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Tax Controversy

Portugal

Law & Practice
and
Trends & Developments

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Law and Practice

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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 recent years have seen the creation of sectorial taxes (eg, on banking, pharmaceuticals or the energy industry) 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, and where 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.

Another way to mitigate tax controversies, considering that in recent years the number of transfer pricing disputes has grown significantly, 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 taxpayers comply with the terms and conditions of the APAs in question.

1.4 Efforts to Combat Tax Avoidance

Over the years Portugal has already put in place a number of measures to combat tax avoidance, these include:

- rules preventing the tax deductibility of payments to entities located in low-tax jurisdictions;
- interest barrier rules;
- CFC rules;
- exit tax rules; and
- the last set of rules (the GAAR and its procedural provisions) that allow the tax authorities to recharacterise operations as purely fictional.

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

fidential, 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 randomised 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 from the ordinary patterns for a specific activity or wealth situation.

Heavily Audited Individuals and Companies

Moreover, specific taxpayers are permanently on the radar of the Portuguese tax authorities, in particular large companies and HNWI.

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

- HNWI – individuals with:
  - (a) income above EUR750,000 in a specific year;
  - (b) ownership, directly or indirectly, of wealth (including assets and rights) worth more than EUR5 million;
  - (c) a lifestyle commensurate with the above-mentioned income or wealth and/or possession of the related accoutrements; or
  - (d) 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;
  - (b) they are holding companies with an income in excess of EUR200 million;
  - (c) they have a total tax bill in excess of EUR20 million per year;
  - (d) they are companies that are considered relevant despite not meeting the above-mentioned criteria because of their relationship with entities that do meet the criteria; or
  - (e) 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 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 limitations period, which in principle corresponds to a four-year period following the taxable event. If a criminal proceeding related to the tax audit is initiated within that period, the statute of limitations is extended and the tax authorities may make a tax assessment until the end of the year following the date on which that 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, that period may be extended for two additional periods of three months each. The tax audit

suspends the statute of limitations period during those six months.

When a mistake that may trigger an additional tax assessment was evidenced in the tax return, the statute of limitations period decreases to three years. On the contrary, the statute of limitations 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:

- 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
- 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 physical documents on paper still exist (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 external audit related to 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
- in addition to all financial documentation (including invoices, receipts, credit or debit notes, banking information), 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 requests 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 to a specific questionnaire.

Taxpayers are often accompanied by their legal and tax advisers during the tax inspections and, in the case of companies, they should also appoint a representative who 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 cover 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 or activity (eg, to verify whether and how 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 examine:

- samples of sale and purchase invoices to verify if they comply with VAT and corporate income tax regulations;
- the information contained in different types of documents, reports and statements to verify if results are consistent;
- the transfer pricing documentation and the intra-group transactions, including the relationships between the company and associated companies and/or permanent establishments;
- formalities observed in specific operations (eg, neutral mergers, divisions, transfer of assets or exchange of shares, the transfer of a head office);
- transactions concluded with entities located in low-tax jurisdictions and, in particular, payments made to them;
- 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;
- payments abroad and all matters related to the proper application of withholding taxes;
- intra-community VAT operations or VAT deductions, or financial operations made by financial institutions often subject to stamp duties; and
- customs matters (often related to the qualification of items).

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 have 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, in some areas, are not yet very significant.

The Portuguese tax authorities' Report of Activities released in 2020, and referring to 2019, evidences the following number of requests for mutual assistance (MA) in the areas of customs/excises.

- Customs areas – 27 Portuguese requests for MA from other states, 70 where Portugal was a recipient of requests from other states, 97 in total.
- Excises – three Portuguese requests for MA from other states, five where Portugal was a recipient of requests from other states, eight in total.
- Naples Convention II – 19 Portuguese requests for MA from other states, 53 where Portugal was a recipient of requests from other states, 72 in total.
- Total – 49 Portuguese requests for MA from other states, 128 where Portugal was a recipient of requests from other states, 177 in 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, according to the Portuguese tax authorities' Report of Activities (released in 2018 and referring to 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 2019 may be summarised as follows.

- Requests – 313 received, 329 sent.
- Spontaneous – 104 received, 40 sent.
- Automatic – 1,137,890 received, 2,698,821 sent.

In 2017, under VAT EU Regulation No 904/2010, concerning administrative co-operation and the 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. Of 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 member states 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 take the following steps 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 to that 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 the situation immediately (with-

out 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.
- To decide what to say (or not to say) after receiving the tax audit draft, considering that, as a rule, the tax authorities will have the 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 to the origin, classification or customs value of the product.

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

The administrative claim should be presented in the local tax office of the area where the taxpayer is domiciled, or where the tax assessment took place, or of the location of the assets; it also can be sent electronically through the tax authorities' website. Although 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 this duty, namely if the taxpayer is able to demonstrate economic hardship or that the presentation of the guarantee will cause irreparable damage). Finally, if the tax authorities intend to dismiss the administrative claim, they should notify the taxpayer, allowing them to react to the projected dismissal within 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 pro-

cedure (including, therefore, an administrative claim) shall be decided within 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 that 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 common to see taxpayers presenting an administrative claim and, at the end of the fourth month, appealing to a 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, subsequently go 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 that 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 ground the final request. Moreover, the value of the claim shall also be indicated. Finally, the petitioners shall indicate their witnesses, other means of proof they wish to use and, in an annexe to the claim, the petitioners shall attach the documentary evidence at their disposal.

4.2 Procedure of Judicial Tax Litigation

After the presentation of the claim, the court attributes a number to the case and the process is distributed to a judge who notifies the tax authorities of the need to contest the claim within three months. The tax authorities are represented in court by a specific body called *Representantes da Fazenda Pública*, whose function is to represent the tax authorities in the thousands of files pending in the courts.

Although 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 taxpayers to confirm, within ten days, if they want 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 forms of proof shall be presented, such as inspections or expert hearings, the judge shall notify the parties of the relevant date to produce those forms 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 videoconference. The claimant as well as the person representing the tax authorities may directly interrogate the witnesses.

Once the presentation of proof is terminated, the judge shall notify the parties to produce their final written allegations with a minimum deadline of ten days, which shall not exceed 30 days.

Finally, before the decision, the claim shall be presented to the Public Prosecutor in the court who 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 testimony 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 its beginning to its termination will occur without any personal 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 a 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 their 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 criminal tax litigation, the burden of proof rests with the Public Prosecutor.

4.5 Strategic Options in Judicial Tax Litigation

Evidence

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 – it is advisable, as a rule, for all the evidence to be presented or requested at the beginning, as well as all the legal arguments.

Settlement

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.

Paying Upfront

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 the fact that the guarantee has costs, firstly a tax cost related to 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 should 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.

Expert Reports

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, they are usually 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 appellate 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 Porto and covers the northern area of the country. The ASC is also located in Lisbon and covers the entire country.

Whoever loses the case at 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 over the facts and the law decided at 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 of a previous judgment, or go to the Constitutional Court in cases where there is a constitutional issue at stake.

If there are uncertainties as to whether a tax assessment violates EU law, the final-instance court shall file a request for a preliminary ruling to the Court of Justice of the European Union. In contrast to the final-instance court, the courts of first instance are not obliged to file such a request and the occasions on 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 30 days of a final decision and shall include the appellant's statements. 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 other party will then have 30 days to submit its response. The appeal then goes to the ACCs or the ASC, where it will await a decision. Where the purpose of the appeal is to review recorded evidence, the above-mentioned deadlines are increased by ten days each.

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 appellate courts 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 their 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 alternative dispute resolution (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 exist to create a specific regime in some areas.

Moreover, at the international level and where tax disputes involve the relationships between states, tax arbitration becomes the ultimate resort to settle those 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

TACs

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 may be submitted.

- 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, the absence of an appeal in respect of TAC decisions is one of the principal characteristics of the model; there are, however, a few exceptions that contribute to ensuring the harmonisation of court decisions and guaranteeing taxpayers rights at the highest level:
  (a) an appeal to the ASC whenever the TAC decision conflicts with a previous decision issued by another TAC, the ACC or the ASC, provided the same fundamental point of law is at issue; or
  (b) an appeal to the Constitutional Court whenever the TAC's decision denies the application of a provision based on its being unconstitutional or applies a provision the unconstitutionality of which was raised during the proceedings.
- 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.
- Decisions must be based strictly on law.

MLI

The OECD Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS (MLI), signed on 17 June 2017, was ratified in November 2019, and, on 28 February 2020, Portugal deposited its instrument of ratification before the OECD. The MLI entered into force in Portugal on 1 June 2020.

Under one of the many optional clauses foreseen in the MLI, Portugal opted to apply the arbitration clause to settle international tax disputes; this option and the transposition of the EU Arbitration Directive (ie, Directive (EU) 2017/1852 of 10 October 2017), which is even more relevant in practice, mean that arbitration will be allowed to settle this type of dispute in the near future.

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 that 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 on 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.

There are far more cases of administrative tax offence, considering that all types of mistake originate in a file and usually the application of a fine (*coima*). However, tax criminal law has been aggravated in the last decade and the tax and social security authorities are using criminal sanctions far more often than in the past.

7.4 Stages of Administrative Processes and Criminal Cases

Administrative Tax Offence Proceedings

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 there are sufficient grounds and evidence to 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 a 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 to the appellate courts if the first-instance court confirms the conviction previously rendered by the tax authorities.

Only the decision rendered by that appellate court 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.

Criminal Tax Offence Proceedings

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 the 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 their 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, they 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 their 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.

As of 1 January 2022, taxpayers will be able to benefit from a more favourable fine reduction regime, since the fine will be set at 12.5% of the minimum applicable fine or 50% of the minimum applicable fine, depending on the stage of the administrative tax offence proceedings, while the deadline to request this reduction has been extended and is twice as long as the one currently applicable.

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 an appellate court 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 their 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 a possibility if the facts were to 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 largest disputes involving such matters (in terms of the amounts involved, the number of defendants or their public notoriety) produce, however, a great deal of media 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 situations of double taxation due to additional tax assessments or tax adjustments in cross-border situations, it is common to use domestic litigation, which does not mean that the mutual agreement procedure is not used – either as an alternative to, or together with, judicial litigation. According to the OECD statistics, 40 cases related to Portugal started in 2019 and 28 were terminated in the same year, and the total number of cases pending at the end of 2019 was 64.

With regard specifically to cases concerning transfer pricing, according to the same source, 10 cases started in 2019 and 8 were terminated in the same year, and the total number of cases pending at the end of 2019 was 33.

The Arbitration Directive and the MLI

In September 2019, Portugal published Law No120/2019, of September 19th, which implemented the EU Arbitration Directive, and "lays down rules on a mechanism to resolve disputes between member states when those disputes arise from the interpretation and application of agreements and conventions that provide for the elimination of double taxation of income and, where applicable, capital. It also lays down the rights and obligations of the affected persons when such disputes arise".

Being so recent, there is still no data or statistics available on its use, although it is likely to assume an important part in cross-border double taxation disputes in the future. It is also not yet possible to determine the effects that the MLI measures will produce in practice; it seems that it will take some time before a proper and reliable evaluation can be made.

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 that occurred as 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.

Times are changing, however. The MLI introduces more anti-abuse rules and includes the principal purpose test (PPT) in all Conventions signed

by Portugal. Moreover, Portugal has accepted the principle that tax treaties generally do not limit the right to tax residents of a state to that state, unless this is expressly excluded by the treaty ("saving clause"), which is intended to clarify that SAARs such as CFC rules might be compatible with the Convention.

This evolution and other international trends justify taxpayers being particularly cautious in cross-border transactions whenever benefiting from tax treaty measures, although they should not feel deterred by these new rules. In practice, it is likely that the PPT will not have a significantly different effect than the GAAR.

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 a possibility, they should be generally promoted by taxpayers since it is in their best interest to avoid the double taxation originating in 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 10 transfer pricing cases under the MAP were initiated in 2019 and 8 were terminated in the same year, and the total number of cases pending at the end of 2019 was 33.

See **8.2 Application of GAAR/SAAR to Cross-Border Situations** for discussion of the effect of the MLI on cross-border tax disputes.

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:

- contain a proposal of the methods chosen by the taxpayer;
- identify the period and operations covered;
- contain the signature of all the entities that are to be bound by the agreement;
- contain a declaration stating that the taxpayer will co-operate with the tax authorities and

will not invoke any commercial or professional secrecy; and
- 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 to cross-border situations that generate the most litigation are those related to withholding taxes. However, transfer pricing and residency matters are increasingly attracting the attention of the tax authorities and several relevant court cases in this domain have recently been initiated or/and decided.

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. Particular attention should be paid to facts, documentation, compliance rules and procedures that might prevent or reduce tax contingencies.

9. INTERNATIONAL TAX ARBITRATION OPTIONS AND PROCEDURES

9.1 Application of Part VI of the MLI to Covered Tax Agreements (CTAs)

Portugal opted to apply part VI of the MLI.

As a result, an arbitration clause was included in 18 double tax treaties (DTTs). These tax treaties include 12 EU member states (Austria, Belgium, Denmark, Slovenia, Spain, France, Greece, the Netherlands, Ireland, Italy, Luxembourg and Malta) and six states that do not belong to the EU (Andorra, Barbados, Canada, Singapore, the United Kingdom and Switzerland).

Before the signature of the MLI and the modifications introduced by these options, Portugal only had one DTT with an arbitration clause inserted in the MAP regime (ie, the DTT signed with Japan – Article 24). Portugal opted not to apply part VI of the MLI in respect of this DTT.

9.2 Types of Matters That Can Be Submitted to Arbitration

Portugal reserved the right only to apply arbitration in matters related to Articles 5, 7 and 9 of the OECD Model Convention, declining to apply it in cases:

- where no effective double taxation occurs;
- of fraud or any other tax crime;
- that deal with the GAAR or SAAR, including tax treaty anti-abuse rules; or
- that should be dealt with by the EU Arbitration Directive or the Arbitration Convention.

9.3 Application of the Baseball Arbitration or the Independent Opinion Procedure

Portugal reserved the right not to apply the default "final offer" arbitration procedure ("baseball arbitration"), opting instead to apply the "independent opinion" model. Although no official justification was made public, this option seems to be consistent with the position adopted by Portugal in the Arbitration Convention.

Apart from this, one should stress that the sole DTT with an arbitration clause (ie, the DTT signed with Japan) does not provide for a specific mode of arbitration.

9.4 Implementation of the EU Directive on Arbitration

The EU Arbitration Directive (ie, Directive (EU) 2017/1852 of 10 October 2017) has been trans-

posed into Portuguese law. Considering the countries covered by the arbitration clause (see **9.1 Application of Part VI of the MLI to Covered Tax Agreements (CTAs)**) and the fact that Portugal declined to apply the MLI arbitration procedure if the case might be dealt with by the EU Arbitration Directive or the Arbitration Convention, it seems that the latter instruments will be more relevant in practice than the MLI. Moreover, the matters that may be challenged under an arbitration procedure are much broader in the EU Arbitration Directive than in the MLI.

9.5 Existing Use of Recent International and EU Legal Instruments

The MLI and the EU Arbitration Directive are very recent and no reliable information is available yet.

9.6 Publication of Decisions

Decisions in international arbitration proceedings are generally not published. Portugal has opted to apply the confidentiality obligation foreseen in the MLI (Article 23.º Nos 4 and 5). However, the EU Directive 2017/1852 and the Portuguese law that implemented it establish the possibility of publication of the final decision if all parties agree, or at least the publication of a summary according to an EU standard form.

9.7 Most Common Legal Instruments to Settle Tax Disputes

Currently international tax disputes are still generally settled under the mutual agreement procedures or, more commonly, in accordance with domestic procedure rules in a litigation procedure between taxpayers and the State.

9.8 Involvements of Lawyers, Barristers and Practitioners in International Tax Arbitration to Settle Tax Disputes

As a rule, taxpayers involve lawyers/barristers in the early stages of a dispute in order to better deal with a potential contingency, many times even before a dispute has emerged. On the other side, it is rare for the State to hire independent professionals in tax disputes. The complexity and paramount importance of these matters suggests that both parties gain from being well assisted and equipped from the start.

10. COSTS/FEES

10.1 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 that claim does not seem to be sufficiently grounded.

10.2 Judicial Court Fees

The tax litigation process involves the payment of fees that vary between EUR102 and EUR3,060 according to the value of the claim, between EUR51 and EUR1,530 in the case of appeals and according to the value of the appeal, and between EUR204 and EUR6,120 in cases classified by the courts as particularly complex.

Where the value of the claim exceeds EUR500,000, the legal fee is not fixed but variable between EUR2,040 and EUR3,060, between EUR1,020 and EUR1,530 in the case of an appeal, or between EUR4,080 and EUR6,120 in the case of files classified by the courts 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), except for variable value legal fees. In these cases, only the minimum fee is paid in advance, the balance is paid at the end of the case.

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 case.

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.

10.3 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 that 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 that 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 resulted from an error on the part of the tax authorities.

10.4 Costs of Alternative Dispute Resolution

Tax litigation in the TAC involves the payment of fees that vary between EUR306 and EUR4,896 according to the value of the claim. Where the value of the claim exceeds EUR275,000, an extra legal fee is due, equal to EUR306 for each additional EUR25,000 or fraction thereof.

Half of the fees due are paid with the initial request for the constitution of the TAC and the other half are due before 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 and a maximum of EUR120,000 for proceedings between EUR7.5 million and EUR10 million.

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 TAC.

11. STATISTICS

11.1 Pending Tax Court Cases

First Instance

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 Política da Justiça* in 2018 and 2019.

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

Appeal

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 (2019 and 2020)

- Pending cases (31/12/2019) – north area/Porto: 3,832; south area/Lisbon: 5,232; total: 9,064.
- Pending cases (31/12/2020) – north area/Porto: 3,848; south area/Lisbon: 5,551; total: 9,399.

Source: based on information published online by the *Conselho Superior dos Tribunais Administrativos e Fiscais* and the *Direcção-Geral da Política da Justiça* in April 2021.

Register of tax cases at the ASC (final instance) and their status (2019 and 2020)

- Pending cases (31/12/2019): tax plenary: 3; tax section: 940; section customs 212; total 1,155.
- Pending cases (31/12/2020): tax plenary: 3; tax section: 741; section customs: 196; total: 940.

Source: based on information published by the *Conselho Superior dos Tribunais Administrativos e Fiscais*, the *Direção-Geral da Politica da Justiça* and the Administrative Supreme Court in April 2021.

Arbitration

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.

11.2 Cases Relating to Different Taxes

Tax Litigation by Region

The following statistics show the number of tax court cases, in the different regions of Portugal, initiated and terminated in 2019 in the first instance, although there is no information regarding their value or the taxes to which they relate.

- Almada: 1,103 cases initiated; 1,461 cases finalised; 3,319 pending cases.
- Aveiro: 1,279 cases initiated; 1,545 cases finalised; 4,016 pending cases.
- Beja: 3,199 cases initiated; 2,025 cases finalised; 2,488 pending cases.
- Braga: 2,759 cases initiated; 3,300 cases finalised; 6,454 pending cases.
- Castelo Branco: 661 cases initiated; 766 cases finalised; 2,178 pending cases.
- Coimbra: 901 cases initiated; 968 cases finalised; 2,028 pending cases.
- Funchal: 395 cases initiated; 524 cases finalised; 1,066 pending cases.
- Leiria: 1,646 cases initiated; 2,000 cases finalised; 5,290 pending cases.
- Lisbon: 6,099 cases initiated; 6,701 cases finalised; 19,716 pending cases.
- Loulé: 862 cases initiated; 645 cases finalised; 1,837 pending cases.
- Mirandela: 681 cases initiated; 620 cases finalised; 1,281 pending cases.
- Penafiel: 1,498 cases initiated; 1,107 cases finalised; 2,223 pending cases.
- Ponta Delgada: 203 cases initiated; 355 cases finalised; 385 pending cases.
- Porto: 3,799 cases initiated; 4,401 cases finalised; 8,074 pending cases.

- Sintra: 1,710 cases initiated; 1,894 cases finalised; 5,315 pending cases.
- Viseu: 566 cases initiated; 719 cases finalised; 1,628 pending cases.
- Total cases: 27,361 cases initiated; 29,031 cases finalised; 67,298 pending cases.

Source: based on information published by the *Conselho Superior dos Tribunais Administrativos e Fiscais* and the *Direcção-Geral da Política da Justiça* in October 2020.

Tax Litigation Subjects

Regarding the different taxes and according to the 2019 data, most cases were related to CIT (34%), personal income tax (18.1%) and VAT (16.2%). Property tax was discussed in 12.8% of the cases and stamp duty and property transfer tax were discussed in 6,4% each. Vehicle tax gave rise to 3,6% of the cases.

Arbitration

As for arbitration, the number of cases initiated every year increased 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.

Finally, in accordance with the 2017 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 million, and only 6% had a value higher than EUR1 million.

11.3 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 to those achieved in arbitration, according to the Administrative Arbitration Centre, using statistics from 2017.

12. STRATEGIES

12.1 Strategic Guidelines in Tax Controversies

Throughout 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 general guidelines that should guide, or be considered by, taxpayers along the path. Below are some of the most relevant issues.

- Usually the factual pattern is of paramount importance – to know all the facts related to 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), may prove crucial in changing a prima facie approach that could lead to the wrong result.
- Legal aspects are also decisive on many occasions, such as:
  (a) the formalities to be observed throughout the course of the process (as at an earlier stage, during the tax audit);
  (b) the analysis of the burden of proof;
  (c) different possible interpretations of legal provisions; and
  (d) the proper use of all possible forms of evidence to prove alleged facts (documents, witnesses, experts, etc) or 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 of a case and the way forward, evaluating all the

facts and the legal possible outcomes is a game changer.
- Taxpayers should also consider which form is best suited for pursuing 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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Trends and Developments

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Introduction

The year 2021 began with the tremendous worldwide challenge of COVID–19. The effect of the novel coronavirus has rapidly spread to all social, economic, and financial areas.

The swift spread of COVID-19 required Portugal to adopt severe containment measures. We have been witness to something never seen before: closed borders, empty streets, the shutting down of non-essential industries and services, and an economy that has come close to grinding to a halt as a result of the quarantine mandated by the government and recommended by the World Health Organization.

The budget for 2021 was published on 31 December 2020 at a particularly difficult time. The Portuguese government continues to feel pressured on daily issues, establishing and reviewing priorities, along with exceptional and temporary measures in all areas – tax and tax litigation included – adopted in 2020.

For the time being, it was decided to maintain, or even ease, the tax burden on individuals and companies but the economy's abrupt slowdown is undoubtedly a major factor contributing to the looming reality of increasing public debt and a public deficit that will need to be addressed.

New issues will certainly arise once the intensity of the pandemic eases or its initial impact is lessened; the State will need to find new measures to recover. If Portugal faced difficult times in 2011, 2012 and 2013 – when harsh measures were required by the troika – one does not need to be Nostradamus to predict that a similar medicine will probably be prescribed with a different name (the government will try to avoid the "austerity" term), and palliatives when necessary. Of course, apart from new taxes or higher rates for the existing ones, the tax authorities – probably more zealously than ever – will reopen their activities, certainly launching audits to review and scrutinise all the situations that may trigger taxes and, in particular, those related to recent years when the economy was growing. They will investigate everything not excluded by the statute of limitations and they will probably focus their attention on large companies and high net worth individuals (HNWI). In this environment, tax disputes and controversies are likely to arise, increasing tax litigation.

Considering that it is preferable to avoid litigation, both for the State and for taxpayers, the two parties will both probably proceed based on the trust they have in each other and their respective actions.

In such an extraordinary context, the following sections describe both recent developments and future trends in tax litigation in Portugal.

COVID-19 – Tax Litigation Measures

The need for people to isolate themselves at home, and the declaration of a state of emergency – leading to the termination of all non-essential business activity at the levels of production, management, and administrative organisation – led the Portuguese government to suspend all judicial and administrative litigation between

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March and June 2020 and between February and April 2021.

The shutdown of almost all court activity, and the suspension of deadlines, have a few obvious and direct consequences: both parties will have to wait (even) longer for the outcome of the processes and procedures of which they are part. This may mean – either the State, if the losing taxpayer did not pay the tax upfront, or the winning taxpayer if they had paid it and claim a reimbursement of the tax unduly assessed and paid – waiting longer to obtain monies. For both parties, these delays may also increase the value of the payment considering that interest might still be accumulating.

Main Areas of Predictable Impact: Examples from the Past

Sooner or later, the tax authorities will need to activate their mechanisms to collect revenue – tax audits that may lead to the assessment of additional taxes and tax foreclosure procedures to collect taxes already assessed and not yet paid – mechanisms that were inactive during long periods in the last year, whether by the formal rule of suspension of deadlines mentioned in the previous section or because of the rules on social isolation.

As a result of these suspensions and the economy's abrupt slow down, the State is currently spending more and collecting less. Public debt, already high, is increasing, but there are limits; taxes will soon be used as the usual tool to raise revenues. How the State will obtain additional revenue, either through new taxes or by harsher tax audits, is still to be seen; probably both methods will be employed.

Foreclosure

Foreclosure files are expected to grow because some taxpayers will be unable to comply with their ordinary obligations, including taxes. This may lead to an unpredictable increase in the number of tax foreclosures, but this will not lead to significant litigation.

Stricter and more extensive auditing

However, other phenomena related to COVID-19 are expected to cause an increase in litigation. Tax authorities will likely become increasingly strict, if not aggressive, once the pandemic is brought under control. Those less affected by the economic effects of the pandemic – such as some large companies, businesses that may have grown from or with the pandemic (such as some online based businesses) and high net worth individuals, already under the scrutiny of tax authorities – are the most obvious targets of new, stricter and extended tax audits in the months and years to come. As these correspond precisely with the profile of taxpayers that do not easily accept aggressive, hurried and unjustified tax assessments (the type that often arises from the State's urgent financial need for revenue) and have the means to fight them, it is foreseeable that the current pause in the tax and arbitration courts, will be followed by a significant increase in tax litigation.

Anti-avoidance

The main areas of litigation may shift from traditional discussion of the admission of tax expenses and obvious mistakes made by taxpayers to broader subjects, open to interpretation and qualification with a greater impact outside the specific case in which a decision is issued. Anti-avoidance practices and BEPS (Base Erosion and Profit-Shifting) actions, are strong candidates to occupy more prominent roles in tax litigation.

The tax authorities may be tempted to unduly expand the use of the means at their disposal, such as the GAAR or SAARs (General or Specific Anti Abuse Rules), or to apply double taxation treaties (DTTs) in a manner intended to maximise

the State's tax revenue – something that already happens from time to time, carelessly or with poor judgement. Even in ordinary times there are several examples of these cases.

For instance, in February and November 2019, the Arbitration Court issued decisions on cases of undue use of the GAAR, in which tax authorities defended their position that the restructuring operations executed by the taxpayers in question had the sole purpose of avoiding tax. According to these decisions, the conditions for the application of the GAAR did not exist in any of those situations. The tax authorities did not prove that tax avoidance was the sole or main reason for those operations taking place and therefore the tax authorities could not make use of the clause to assess additional tax under the circumstances (cases ns.s237/2018-T and 165/2019-T, respectively).

The correct application of DTTs is also of paramount importance and the courts are frequently asked to verify if the tax authorities have correctly challenged a specific interpretation and/or application made by taxpayers in this domain, or an incorrect qualification. In addition, the proper use of foreign tax credits is something on which the tax authorities are particularly focused, sometimes making basic mistakes.

Recently the Supreme Administrative Court (SAC) confirmed a previous decision of a tax court that ruled against the tax authorities' decision to deny a tax credit for taxes paid in Germany. In that decision, issued on 6 November 2019, the SAC confirmed that the *Kirchensteuer* (ecclesiastical tax) and the *Solidaritätszuschlag* (solidarity tax) are covered by the DTT celebrated between Portugal and Germany, because they have the nature of additional taxes to the main *Einkommensteuer* (income tax), thus having to be taken into account by the tax authorities when calculating the tax credit for international double taxation.

The State surcharge

In fact, not long ago, Portugal saw this happen, despite it being on a different scale, when the troika intervened in its fiscal affairs. At that time, several new taxes were created. The State surcharge (*derrama estadual*) is a clear example of a tax (i) created with the sole purpose of facing a crisis, (ii) mainly affecting large companies, (iii) abusively applied by the tax authorities, and (iv) strongly challenged by taxpayers.

Back in mid-2010, the State created a surcharge of 2.5% on taxable profits over EUR2 million. The State surcharge was then applied by the tax authorities to all taxable profits in 2010. It has been successfully challenged by taxpayers for being retroactive, thus unconstitutional, in recent years. The Supreme Administrative Court decision of 7 July 2018, among others of the same nature and content, states that "in the absence of a transitional law rule and with due regard to the provisions of paragraph 2 of Article 12 of the General Tax Law, the State surcharge created by Law No 12-A/2010, of June 30th, can only be applied to that part of taxable profits which correspond to the period from 1 July 2010, the date of entry into force of that Law."

However, the story of the State surcharge did not end there. A few years later, the crisis has receded but the surcharge remains. Moreover, considering that it is targeted and applied only to large companies, the government decided to increase the tax rate first to 5%, then to 7% and in 2017 to 9%, even raising the profitable income to which these rates apply in order to narrow the number of affected taxpayers (there are probably fewer than 100 taxpayers subject to the top rate). This, despite the fact the Portuguese Constitution stipulates progressive tax rates for individuals but a proportional rate for

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corporate bodies. Unsurprisingly, this action promoted litigation that is still pending where taxpayers challenged this tax, mainly based on the principles of equality in taxing the real profit (the Portuguese Constitution does not subject corporate income tax to a progressive taxation contrary to individual income tax), confidence, good faith, justice and proportionality.

Matters where litigation may increase

The above-mentioned cases are mere examples that illustrate the type of issues that the near future may bring – at an amplified scale – in terms of post-pandemic litigation, now with all the most sophisticated tools brought forward by BEPS, the Anti -Tax Avoidance Directives (ATAD) I and II, the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS (MLI), the Common Reporting Standard (CRS), DAC 6, etc.

The targeted taxpayers will probably check whether those measures used offend ordinary or constitutional domestic rules, or EU and international agreements, such as DTTs, and if they consider that they do, they will fight for their rights. One cannot forget that most large companies or HNWIs were also affected by the current crisis, and they will try to avoid a second wave launched by nation states.

Prevention of BEPS and Tax-Avoidance

The prevention of BEPS has been one of the OECD's and the EU's main concerns in recent years. Within this context, several amendments have been introduced into domestic Portuguese legislation or into Portuguese DTTs via the signing of the MLI, with direct impact on all those matters covered by different OECD BEPS actions being closely monitored by tax audit inspection teams.

The post-pandemic period will probably see these teams scrutinising all these issues with greater diligence in large companies when reviewing and auditing the last few years. From 2021 onwards, an important new legal instrument is expected to assist the authorities in detecting possible opportunities to make additional tax assessments: DAC 6.

DAC 6

Council Directive 2018/822, of 25 May 2018 amending Council Directive 2011/16/EU, of 15 February 2011 as regards the mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements (commonly known as DAC 6) was implemented in Portugal by Law 26/2020, of 21 July 2021; this law overrules the previous disclosure regime of tax planning operations, in force since 2008. The new law was initially scheduled to enter into force by mid-2020 but due to the pandemic, its entry into force was postponed to 1 January 2021 by Decree Law 53/2020, of 11 August 2020. This Decree Law also created the Forum DAC 6, an informal forum bringing together the tax authorities and some major stakeholders (essentially professional associations (lawyers, accountants, chartered accountants and tax consultants) and the "Big Four" accounting firms) with the aim of enhancing the application of the new regime. On 29 December 2021, Ordinance 304/2020 was published, containing the form (Modelo 58) to disclose the information. Finally, at the beginning of 2021 the tax authorities published their guidelines on the application of the DAC 6 regime.

This regime imposes the mandatory automatic exchange of information for arrangements with an EU cross-border element that meets one or more of the listed hallmarks (ie, that presents an indication of a potential risk of tax avoidance listed in DAC 6 Annex IV).

Notwithstanding the European regime, the Portuguese law in this area is broader since in

addition to cross-border arrangements, it also introduces disclosure requirements in respect of domestic arrangements with sole effects in the Portuguese territory and covering several taxes, including VAT. Additionally, the Portuguese regime does not include an exemption, due to legal professional privilege for certain intermediaries such as lawyers, from the duty to report, making these professionals ultimately responsible for disclosing information if their client or other intermediaries do not comply with the obligation to report.

It seems likely that this legal instrument will be applied in future investigations by the tax authorities. How this information will be used by the tax authorities remains to be seen, but a very strict and aggressive approach will certainly lead to more litigation. As a result, this will certainly be a very sensitive area for the next couple of years.

DTTs

Apart from domestic tax litigation, disputes among states over the interpretation and application of DTTs and matters of qualification will probably also increase. In this domain, it is relevant to stress that Portugal signed and deposited the instrument of ratification of the MLI on 17 June 2017 and on 28 February 2020, respectively; the MLI entered into force on 1 June 2020.

The Portuguese ratification instrument lists and covers a total of 79 tax treaties and clarifies the reservations and options made by Portugal in relation to various optional rules. The full text of the MLI, as well as the ratification document containing all the Portuguese reservations and options, is available at the OECD website.

Portugal reserves the right not to apply several MLI provisions, notably those related to non-individual tax residency, anti-abuse rules for permanent establishments situated in third jurisdictions, artificial avoidance of permanent establishment status through commissionaire arrangements and similar strategies, among others. However, mandatory rules concerning the purpose and preamble of treaties and the prevention of treaty abuse, as well as the rule clarifying that treaties do not generally restrict a state from taxing their own residents, already represent a significant alteration to the current treaties. In this respect, Portugal adopted the principal purpose test (PPT) and not the simplified limitation on benefits rule.

It has opted, instead, to settle international tax disputes by arbitration. Whether this mechanism will be useful in settling disputes over the application of treaties signed by Portugal is yet to be seen, in particular due to approval of EU Directive No 2017/1852 of 10 October 2017.

The novelty of the MLI, which certainly increases the complexity of applying DTTs may provoke more errors, and this may contribute to further litigation, at least in the short term.

The GAAR

Nevertheless, probably the principal weapon used by the authorities, and the one that gives rise to the largest amount of highly controversial litigation, is the general anti-avoidance rule (GAAR), which was recently amended (in 2019) to cover a larger scope of operations and to more heavily penalise the persons involved.

The GAAR was introduced into Portuguese law in 1999 and currently allows the Portuguese tax authorities to disregard any transaction that have been undertaken through artificial, fraudulent or abusive forms with the principal, or one of the principal, purposes being to avoid tax (including its mitigation or deferral), taxing instead the transaction according to its substance, rather than its form. The key point is to find whether the transaction (or a series of transactions/arrangements put together) is (or are) genuine and was

(or were) done with valid economic reasons. In making this appraisal one should also verify if this is supported by the economic substance of the transaction.

The alteration of the preamble and purpose in all double tax treaties as well as the introduction of the PPT by the MLI, may also lead the tax authorities to use the GAAR in more cross-border situations.

It should be noted that the rule was amended to foresee an aggravated interest penalty applicable to all situations that fall under the GAAR. In these situations, in addition to the general 4% yearly compensatory interest due when an additional tax assessment is made regarding a previous year (usually no more than four years due to the statute of limitation period), a 15% yearly interest rate is then applicable, meaning that a tax saving allegedly based on an abusive tax scheme is subject to a 19% rate of total yearly interest. This may also be applicable to resident taxpayers or payers of income that did not withhold tax on payments made abroad if the tax authorities consider that they knew or should have known that the structure put in place was intended to avoid the payment of tax in a manner covered by the GAAR. As a rule, these taxpayers may not only become subject to tax on the income paid abroad to non-residents but from now on also to this massive penalty disguised as an interest rate.

If this might seem an effective measure to dissuade taxpayers from resorting to tax avoidance and abusive schemes, it is also an enormous incentive to litigation. First, this is a very strong penalty badly disguised as an interest rate, which will probably be systematically challenged because it avoids the control of legislating penalties and applying new penalties. Secondly, being a punitive interest rate, it will push taxpayers to challenge the Portuguese tax authorities' use of the GAAR, which is often applied for the purpose of getting results (taxes) rather than because the evidence demands it.

Tax Dispute Resolution Mechanisms between EU Member States

New and more effective means to settle international tax disputes between states have also been developed recently. In September 2019, Portugal published Law No 120/2019, of September 19th, which implements Directive (EU) 2017/1852 of 10 October 2017.

According to the Directive, it "lays down rules on a mechanism to resolve disputes between Member States when those disputes arise from the interpretation and application of agreements and conventions that provide for the elimination of double taxation of income and, where applicable, capital. It also lays down the rights and obligations of the affected persons when such disputes arise".

Law No 120/2019 of 19 September 2019 establishes that taxpayers have a three-year deadline to submit a claim to the national competent authority on EU double taxation issues, a right that does not obliterate the right to challenge or appeal tax assessments under the national laws of Portugal or another EU member state involved in the dispute.

The national competent authority has a six-month period to decide whether to accept the complaints that are submitted and, in the case of acceptance, a two-year deadline to issue a final decision which may be extended for an additional year at the most.

It is also foreseen that, if an agreement is reached between all the competent authorities concerned in this respect, the decision will be binding on the national competent authority and enforceable by the taxpayer provided that the

taxpayer accepts it and, if any other appeal is pending, renounces that appeal. Additionally, if it is not possible to reach an agreement between the national competent authority and the other competent authorities involved in the dispute, the party concerned must be notified of this fact and the reasons for it.

If the decision is not favourable, the taxpayer may still use its national appeal mechanisms or, alternatively, appeal to the Advisory Commission.

After the Advisory Commission issues an opinion, the national competent authorities of the states involved shall reach an agreement complying with it, within six months after being notified of that opinion. In the absence of an agreement between these authorities, the opinion issued by the Advisory Commission shall be binding on the national competent authority.

The implementation of the Directive in Portugal is so recent that there are still no statistics on the volume of litigation generated by the approval of Law No 120/2019. Certainly, it is not yet a significant amount, not only because the regime is only a few months old, but also due to the deadlines and the suspension of acts determined by law due to COVID-19, a measure adopted in many member states.

The dispute resolution mechanisms now available fill a gap that taxpayers have wanted fixed for a long time. Furthermore, the COVID-19 crisis is already giving rise to many concerns relating to the interpretation of the double tax treaties in force. Can employees stuck in countries other than the country in which they regularly work, and working from their homes during the COVID-19 crisis, create a permanent establishment for themselves in those countries? Can the relocation or inability to travel of chief executive officers or other senior executives change the place of effective management of a company under certain domestic laws? Is the relocation, or inability to travel in general, capable of changing an individual's residency for tax purposes?

These questions led the OECD to issue a report to address the main issues. Notwithstanding this, and despite the OECD's efforts to clarify such doubts, it is possible that some of them will give rise to litigation between states.

Final Notes

The world's economic scenario is changing fast and in ways that it is not always possible to predict beforehand. States are being tested on their ability to respond to simultaneous public health and economic crises, and the tax repercussions will play a central role in the way they do so.

Portugal was already witnessing the dawn of a new era in tax matters, a trend that will continue more than ever after the pandemic is controlled.

Damage control will become an urgent necessity, and it is likely that an increase in taxes will occur with new taxes and/or heavier burdens placed on existing ones. The Portuguese authorities are better equipped with technical means and supplied with much more information and knowledge than in the past. At the same time, they will be pressed to increase tax receipts and collection after this crisis. IFRIC 23, DAC 6 and the developments in anti-tax avoidance practice and the BEPS initiatives (in particular, the MLI) will continue to make an important contribution to the monitoring of large companies and HNWIs as well as the interaction of different tax systems in cross-border situations.

In the global context, the OECD/G20 Inclusive Framework on BEPS gained new momentum with the Biden administration and negotiations are evolving at a good pace on the finalisation of Pillar Two, on the introduction of a global mini-

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mum tax that could bolster states' tax revenues to pay for the crisis created by the pandemic. If states manage to agree on Pillar Two of the Inclusive Framework we will witness a truly Copernican revolution in global taxation that will certainly herald an immense quantity of new challenges and – probably – new disputes.

Clearly, the best strategy for taxpayers is to anticipate and be prepared for the tax audits that will soon come, by reviewing their most recent operations and any possible weaknesses in order to better identify and mitigate the tax risks – collecting data and arguments that will sustain positions. This is crucial to avoid potential litigation and, if this is not possible, it may be key to initiating a successful challenge of an additional tax assessment.

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