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# Tax Controversy

**Contributing Editor**
Francisco de Sousa da Câmara
Morais Leitao, Galvão Teles, Soares da Silva & Associados, SP, RL.

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# INTRODUCTION

**Morais Leitão, Galvão Teles, Soares da Silva & Associados, SP, RL.** has the largest tax group of any Portuguese firm, with seven partners and more than 30 other lawyers. The tax litigation area is the main focus of this group, involving all types of tax controversies and parafiscal duties, and the different teams for each project include partners and associates with experience and skills in processual and court cases, and others with particular knowledge in business and substantive tax matters, acting for some of the largest national and foreign corporate groups from a wide range of sectors, including energy, oil and gas, mining, finance and banking, private equity funds, media, telecommunications and construction. The firm's tax lawyers work closely with colleagues in the transaction and corporate department of the firm, on matters relating to banking and finance, group reorganisations, M&A (both domestic and international) and real estate, among others.

## Contributing Editor

**Francisco de Sousa da Câmara** is a senior partner who has headed the tax teams in Lisbon and Madeira for more than two decades. He specialises in complex tax litigation involving domestic and international tax issues, and focuses on handling files in all type of courts and leading different teams. He is also an arbitrator recognised by Centro de Arbitragem Administrativa (CAAD), where tax arbitration is conducted. Francisco also advises high net worth individuals and family office businesses and structures. He has notably been involved in drafting tax legislation, including the General Tax Law, the Proceedings and Procedure Tax Code, and a project for a wealth tax reform. Francisco regularly contributes to several tax-focused publications in Portugal and abroad, being a correspondent for European Taxation and International Tax Notes.

Undoubtedly, the management and control of tax risks is a primary goal for both tax authorities and taxpayers. For the former, it is disastrous if the State is unable to collect the expected level of revenue. For the latter, tax is a significant cost for business and a wrong estimation can jeopardise a company's level of profitability and damage its reputation, not to mention cause egregious disadvantages and losses.

Inevitably, no one can anticipate and eliminate entirely the potential and adverse situations that lead to disputes. Although disagreements may emerge suddenly and in relation to all type of taxes, the majority of reports refer to the many international, complex and controversial substantive tax matters around BEPS, State Aid, digital taxation and the use of the general anti-abuse rule (GAAR) to challenge cross-border transactions, although many of them cannot ascertain whether these have so far contributed, or not, to an increase in the level of tax controversies.

The tax authorities of each jurisdiction might have different perceptions and approaches on how to combat non-compliance with tax obligations or tax avoidance. Nevertheless, they are all undoubtedly better equipped and prepared, with substantial information at their disposal about taxpayers, as well as their own activity, and they are much more integrated internationally.

Perusing the reports, we notice that taxpayers, even multinational enterprises (MNE) and high net worth individuals (HNWI), are often caught in the crossfire created by the competition between states for capital and investment, and suffer from a changing and uncertain compliance landscape. It is therefore extremely valuable to know how to anticipate, prepare and manage possible audits or to verify whether it is possible to eliminate or mitigate the risks, either before or during a specific controversy.

This guide presents an excellent overview of the main aspects of tax controversies that are common and distinct in 25 jurisdictions, but also provides a very interesting global analysis of trends: the origin and causes of tax controversies; the continuous efforts to combat tax avoidance and evasion; the means to mitigate and manage tax risks and to be aware of the best ways to settle the cases; and, finally, strategies in the context of an administrative or judicial litigation.

The reader will also be able to gather comparative information on all the phases of tax litigation in each jurisdiction, either in domestic or cross-border disputes, and will be able to garner an idea of costs and statistics in the ambit of tax litigation, including the number of cases and the likelihood of successful outcomes for tax authorities and taxpayers.

It is clear from all chapters that tax authorities are collecting more and more information concerning taxpayers, and their businesses and cross-border activities (either through exchanges of information and mutual assistance or through the CbC reports, CRS or other mechanisms or groups – JITSIC). Whether one is in the UK, China or Brazil, the tax authorities now know more than in previous years. However, given the specific circumstances, culture and approaches in each jurisdiction, there is no unanimity as to whether this has been leading, or will lead, to an increase in tax controversies.

According to the country reports, it seems that some tax authorities are investing in minimising tax disputes, either helping taxpayers effectively via direct contact or through the use of alternative dispute resolution mechanisms. It seems that this open approach pays off, considering that when litigation occurs the tax authorities claim a higher success rate before the tax tribunals or higher courts, such as the UK, New Zealand or Switzerland reports emphasise.

In countries where the tax authorities seem more reluctant to invest in assisting taxpayers dealing with complex legislation and ambiguous matters, additional tax assessments grow significantly, which also gives rise to an increase in the number of controversies. Unsurprisingly, this reflects negatively on how investors evaluate the "tax element" when researching the different aspects of doing business in that specific jurisdiction, as the Brazilian report suggests. In these countries it is more common for courts to rule in favour of taxpayers.

The tax legislation and the tax authorities' approach in some other countries, meanwhile, seem to occupy a middle ground between the types of patterns described above. Statistics regarding the success of the tax authorities in litigation seem to be in line with this, for instance in Portugal or Spain.

Efficient ADR mechanisms may also be very helpful in preventing/reducing or at least resolving disputes quickly, as the Portuguese domestic arbitration system shows, but the administrative attitude and the taxpayer culture still seem to be the crucial key elements, ie, without a willingness on the part of both the authorities and taxpayers to work collaboratively, and with reasonable alacrity, ADR mechanisms may not be sufficient.

This guide also illustrates the way tensions may be avoided as they arise and may evolve from tax audits up to the higher tribunals, either under administrative and civil discussions where anti-avoidance rules, including transfer pricing, still play an important part, or in the context of tax evasion or fraud, involving dishonest conduct and false accounting, for instance, when such matters will usually be treated as crimes, and where the proceedings and the investigations are conceptually separate and evolve independently - explaining the differences, the possible interactions between tax assessments and tax infringements and the possibilities to reduce fines and/or to initiate and conclude settlements.

At the same time, the reader is guided by each author through different geographies along the administrative and judicial routes, from the first to the later stages (that is, considering administrative hierarchical or judicial appeals), considering deadlines, intricate proceedings and rules and principles that reveal how disputes may be settled in the most appropriate manner.

Despite the existence of absolutely different procedural rules and ways to settle tax disputes, we observe important common features that contribute to taxpayers' best interests, which are stressed by the majority of authors, such as: i) the importance of being prepared before an audit has even started and of being assisted by the legal adviser from the first hour; ii) the need to be fully conversant with all the relevant facts around the potential controversy and to evaluate the risks and associated contingencies in order to minimise them; iii) supporting the facts and bolstering the substance of the case, disclosing documentation and engaging expert assistance, or any other; iv) verifying if the dispute may be narrowed, either by settling or abandoning any of the issues, but making wise use of all procedural and material rights; and v) the importance of an awareness of previous case law, even in civil law jurisdictions where precedent does not have the same strength as in common-law systems, an importance that increases with the need to know international jurisprudence from the ECJ or the European Court of Human Rights and even being aware of comparative jurisprudence or doctrine.

Naturally, in-depth analysis of the case, its facts and the applicable rules of law, is crucial to mastering tailor-made strategies for individual cases, as the reports emphasise. The reader will certainly understand that, in spite of globalisation and of similar concepts/substantive tax issues (such as transfer-pricing matters or hybrid mismatches or re-characterisation issues or cross-border disputes after BEPS) or

procedural rules and principles, the way disputes may best be settled in each country is still by the expertise and art of the practitioners in the respective jurisdiction.

The different reports also emphasise the use of domestic or international tools such as the Mutual Agreement Procedure to solve cross-border disputes, indicating how they usually interplay. Some of the reports already allude to the Multilateral Instrument (MLI), although the ratification process is still under way in the majority of the countries.

It is also interesting to observe that the GAAR and SAAR (Specific Anti-Abuse Rule) in a treaty context have already been challenged in several court cases, for instance, in Canada, New Zealand and Italy, and several other reports observe that the confidence in the compatibility that the tax authorities and states seem to stress (these days, along with the OECD MC commentaries) is not shared by many taxpayers and is still not applied worldwide.

**Morais Leitão, Galvão Teles, Soares da Silva & Associados, SP, RL.**

Rua Castilho, 165.
1070-050 Lisbon

Tel: +351 213 817 400
Fax: +351 213 817 499
Email: mlgtslisboa@mlgts.pt
Web: www.mlgts.pt

The fight for income from international taxation that ignites intense discussions, with taxpayers, but also among different tax authorities and states, and the appearance of so many new tools and weapons to combat tax avoidance, allows us to predict that tax disputes will increase, unless a great investment is made in assisting taxpayers on a daily basis and in creating ADR mechanisms.

Considering that every move takes time and that the state of the art in each jurisdiction is at a different stage of development, the present guide is an excellent tool for professionals – tax lawyers, barristers, and in-house lawyers, but also company CFOs and members of their departments, tax consultants, judges, or other professionals – to provide a compass in finding the right path when preparing and handling a tax audit or controversy; either to assist in managing a good settlement or, if this proves unworkable, conducting a successful dispute.

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# Law and Practice

*Contributed by Morais Leitão, Galvão Teles, Soares da Silva & Associados, SP, RL.*

## Contents

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## Authors


**Francisco de Sousa da Câmara** is a senior partner who has headed the tax teams in Lisbon and Madeira for more than two decades. He specialises in complex tax litigation involving domestic and international tax issues, and focuses on handling files in all type of courts and leading different teams. He is also an arbitrator recognised by Centro de Arbitragem Administrativa (CAAD), where tax arbitration is conducted. Francisco also advises high net worth individuals and family office businesses and structures. He has notably been involved in drafting tax legislation, including the General Tax Law, the Proceedings and Procedure Tax Code, and a project for a wealth tax reform. Francisco regularly contributes to several tax-focused publications in Portugal and abroad, being a correspondent for European Taxation and International Tax Notes.

**Bruno Santiago** is a partner who is a specialist in tax law, with a focus on domestic and international taxation, both in consulting and in dispute resolution. He co-ordinates dedicated teams advising clients on cross-border transactions and transfer pricing, taking advantage of his knowledge of Angolan and Mozambican taxation. Bruno is also very active in the area of tax disputes and arbitration covering income taxes, value-added tax, property taxes as well as stamp duty on financial operations, in administrative, judicial and penalties proceedings. Bruno represents clients from various sectors, including financial services, oil and gas, energy, real estate and construction, media and advertising, pharmaceuticals and private clients.

**Inês Salema** is a senior associate who practises in the area of domestic and international taxation, both in dispute resolution and in consulting. She has a strong focus on tax litigation (administrative and judicial procedures), with a very wide range of themes, but an emphasis on local, regulatory and port charges. Inês works in the field of tax consultation on various matters, including the taxation of individuals, particularly within an employment context (taxation of fringe benefits/stock options plans/compensation for termination of employment contracts). She has also been actively working on the taxation of fortuitous gains, both from the individual and business perspectives.

**Andreia Gabriel Pereira** is a senior associate who is an expert in tax litigation and has experience in the corporate and commercial, and capital markets teams, having assisted on transactions in these areas of activity, as well as in the IP area. Her professional experience covers a wide variety of complex tax matters in arbitration and judicial courts, including the Constitutional Court, and in matters relating to all categories of taxes, including property taxes, charges and sectorial charges.

## 1. Tax Controversies

### 1.1 Tax Controversies in this Jurisdiction

Most tax controversies have their origin in a tax assessment, which may be made by the tax authorities (as is the case with personal income tax and with the tax on the acquisition of immovable property, based on information disclosed by taxpayers) or directly by taxpayers (as is generally the case with corporate income tax (CIT) and value-added tax (VAT)).

Tax controversies may arise for numerous reasons, although in most cases they arise because of an alleged illegality identified by the tax authorities during administrative tax audits that lead to additional tax assessments.

### 1.2 Causes of Tax Controversies

Most tax controversies arise from corporate income tax disputes, in particular regarding the non-recognition of certain costs for CIT purposes by the tax authorities.

Nonetheless, there are some pending cases related to more cutting-edge topics, such as controlled foreign corporations (CFCs), transfer pricing and the general anti-avoidance rule (GAAR).

Additionally, considering that the recent years saw the creation of sectorial taxes (eg, on banking, pharmaceutical or energy activities) that generate very high assessments, such taxes have given rise to a significant number of tax disputes.

### 1.3 Avoidance of Tax Controversies

Taxpayers may use the possibility of requesting binding rulings from the tax authorities regarding the application of law to certain facts.

Through such binding rulings taxpayers may, for instance, request advance clearance on the tax and legal qualification of certain highly complex transactions.

At the request of the taxpayer, duly justified, the binding ruling may be provided urgently within 75 days, as long as the taxpayer presents a proposal for the tax treatment considered applicable. A fee ranging between EUR2,550 and EUR25,500 is payable by the taxpayer to the tax authorities in such cases.

If the tax authorities recognise the urgency of the matter and the binding ruling is not issued within 75 days, it is considered that the tax authorities agree with the proposal of the tax treatment presented by the taxpayer.

Non-urgent binding rulings are free of charge and should be given within 150 days after the submission of the request. This deadline is considered merely indicative.

On the other hand, considering that in recent years the number of transfer pricing disputes has grown significantly, one of the ways to mitigate tax controversy is to enter into an advance pricing agreement (APA) with the tax authorities. Such agreements may be unilateral, bilateral or multilateral.

APAs give legal certainty to taxpayers when conducting transactions with related entities (including parent companies, subsidiaries or associated companies, branches and other permanent establishments) provided that a taxpayer complies with the terms and conditions of APAs.

### 1.4 Efforts to Combat Tax Avoidance

Over the years Portugal has already put in place a number of measures to combat tax avoidance; eg, (i) rules preventing the tax deductibility of payments to entities located in low-tax jurisdictions, (ii) interest barrier rules, (iii) CFC rules, (iv) exit tax rules and (v) the last set of rules (the GAAR and its procedural provisions) that allow the tax authorities to recharacterise operations in a purely fictional way.

Nonetheless, in May 2019 the Portuguese Parliament formally (partially) implemented the Anti-Tax Avoidance Directives I and II to Portuguese Law.

Through this legislation the Portuguese tax system adopts the common solutions defined in the context of the EU, in line with the conclusions of the final reports of the G20 and Organisation for Economic Co-operation and Development (OECD) project on the erosion of the tax base and the artificial shifting of profits (BEPS) to ensure that co-ordinated measures are implemented to discourage tax avoidance practices more effectively, to ensure fair and effective taxation, and to protect tax systems, at a global level, against aggressive fiscal planning.

This legislation includes amendments to the CIT Code and to the GAAR and its procedural provisions, currently provided for in the General Tax Law and the Tax Procedure and Process Code.

### 1.5 Additional Tax Assessments

The taxpayer may challenge an additional tax assessment through an administrative, a judicial or an arbitration claim.

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

Neither of these claims, by itself, suspends the foreclosure file. As a rule, the taxpayer must also pay the tax assessed or render a guarantee to suspend the foreclosure file while the claim is being heard and if the taxpayer is not successful with

the administrative, judicial or arbitration award and the latter becomes res judicata, the foreclosure file is immediately activated and enforced.

In the case of disputes related to additional tax assessments made by the tax authorities, the taxpayer will also be notified of an infraction procedure. Notwithstanding the possibility of immediately paying the administrative penalty or challenging the decision that determined the administrative penalty on its own merits, the law provides that this process may remain suspended until a final decision is reached in the tax dispute concerning the legality of the tax assessment. Usually, taxpayers opt for the latter alternative because the infraction file will be closed if they win the tax dispute.

## 2. Tax Audits

### 2.1 Main Rules Determining Tax Audits

Primarily, tax audits follow a general National Plan for tax and customs audits (the so-called PNAITA) that is approved every year by the government. The National Plan defines the programme of action, the criteria to be used and the taxpayers to be audited, and establishes the targets to be achieved by the different tax services.

However, other tax audits may also be initiated during the year and the Plan should allocate specific human and material resources to tax audits not previously established. Although the National Plan for tax and customs audits is confidential, the tax and customs authorities must disclose the general criteria defined to select taxpayers and other entities that will be subject to a tax audit.

Tax audits may, therefore, be initiated following:

- the National Plan for tax and customs audits;
- European or international (eg, OECD) guidelines that tax authorities decide to enforce;
- the application of aleatory methods for the selection of taxpayers;
- specific denunciations lodged before the tax authorities; and
- the verification of abnormal behaviours or parameters that do not follow under the ordinary patterns for a specific activity or wealth situation.

Moreover, specific taxpayers are permanently under the radar of the Portuguese tax authorities, in particular big companies and high net worth individuals (HNWI).

Under the current regulations, these entities are accompanied by a special large taxpayers unit (LTU) that targets such entities under the following criteria.

- HNWI – individuals with:
  - (a) income above EUR750,000 in a specific year;
    - (i) ownership, directly or indirectly, of wealth (including assets and rights) worth more than EUR5 million;
    - (ii) a lifestyle commensurate with the above-mentioned income or wealth and/or possession of the related accoutrements; or
  - (b) the existence of a legal or economic relationship with HNWI or with companies or entities that are followed by the LTU.
- Large companies – if:
  - (a) they have turnover higher than EUR100 million, if they are supervised by the Central Bank or by the Insurance and Pensions Funds Authority, or have a turnover higher than EUR200 million, in other cases;
    - (i) they are holding companies with an income in excess of EUR200 million;
    - (ii) they have a total tax bill in excess of EUR20 million per year;
    - (iii) they are companies that are considered relevant despite not meeting the above-mentioned criteria because of their relationship with the entities that meet the criteria; or
  - (b) they make up part of a tax group for corporate income tax purposes and any of the companies meet the above-mentioned criteria.

The government also prepares and releases a triennial Strategic Plan to Combat Tax and Customs Fraud and Evasion (the current one concerns the period of 2018-20), and presents an annual report to Parliament, setting out the relevant actions that were put in place to achieve those goals and presenting statistics on different subjects under analysis.

### 2.2 Initiation and Duration of a Tax Audit

As a rule, a tax audit may be initiated within the statute of limitation period, which in principle corresponds to a four-year period following the taxable event. If a criminal proceeding related with the tax audit is initiated within that period, the statute of limitation is extended and the tax authorities may make a tax assessment until the end of the year following the date in which such proceeding is closed, or a final decision becomes res judicata.

Usually a tax audit that takes place in the taxpayer's premises should be concluded in a six-month period, but in specific circumstances such period may be extended for two additional periods of three months each. The tax audit suspends the statute of limitation period during those six months.

When a mistake that may trigger an additional tax assessment was evidenced in the tax return, the statute of limitation period decreases to three years. On the contrary, the statute of limitation period increases to 12 years in two other situations; precisely when the tax authorities may encounter more difficulties in making additional tax assessments,

as follows: (i) when the tax event, not reported to the tax authorities in due time, is connected with low-tax jurisdictions, as foreseen in the blacklist approved by the Minister of Finance; or (ii) when the tax event is connected with bank accounts (cash or securities) opened with a non-EU financial institution or branches located outside the EU and those accounts are not mentioned in the tax returns presented by taxpayers.

### 2.3 Location and Procedure of Tax Audits

The audits may occur in the tax authorities' headquarters or the taxpayer's premises. The latter inspection is the so-called external audit and usually occurs in the taxpayer's head office or other location where the accounting ledgers are maintained; all this information (eg, inventory, assets, VAT registers, any other types of records) is currently kept on computers, but the existence of physical documents on paper still exists (eg, invoices). In addition, the board of directors minutes and general shareholders' meeting minutes are also provided in physical books. The tax authorities may also ask to see any specific elements or documents and may make special visits to the taxpayers' offices, namely to verify if the records are duly updated and/or to see inventory, etc.

The tax authorities can only make one tax external audit related with the same tax or year of a specific taxpayer, unless a specific grounded decision is adopted by the head of the tax services, namely invoking new facts.

Under their rights and powers, the tax authorities may:

- ask for all types of elements and documents that reveal the taxpayer's situation;
- proceed with a physical inventory, including the identification and evaluation of assets;
- analyse and test all computer data and electronic archives either to check compliance matters (eg, tax return compliance or tax payments), tax accounts and tax reporting, specific operations (eg, mergers, divisions) or specific matters such as transfer pricing, tax-consolidation rules of a group or specific payments abroad, in particular to low-tax jurisdictions;
- send specific questionnaires to taxpayers or obtain specific oral statements from them;
- obtain information from other taxpayers that relate to the specific taxpayer subject to the tax audit;
- collect information from other tax authorities under the EU directives, bilateral tax treaties or any other international treaties or 'arrangements'; and
- apart from all financial documentation (including invoices, receipts, credit or debit notes, banking information), the tax authorities may also ask to see reports prepared by the taxpayer's accountants, auditors or lawyers, although confidentiality rules may apply and prevent them from being revealed in specific cases.

As a rule, the tax authorities should make their request in writing and, if not made under an audit within the taxpayer's premises, through a registered letter, allowing the taxpayer to obtain and prepare its answers. Thus, the rule is to give advance notice that they are initiating a tax audit in the taxpayer's premises (with a minimum period of five days) to provide time to reply and answer a specific questionnaire.

Taxpayers are often accompanied by their legal and tax advisers during the tax inspections and, in the case of companies, they also should appoint a representative that accompanies the tax auditor within the company's premises.

### 2.4 Areas of Special Attention in Tax Audits

Tax audits can be general or specific. The former generally covers all types of taxes, although the most common audits only cover income taxes, VAT, real estate taxes or stamp duty. They may also be very specific, covering one of the taxes above-mentioned or any other.

General tax audits are usually designed to verify the global position of a specific taxpayer, whereas specific tax audits are commonly launched to verify a particular aspect within a sector of activity (eg, to verify whether and how the financial institutions are dealing with a specific stamp duty or VAT issue).

Usually the tax authorities review the company's accounts and review its financial accounting compliance and tax obligations. Depending on the type of tax audit (a general or a specific one), the tax authorities may ask to verify (i) samples of sale and purchase invoices to verify if they comply with VAT and corporate income tax regulations; (ii) the information contained in different types of documents, reports and statements to verify if results are consistent; (iii) the transfer pricing documentation and the intra-group transactions, including the relationships between the company and associated companies and/or permanent establishments; (iv) formalities observed in specific operations (eg, neutral mergers, divisions, transfer of assets or exchange of shares, the transfer of head office); (v) transactions concluded with entities located in low-tax jurisdictions and, in particular, payments made to them; (vi) the consolidated tax return and the different returns presented by all the companies belonging to a specific group as well as the formalities that those companies are, or are not, observing; (vii) payments abroad and all matters related with the proper application of withholding taxes; (viii) intra-community VAT operations or VAT deductions, or financial operations made by financial institutions often subject to stamp duties; and (ix) customs matters (often related with the qualification of items), to give just a few examples.

Both formal requirements and substantive issues are some of the top priorities analysed by the tax authorities and litigation often arises because the tax authorities consider that

taxpayers failed to observe formal requirements in order to benefit from a specific tax regime (eg, a neutral merger operation, the consolidation tax regime or a waiver of a withholding tax), or reach the conclusion that a specific operation or a sequence of operations cannot produce the tax result intended by the taxpayer either considering a specific violation of a substantive tax rule or invoking a specific or the general anti-avoidance rule.

### 2.5 Impact of Rules Concerning Cross-border Exchanges of Information and Mutual Assistance Between Tax Authorities on Tax Audits

Cross-border exchanges of information and mutual assistance between tax authorities have been increasing tendencies over the years, although the numbers are not yet very significant in some areas.

The Portuguese tax authorities' Report of Activities released in 2018, and referring to 2017, evidences the following number of requests of mutual assistance (MA) in the areas of customs/excises.

- Customs areas – 38 PT requests MA from other states, 65 PT as a recipient of requests from other states, 103 total.
- Excises – 4 PT requests MA from other states, 16 PT as a recipient of requests from other states, 20 total.
- Naples Convention II – 13 PT requests MA from other states, 32 PT as a recipient of requests from other states, 45 total.
- Total – 55 PT requests MA from other states, 113 PT as a recipient of requests from other states, 168 total.

Moreover, in relation to the co-operation between the Portuguese tax authorities and the EC – mainly the Directorate-General for Taxation and Customs Union (DG TAXUD) and the European Anti-Fraud Office (OLAF) – in 2017 Portugal received a total of 1,481 forms of information of significant risks that required specific analysis and treatment, and 28 specific indications of fraud and serious irregularities detected by OLAF.

The cross-border exchanges of information in relation to income taxes in 2017 may be summarised as follows, for a total of 67 countries.

- Requests – 221 received, 265 sent.
- Spontaneous – 301 received, 184 sent.
- Automatic – 732,380 received, 401,002 sent.

France, Spain, UK and Germany are clearly the countries with whom Portugal exchanged more information.

In 2017 under VAT EU Regulation No 904/2010, concerning the administrative co-operation and fight against VAT fraud – through the Central Liaison Office (CLO) – participation in the Eurofisc network and participation in Multilateral Controls, 1,452 files were initiated concerning the exchange of information, at the request of member states. From these, 500 files originated in requests from other tax authorities and 952 in requests made by the Portuguese tax authorities.

The exchange of information between the tax authorities of different MS and their mutual assistance is obviously influencing the growth of tax audits as well as the sophistication and the level of information that the Portuguese tax authorities currently have in relation to taxpayers that do business abroad and/or have cross-border connections.

### 2.6 Strategic Points for Consideration During Tax Audits

In general, it is important to be aware of the following aspects before and during a tax audit:

- to prepare the right and proper documentation to release to the tax inspector and to be able to explain it, including all the relevant facts related with such documentation;
- to know beforehand the legal and formal requirements that the tax authorities and the taxpayer should observe during the tax audit in relation to all relevant aspects (scope, duration, timetables, obligation to provide documents, how to reply to questionnaires, how and when to require deadline extensions, etc);
- to evaluate the tax contingencies at an early stage and to verify whether it is better to regularise such situation immediately (without penalties or with less penalties) or how it might be possible to mitigate and reduce adverse tax and other consequences (eg, infringement or even criminal penalties);
- to be assisted by a tax lawyer before the tax inspection is initiated and during its course;
- to provide documentation and clarifications to the tax audit accurately; and
- to decide what to say (or not to say) after receiving the tax audit draft, considering that, as a rule, the tax authorities would have a possibility to review it before issuing their final report.

## 3. Administrative Litigation

### 3.1 Administrative Claim Phase

There are situations where an administrative claim is mandatory before initiating a judicial phase, namely in situations of self-assessment, withholding taxes, payments on account of the final tax due or custom duties, when the claim is related with the origin, classification or customs value of the product.

However, in situations of additional tax assessments, the administrative claim phase is always optional.

The administrative claim should be presented in the local tax office of the area of the taxpayer's domicile, or of the tax assessment, or of the location of the assets and it also can be sent electronically through the tax authorities' website. Albeit the administrative claim should be presented in the local tax office, it should be decided by the regional tax directorate (in Portugal the tax authorities are formed by the central services, regional tax directorates and local tax offices). The deadline for the presentation of the claim is 120 days counted from the first day inclusive following the termination of the deadline to pay the additional assessment, which should be around 30 days after the assessment is made. If the additional tax assessment does not give rise to an obligation to pay a certain amount of tax (for instance, the taxpayer had tax losses and the result of the additional tax assessment was a reduction of the available tax losses), the 120-day deadline to present the administrative claim should be counted from the notification of the assessment.

The procedure of the administrative claim, up to the final decision, is determined by law to be simple and without formalities. In this regard it is worth mentioning that, as a rule, in the administrative phase of tax litigation there are no costs or fees due to the administration, but the proof is limited to the documentation made available and only exceptionally will the tax authorities decide to hear witnesses. Moreover, this phase (as well as the eventual subsequent judicial phase) does not, by itself, suspend the enforcement and collection of the tax assessed, which means that to avoid the seizure of assets, the taxpayer should pay the assessment or present a guarantee to the tax authorities (exceptionally it can be released from such duty, namely if the taxpayer is able to demonstrate economic hardship or that the presentation of the guarantee will cause an irreparable damage). Finally, if the tax authorities intend to dismiss the administrative claim, they should notify the taxpayer to react on the projected dismissal in a deadline of between 15 and 25 days. In their final decision, the tax authorities should take into consideration the reasons invoked by the taxpayer and the grounds on which they were rejected.

### 3.2 Deadline for Administrative Claims

Notwithstanding specific deadlines that may apply to specific administrative procedures or claims, the main rule stipulates that any tax procedure (including, therefore, an administrative claim) shall be decided in four months.

The consequence of the tax authorities not complying with this deadline is that the taxpayer may presume that the claim was tacitly denied for the purposes of appealing against such tacit negative decision. The practical effect of this rule is to allow speeding up of litigation; ie, instead of waiting sine diem for a decision from the tax authorities, the taxpayer may presume that the appeal was dismissed at the end of the four-month period and appeal to court against that tacit negative decision.

Taxpayers frequently use this rule in a strategic move because (i) they try to convince tax authorities at the administrative level first and (ii) the deadlines to lodge administrative claims terminate after the deadlines to go directly to court. Accordingly, it is relatively frequent to see taxpayers presenting an administrative claim and at the end of the fourth month appeal going to court assuming the tacit denial of the claim. Instead of going to court, taxpayers can also make a hierarchical appeal against the tacit negative decision and on the express or tacit negative decision of the hierarchical appeal go subsequently to court.

Otherwise – ie, if the tax authorities manage to decide the appeal in the said timeframe – taxpayers can also go to court against an express denial of the administrative appeal.

However, whilst the deadline to lodge a judicial claim is 90 days after the notification of the denial of the administrative claim or after the tacit negative decision of such claim, the deadline to present the hierarchical appeal is 30 days counting from the same events. According to the law, hierarchical appeals should be decided within 60 days; however, this deadline is considered merely indicative and it is frequently not complied with. Taxpayers may consider that a tacit negative decision has occurred at the end of the 60-day term for the purpose of reacting against such negative decision.

## 4. Judicial Litigation: First Instance

### 4.1 Initiation of Judicial Tax Litigation

Judicial tax litigation is initiated with the presentation of the claim in writing to the Court of First Instance. The claim may be sent by mail or by electronic means through the dedicated website of the tax (and administrative) courts. The claims can be presented directly by taxpayers, except if the value of the claim exceeds EUR10,000, in which case it is mandatory to appoint a lawyer registered with the Portuguese Bar Association. The claim has to be presented in articles, identify the act contested, and expose the circumstances of fact and the law that grounds the final request. Moreover, the value of the claim shall also be indicated. Finally, the petitioner shall indicate his or her witnesses, other means of proof he or she wants to use and in annex to the claim the petitioner shall attach the documentary evidence at his or her disposal.

### 4.2 Procedure of Judicial Tax Litigation

After the presentation of the claim, the court attributes a number to the process and the process is distributed to one judge that notifies the tax authorities to contest within 90 days. The tax authorities are represented in court by a specific body of persons called Representantes da Fazenda Pública whose function is to represent the tax authorities in the thousands of files pending in the courts.

Although the contestation is not mandatory, the tax authorities normally contest within the said deadline. Within the deadline available to contest the claim, the tax authorities shall also gather the information available related with the process (the administrative file) and present it to the court.

If there is a partial revocation of the act, the tax authorities shall within three days notify the taxpayer to confirm, within ten days, if he wants to continue with the judicial claim.

If the act is totally revoked, the tax authorities shall contact the person representing the tax authorities in court to promote the termination of the judicial claim.

After the response of the tax authorities to the taxpayer's petition and if the litigation is related to a strictly legal matter, the judge may decide upon the claim immediately after it has passed through the public prosecutor in the court.

If witnesses shall be heard or other diligences of proof shall be made, such as inspections or expert hearings, the judge shall notify the parties of the relevant date to produce such diligences. The number of witnesses to be heard in relation to each fact shall not exceed three and the maximum number of witnesses allowed is ten. The hearing shall occur in court and the testimonials shall be duly recorded. If witnesses are resident in an area not covered by the territorial jurisdiction of the court, they may be present in the court of the area where they live and be heard and interrogated through video conference. The claimant as well as the person representing the tax authorities may directly interrogate the witnesses.

Once the diligences of proof are terminated, the judge shall notify the parties to produce their final written allegations in a deadline that shall not exceed 30 days.

Finally, before the decision, the claim shall be presented to the public prosecutor in the court that may pronounce on the matters under discussion. The public prosecutor's opinion is not binding upon the judge.

### 4.3 Relevance of Evidence in Judicial Tax Litigation

In principle the proof must be presented (in the case of documentation or witnesses) or requested (in the case of inspections or expert witness) immediately with the presentation of the claim in writing to the Court of First Instance. Exceptionally, mainly if it is demonstrable that it was not possible to present or request the proof earlier, it is possible to present or request such proof afterwards.

Although it is not stated as such in the law, there is a clear preference for documentary evidence in tax litigation in comparison with witness testimonials or other types of proof. If there are no witnesses to be heard – and in a considerable number of cases there are not – the entire case from the beginning to its termination will occur without any eye contact between the parties and the judge as all the contact is in writing.

If witnesses are to be heard and questioned by the judge and the parties, it is up to the judge to schedule such hearing after the tax authorities have presented their answer to the taxpayer's petition. Both the taxpayer and the tax authorities can request the hearing of witnesses. Usually, in the tax authorities' case, their witnesses will be their agents. Witnesses are first questioned by the judge, then by the party that has requested their hearing and they can be subsequently cross-examined by the other party.

### 4.4 Burden of Proof in Judicial Tax Litigation

The burden of proof is with the party that invokes a certain fact to be proved. As a rule, the tax authorities invoke and should prove its claims in the audit report, therefore grounding the tax assessment, and it is for the taxpayer to challenge such views and refute those proofs in the administrative or judicial claim.

In the case of criminal tax litigation the burden of proof of the verification of the elements of the crime rests with the public prosecutor.

### 4.5 Strategic Options in Judicial Tax Litigation

From a strategic perspective and taking into consideration the limitations established by the law of the process as well as the fundamental audi alteram partem principle, as a rule, it is advisable for all the evidence to be presented or requested at the beginning, as well as all the legal arguments.

The possibility of settlement, namely through an agreement whereby both the taxpayer and the tax authorities would retract part of what they are claiming, is not possible. Among other motives this is due to the fact that the law clearly states that the tax authorities' credit (ie, the amount of tax) is not at their disposal.

The option to pay or not to pay the tax while the dispute is pending is mainly a financial issue that the taxpayer has to weigh. In favour of paying the tax one can essentially invoke that, on the one hand, this is reflected on the company's financial accounts and, on the other hand, if it wins the case, in principle it will be entitled to interest, currently at the rate of 4% per year. Taking into account the interest rate offered by banks operating in Portugal, it can be quite advantageous from a financial perspective to opt to pay the tax and then receive back the tax paid with interest. If the taxpayer opts not to pay the tax, it will have to constitute a guarantee to the benefit of the tax authorities. In considering this option the taxpayer has to weigh that the guarantee has costs, firstly a tax cost related with stamp duty due on guarantees and then variable costs depending on the type of guarantee chosen (eg, bank commissions or notary costs). Moreover, in connection with this option, the taxpayer shall also consider

that while the case is pending, interest will continue to be computed and will be due if the taxpayer loses the case. On the other hand, if the taxpayer wins the case, as a rule, it is possible to recover this cost.

Finally, the taxpayer can also opt to pay the tax in instalments. Depending on the amount due, payment in instalments, to be accepted by the tax authorities, may oblige the presentation of a guarantee.

The presentation of expert reports or professors' opinions is also something to consider. Their use will depend on the type of case. If the file includes complex non-legal matters, expert reports may be relevant to help the judge to understand the situation. In the case of complex legal matters, opinions from scholars may also be worth considering. Although these reports and opinions are not binding on the judge, usually they are taken into consideration.

### 4.6 Relevance of Jurisprudence and Guidelines to Judicial Tax Litigation

In litigation related to international tax matters, it is common for the courts to take into account relevant jurisprudence (mainly from the ECJ) and international guidelines (mainly the different versions of the commentaries to the OECD Model Tax Convention or to the OECD Transfer Pricing Guidelines).

## 5. Judicial Litigation: Appeals

### 5.1 System for Appealing Judicial Tax Litigation

There are two second-instance courts, the Administrative Central Court (ACC) North and the ACC South, and one Administrative Supreme Court (ASC).

The ACC South is situated in Lisbon and essentially covers the southern area of the country, and the ACC North is situated in Oporto and covers the northern area of the country. The ASC is also located in Lisbon and covers the entire country.

Whoever loses the case in first instance – the taxpayer or the tax authorities – or both in the event that both parties lose part of the case, may take the case to the ACCs in the event of a disagreement with the facts and the law decided in first instance, or to the ASC in the event of a disagreement exclusively based on matters of law.

The appeal is only precluded if the value of the case (in cases challenging tax assessments, the amount of tax in litigation) is lower than EUR5,000.

From the decision of the ACCs or of the ASC, the taxpayer or the tax authorities may in exceptional cases still lodge a second appeal to the ASC based on a contradiction with a previous judgment, or go to the Constitutional Court in cases where there is a constitutional issue in the process.

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

### 5.2 Stages in the Tax Appeal Procedure

The appeal is launched in the Court of First Instance within ten days of a final decision. If the appeal is admitted by the Court of First Instance (it is only precluded if the value of the case is lower than EUR5,000), the parties will have 15 days each to submit their appeal statements. The appeal then goes to the ACCs or the ASC, where it will await a decision.

### 5.3 Judges and Decisions in Tax Appeals

The ACCs and the ASC each have one chamber for tax law appeals and actions, and another chamber that deals only with administrative law appeals and actions.

The decisions of the Courts of Appeal are rendered by the majority decision of a panel of three judges. The judges are appointed by the court randomly. If there is no unanimity, the dissenting judge may publish the reasons for the dissenting vote.

## 6. Alternative Dispute Resolution (ADR) Mechanisms

### 6.1 Mechanisms for Tax-related ADR in this Jurisdiction

Portugal adopted an arbitration regime to settle tax disputes as an ADR mechanism in 2011. Tax arbitration courts (TACs) were created to solve domestic tax disputes regardless of whether they involve domestic, EU or international tax law.

TACs must decide the cases based on the written law, being expressly prohibited from resorting to equity. In a nutshell, TACs should decide tax cases based on the same legal framework available to judicial tax courts.

According to this regime, the tax authorities are bound by arbitration decisions for almost all types of tax disputes with a value of up to EUR10 million.

Mediation has not yet been established, although several proposals already exist to create a specific regime in some areas.

Moreover, at the international level and on the relationships between states, tax arbitration becomes the ultimate resort to settle tax disputes.

### 6.2 Settlement of Tax Disputes by Means of ADR

Under the arbitration regime, disputes are settled by TACs that can be constituted by a single arbitrator (usually for controversies of low value – up to EUR60,000) or a panel of three arbitrators (cases up to EUR10 million).

The linchpin of the tax arbitration project was deciding how the judges would be chosen/appointed by the parties involved or by a third party.

Provided the disputed amount exceeds EUR60,000, or the taxpayer chooses to appoint an arbitrator, the arbitration court is formed by a panel of three arbiters. Otherwise, the case will be settled by way of a decision of a single arbiter. The majority of cases are decided by a single arbitrator appointed by the Ethics Committee of the Centre for Administrative Arbitration (CAA).

Cases are initiated by a specific request filed electronically to CAA, which also indicates whether the taxpayer intends to appoint a specific arbitrator. Cases must be settled in a period of six months following the creation of the TAC, which nevertheless may be extended for a further six-month period.

TACs receive the written arguments of both parties (first taxpayers, usually contesting a tax assessment grounded in an audit report, and then the tax authorities) and analyse the merits of the claim, hear witnesses and eventually the parties or experts, and they decide in writing.

### 6.3 Agreements to Reduce Tax Assessments, Interest or Penalties

Under the arbitration system it is not possible to reach an agreement to reduce the tax assessment, the interest due or the penalties that may eventually be applied.

However, in an earlier phase (usually during the tax audit), it is possible to regularise situations to reduce the interest due and/or the penalties that may potentially apply.

### 6.4 Avoiding Disputes by Means of Binding Advance Information and Ruling Requests

Advance rulings with binding effect may be requested from the tax authorities. See also **1.3 Avoidance of Tax Controversies**.

### 6.5 Further Particulars Concerning Tax ADR Mechanisms

According to the current arbitration regime, cases may be submitted to TACs as follows:

- as a rule, TACs have the jurisdiction to decide on the legality or illegality of the most common tax acts or decisions;
- all cases with a value up to EUR10 million;
- the TAC has a period of six months, eventually renewable by another six months, to provide its final decision;
- usually, there is no possibility to appeal against a TAC decision;
- TACs are formed by one or three arbitrators;
- the panel of three arbitrators may be chosen by the CAA; otherwise each party chooses an arbitrator, and both choose the president;
- although precedence is not a binding rule, a previous decision on a specific matter of law may prove to be extremely important; and
- decisions must be based strictly on law.

### 6.6 Use of ADR in Transfer Pricing and Cases of Indirect Determination of Tax

In specific areas (eg, transfer pricing) or situations (eg, when the tax authorities calculate income through indirect methods), agreements between the parties (taxpayers and tax authorities) may be signed. See also **1.3 Avoidance of Tax Controversies**.

## 7. Administrative and Criminal Tax Offences

### 7.1 Interaction of Tax Assessments with Tax Infringements

Additional tax assessments typically result from internal or external tax audit procedures conducted by the Portuguese tax authorities. Within the context of such tax inspection procedures, the tax authorities not only evaluate whether the taxpayer has made a correct assessment of the tax paid and whether the taxpayer has paid the full amount of taxes due, but also ascertain if the mistakes eventually detected correspond to tax infringements/crimes.

Therefore, the tax inspection's final report already contains (i) an assessment regarding possible inaccuracies regarding the taxes paid and the taxes and interest due, and (ii) an assessment respecting any tax infringements that may derive from the mistakes/significant crimes committed by taxpayers.

In these circumstances and because both assessments are made at the same time, typically, additional tax assessments and tax infringement processes begin 'side by side'.

However, the tax authorities may initiate an administrative tax offence process whenever there is suspicion that an administrative tax offence has taken place and independently from a tax inspection procedure, and whatever the situation

is under the tax assessment perspective. The same applies to the Public Prosecutor's Office regarding tax crimes.

If an administrative tax offence is detected, the tax authorities are competent to initiate an administrative tax offence procedure on their own. In the event of a possible tax crime being detected, the tax authorities must inform the Public Prosecutor's Office and pass on all the information gathered during the inspection procedure.

### 7.2 Relationship Between Administrative and Criminal Processes

The administrative process in which the additional tax assessment is being challenged and the tax administrative offence or criminal process regarding the facts that gave rise to such additional tax assessment run in parallel. They are, therefore, independent from one another.

However, when an administrative process in which the additional tax assessment is being challenged is pending and the qualification of the facts under dispute as a tax infringement depends on the decision of such administrative process – which determines whether the additional tax assessment was legally issued and if the tax assessed is due – the tax-infringement process (whether an administrative offence or a criminal one) must be suspended until a final decision of the administrative process is adopted and becomes res judicata.

### 7.3 Initiation of Administrative Processes and Criminal Cases

As described above (see **7.1 Interaction of Tax Assessments with Tax Infringements**), an administrative or a criminal tax offence proceeding is initiated by the tax authorities in any case in which they become aware or suspect that an administrative tax offence or that a tax crime may have taken place. Commonly this awareness arises within the context of tax audit procedures.

The same facts may simultaneously support an indictment in an administrative tax offence proceeding and an indictment in a criminal proceeding. When this happens, the facts are prosecuted as a crime.

If, for some reason, the same facts have given rise to an administrative tax offence proceeding and a criminal one, the first one is extinguished as soon as the defendant is notified of the criminal indictment.

### 7.4 Stages of Administrative Processes and Criminal Cases

The administrative tax offence proceedings may be divided into two main stages: the administrative stage and the judicial stage. In the first stage, the tax authorities have broad powers to investigate and to issue a formal bill of indictment against the taxpayer, if it is concluded at the end of an investigation that enough grounds and enough evidence indicate that a tax offence has been committed. Normally the grounds that give rise to additional tax assessments are the ones used by the tax authorities to issue such bill of indictment.

Subsequently, the defendant may present its defence before the tax authorities.

Thereafter the tax authorities will issue their final decision; if a conviction is rendered at that moment, that decision may be judicially challenged by the defendant. Such judicial appeal marks the beginning of the judicial stage and has suspensive effect: therefore, the decision reached by the tax authorities at that point will neither become final nor immediately enforceable.

The judicial decision rendered by the first-instance court may still be appealed against to the Court of Appeals if the first-instance court confirms the conviction previously rendered by the tax authorities.

Only the decision rendered by such Court of Appeals would, in principle, be final and fully enforceable, except if constitutional issues are involved and an extraordinary appeal (also with suspensive effect) is presented to the Constitutional Court.

The Administrative and Tax Courts are the competent courts to decide on tax administrative processes.

On the other hand, criminal tax proceedings usually consist of four main stages: an investigation stage, a pre-trial stage (that may or may not occur), a trial stage and an appeal (see **7.7 Appeals Against Criminal Tax Decisions**).

The investigation stage, which is conducted by the Public Prosecutor's Office, has the purpose of gathering all relevant information and evidence regarding the tax criminal offence allegedly committed. This stage typically ends with a decision of indictment or with a decision to close the investigation. Under certain circumstances, this stage may also give rise to a decision of provisional suspension of the tax criminal proceedings, where the defendants agree to comply with a number of injunctions for a period, after which time the investigation may be closed with no further action, or proceed, if the injunctions are not complied with.

The pre-trial stage is not compulsory. It may take place if requested by the defendant, as regards facts based upon which the Public Prosecutor submitted a bill of indictment.

The pre-trial stage represents a number of preliminary judicial acts that the investigating judge intends to perform and, compulsorily, involve a preliminary hearing, oral and adversarial in character, during which the Public Prosecutor, the defendant and his or her defence counsel may participate.

It ends with a decision to arraign, with the case proceeding to the trial stage, or with a decision not to pursue the case, which brings an end to the proceedings.

In the trial stage, all evidence gathered by the Public Prosecutor's Office and all evidence gathered by the defendants is brought to the first-instance court to be discussed and analysed. This stage ends with the court issuing a decision, which is, in principle, appealable (see **7.7 Appeals Against Criminal Tax Decisions**).

The Criminal Courts are the competent courts to decide on tax criminal offences.

### 7.5 Possibility of Fine Reductions

Portuguese Law provides for some situations in which the taxpayers may benefit from fine reductions.

If the fine is paid at the taxpayer's request, he or she will benefit from a reduction of the fine, which can go from 12.5% of the minimum applicable fine up to 75% of the minimum applicable fine, depending on the stage of the administrative tax offence proceedings.

If the defendant pays the fine during the course of the administrative tax offence proceedings, but before the deadline for presenting his or her defence, the minimum applicable fine will always be imposed.

When the taxpayer pays the fine within the voluntary payment deadline, after the conviction decision is issued by the tax authorities, the penalty shall be reduced to 75% of the value set in such decision.

### 7.6 Possibility of Agreements to Prevent Trial

Portuguese law does not allow a defendant to enter a plea bargain. Normally, plea bargains represent agreements between defendants and the Public Prosecutor's office whereby the defendant agrees to plead guilty and pays the tax assessed plus interest and penalties in exchange for a reduced sentence and avoiding trial.

There are no other procedures for the early resolution of criminal law offences before trial.

However, if the criminal process refers to a crime for which criminal law allows no sentence, the Public Prosecutor's Office may decide to close the case without further action (ie, no indictment and no trial) after consulting the tax authorities and with the agreement of the investigating judge.

### 7.7 Appeals Against Criminal Tax Decisions

The judicial decision rendered by the first-instance court is appealable, as a rule, to the Court of Appeals and has suspensive effect in the case of conviction: therefore, the decision reached by the first-instance court at that point will neither become final nor immediately enforceable.

In some exceptional cases, first-instance court decisions are appealable to the Supreme Court.

To appeal against a criminal court decision, the defendant must submit a written application declaring his intention to file an appeal, together with a written appeal statement. The written application must be submitted to the Court of First Instance, but it will be considered by the second-instance court. The appeal must be submitted within 30 days after the notification of the decision issued by the first-instance court.

If constitutional issues are involved, an extraordinary appeal (also with suspensive effect) may still be presented to the Constitutional Court.

### 7.8 Rules Challenging Transactions and Operations in this Jurisdiction

As a rule, transactions and operations that have been challenged in Portugal under the GAAR, specific anti-avoidance rules (SAAR), transfer pricing rules or anti-avoidance rules gave rise to administrative tax cases in the same terms as all other tax facts (see **7.1 Interaction of Tax Assessments with Tax Infringements**); this firm is not aware of criminal cases involving these type of operations, but one cannot exclude such possibility if the facts show the existence of dolus with the evident intent of not paying the due taxes.

Therefore, in principle there are no particular procedures to address these matters.

The biggest processes involving such matters (as in what concerns the amounts, the number of defendants or their public relevance) bring, however, a great amount of mediatic attention and public pressure to obtain convictions (which do not necessarily occur).

## 8. Cross-border Tax Disputes

### 8.1 Mechanisms to Deal with Double Taxation

In the case of a situation of double taxation due to an additional tax assessment or tax adjustment in a cross-border situation, it is common to use domestic litigation, which does not mean that the mutual agreement procedure is not used as an alternative or together with judicial litigation. According to the OECD statistics, 23 cases related with Portugal started in 2017 and 34 were terminated in the same year, and the total number of cases pending at the end of 2017 was 49 (http://www.oecd.org/tax/dispute/mutual-agreement-procedure-statistics-2017-per-jurisdiction-all.htm).

With regard specifically to cases concerning transfer pricing, according to the same source, 11 cases started in 2017 and 24

were terminated in the same year, and the total number of cases pending at the end of 2017 was 28 (http://www.oecd.org/tax/dispute/mutual-agreement-procedure-statistics-2017-per-jurisdiction-transfer-pricing.htm).

### 8.2 Application of GAAR/SAAR to Cross-border Situations

With the publication of the 2003 update to the OECD Model Convention, Portugal introduced an observation on the Commentaries to Article 1 stating that the application of GAAR or SAAR could not prevail if they were in conflict with treaty provisions due to the rules of the hierarchy of laws in the Portuguese legal system, according to which double tax treaties prevail over domestic law regardless of whether the latter rules were enacted before or after the former ones. This observation was later eliminated in the 2010 update of the OECD Model Convention.

After the elimination of this observation, Portugal started to negotiate treaties allowing the application of domestic anti-abuse provisions. Specifically, with regard to the application of the GAAR, taking into account that it may allow the tax authorities discretionarily to recharacterise the facts and operations occurred in facts or operations of an equivalent economic result, it is argued that it can be against the double tax treaty as it may alter the taxing powers of the contracting states. However, to the best of the authors' knowledge, this has never been challenged successfully in court.

### 8.3 Challenges to International Transfer Pricing Adjustments

Portuguese tax law allows for correlative adjustments. Although these adjustments can be promoted by the tax authorities in the context of double tax treaties that foresee such possibility, they should be generally promoted by taxpayers since it is in their best interest to avoid the double taxation originated by the transfer pricing correction made to an associated company in another state. According to the law, the taxpayer shall present to the tax authorities a request to make the correlative adjustment. This request has to be presented within the deadline foreseen in the mutual agreement procedure (MAP) of the relevant double tax treaty. If the tax authorities agree with the adjustment made in the other state, the correlative adjustment shall be made within 120 days after the agreement obtained with the tax authorities of the other state.

There is no information available on the number of such adjustments that have been made by the tax authorities or challenged by taxpayers.

The only information available is that 11 transfer pricing cases under the MAP were initiated in 2017 and 24 were terminated in the same year, and the total number of cases pending at the end of 2017 was 28.

### 8.4 Unilateral/Bilateral Advance Pricing Agreements

Whilst detailed rules on transfer pricing have been provided for in the law since 2001, APAs were only introduced in 2008. In the early years taxpayers were reluctant to initiate APAs, but things have changed in recent years, when they have become more widespread to mitigate controversies and litigation in transfer-pricing matters. It is expected that if the number of APAs does not grow, more tax controversies on transfer-pricing matters will arise. Although APAs take some time and involve a complex administrative procedure, more and more taxpayers intend to enter into this type of agreement.

The procedure to sign an APA starts with the request presented by the taxpayer to the tax authorities. In the event that taxpayers want to include operations with associated enterprises resident in countries with which Portugal has entered into double tax conventions, they can request that the APA is bilateral or multilateral, in which case the request will be presented to the other(s) tax authorities under the MAP. The agreement reached between the tax authorities is notified to the taxpayer, to obtain its confirmation on the acceptance of such agreement. The request shall (i) contain a proposal of the methods chosen by the taxpayer, (ii) identify the period and operations covered, (iii) contain the signature of all the entities that are to be bound by the agreement, (iv) contain a declaration stating that the taxpayer will co-operate with the tax authorities and will not invoke any commercial or professional secrecy, and (v) supply all the necessary elements so that the automatic exchange of information between the tax authorities can be put in place.

### 8.5 Litigation Relating to Cross-border Situations

Taking into account the case law produced by the higher courts, the cases related with cross-border situations that generate the most litigation are related with withholding taxes.

To mitigate this situation, taxpayers should have internal compliance rules that allow them to control these cases. Moreover, they should verify with particular attention the different formalities and criteria that the implementation of EU rules and the double tax treaty requires.

## 9. Costs/Fees

### 9.1 Costs/Fees Relating to Administrative Litigation

As a rule, litigating at the administrative level (by filing an administrative claim to the Portuguese tax authorities) has no associated fees, but the latter may apply a 5% fee if such claim does not seem to be sufficiently grounded.

### 9.2 Judicial Court Fees

The tax litigation process involves the payment of fees that vary between EUR102.00 and EUR1,632.00 according to the value of the claim, between EUR51.00 and EUR816.00 in the case of appeals and according to the value of the appeal, and between EUR153.00 and EUR2,448.00 in cases classified by the court as particularly complex.

Where the value of the claim exceeds EUR275,000.00, an extra legal fee is due for each additional EUR25,000.00 or fraction thereof, equal to EUR306.00, EUR153.00 in the case of an appeal, or EUR459.00 in the case of files classified by the court as particularly complex.

The court may decide not to impose this extra fee.

In general terms, taxpayers must pay the above-mentioned fees in advance (it is the cost of their initiative to litigate), with the exception of the extra legal fee due in claims with values exceeding EUR275,000.00, which is only paid at the end of the process.

The tax authorities are excused from the advance payment of legal fees, which means they will only be notified to pay fees at the end of the process.

Each party is responsible for the payment of the legal fees to the court: the court is always paid for its intervention. However, the winning party may request a refund of the amounts paid in all instances of litigation from the party that lost.

### 9.3 Indemnities

There are two possible situations to address regarding the possibility of requesting an indemnity if the disputed additional tax assessment is considered absolutely void and/or null.

Where the additional tax assessment has been paid, the taxpayer will be entitled to a full refund of the tax and interest unduly paid plus an amount of indemnity interest of 4% per year calculated on the value of such tax and interest unduly paid.

If the additional tax assessment has not been paid and the taxpayer has prevented a tax enforcement procedure from seizing their assets by providing a bank guarantee or equivalent to suspend such procedure while the additional tax assessment is in dispute, the taxpayer may request an indemnity related to the costs borne to maintain such guarantee.

The guarantee must have been maintained for at least three years for the taxpayer to be entitled to an indemnity, unless the additional tax assessment results from an error on the part of the tax authorities.

### 9.4 Costs of Alternative Dispute Resolution

Tax litigation in the Arbitration Court involves the payment of fees that vary between EUR306,00 and EUR4,896.00 according to the value of the claim. Where the value of the claim exceeds EUR275,000.00, an extra legal fee is due, equal to EUR306.00 for each additional EUR25,000.00 or fraction thereof.

Half of the fees due is paid with the initial request for the constitution of the Arbitration Court and the other half is due up to the point that the arbitration decision is issued (no decisions are issued without the correspondent fees being entirely paid for).

Where the arbitrators are appointed by the parties, the fees payable by the taxpayer vary between EUR6,000 for arbitration proceedings with a value up to EUR60,000.00 and a maximum of EUR120,000.00 for proceedings between EUR7,500,000.01 and EUR10,000,000.00.

In the latter case, arbitration fees are entirely borne by the taxpayer and must be totally paid before the filing of the initial request for the constitution of the Arbitration Court.

## 10. Statistics

### 10.1 Pending Tax Court Cases

The following statistics show the number of tax court cases pending in the first instance, indicating the average number of cases attributed to a judge of first instance.

Register of tax court cases (first instance) and their status (2017 and 2018).

- Pending Cases (31/12/2017): 47,854.
- Pending Cases (31/12/2018): 45,998.
- Total number of first-instance judges (31/12/2017): 97.
- Average number of cases per judge (2017): 493.

Source: based on information published by the Conselho Superior dos Tribunais Administrativos e Fiscais and the Direcção-Geral da Politica da Justiça in 2018 and 2019; available at www.cstaf.pt and www.siej.dgpj.mj.pt

The statistics show that tax judges are allocated a significant number of cases despite the level of litigation having decreased slightly in 2018.

The following two sets of statistics reflect the number of cases pending in the second-instance courts and the ASC. There was also a decrease in the level of appeal litigation.

Register of tax cases at the ACC (second instance) and their status (2016 and 2017).

- Pending cases (31/12/2016) – north area/Oporto: 2,387; south area/Lisbon: 1,670; total: 4,057.
- Pending cases (31/12/2017) – north area/Oporto: 2,658; south area/Lisbon: 2,056; total: 4,714.

Source: based on information published by the Conselho Superior dos Tribunais Administrativos e Fiscais and the Direcção-Geral da Politica da Justiça in 2018; available at www.cstaf.pt and www.siej.dgpj.mj.pt

Register of tax cases at the ASC (final instance) and their status (2016 and 2017).

- Pending cases (31/12/2016): tax plenary: 61; tax section: 847; section customs: 3; total: 911.
- Pending cases (31/12/2017): tax plenary: 76; tax section: 752; section customs 1; total 829.

Source: based on information published by the Conselho Superior dos Tribunais Administrativos e Fiscais, the Direcção-Geral da Politica da Justiça and the Administrative Supreme Court in 2018; available at www.cstaf.pt, www.siej.dgpj.mj.pt and www.stadministrativo.pt

As for tax arbitration, since 2011, 4,300 cases were initiated and, up to 31 December 2018, 3,809 cases were terminated, hence 491 were pending on 1 January 2019.

### 10.2 Cases Relating to Different Taxes

The following statistics show the number of tax court cases initiated and terminated in 2016 and 2017 in the first instance, although there is no information regarding their value or the taxes they relate to.

Register of tax court cases (first instance) and their status (2018, by first-instance tax courts area).

- Almada: 766 cases initiated; 1,161 cases finalised; 2,737 pending cases.
- Aveiro: 1,153 cases initiated; 999 cases finalised; 3,194 pending cases.
- Beja: 647 cases initiated; 540 cases finalised; 663 pending cases.
- Braga: 2,240 cases initiated; 2,145 cases finalised; 4,732 pending cases.
- Castelo Branco: 367 cases initiated; 354 cases finalised; 1,516 pending cases.
- Coimbra: 427 cases initiated; 501 cases finalised; 1,429 pending cases.
- Funchal: 313 cases initiated; 238 cases finalised; 660 pending cases.
- Leiria: 1,233 cases initiated; 1,351 cases finalised; 4,023 pending cases.
- Lisbon: 2,553 cases initiated; 3,057 cases finalised; 12,433 pending cases.
- Loulé: 509 cases initiated; 274 cases finalised; 820 pending cases.
- Mirandela: 263 cases initiated; 391 cases finalised; 347 pending cases.
- Penafiel: 551 cases initiated; 556 cases finalised; 969 pending cases.
- Ponta Delgada: 88 cases initiated; 241 cases finalised; 222 pending cases.
- Porto: 2,461 cases initiated; 3,253 cases finalised; 6,736 pending cases.
- Sintra: 914 cases initiated; 1,352 cases finalised; 4,333 pending cases.
- Viseu: 410 cases initiated; 415 cases finalised; 1,184 pending cases.
- Total cases: 14,895 cases initiated; 16,828 cases finalised; 45,998 pending cases.

Source: based on information published by the Conselho Superior dos Tribunais Administrativos e Fiscais and the Direcção-Geral da Politica da Justiça in 2018; available at www.cstaf.pt and www.siej.dgpj.mj.pt

As for arbitration, the number of cases initiated every year augmented until 2014, peaking at 850 new cases, and has since decreased slightly. In 2015 there were 789 new cases, in 2016 there were 772 new cases, in 2017 there were 693 cases and in 2018 there were 709 new cases.

Regarding the different taxes and according to the 2018 data, most cases were related to stamp duty (26%) and CIT (25.1%). Personal income tax was discussed in 15.9% of cases and VAT in 10.4%. Vehicle tax gave rise to 9.4% of the cases, property transfer tax to 7% of cases and property tax to 4.5% of cases.

Finally, also in accordance with the 2018 data, in arbitration most cases had a value of up to EUR60,000 (62%), 20.8% of cases had a value between EUR60,000 and EUR275,000, 5.8% had a value of EUR275,000 up to EUR500,000, 5.4% had a value between EUR500,000 and EUR1,000,000, and only 6% had a value higher than EUR1,000,000.

### 10.3 Parties Succeeding in Litigation

According to the OECD statistics (compiled with tax litigation data reported to 2015), around 40% of tax court cases are decided in favour of the Portuguese tax administration.

These results do not seem different in arbitration, according to the Administrative Arbitration Centre, using statistics from 2017.

## 11. Strategies

### 11.1 Strategic Guidelines in Tax Controversies

Along the course of a tax controversy there are many strategic options and decisions to be taken. In spite of each case deserving its own strategic consideration, preparation and analysis, there are specific guidelines that should guide or be considered by taxpayers along the path. These are some of the most relevant issues.

**Morais Leitão, Galvão Teles, Soares da Silva & Associados, SP, RL**

Rua Castilho, 165.
1070-050 Lisbon

Tel: +351 21 381 74 00
Fax: +351 21 381 74 99
Email: mlgtslisboa@mlgts.pt
Web: www.mlgts.pt

- Usually the factual pattern is of paramount importance. To know all the facts related with the case, to scrutinise all the documents and the relevant business matters around them (including all the business reasons for a specific transaction or behaviour), might prove to be crucial to change the prima facie approach that could lead to the wrong result.
- Legal aspects are also decisive on many occasions, such as formalities along the course of the process (as at an earlier stage, during the tax audit), the analysis of the burden of proof, different possible interpretations of legal provisions, the proper use of all possible ways to evidence facts (documents, witnesses, experts, etc) or to better illustrate a question of law (an option).
- Therefore, to be assisted by a tax lawyer from an early stage to help to understand the controversy, the strong and weak points and the way forward, evaluating all the facts and the legal possible outcomes is a game changer.
- Consider which form is best suited for the tax dispute, either administratively, judicially or through arbitration (including the possibility to refer questions to the ECJ). This must be evaluated at an early stage, together with the eventual interplay of options – pursuing an option and subsequently an alternative or alternatives, if necessary.

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# Tax Controversy

**Portugal: Trends & Developments**

Morais Leitão, Galvão Teles, Soares da Silva & Associados, SP, RL.

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# Trends and Developments

*Contributed by Morais Leitão, Galvão Teles, Soares da Silva & Associados, SP, RL.*

**Morais Leitão, Galvão Teles, Soares da Silva & Associados, SP, RL.** has the largest tax group of any Portuguese firm, with seven partners and more than 30 other lawyers. The tax litigation area is the main focus of this group, involving all types of tax controversies and parafiscal duties, and the different teams for each project include partners and associates with experience and skills in processual and court cases, and others with particular knowledge in business and substantive tax matters, acting for some of the largest national and foreign corporate groups from a wide range of sectors, including energy, oil and gas, mining, finance and banking, private equity funds, media, telecommunications and construction. The firm's tax lawyers work closely with colleagues in the transaction and corporate department of the firm, on matters relating to banking and finance, group reorganisations, M&A (both domestic and international) and real estate, among others.

## Authors

**Francisco de Sousa da Câmara** is a senior partner who has headed the tax teams in Lisbon and Madeira for more than two decades. He specialises in complex tax litigation involving domestic and international tax issues, and focuses on handling files in all type of courts and leading different teams. He is also an arbitrator recognised by Centro de Arbitragem Administrativa (CAAD), where tax arbitration is conducted. Francisco also advises high net worth individuals and family office businesses and structures. He has notably been involved in drafting tax legislation, including the General Tax Law, the Proceedings and Procedure Tax Code, and a project for a wealth tax reform. Francisco regularly contributes to several tax-focused publications in Portugal and abroad, being a correspondent for European Taxation and International Tax Notes.

**Bruno Santiago** is a partner who is a specialist in tax law, with a focus on domestic and international taxation, both in consulting and in dispute resolution. He co-ordinates dedicated teams advising clients on cross-border transactions and transfer pricing, taking advantage of his knowledge of Angolan and Mozambican taxation. Bruno is also very active in the area of tax disputes and arbitration covering income taxes, value-added tax, property taxes as well as stamp duty on financial operations, in administrative, judicial and penalties proceedings. Bruno represents clients from various sectors, including financial services, oil and gas, energy, real estate and construction, media and advertising, pharmaceuticals and private clients.

**Inês Salema** is a senior associate who practises in the area of domestic and international taxation, both in dispute resolution and in consulting. She has a strong focus on tax litigation (administrative and judicial procedures), with a very wide range of themes, but an emphasis on local, regulatory and port charges. Inês works in the field of tax consultation on various matters, including the taxation of individuals, particularly within an employment context (taxation of fringe benefits/stock options plans/compensation for termination of employment contracts). She has also been actively working on the taxation of fortuitous gains, both from the individual and business perspectives.

**Andreia Gabriel Pereira** is a senior associate who is an expert in tax litigation and has experience in the corporate and commercial, and capital markets teams, having assisted on transactions in these areas of activity, as well as in the IP area. Her professional experience covers a wide variety of complex tax matters in arbitration and judicial courts, including the Constitutional Court, and in matters relating to all categories of taxes, including property taxes, charges and sectorial charges.

**Introduction**

Over the past decade Portugal has witnessed great changes in the relationship between taxpayers and the tax authorities as a result of the digitalisation of routines and procedures. Accordingly, most interactions with the tax authorities are now performed electronically. The most recent development was the introduction of the possibility of electronic invoicing on a broad scale in 2019. Nevertheless, despite this shift, according to the report "Paying Taxes 2018" prepared by The World Bank and PwC, Portugal still ranks in the first ten of the 33 countries ranked in which taxpayers have to spend more time annually to comply with tax obligations.

According to the tax authorities' data, there are around 25 million tax assessments made annually related to the various taxes that compose the Portuguese tax system. Of those 25 million tax assessments, around 48,000 assessments give rise to litigation (representing a percentage of approximately 0.20%). Regarding administrative litigation (*reclamações graciosas*), cases related to personal income tax represent the larger piece of the pie (8,685 cases initiated in 2018), but it is also worth noting the sharp increase in cases related to stamp duty (6,612 cases initiated in 2018 in comparison with 3,537 cases initiated in 2017). Another interesting statistic is that in 2018 57% of administrative claims were decided in favour of taxpayers.

14,895 new judicial litigation files were initiated in 2018 in tax courts of first instance. Of these, 3,569 files related to disputes against tax assessments. The same courts produced 16,828 sentences in the same year, with more than 50% being totally or partially ruled in favour of taxpayers (including cases where the tax authorities revoked the assessments during the dispute). Unfortunately, no information is available on the cases pending in the courts of appeal, nor on the number of appeals ruled in favour of taxpayers.

In contrast, tax arbitration is more limited than litigation in tax courts since it does not rule on disputes related to tax enforcement processes, the value of the cases is capped at EUR10 million, and the grounds to present appeals from the decisions are more limited; there were 709 new cases initiated in 2018 and almost the same number of final decisions were reached. Of those final decisions, around 60% were totally or partially ruled in favour of taxpayers. Since its inception in 2011, most arbitration has related to taxes on immovable property, followed by cases on income taxes.

Experience shows that arbitration has proved to be a good option in test cases, because it is possible to obtain a final decision in less than one year. This swiftness in obtaining a final decision has the consequence of creating an imitation effect when the first decision is in favour of the taxpayers, because others will rapidly follow the same path. However, contrary decisions may occur due to the divergent opinions of the different arbitrators that judge the cases, especially considering that the rule of precedence does not exist in Portugal. In these situations, taxpayers have no grounds to appeal from the decisions rendered against them. To avoid this, an amendment to the law is expected in the short term, to allow an appeal to the Supreme Court in the case of two opposing arbitration decisions. Due to the subtleties of Portuguese procedural law, arbitration has also proved to be a valid option in cases related to Constitutional and EU law matters that are intended to go up to the Constitutional Court and the European Court of Justice, since it allows taxpayers to reach these courts much more rapidly than through the alternative route of the tax courts.

The following sections describe some of the latest trends and developments in tax litigation in Portugal.

**GAAR**

The general anti-avoidance rule (GAAR) was introduced into Portuguese law in 1999, and was amended in May 2019 to bring it more into line with the GAAR foreseen in the ATAD (Council Directive (EU) 2016/1164 of 12 July 2016 laying down rules against tax avoidance practices that directly affect the functioning of the internal market). The GAAR allows the Portuguese tax authorities to disregard any transaction that has been undertaken through artificial, fraudulent or abusive forms with the prime purpose of avoiding tax (including its mitigation or deferral), taxing instead the transaction according to its substance, rather than its form. However, the tax authorities have to prove that the transaction has been implemented or concluded with the primary intention of avoiding taxes.

To apply the GAAR, the tax authorities must follow a strict procedure and meet extra requirements. These exigencies, combined with the absence of experience and tradition in Portuguese tax law in dealing with these types of clauses, contributed to the fact that the first decision from the courts where the applicability of the GAAR was considered was only issued at the beginning of 2011.

In recent years, the Portuguese tax authorities have resorted increasingly to the application of the GAAR, which has meant that the number of cases decided in the tax courts and mainly in the arbitration courts has increased significantly.

In general, the GAAR has been applied to three main groups of cases: (i) distribution of dividends in the form of debt repayment; (ii) capital gains from the sale of shares after the transformation of a *sociedade por quotas* (Lda) into a *sociedade anónima* (SA); and (iii) sale of own shares. Other more specific cases were also targeted by the GAAR.

The use of the GAAR is likely to become more and more relevant in 2019, with the implementation of the ATAD. A significant change will be introduced in the GAAR to facili-

tate its application and ensure a higher level of protection against abusive planning and tax avoidance schemes.

For instance, under this amendment it will no longer be necessary to prove that the obtainment of a tax advantage was the main purpose of the transaction, as it will be sufficient to prove that it was one of the main purposes. Additionally, a new paragraph will be added to introduce the concept of "valid economic reasons", which has been clarified by the Court of Justice on several occasions, hence the Portuguese tax courts and arbitration courts will now have abundant case law to which they may refer.

**Large Companies**
In Portugal, large companies are addressed by a dedicated team within the tax authorities, called the Large Taxpayers' Unit (LTU), which came into existence in January 2012. Companies are defined as large companies if:

- they have turnover higher than EUR100 million, are supervised by the Central Bank or the Insurance and Pensions Funds Authority, or have a turnover higher than EUR200 million, in other cases;
- they are holding companies with an income in excess of EUR200 million;
- they have a total tax bill in excess of EUR20 million per year;
- they are considered relevant despite not meeting the above-mentioned criteria because of their relationship with the entities that do meet the criteria; or
- they make up part of a tax group for corporate income tax purposes and any of the companies within the group meet the above-mentioned criteria.

The list of large companies is public and published in the Portuguese official gazette.

The LTU's aim is to be in direct contact with large companies and gain a clear comprehension of their particular needs in order to better support them and develop open and transparent working relationships. The final purpose is to improve tax compliance.

It is the LTU that performs tax audits on large companies, conducts the tax enforcement processes and decides the administrative claims against tax assessments.

Large companies are frequently subject to annual tax audits, which lead to additional tax assessments by the Portuguese tax authorities. Such assessments are more often than not contested through either an administrative claim, a judicial challenge or a request for arbitration, creating new litigation trends.

**Extraordinary Contribution**
Following the most recent economic and financial crisis, the Portuguese Government created a number of Sectorial Extraordinary Contributions, intended to operate as financing mechanisms and new sources of income from specific economic areas.

For instance, in 2011 the Banking Sector Contribution was levied for the first time, and in 2014 the Energy Sector Extraordinary Contribution was imposed, amounting to millions of euros of additional tax revenue. The pharmaceutical industry and large retailers were also targeted with new contributions.

Despite being expressly "extraordinary" or perceived as such (at the time Portugal was under the Troika supervision), which would imply that these Contributions should only be levied in the years they were created or for a short period of time, this has not been the case and they are still in force in 2019.

Assessments of these Contributions have been challenged by the various market operators, creating a body of relevant litigation in tax courts and arbitration courts that is still under discussion.

**High Net Worth Individuals**
In 2016, the Portuguese government defined the term "high net worth individual" (HNWI) for the purposes of such individuals also being monitored by the Large Taxpayers' Unit (LTU). As a result, for these purposes, HNWIs are defined as those that earn income above EUR750,000 per annum; own, directly or indirectly, wealth (including assets and rights) worth more than EUR5 million; have a lifestyle commensurate with the above-mentioned income or wealth and/or possession of the related paraphernalia; or have a legal or economic relationship with HNWIs or with companies or entities that are followed by the LTU.

The Tax Authorities first started monitoring 758 individuals under this definition, 539 of whom were included under the 'income above EUR750,000' criteria and 215 under the 'ownership of wealth worth more than EUR5 million' criteria and four individuals under the oath two criteria. The list of HNWI is not published, and is unknown.

The Tax Authorities recently announced that they have identified 868 other individuals that may shortly be added to the monitoring list. However, it seems that the majority of these are the spouses of the individuals that were already considered HNWIs, as well as the spouses of those now identified as meeting the criteria described above.

Within this monitoring regime, the Tax Authorities have carried out 450 tax audits on the already certified HNWIs, which resulted in 146 different situations, and in additional

tax assessments amounting to approximately EUR3.4 million.

Considering the amount of new information that the tax authorities are gathering from banks, beneficial owners' registers, other taxpayers and other tax authorities, alongside the political pressure put on taxing this category of taxpayers, these numbers will probably increase significantly. Therefore, this is definitely one Portuguese tax trend to keep an eye on.

**Tax-driven Crimes**

Over the last few years, Portugal has witnessed an increase in the number of tax-related criminal cases, in terms of both number and importance.

Typically, such cases involve large amounts of non-declared income, which give rise to indictments for tax fraud and qualified tax fraud. The most common suspicions fall on the existence of corruption, money laundering, the use of offshore structures to avoid taxation and the rendering of false services between companies to abusively shift profits/losses to where they benefit from the most favourable tax regime.

These indictments may or may not give rise to additional tax assessments, depending on the particularities of the case and eventual options selected by the Public Prosecutor's Office – which may opt to file an indemnity request with the civil courts in order for the Portuguese State to be reimbursed the damages caused by the taxpayers involved or to follow the general rules to investigate and calculate the exact amount of tax that may have been avoided by the indicted taxpayers, additionally assessing it with interest.

The most mediatic tax crime-related cases that have occurred in Portugal in recent years include the '*Operação Furacão*' and the '*Operação Marquês*'.

The first case involves an estimated EUR45 million loss of tax revenue to the Portuguese State and an alleged 'tax optimisation scheme' set up with the main purpose of avoiding corporate and individual income taxes in Portugal. The 'scheme' involved the mass issuance of false invoices for services that were never rendered by offshore companies to companies resident in Portugal, shifting the profits offshore. Some of the tax fraud crimes investigated were covered by criminal law dispositions that allow no sentence. Therefore, the Public Prosecutor's Office decided to close the case without further action (ie, no indictment and no trial) in relation to many of the more than 40 defendants after consulting the Tax Authorities, and with the agreement of the judge. Such action imposed some obligations upon the defendants, such as payments to the Portuguese State and not engaging in certain activities for a period of time. This is still an ongoing process.

The second case is more recent, and is still at an earlier stage. At the centre of the investigation are the more than EUR23 million gathered by the childhood friend of a former Portuguese prime minister, in Switzerland. Part of the amount was transferred to Portugal in 2004 and the overwhelming majority was transferred in 2010 and 2011. At that time, such amounts were self-declared by a third intervenient under an amnesty tax regime. The prosecution alleges that the amounts in question were in fact obtained by the abovementioned former Portuguese prime minister. The process is still ongoing and currently involves 28 defendants, accused of 188 different crimes, including corruption, money laundering, tax fraud and qualified tax fraud.

**Final Notes**

We are witnessing the dawn of a new era in tax matters. The increase in world trade, e-commerce and the digital economy, alongside the mobility of HNWIs and MNEs, is being accompanied by an increase in exchanges of information between tax authorities, which allows for the unprecedented gathering of information that is relevant for tax purposes and mutual assistance among tax authorities. With new tools and information, the tax authorities are becoming more thoughtful in their analysis and the cases that will come up in the courts will definitely become more complex. Moreover, the BEPS initiative is making an important contribution to closing loopholes in the law and in the interaction of the different tax systems in cross-border situations, and will also contribute to an increase in transfer pricing-related tax disputes. On the other hand, taxpayers' rights and their privacy are increasingly in danger, with all sorts of leaks and fake news, and it is expected that the judiciary will play an important part in combating these abuses.

On an EU scale, state aid cases are gaining prominence. Portugal is awaiting the final results of the pending EU Commission's in-depth investigation to examine whether Portugal has applied the Madeira Free Zone regional aid scheme in conformity with the 2007 and 2013 Commission decisions approving it. Depending on the outcome of the investigation, a new flow of litigation may be on the horizon.

**Morais Leitão, Galvão Teles, Soares da Silva & Associados, SP, RL**

Rua Castilho, 165.
1070-050 Lisbon

M L MORAIS LEITÃO
GALVÃO TELES, SOARES DA SILVA & ASSOCIADOS

Tel: +351 21 381 74 00
Fax: +351 21 381 74 99
Email: mlgtslisboa@mlgts.pt
Web: www.mlgts.pt