles of justice and *pro action* (the need for the court to reach a decision on the substantive matters at issue) the TAL also stipulates that whenever the arbitral award concludes the proceedings without a decision being given on the merits of the claim for "reasons alien to the taxpayers", as a rule, the clock in terms of the complaint, challenge or reassessment, or request for a new arbitral award would start again on the date of the notice of the arbitral award. Although the definition of the concept "reasons alien to the taxpayers" may seem ambiguous, it is the author's position, based on the above principles outlined herein and the spirit of the law, that, in a grey area and, in particular, when there is no clear gross negligence on the part of the taxpayer, the decision should lean in favour of allowing the taxpayer to initiate a new case.

As noted, the EUR 10 million threshold emphasizes the prudence of the tax arbitration model. This also explains why the total value of litigation under the TACs is still relatively small in comparison with the global value of tax litigation in Portugal.[20]

3.2. Domestic tax law and its interplay with tax treaties and EU law

Over the last three years, taxpayers have opted to litigate approximately 917 tax disputes under the arbitration mechanism. The matters covered included thin capitalization rules, transfer pricing rules, tax groups, reverse mergers that may, or may not, benefit from tax neutrality, several types of VAT issues, stamp duties including some related to EU directives on concentration of capital, immovable property taxes, residency issues, etc.).[21]

16. *See* arts. 2, no. 1 and 4 of the TAL and art. 2, Ordinance No. 112-A/2011, 22 March 2011.

17. *See* art. 4, no. 1 of the TAL and art. 3, no. 1 of Ordinance No. 112-A/2011, 22 March 2011.

18. *See*, for instance, PT: TAC, Cases 47/2012-T, 50/2012-T, 94/2013-T, 236/2013-T and 123/2013-T.

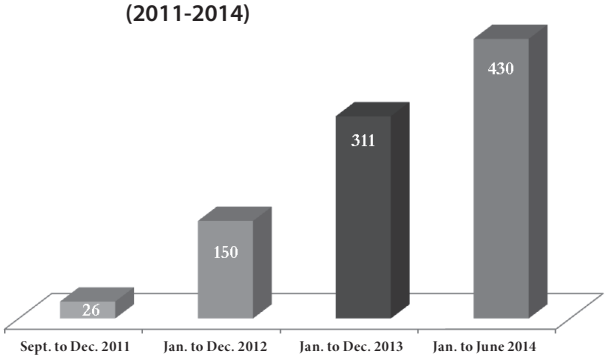
19. The tax authorities have been keen to invoke exceptions (much more than in the tax courts), although generally without success; however, in rare cases they have been successful in very controversial cases such as PT: TAC, 26 Jan. 2012, Case 5/2011-T.

20. With reference to cases above EUR 1 million alone, Table 3 evidences a total value of EUR 6,227,976,802.

21. A total of 917 cases had been initiated by 11 June 2014 according to CAA data.

Tax arbitration is becoming more and more appealing as Diagrams 1 and 2 evidence:

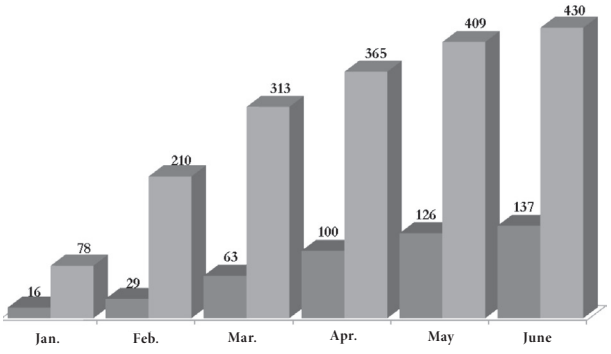
Diagram 1: Tax arbitration: Total cases initiated (2011-2014)



Source: CAA (16 June 2014), for futher and updated data, *see* http://www.caad.org.pt.

Apart from evidencing a clear evolution each year (from 26 cases initiated in 2011 to 430 initiated in the first six months of 2014), it can also be noted that the comparative growth per month is also significant as seen in Diagram 2 (for the first six months of 2014, the number of cases initiated more than tripled compared with 2013).

Diagram 2: Comparison of cumulative tax cases initiated in the first six months of 2013/2014



Source: CAA (16 June 2014), for futher and updated data, *see* http://www.caad.org.pt.

On many of these occasions, the TACs were obliged to interpret and apply domestic law in light of EU law (mainly the Treaty on the Functioning of the European Union (TFEU) (2007)[22] or specific directive provisions), as well as tax treaties.

An examination of various TAC awards indicates that taxpayers have often submitted novel issues to arbitration. The motive may have been to bring forth a test case in order to obtain a precedent (although the Courts are not obliged to follow previous decisions),[23] obtain a quick answer, recover overpaid tax as soon as possible, gauge whether arbitrators are more receptive to EU and international tax law, a bit of everything or something else entirely.

The fact is that TACs have already considered and decided upon certain key issues, including both purely domestic matters and some with an international element. The following provides a sampling of the range of cases:[24]

– MERCATUS, a MNF Capital subsidiary (a Portuguese company that is a leading export company in the field of commercial refrigeration, such as refrigerated counters, cabinets and cold rooms) was involved in a reverse merger incorporating both its parent company — which had no assets other than the participation in MERCATUS and sought a bank loan in order to buy MERCATUS' share capital — and the company that holds the capital in the parent company.[25]

  After an extensive tax audit, the Portuguese tax authorities proceeded with an additional assessment against MERCATUS (2007 tax year), charging corporate income tax on capital gains derived from the merger. In justifying the assessment, the Portuguese tax authorities invoked former rulings that held that the special merger regime allowing for deferral of taxation (the Portuguese regime, as well as the EU Merger Directive)[26] was not designed to permit operations such as reverse mergers but only mergers by absorption (expressly stating that downstream mergers were not included), mergers by incorporation and mergers with wholly-owned companies.

  In the beginning of 2013, MERCATUS obtained a positive decision annulling the additional assessment of corporate income tax from a Portuguese TAC.

  This was, notably, the first case in which there was an explicit agreement that reverse mergers are operations that fall within the scope of the Portuguese legislation implementing the former version of the EU Merger Directive (90/434)[27] and that such an interpretation of the Directive text is clearly in line with its rules and principles.

  This was a ground breaking decision, both in terms of defining the scope of the respective legislation implementing the Directive and, moreover, in terms of its repercussions, including at the level of other EU

22. Treaty on the Functioning of the European Union of 13 December 2007, OJ C115 (2008), EU Law IBFD.
23. As the vice-president of the ASC put it, "Although precedent does not exist under the Portuguese legal system as a binding rule […], it is a fact that jurisprudence has enormous real and effective weight in future decisions, apart from contributing towards the creation, development and reshaping of legal provisions, revealing the meaning of the law [...]", J. Conselheira, *Dulce Manuel Neto*, in *A Jurisprudência da Secção de Contencioso Tributário do STA. Notas e reflexões. Velhas questões. Novas soluções*, Revista de Finanças Públicas e Direito Fiscal, Ano V-4, p. 115 (2012) (author's translation).
24. Cases involving a domestic merger based on identical EU provisions, an initial request for an ECJ preliminary ruling or tax treaties.
25. PT: TAC, 4 Jan. 2013, Case 14/2011-T.
26. For the current version *see* EU Merger Directive (2009): Council Directive 2009/133/EC of 19 October 2009 on the Common System of Taxation Applicable to Mergers, Divisions, Partial Divisions, Transfers of Assets and Exchanges of Shares Concerning Companies of Different Member States and to the Transfer of the Registered Office of an SE or SCE between Member States (Codified Version), OJ L310 (2009), EU Law IBFD.
27. EU Merger Directive (1990): Council Directive 90/434/EEC of 23 July 1990 on the common system of taxation applicable to mergers, divisions, transfers of assets and exchanges of shares concerning companies of different Member States, EU Law IBFD.

Member States, considering that the Portuguese Tax Court's reasoning was also based on article 2 of the Merger Directive (2009/133).

– Ascendi, a concessionaire of several Portuguese motorways, requested a refund of stamp duties it had paid in respect of four capital increases it carried out between December 2004 and November 2006, on the grounds that Portuguese stamp duties were contrary to EU law because capital duties on an increase of share capital – abolished in 1991 – could not have been reintroduced later on (in 2001).[28]

  The Portuguese tax authorities contested this interpretation arguing that, in 1984, Portugal still had stamp duties on these particular operations. Ascendi brought the case before a TAC, which requested a preliminary ruling from the ECJ to determine whether articles 4(1)(c), 2(a), 7(1) and 10(a) of Directive 69/335[29] precluded national legislation that subjected to stamp duty any increase in the capital of companies, bearing in mind that, as of 1 July 1984, national legislation subjected these increases in capital, made in that manner, to stamp duty but exempted them later on.

  Although Directive 69/335 does not expressly refer to the case of a tax abolished and later reintroduced from 1 January 2002, on 12 June 2014, the ECJ stated emphatically that:

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

– The application, or non-application, of tax treaties has also been one of the main focuses of attention, covering matters such as "residence"[30] "permanent establishment",[31] dividend payments,[32] royalties or professional income[33] and tax credits.[34] The recognized international tax expertise of many arbitrators – who were expressly accepted as experts in order to be included in the list of potential judges on these matters – can certainly be an incentive for taxpayers submitting cases to arbitration.

3.3. Anti-avoidance matters

Another hot topic to reach the TAC is "abuse cases", wherein the tax authorities invoke and apply the general anti-avoidance rule (GAAR) or other specific anti-avoidance rules (SAAR) to make adjustments and additional tax assessments.

The tax authorities took approximately ten years to use the GAAR for the first time following the introduction of the rule into Portuguese law at the end of the 1990s. For a while, it had a deterrent effect, but its lack of use perhaps undermined this effect until the tax authorities started applying it. At the same time the government enacted even more legislation to combat tax avoidance, including regarding tax planning disclosure information.[35]

In this respect, TACs have made decisions relating to the formal requirements that must be met to attack tax assessments based on the application of the GAAR,[36] the factual and the legal criteria that should be met for the GAAR to apply,[37] as well as the relationship between this regime and the transfer pricing rules.[38]

Moreover, TACs have decided upon other anti-avoidance procedures related to the SAAR,[39] and several other anti-abuse provisions,[40] as well as cases where apparently no anti-abuse provision was invoked but where tax adjustments were made based on an allegation of an abusive practice (a practice without sufficient substance with abusive aspects).[41]

4. Tax Arbitration Courts and Arbitrators

4.1. The types of cases that have been decided

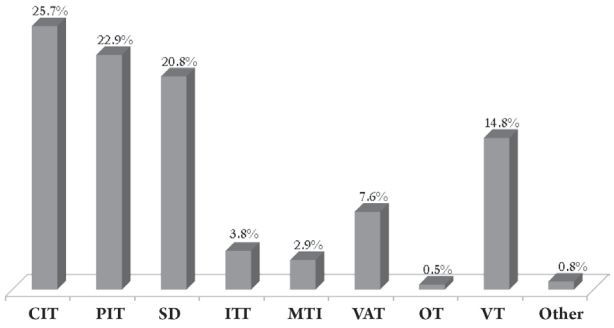
Currently TACs have jurisdiction over several types of requests brought by taxpayers for the purpose of obtaining decisions regarding the illegality of certain acts, such as:
– tax assessments;
– tax self-assessments;*
– tax withholdings;*
– tax payments on account;*
– tax decisions determining the tax base that do not result in the assessment of any tax; and
– tax decisions defining property values.

* Provided these files were preceded by an administrative claim; otherwise the tax authorities would not be bound by the decision – *see* article 2(a) of Ordinance No. 112-A/2011 of 22 March 2011 and articles 131 to 133 of the Code of Tax Procedures. Some other matters are expressly excluded from arbitration (for example, when taxes are assessed based on indirect methods and some customs matters).

For the last three years, TACs have been scrutinizing tax assessments and other tax acts related to the most important Portuguese taxes, in particular, corporate income tax, personal income tax, stamp duties, VAT, transfer tax, municipal taxes on real estate, etc. Diagram 3 shows the number of requests submitted for arbitration based on type of tax.

28. *Ascendi* (C-377/13).
29. EU Capital Duty Directive (1969): Council Directive 69/335/EEC of 17 July 1969 concerning indirect taxes on the raising of capital, EU Law IBFD.
30. For instance, PT: TAC, Cases 121/2012-T, 41/2013-T, 104/2013-T.
31. For instance, PT: TAC, Case 1/2013-T.
32. For instance, PT: TAC, Cases 20/2012-T, 22/2013-T.
33. For instance, PT: TAC, Case 108/2012-T.
34. For instance, PT: TAC, Case 199/2013-T.
35. *See* F. de Sousa da Câmara & J. Almeida Fernandes, *Tax Treaties and Tax Avoidance: Portuguese branch report*, *Cahiers de droit fiscal international*, Vol. 95a (Sdu Uitgevers 2010), Online Books IBFD.
36. PT: TAC, Case 5/2001-T.
37. PT: TAC, Case 124/2012-T; Case 70/2013-T and several others.
38. PT: TAC, Case 224/2013.
39. PT: TAC, Case 14/2011-T, para. 46.
40. PT: TAC, Case 34/2013-T.
41. PT: TAC, Case 130/2013-T, wherein the proceeds of the sale of shares were considered and taxed as a distribution of dividends. The TAC did not accept this tax adjustment.

Diagram 3: Distribution of cases by type



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

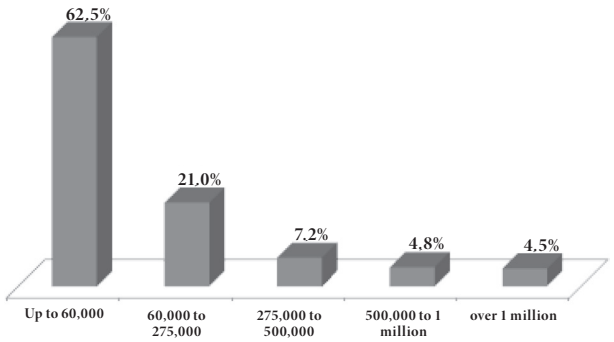
Source: CAA (16 June 2014), for futher and updated data, *see* http://www.caad.org.pt.

4.2. The formation/creation of arbitration courts

The lynchpin of this project – creating arbitration courts to settle tax disputes – was deciding how these courts would be formed and, moreover, how the judges would be chosen/appointed by the parties involved or a third party.

Under the regime as it was approved, arbitration courts may operate with a single arbitrator or with a panel of three arbitrators. Provided the disputed amount exceeds EUR 60,000, or the taxpayer chooses to appoint an arbitrator, the arbitration court is formed by a panel of three arbitrators. Otherwise, the case will be settled by way of a decision of a single arbitrator. Experience shows that the majority of cases (62.3%) do not exceed EUR 60,000 and are decided upon by a single arbitrator appointed by the Ethics Committee of the CAA – *see* Diagram 4.

Diagram 4: Distribution of cases by value



Source: CAA (16 June 2014), for futher and updated data, *see* http://www.caad.org.pt.

All single arbitrators are appointed, on a case-by-case basis, by the Ethics Committee of the CAA; i.e., each time a case is submitted to arbitration, the Committee appoints the arbitrator from the list of approved CAA arbitrators.

4.3. The appointment of arbitrators

Taxpayers have the possibility to initiate arbitration by choosing a specific arbitrator. As the arbitration court is formed by three judges, the second arbitrator is chosen by the tax authorities and the third by way of agreement of both parties. Alternatively, if the parties do not reach an agreement, the third arbitrator should be appointed by the Ethics Committee of the CAA. Otherwise, all arbitrators (single or panel) are appointed by the Ethics Committee of the CAA.

To be appointed as an arbitrator by the Ethics Committee, the individual must be on the list of arbitrators, which includes individuals that applied to perform such a task and were accepted by the CAA as a result of a favourable opinion of its Ethics Committee.[42] The annual list of arbitrators is published and is usually renewed every year.[43] The legal regime regarding tax arbitration requires that such arbitrators have proven technical capacity, a moral character and a sense of public interest.[44] They should be:

- primarily jurists, with at least ten years of proven experience in tax law, notably as a public servant, magistrate, lawyer, consultant, legal consultant, in higher education teaching or research, in the tax administration or with relevant scientific work in the area of tax law; or
- individuals with a degree in Economics or Management (these may be appointed as arbitrators, though not as the chairperson), in matters requiring specialized knowledge of an area outside of law; or
- retired magistrates, provided they make a statement renouncing their retirement status or requesting the temporary suspension of such status.

The list of arbitrators is prepared in accordance with the expertise of the arbitrators,[45] the order being determined on an aleatory basis by a computer system.

According to this regulation, the arbitrators are appointed according to the computer system on a sequential basis. If they cannot be appointed (*see* below), then the Ethics Committee makes the decision.

In particular cases, however, namely: (1) when the arbitrator is currently representing an entity in a case submitted to an arbitration court; or (2) when the special nature of the case requires more expertise, the Ethics Committee may appoint an arbitrator outside such sequential order. When this occurs, the Ethics Committee should use the sequential order in the subsequent appointment.

Despite a lack of a certain degree of transparency regarding the system, to date, there has been no cause for complaint, although the system should be reconsidered to avoid issues in the future, namely to ensure that there is no human interference in the selection of the arbitrators.

When the matter is decided by a panel of arbitrators, the appointment of the chairperson, if not chosen by the other two members of the panel (i.e. when the first arbitrator is

42. *See* articles 3 and 4 of the Regulation of Arbitrators Selection in tax matters and articles 8(g) and 10(A)(4)(c) of the bylaws of the CAA.
43. The website at www.caad.org.pt lists the names of each arbitrator, area of activity (for example, jurist or economist), expertise, as well as a CV and other comments. *See also* PT: Deontological Code of the CAA, article 3.
44. The various requirements to be an arbitrator are also described in article 2 of the Deontological Code of the CAA.
45. Arbitrator candidates should provide information as to whether they are experts in direct or indirect taxes, international matters, etc. and they should attach a CV.

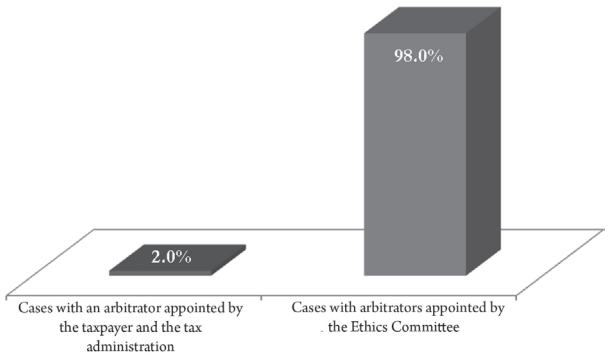
chosen by the taxpayer and the second by the tax authorities), is made by the Ethics Committee from candidates featured on the list mentioned herein.

The chairperson must be:
- an ex-judge from the tax courts (or someone holding an LLM in tax) for cases with a value up to EUR 500,000;
- an ex-judge from the tax courts or holding a PhD in tax for cases with a value of EUR million or more; cases cannot be submitted to arbitration if the value exceeds EUR 10 million.[46]

These limitations may need to be reconsidered notably because the justification for limiting candidates to those with this background is debatable and the number of cases is increasing significantly.

Experience has shown that the vast majority of cases initiated and decided upon were heard by a singe arbitrator. Even when the TACs were formed by three judges, however, just 2% of the cases had an arbitrator appointed by the taxpayer, as Diagram 5 indicates. All cases with a value of EUR 60,000 or less were decided by a single arbitrator.

Diagram 5: Total percentage of cases by arbitrator type



Source: CAA (16 June 2014), for futher and updated data, *see* http://www.caad.org.pt.

If the first arbitrator is chosen by the taxpayer, he can be selected from outside the list of arbitrators.

After being appointed as an arbitrator, the latter should expressly state if he/she accepts or declines such a role and, at the same time, confirm/cite his specific expertise and availability to decide the case, as well as the fact that no impediment exists.

4.4. Impediments and duties of arbitrators

There are several possible impediments to acting as an arbitrator. Apart from the general ones foreseen in the Administrative Procedure Code,[47] the tax arbitration regime also foresees a two-year period of "mandatory leave", which means that a person cannot be appointed as an arbitrator if, in the previous two years, they were:

- an officer, employee or agent of the tax administration; a member of the corporate bodies, employee, attorney, auditor or consultant of a taxpayer who is party to the proceedings or of an entity in a control relationship with the relevant taxpayer as defined in the Companies Code; or a person or entity with an interest in the success of the claim; or
- an employee, collaborator, member, associate or partner of any entity that has provided auditing, consulting or legal services or legal counsel to the taxpayer.[48]

Moreover, the law also expressly requires that an appointed arbitrator must decline to intervene in any circumstance that may reasonably entail suspicion concerning their impartiality and independence.[49] Notwithstanding their lay status and considering that – as a rule[50] – they all have other professional careers, the usual ethical requirements for judges apply to arbitrators, i.e. they are obliged to decide the case with objectivity and maintain absolute confidentiality.[51] In addition, they should aim for a quick, efficient and economical arbitration whilst observing the appropriate procedural guarantees for both parties.[52]

The parties may request that an appointed arbitrator be barred from acting as such but it is up to the Ethics Committee to decide this, based on the grounds specifically outlined in the Ethical Code, after hearing the arbitrator, the other party, as well as the other arbitrators (where there is a panel of three arbitrators).[53]

Although no public data exists regarding the number of cases where such a request has been made, unofficial information seems to confirm that these situations are rare. It would, however, also contribute to transparency to make information about situations that have arisen available, together with the petitions and arguments, or at least the final decision adopted by the Ethics Committee. Arbitration gains from an open framework and accessible decisions. Full transparency contributes to a more robust system, as the CAA recognizes. The information and statistics (as this article evidences) have been extremely important in fomenting arbitration.

4.5. TACs may request a preliminary ruling from the ECJ

If there are uncertainties as to whether or not a tax assessment violates EU law, the court of last instance must file a request for a preliminary ruling with the ECJ. In contrast to the court of last instance, the courts of first instance are not obliged to file such requests. Indeed, examples of cases in which such courts have opted voluntarily to request a preliminary ruling are rare.[54] This is, however, an extremely

46. Currently, the tax and customs authorities are only bound by the jurisdiction of the TACs up to a maximum ceiling of EUR 10 million (Ordinance No. 112-A/2011, of 22 March 2011).
47. *See* art. 44(1) of the CPA.
48. *See* art. 8, No. 1 of DL 10/2011, 20 Jan. 2011.
49. Id., art. 8, No. 2.
50. The main exception applies to retired judges.
51. Arts. 1, 10 and 12 of the CAA Ethics Code.
52. Art. 11 of the CAA Ethics Code.
53. *See* art. 6 et seq. of the CAA Ethics Code.
54. For further developments concerning referrals made by Portuguese courts to the ECJ, *see* F. de Sousa da Câmara, *The meaning and scope of the* acte clair *doctrine concerning direct taxation: the Portuguese experience and the establishment of boundaries*, in *The Acte Clair in EC Direct Tax Law* (A.

important measure to ensure uniformity in the EU legal order; at the same time it represents an effective way to assist national courts in attaining this goal.

Notwithstanding the fact that it was created as an alternative means of judicial resolution of disputes and the preamble to the tax arbitration law expressly stipulates the possibility for such "Tribunals" to submit a request for a preliminary ruling to the ECJ, under article 267, no. 3 of the TFEU, it was only on 12 June 2014 that the ECJ confirmed its jurisdiction to reply to questions referred to it by a TAC.[55]

Following the Opinion of Advocate General Szpunar and the path thereby set out, the ECJ determined that a TAC is a tribunal within the meaning of article 267 of the TFEU, taking into account several factors and criteria that have been emphasized by the ECJ over the years; in particular, the ECJ acknowledged and/or confirmed that:

- "arbitration courts" are included in the list of national courts by the Portuguese Constitution and TACs were established by law as an alternative means of judicial resolution of disputes dealing with the legality of taxes (Decree Law No. 10/2011 of 20 January 2011);
- TACs meet the requirement of permanence [although their composition is variable and their activity ends with their decisions (in fact, there is no particular difference in this respect relative to a judicial tax court or to the sections of the ACC or the ASC ruling upon a specific case) the TACs are permanent in nature];
- TAC decisions are compulsory. Although taxpayers are not obliged to lodge their case before a TAC, if they follow such a path they automatically relinquish the right to follow the judicial route and the decision of the TAC – decided exclusively based on the applicable law – is binding on the parties and does not allow for appeals;[56]
- TACs make decisions in respect of *inter partes* proceedings that respect the same principles as the judiciary respects, however the principles are simpler and more amenable to being efficiently applied and used by the parties and the TACs;
- TACs decide exclusively based on the statutory law, which means that recourse to equity is absolutely prohibited. Similarly, settlement agreements between the tax authorities and taxpayers are forbidden; and
- TACs exercise judgement in proceedings intended to lead to a decision of a judicial nature.

In the case at issue, approximately 18 months elapsed from the creation of the respective TAC until the ECJ decision was given. Naturally, in this case, the TAC's final decision did not observe the relative six-month or one-year period timeframe (considering that the case was suspended while it was pending – for approximately one year – at the ECJ level); notwithstanding, this still indicates that one may have timely access to the ECJ. In all likelihood, this route has become one of the fastest routes to an ECJ ruling in Europe and, as such, it is likely this route will be increasingly used by arbitrators and requested by the parties involved in the litigation.

5. The Usual Process of Law Followed by an Arbitration Court

5.1. The different types of proceedings and main procedural principles

A request for the constitution of a TAC is filed by means of an application sent by e-mail to the head of the CAA. The choice of arbitrators is made by the parties or by the Ethics Committee. The TAC is formed, provided the tax authorities do not revoke their acts/decisions. The TAC is typically constituted within a period of 40-50 days following the taxpayer's initial request.

Initially, the tax authorities have a 30-day period in which the taxpayer's petition can be analysed and a decision reached on whether to revoke the tax assessment or the challenged tax decisions. In fact, if the tax acts/decisions are not revoked, the arbitrators are appointed and the TAC is created by way of notification by the CAA. The tax authorities will have the possibility to contest the petition by giving reasons to support the tax decision and possible "exceptions" that may lead the TAC to dismiss the case immediately at the first meeting of the court. Statistics indicate that the tax authorities have struck cases on many occasions and have requested, on even more occasions, that the case be dismissed in the first stage (Table 5 indicates cases dismissed at the first stage).

Table 5: Tax arbitration: Global statistics		
Cases initiated	917	
Cases completed	479	
Struck by tax authorities (first stage)	88	18.4%
Decided by way of arbitral decision	391	81.6%
Source: CAAD (16 June 2014).		

If the judges decide that no exception prevents the analysis of the merits of the claim they then determine whether or not they will need to hear the witnesses presented by the parties.

Witnesses may be heard in the presence of the court, although other alternatives are possible, such as video conferencing, including using Skype.

Considering the enormous relevance of "facts", the timelines of the process and the fact that oral submissions with regard to the facts and legal submissions are favoured over lengthy written ones, taxpayers should pay particular attention to this phase of the case.

The parties may also exercise their rights and issue their opinion – under the *equality of arms* principle *umbrella* – on any factual and legal matters raised within the scope of the proceedings.

The TAC has autonomy in conducting the proceedings and determining the rules to be observed in order to reach a decision on the merits of the claim in a timely manner.

Paula Dourado & R. da Palma Borges eds., IBFD 2008), Online Books IBFD.

55. *See Ascendi* (C-377/13).
56. In very specific cases, the judicial courts and the Constitutional Court may still be a "last resort" for the parties.

It is free to determine the necessary means of proof in accordance with experience to date and the judicial discretion of the arbitrators. These principles do not diverge significantly from those observed by judicial tax courts and judges; moreover, as already underlined, the TAC is obliged – like other courts – to reach its decision according to written law.

Simplicity and informality, a modern and efficient structure, a commitment to comply with deadlines and an effort to make the upmost of the arbitration model are important factors in the model's success to date.

Typically, after the hearing, the parties are invited to present their own case, which may be presented orally or in writing, and the TAC thereafter reaches its decision.

5.2. Deadline to obtain a final decision

It is fair to say that the need to speed up tax proceedings and alleviate the burden on the courts were paramount in justifying the creation of the TACs. The main goal was for the case to be decided within a six-month timeframe from the date of constitution of the TAC. Subsequently, a few procedural principles were introduced to simplify the procedures and to make it possible to achieve this result; in order to make the timeframe realistic in more complex cases, however, another set of rules was added to allow for the possibility of an extension, which nevertheless should never exceed a further six-month period.[57]

The statistics currently indicate that this objective has been achieved. The average pending period for cases is four and a half months, based on CAA information available as of June 2014. Apart from the nature of the rules that have been established, there are other reasons that have contributed to these results to date and allow for a much faster process in comparison with the situation in the tax courts that should also be mentioned.

First, although the vast majority of arbitrators are engaged in other professional functions, the fact is that they have very few – rarely more than one – TAC cases at any given time. A comparison of these figures with those mentioned in Tables 1 and 2 (at the different levels of the judicial tax courts) is extremely impressive.

Second, it is clear that the level of expertise of the arbitrators is high, not only in respect of procedural matters but also substantive matters. This, together with the fact that the arbitration awards are immediately published on the CAA website and are, therefore, subject to public scrutiny, contributes to the diligence, quality and effort put into these awards and to the observance of the rules and deadlines. Transparency pays off.

Third, the positive outcome of this project also derives from the manner in which the CAA, which operates in Lisbon, organizes the administrative and procedural structure, ensuring permanent access to all files by computer and the efficient day-to-day running of the court.

Therefore, overall, the new system pays more attention to tax justice. Further, the statistics, which are being analysed consistently and periodically, demonstrate the significance of the contribution made by tax arbitration and the CAA in particular.

Fourth, as a rule, the arbitration decision cannot be appealed or challenged – it is binding on both the tax authorities and taxpayers – thus allowing the parties to obtain a decision far more quickly and economically.

More effort needs to be made to disclose, more openly and transparently, the cases that become *res judicata*. Statistics and access to these decisions by case type should be given. Again, transparency will yield dividends.

Following the final arbitration decision, the CAA notifies the parties of the closing of the proceedings. The TAC is deemed dissolved on that date. An enforcement procedure, or an eventual appeal against such a decision, will not be considered by the TAC, whose role is complete upon issuing the final decision. There is a possible exception to this rule – discussed more in the literature than in practice – which is addressed in section 5.3. (referred to as a revisionary appeal "*recurso de revisão*").

5.3. Arbitration court decisions

At the end of the proceedings, the TAC issues its decision,[58] which must contain a description of the facts in dispute and the factual and legal grounds that led to the decision.[59] As a rule, this decision is not appealable, which means that it is binding on the taxpayers and tax authorities.

The decision is adopted by a majority of the arbitrators (when there is a panel); if the decision is not unanimous, an arbitrator may issue a dissenting opinion as to the arbitral award or partial award. It may be that different dissenting opinions will arise with regard to the same arbitration procedure in relation to different aspects.[60]

Following the same type of principles enshrined in the administrative and procedural provisions, the TAL provides express guidelines for the tax authorities, namely: (1) to assess the tax legally due in substitution for the assessment that was the object of the arbitration decision; (2) to reinstate the situation that would have existed had the tax decision that was the object of the arbitration decision not been made by carrying out the acts and operations necessary for such purpose; (3) to review the tax acts and decisions that have an impact or depend on the tax acts that constituted the object of the arbitration decision, notably due to being part of the same fiscal relationship; (4) to refund any applicable tax (and interest) in compliance with the arbitration decision or abstain from collecting such amounts.[61]

Except in cases where appeals are allowed, taxpayers and tax authorities cannot lodge a complaint; challenge,

57. The arbitration court may extend the six-month term for successive two-month periods, up to a maximum of a total six-month period; if the court decides it needs extra time, it should inform the parties of such an extension and the rationale.

58. The arbitral award is made by way of a majority decision when there is a panel of three (art. 22, No. 1 of the TAL).

59. The arbitrators should also sign the award indicating the date of issue, the amount of the arbitration fees and the manner in which the fees should be divided amongst the parties.

60. *See* art. 23, No. 5 of the TAL.

61. *See* art. 24 of the TAL.

request a reassessment or promote an *ex officio* reassessment; or request the creation of another TAC to decide on the same matter; the *res judicata* effect of the decision will also preclude the right of the tax authorities to adopt a new decision regarding the same taxpayer and tax period, unless such a case is grounded in new facts that are different from those at issue in the arbitration decision.

5.4. The application of subsidiary legislation

Although arbitration is expressly mentioned in some legislation, it is conspicuously absent in the "subsidiary law" chapter of Decree Law No. 10/2011 of 20 January 2011.

The subsidiary laws expressly sets out rules that apply in unforeseen cases, such as: (1) tax procedure and court procedure rules; (2) rules on the organization and functioning of the tax administration (3) rules on the organization and procedures in administrative and tax courts; (4) administrative procedure rules; and (5) civil procedure rules.

No reference at all is made to the voluntary arbitration rules as a subsidiary law,[62] which indicates that there is some prejudice towards the arbitration model itself; whether this decision was made to stress that normal court proceedings and arbitration are fields apart, or to try to avoid attacks on the nascent tax arbitration system remains questionable.

However, considering that the TACs should adopt appropriate procedures, notably in terms of procedure, timeliness, simplification and informality and are really a different type of court within a single system (although not allowed to decide *ex aequo et bono*), it would have been helpful for the voluntary arbitration rules to have been specifically mentioned as subsidiary law. Time will tell whether or not this prejudice will be remedied.

6. Appeals in Matters Decided by TACs

The absence of an appeal in respect of TAC decisions is one of the principal characteristics of the model. It represents an extremely important departure from traditional tax litigation, which – as a rule – guarantees the right to an appeal. The timeliness of tax arbitration seems, however, to fully compensate for the lack of an appeal.

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

- an appeal, to the ASC, whenever the TAC decision conflicts with a previous decision issued by the ASC or the ACC, provided the same fundamental point of law is at issue;[63] and
- an appeal, to the Constitutional Court, whenever the TAC's decision denies the application of a provision based on it being unconstitutional or applies a provision the unconstitutionality of which was raised during the proceedings.[64]

Apart from these appeals, expressly guaranteed by the TAL, it is arguable that the litigants may also avail themselves of an exceptional "revisionary appeal" (*recurso de revisão*) expressly provided for in the Civil Procedure Code to be applied as a subsidiary law; under this exceptional facility the case can be brought before judges – even after the decision has become *res judicata*. The justification for recourse to this form of appeal is solely based on the pursuit of justice in its truest sense.

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

Notwithstanding the absence of a specific provision allowing for this type of appeal under the tax arbitration model, the legal principle of subsidiarity and the constitutional principle of justice strongly imply that this mechanism should be available and valid in the context of tax arbitration. For this purpose, the TAL could conceivably be amended to expressly allow for the same court that issued the decision to be reinstated to reconsider the appeal.[65]

In order to prevent abuse of this possible avenue and protect the essential feature of the arbitration model, i.e. timeliness, the TACs should impose penalties in the event the use of this appeal mechanism was in bad faith.

Under the current regime, ordinary appeals (to the ASC or to the Constitutional Court) must be lodged, together with the TAC's decision, before the court that has the jurisdiction to review the appeal. The appellant is obliged to notify the CAA and the other party to the appeal.

In this scenario, the appeal has the effect of suspending, in whole or in part, the court decision depending on the object of the appeal.[66]

In addition, there is still a further opportunity to address the legality of the tax arbitration decision, i.e. having the decision suspended. This happens when the parties challenge the tax arbitration decision before the ACC by invoking one of the following:

62. PT: Law No. 63/2011, of 14 December 2011.
63. The ASC has already denied this possibility on several occasions, invoking a lack of grounds: PT: ASC, 3 July 2013, Case 1136/12 (on appeal from PT: TAC, 20 Sept. 2012, Case 7/2012-T); PT: ASC, 18 Sept. 2013, Case 1158/12 (on appeal from PT: TAC, 24 Sept. 2012, Case 39/2012-T); PT: ASC, 7 May 2014, Case 1802/13 (on appeal from PT: TAC, Case 79/2013-T); and PT: ASC, 26 Feb. 2014, Case 1470/13 (on appeal from PT: TAC, Case 12/2013-T).
64. *See* the decisions in PT: CC, 25 Mar. 2014, Case 204/2014 (decision 281/2014 of 25 March 2014 – on appeal from PT: TAC, C-50/2013-T, decision of 29 October 2013) and CC, Case 564/12 (decision 42/2014 of 9 January 2014).
65. *See*, for an in-depth analysis, J. Lopes de Sousa, *Recurso de revisão de decisões arbitrais tributárias*, CAA – Arbitragem Tributária 1, pp. 34-39 (2014), coordinated by N. Villa-Lobos & T. Carvalhais Pereira. In any event, the Constitutional principles mentioned already justify this possibility in the absence of the TAL amendment (*see also* PT:ASC, 2 July 2014, Case 360/2014, which accepted this type of appeal in the tax area).
66. *See* art. 28 of the TAL. The appeal lodged by the tax authorities results in the expiration of any guarantee provided by the taxpayer in order for the tax enforcement procedure to be suspended (*processo de execução*). i.e. the tax authorities are obliged to suspend any eventual enforcement and the taxpayer can eventually recover the bank guarantee given while the matter is under dispute.

- lack of specification of the factual and legal grounds that justify the decision;[67]
- a conflict between the grounds and the decision;
- that the decision is in regard to matters that are not at issue or there is no decision on matters that are at issue;[68] or
- a breach of the "*audi alteram partem*" and "equality of arms" principle.[69]

In this scenario, the parties request that the ACC address the legality of the decision in relation to procedural and formal matters; it is not the outcome of the decision per se that is being appealed; instead, the decision must be overturned by the ACC based on grounds related to the decision.[70]

7. The Cost of Litigating in TACs

As a rule, the cost of litigating in TACs (usually known as "arbitration fees") must be borne by the parties and include the administrative expenses incurred in respect of the preceding by the Centre for Administrative Arbitration (CAA) and the arbitration fees; this payment is made to the CAA.

There are two main factors that may determine the arbitration fees, namely: (1) the value of the case (usually the tax assessment value); and (2) the entity appointing the arbitrators.

The arbitration fees are as follows:

- EUR 306 for cases with a value up to EUR 2,000 or EUR 2,142 for cases with a value up to EUR 60,000 when the tax arbitrator is appointed by the Ethics Committee;
- The maximum amount foreseen in the arbitration fee table for cases when arbitrators are appointed by the Ethics Committee and are of a value up to EUR 275,000 is EUR 4,896. The latter value increases by an amount of EUR 306 per each EUR 25,000 or fraction thereof;
- EUR 6,000 for cases with a value up to EUR 60,000, when the parties appoint their own arbitrators, which should be indicated when the taxpayer lodges the arbitration request; and
- the fees increase according to a scale, up to a ceiling of EUR 10,000,000 (case value). At this level, the fees amount to approximately EUR 120,000.

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

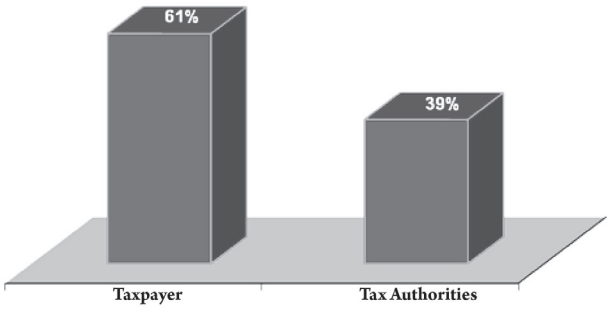
When, however, arbitrators are appointed by the CAA Ethics Committee, the fees are borne by the unsuccessful party in the arbitration, as is the case in the traditional civil and tax courts. The arbitration award may decide the definitive value of the arbitration fees and how it should be borne (or shared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

8. Final Overview

Three years of tax arbitration have confirmed its successful implementation and usefulness as a dispute resolution mechanism. Apart from the obvious advantages (simplicity of procedures, timeliness, level of expertise and quality of the decisions), including improved access to justice at a lower implicit cost and faster financial settlements (time is money), this model has contributed to the achievement of many other goals, such as:

- transparency – all decisions are published immediately and a complete set of statistics have been collated and organized by the CAA, as well as by the various interested parties (tax authorities, lawyers, consulting firms, etc.);
- the statistical analyses that have been conducted (i.e. on the type and value of cases, the substance of the cases, exceptions invoked, breakdown of the percentage of awards in favour of taxpayers or the tax authorities (*see* Diagram 6) decision-making record of the arbitrators, etc.) have encouraged a new level of interest in similar analyses of the judicial tax courts;
- healthy competition with traditional tax courts, although it is still unclear to what extent each type of court will evaluate and be influenced by "precedent" in the parallel system;
- a serious and efficient administrative structure (CAA) that can serve as a positive example in other areas of tax justice; and
- more attention is being paid to the notion of tax justice, leading to some behavioural adjustments.

Diagram 6: Tax arbitration decisions: Excluding municipal surchage cases – favourable results of arbitration by party



Source: CAA (16 June 2014), for futher and updated data, *see* http://www.caad.org.pt.

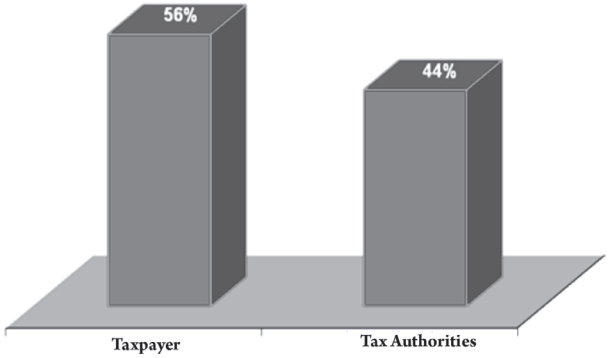
The number and the type of cases that have been initiated and concluded by TACs demonstrate a serious commitment to resolving disputes in a new way. The word is spreading. Publicity, in conjunction with time and positive

67. *See* PT: ACC, 21 May 2013, Case 5.922/12 (on appeal from PT: TAC, Case 18/2012-T).
68. *See* PT: ACC, 26 June 2014, Case 7084/13 (on appeal from PT: TAC, Case 110/2012-T) and PT: ACC, 11 Feb. 2013, Case 5203/11 (on appeal from PT: TAC, Case 2/2011-T).
69. *See* PT: ACC, 10 Sept. 2013, Case 6.258/12 (on appeal from PT: TAC, Case 75/2012-T).
70. *See* arts. 27 and 28 of the TAL.

experience, has been responsible for a growing number of cases being submitted to the CAA every day.

Nonetheless, it is not for the TACs to resolve the problems of tax justice. In all likelihood, the TACs will contribute more, with all the visible advantages and efficiency gains, to a new impetus across the justice system, than the numbers alone indicate. The number of new files challenged in court and going to arbitration are still relatively modest, albeit growing at a fast pace from around 1% (2012) to potentially 4% or 5% in 2014. Moreover, TACs have made a meaningful contribution to resolving the complex question that would otherwise have added to the congestion of the courts.

Diagram 7: Monetary distribution of awards – excluding municipal surcharge cases



Note: Total amount: EUR 113,443,242, with 56% equalling EUR 63,154,764 and 44% equalling EUR 50,288,478.

Source: CAA (16 June 2014), for futher and updated data, *see* http://www.caad.org.pt.

TACs may not intervene with regard to all tax topics and the value of cases they can hear is limited to EUR 10 million, which is probably prudent considering that these are still early days. Curiously, empirical data evidences that taxpayers concur with this legislative restriction, given the fact that very few high value cases have been initiated. It is interesting to see, in Diagram 7, how the TAC monetary awards have been allocated over the last three years, along with the total amount involved.

This might inspire the tax authorities to use other mechanisms to speed up tax justice, either preventively based on an "open policy" to provide a fruitful dialogue between taxpayers and the tax authorities and effective binding rules, or in the case of administrative litigation, once claims and appeals have been lodged, with the goal of reaching an understanding on the various points of view. Justice in the tax context will only improve significantly if the alternative dispute resolution tools, as well as the judiciary and the administrative bodies, make their respective contribution.

The tax arbitration model must continue along its stable path. However, it is crucial that the legislator let the TAL breathe and refrain from meddling every year. Eventual amendments should be surgical and targeted, in order to contribute towards transparency (for example, concerning the appointment of arbitrators by the ethics committee) and fairness (for example, arbitration fees should be identical regardless of which entity appoints the arbitrator and should be borne by the losing side), considering that the existing provisions, enforced by the Ethics Committee and the CAA, allow room for the system to evolve.

As Milton Friedman wisely noted, "One of the greatest mistakes is to judge policies and programs by their intentions rather than their results". Good intentions need to be translated into workable and effective mechanisms. The TACs' results have, to date, been resoundingly positive. Consolidation and longevity are the next challenges.