Portugal's Tax and Customs Authority looks to avoid problematic trial and error model

Pedro Cruz Gonçalves of Morais Leitão discusses why the PTA's inspections often embodies a model that a modern administration should not adopt.

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The PTA's approach is based on a trial and error method

Tax law is based on a set of principles and legal norms, whether more general or specific, aiming to regulate the complex relationship between the state and its taxpayers.

The development of these rules invariably takes place in the tension between the application of the principle and its exceptions, defined at the outset, and the multiple adaptations that reality ends up imposing, in a kind of fine tuning that calibrates the interests at stake.

Beyond normal, this evolution is desirable, if it is done in parity, regarding the respect for rights of both, state and taxpayers. It happens, however, not infrequently, rules distortion situations, carried out (or, at least, attempted) through the direct action of the Portuguese Tax and Customs Authority (PTA), namely, through corrections made during inspection procedures.

Problematic actions

At times, the PTA confronts taxpayers with certain innovative interpretations of different rules and regimes, thereby dictating expressive corrections to the originally declared values. It thus imposes *fait accompli*, unfounded and abusive situations, with the ultimate purpose of raising revenue, what happens to be especially serious when happening in compliance of service management policy directives, even if in barefaced violation of the law in force.

A glaring example of this action arises from the PTA's attempt to deny the deductibility of tax benefits accumulated by a company that, at a certain moment, became part of a new fiscal consolidation perimeter, under the Group's Special Tax Regime (RETGS), regulated by Articles 69 to 71 of the Corporate Income Tax Code (CIRC).

In known situations, the PTA has assumed, by analogy, to give tax benefits credits deductibility the same treatment provided by Portuguese legislator for the deduction of tax losses - which, as is known and not disputed, has defined limits -, concluding that the these tax credits can only be used within the group, insofar as the taxable income of the company that obtained those credits contributes to the group tax.

In a far-fetched, almost pernicious, argumentative exercise, that goes far beyond what the letter of the law allows, the PTA seeks to justify its action with systemic reasons, trying to fill an alleged gap in the legal provision, but mostly ignoring, as mentioned, the letter of law.

Contrary to the law

However, this odd position does not find any support in law, nor in its letter, nor even in its spirit, as it is claimed. From the outset, the PTA fails to apply the rule that regulates corporate tax settlement (namely CIRC Article 90) and, moreover, fails when, assuming an alleged law gap, unreasonably opt to apply by analogy the scheme provided for the tax losses deduction.

Article 90 expressly provides that corporate income tax is deducted, up to its limit, by tax benefits credits. CIRC also states that the group's taxable income is determined by the dominant company, through the algebraic sum of taxable profits and tax losses calculated in the individual tax returns of each of the companies belonging to the group. It follows that Portuguese legislator did not establish any limitation to tax credits deduction, within a group, for tax benefits accumulated by a company to be integrated in that group, as it is raised by the PTA.

Having created a specific scheme on tax losses transmissibility, namely where the company that accumulated them is included in a new consolidation perimeter (Article 71 of the CIRC), the legislator chose, deliberately, for not doing so in relation to tax benefits credit deduction. Thus, there is no support for the PTA to invoke a gap, only aiming to raise more taxes.

The Administrative Arbitration Center (CAAD) has already ruled on a specific case, granting reason to a taxpayer who reacted against the PTA's action, deeming that action to be illegal and, thus, voiding the additional tax payments arising from the corrections made on that basis (*cf.* the decision rendered by CAAD, on March 26 2020, in case 482/2019-T).

The need for an efficient administration

The PTA's approach, based on a trial and error method, aiming only at an unbridled search for new taxation niches, in addition to distorting the purposes of its action, embodies a model that a modern administration should not adopt.

Interventions such as this are an irrational application of the resources made available to the PTA and do not favour a closer relationship between the state, as an entity that collects and manages taxes, and its taxpayers, who, being also its beneficiaries, are thus, the principals interested in its more efficient administration.

On the contrary, the way forward, for the benefit of all, will have to be the maximum weighting of the inspection and correction criteria assumed by the PTA and the creation of effective mechanisms for monitoring taxpayers and mediating issues that may be the object of dispute.

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