

THE TAX DISPUTES
AND LITIGATION
REVIEW

TENTH EDITION

Editor
David Pickstone

THE LAWREVIEWS

THE TAX DISPUTES
AND LITIGATION
REVIEW

TENTH EDITION

Reproduced with permission from Law Business Research Ltd
This article was first published in February 2022
For further information please contact Nick.Barette@thelawreviews.co.uk

Editor
David Pickstone

THE LAWREVIEWS

PUBLISHER

Clare Bolton

HEAD OF BUSINESS DEVELOPMENT

Nick Barette

TEAM LEADER

Jack Bagnall

BUSINESS DEVELOPMENT MANAGERS

Rebecca Mogridge, Katie Hodgetts, Joey Kwok

BUSINESS DEVELOPMENT ASSOCIATE

Archie McEwan

RESEARCH LEAD

Kieran Hansen

EDITORIAL COORDINATOR

Leke Williams

PRODUCTION AND OPERATIONS DIRECTOR

Adam Myers

PRODUCTION EDITOR

Richard Cosgrove

SUBEDITOR

Martin Roach

CHIEF EXECUTIVE OFFICER

Nick Brailey

Published in the United Kingdom

by Law Business Research Ltd, London

Meridian House, 34–35 Farringdon Street, London, EC4A 4HL, UK

© 2022 Law Business Research Ltd

www.TheLawReviews.co.uk

No photocopying: copyright licences do not apply.

The information provided in this publication is general and may not apply in a specific situation, nor does it necessarily represent the views of authors' firms or their clients. Legal advice should always be sought before taking any legal action based on the information provided. The publishers accept no responsibility for any acts or omissions contained herein. Although the information provided was accurate as of February 2022, be advised that this is a developing area.

Enquiries concerning reproduction should be sent to Law Business Research, at the address above.

Enquiries concerning editorial content should be directed
to the Publisher – clare.bolton@lbresearch.com

ISBN 978-1-83862-279-4

Printed in Great Britain by

Encompass Print Solutions, Derbyshire

Tel: 0844 2480 112

ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following for their assistance throughout the preparation of this book:

ASBZ ADVOGADOS

BAE, KIM & LEE LLC

BPV HÜGEL RECHTSANWÄLTE GMBH

THE CHAMBERS OF MIHIR NANIWADEKAR

CUATRECASAS

DDTC CONSULTING

GALICIA ABOGADOS

GORRISSEN FEDERSPIEL

KPMG LAW ADVOKATFIRMA AS

LENZ & STAEHELIN

LEXVALOR ABOGADOS

LOYENS & LOEFF

MAISTO E ASSOCIATI

MAPLES AND CALDER

OLD SOUTH BRITISH CHAMBERS

SCORDIS, PAPAPETROU & CO LLC

STEWARTS

STIBBE

STREAMSOWERS & KÖHN

TMI ASSOCIATES

TRIPLEOKLAW

VASIL KISIL & PARTNERS

WASELIUS & WIST

CONTENTS

PREFACE.....	vii
<i>David Pickstone</i>	
Chapter 1	AUSTRIA..... 1
<i>Gerald Schachner, Kornelia Wittmann, Nicolas D Wolski and Lucas Hora</i>	
Chapter 2	BELGIUM 10
<i>Caroline P Docclo</i>	
Chapter 3	BRAZIL..... 26
<i>Adriano Gonzales Silvério, Daniela Vicente Armelin, Filipe da Costa Lessa and Mayra Tenório Silva</i>	
Chapter 4	CYPRUS..... 37
<i>Kyriacos Scordis, Penelope Papapetrou, Costas Michail and Phoebe Papageorgi</i>	
Chapter 5	DENMARK..... 48
<i>Jakob Skaadstrup Andersen</i>	
Chapter 6	ECUADOR..... 58
<i>Carlos Coronel Endara, Pablo Arias Aizaga and Danny Espinosa Taipe</i>	
Chapter 7	FINLAND..... 66
<i>Jouni Weckström</i>	
Chapter 8	INDIA..... 80
<i>Mibir Naniwadekar, Suyog Bhawe and Rucha Vaidya</i>	
Chapter 9	INDONESIA..... 94
<i>David Hamzah Damian and Ganda Christian Tobing</i>	
Chapter 10	IRELAND..... 110
<i>Andrew Quinn, William Fogarty and Robin McDonnell</i>	

Contents

Chapter 11	ITALY	120
	<i>Guglielmo Maisto</i>	
Chapter 12	JAPAN	137
	<i>Masakazu Iwakura and Hiroyuki Yoshioka</i>	
Chapter 13	KENYA.....	152
	<i>John M Ohaga, SC, Isaac Kiche and William Muthee</i>	
Chapter 14	MEXICO	164
	<i>Denise Lester, Alejandro Madero and Abraham Rubio</i>	
Chapter 15	NETHERLANDS.....	174
	<i>Reinout de Boer, Michael Molenaars, Rogier van der Struijk, Mieke Lavreysen and Tirza Cramwinckel</i>	
Chapter 16	NEW ZEALAND.....	186
	<i>Geoffrey Clews</i>	
Chapter 17	NIGERIA.....	205
	<i>Erigwe Uwa, Adeyinka Aderemi, Vincent Owbor and Agbada Stephen Agbada</i>	
Chapter 18	NORWAY.....	219
	<i>Thor Leegaard</i>	
Chapter 19	PORTUGAL.....	229
	<i>Diogo Ortigão Ramos and Pedro Vidal Matos</i>	
Chapter 20	SOUTH KOREA	241
	<i>Gyu Chan Shim, Seongjun Joo, Mooyoun Cho, Sungdoo Jang and Maria Chang</i>	
Chapter 21	SWITZERLAND	250
	<i>Jean-Blaise Eckert</i>	
Chapter 22	UNITED KINGDOM	262
	<i>David Pickstone, Victor Cramer, Lee Ellis and Cristiana Bulbuc</i>	

Chapter 23	UKRAINE.....	287
	<i>Tetyana Berezhna and Alina Ratushna</i>	
Appendix 1	ABOUT THE AUTHORS.....	297
Appendix 2	CONTRIBUTORS' CONTACT DETAILS.....	315

PREFACE

It is increasingly common for tax practitioners to be involved in disputes that span multiple jurisdictions. We operate in a global economy. Supply chains cross continents, and the increasing role of technology accelerates the pace at which economic activity becomes divorced from the structures intended to tax it. The pace of economic and technological change potentially increases the gap between the reality of commerce and that of taxation.

Although supranational agencies, such as the European Commission and the Organisation for Economic Co-operation and Development, work hard to keep pace with change, there is an inevitable lag between intention and action. Of late we have seen individual countries start to take unilateral actions, with digital taxation being a prime example. In coming years, a combination of economic developments and unilateral actions by individual countries is likely further to emphasise the importance of double tax treaties and the OECD multilateral instrument.

As the chapters of this book were being written, there were already important changes taking place in the political landscape in the United States and Europe, and in the global economy, that will affect international cooperation on tax and trade. For example, the past year has seen a ground-breaking deal agreed by 136 countries, accounting for more than 90 per cent of global GDP, to impose a minimum tax rate of 15 per cent on multinational enterprises.

In the light of the economic effects of the global pandemic, tax authorities are under unprecedented pressure to increase tax yield, and this will only increase the pressure on tax authorities to collect what is seen as a fair share of tax from international businesses operating on their shores. For our profession, this means a likely increase in the frequency of tax disputes, an ever-increasing international element to them and the ensuing need to work more closely with international colleagues as complex, multi-jurisdictional issues arise. It comes as no surprise that the authors of many chapters continue to identify international tax issues and offshore structures as areas of key focus for their own domestic tax authorities.

Regardless of whether tax authorities increase in cooperation or increase in competition, one thing is certain: they will not stand still. Tax, and particularly the international approach to tax, is a permanent fixture on the political agenda. The resulting frequent (and sometimes abrupt) changes in key elements of tax law inevitably lead to high value and complex disputes which often take many years to resolve.

The purpose of this book is to provide insight into the issues that give rise to tax disputes in different jurisdictions, the procedures for resolving those disputes and the powers and approach of local tax authorities. It is hoped that it will provide valuable insight into the process, timescale and cost of resolving complex difficulties when they arise across more than one jurisdiction.

We are lucky to have contributions from many leading and impressive tax practitioners across a wide range of jurisdictions. Each provides an up-to-date insight into dealing with contentious tax issues in their jurisdiction. I have enjoyed and learned from reading their contributions and I hope you will do, too.

I would like to thank my colleagues Victor Cramer, Lee Ellis and Cristiana Bulbuc for their valuable assistance in compiling this edition.

David Pickstone

Stewarts

London

February 2022

PORTUGAL

*Diogo Ortigão Ramos and Pedro Vidal Matos*¹

I INTRODUCTION

Historically, tax litigation has been a somewhat neglected field in Portugal. While the Portuguese legal framework is reasonably satisfactory in acknowledging taxpayers' rights and providing means for their defence, the harsh reality is that tax courts face a chronic backlog of unresolved cases that they struggle to handle at an appropriate pace.² More often than not, public resources are allocated to other areas of the judicial system such as criminal or civil courts, leaving tax courts struggling to keep up with the demands of a modern-day economy.

To make things worse, over the past decade significant investments have been made by the government to increase the tax authorities' efficiency in raising revenue, notably augmenting their data management and audit capabilities. In turn, this intensified the volume of tax litigation, adding pressure to an already stressed tax court system.

Against this backdrop, some measures have been taken to address the issues faced by tax litigation in Portugal. Notoriously, in 2011, tax arbitration courts were created as an alternative dispute resolution mechanism capable of offering a final judgment within six months to one year, in contrast to the three to five years taken on average by the ordinary tax courts. To make this possible, arbitrators are selected from tax professionals, tax scholars and retired tax judges, and appeals are generally inadmissible.³ On the other hand, the digital environment has finally fully reached the tax courts. Initially created in 2003, it took the best part of two decades and several improvements for the tax and administrative courts' case management software, *SITAF*, to be fully implemented. Finally, in 2018, its use became mandatory in all tax courts and now both taxpayers and tax authorities can access their cases in real time and must present their writs by online submission. Moving from paper to a digital environment will certainly prove crucial to improve efficiency within the tax courts without compromising the quality of decisions.

Nevertheless, tax litigation is likely to continue to be on the rise as international exchange of information and the global stance against aggressive tax planning and tax avoidance fuels the tax authorities' initiative and budgetary constraints still encourage a revenue-based

1 Diogo Ortigão Ramos and Pedro Vidal Matos are partners at Cuatrecasas.

2 According to the latest statistics, in 2020 there were 39,912 cases pending before the first-instance tax courts. To put this into perspective, in that same year, 10,350 new cases were lodged and 14,788 decisions were rendered (information available at the Directorate-General on Justice Policy website (<https://estatisticas.justica.gov.pt/sites/siej/en-us>)).

3 See Section VII, *infra*.

approach to their rapport with taxpayers. At the same time, taxpayers are increasingly aware of their rights and willing to assert them in court. Moreover, the issue of tax authorities' liability for unlawful tax assessments is beginning to reach the courts in a meaningful manner.

Overall, there is a clear need to strike a balance between tax authorities' efficiency and taxpayers' rights protection, possibly through less adversarial approaches to the administration of taxes and tax litigation. Traditionally, tax administration tools such as mediation, settlement or horizontal monitoring have been discarded in Portugal under constitutional constraints such as the principles of tax legality and equality but, slowly and steadily, things may also be changing in this regard.

In 2013, a special division was formed within the tax authorities' structure to assist large taxpayers. The Large Taxpayers Unit successfully created a taxpayer-friendly environment directed towards large businesses and high-profile individuals in acknowledgement of the fact that most of those taxpayers focus primarily on adequate compliance with tax law and not in saving taxes at all costs.

More recently, in 2018, the government assigned an independent group of individuals with the task of drafting a report suggesting legal amendments aiming at preventing unnecessary disputes between the tax authorities and taxpayers, with the view that often their interests are not irreconcilable or conflicting and stem from misinformation or simply from the unnecessary intricacy of tax law.⁴

II COMMENCING DISPUTES

At the heart of any tax dispute is a disagreement between the tax authorities and a taxpayer as to how tax should apply to a given situation (i.e., how tax should be assessed). On the other hand, nowadays the vast majority of assessments result primarily from the interaction between the taxpayers and the tax authorities' software. This entails most disputes arising either when taxpayers wish to amend previously filed tax returns, or, above all, when the tax authorities initiate tax audit procedures and disagree with how or what the taxpayers have stated to be their tax-related affairs.

i Amending tax returns

The amendment of tax returns by taxpayers is possible in the event of factual or legal errors that affect the accuracy of the original return or whenever new facts dictate a retrospective reassessment of tax.⁵ Moreover, in the case of self-assessed taxes such as corporate income tax and value added tax (VAT), it is mandatory whenever the amendment implies an increase of the tax assessed.⁶

Personal income tax returns may be amended, as a rule, within two years as of the corresponding filing deadline. By contrast, when favourable to the taxpayer, the amendment of corporate income tax returns may take place within one year as of the original filing deadline and, when unfavourable, within the general four-year statute of limitations period.

4 Ministerial Dispatch No. 4223/2018 of 17 April 2018.

5 Under Article 59(3) of the Tax Procedure and Process Code (CPPT).

6 See Article 122(1) of the Corporate Income Tax Code (CIRC) and Article 78(6) of the Value-Added Tax Code (CIVA).

Similarly, VAT assessments may be amended within two years of the original filing when the amendment is favourable to the taxpayer and, when unfavourable, must be amended with no time limit other than the aforementioned general statute of limitations period.

Regarding legal or factual errors detrimental to taxpayers, once the deadlines for amending the corresponding returns have expired, taxpayers may only seek to alter tax assessments by initiating a formal dispute with the tax authorities, as discussed below.

The amendment of tax returns within the assessment procedure by the tax authorities is possible and is usually the result of the cross-referencing of data provided by other taxpayers or, rather less frequently, from the automatic exchange of information with foreign tax authorities. However, as a rule, the tax authorities tend to act once taxes have already been assessed, examining the conformity of such assessments within tax audit procedures.⁷ These may be initiated at any time during the statute of limitations period,⁸ which is then stayed whenever the tax audit takes place at the taxpayers' premises or facilities (i.e., is an 'external' tax audit).

Tax audits must be completed within six months, a period that in certain circumstances may be extended for up to two additional three-month periods. Should the tax audit include the resort to exchange of information mechanisms with foreign tax authorities, an additional extension of 12 months is applicable.

Within the tax audit procedure, when the tax authorities reach a preliminary conclusion that an amendment detrimental to the taxpayer is due, the taxpayer is notified to present any additional information and issue an opinion on such conclusion within a set deadline ranging from 15 to 30 days. Pursuant to such hearing and upon conclusion that no further inquiry is necessary, the final tax audit report is issued dictating any tax assessments the tax authorities deem justifiable.

ii Disputes related to tax assessments

Once a tax assessment is issued, taxpayers may typically choose to dispute it via an administrative procedure within the tax authorities hierarchy, or go directly either to the Judicial Tax Court or to the Tax Arbitration Centre. In certain specific circumstances, however, the administrative review procedure is a precondition that needs to be met before taking the dispute to court. This is generally the case with self-assessments or withholding tax disputes, in which taxpayers can only go directly to court if the dispute does not pertain to a matter of fact and the assessment was made in accordance with assessment guidelines published by the tax authorities.⁹

The administrative claim procedure is free of charge and may generally be filed within a 120-day period as of the assessment's payment deadline.¹⁰ However, administrative claims pertaining to tax return mistakes, self-assessments or withholding tax may be filed within

7 Tax audit procedures are governed by the General Tax Law (LGT) and by the Tax and Customs Audit Procedure Regime (RCPITA), a specific statute that outlines the tax authorities' prerogatives and the corresponding taxpayers' rights.

8 The general statute of limitations period is four years, foreseen in Article 45(1) LGT. There are, however, a number of specific exceptions that can extend such period to up to 12 years, such as whenever the facts at stake pertain to blacklisted jurisdictions (see Article 45(7) LGT).

9 See Articles 131(3) and 132(6) CPPT.

10 See Article 70(1) CPPT.

two years following the filing deadline or the assessment date.¹¹ Administrative claims are to be decided by the tax authorities within four months. Upon an express or tacit dismissal¹² of the administrative claim, taxpayers may choose to lodge an administrative appeal to the Ministry of Finance (within 30 days),¹³ to file a judicial claim before the Judicial Tax Court (within three months)¹⁴ or, when admissible, to file a tax arbitration request before the Tax Arbitration Centre (within 90 days).¹⁵ Administrative appeals should be decided within 60 days. Pursuant to such decision, the dispute may still be brought to either the Judicial Tax Court or the Tax Arbitration Centre (within the aforementioned deadlines).

Similarly, whenever a taxpayer chooses to challenge the tax assessment directly before the Judicial Tax Court, the corresponding judicial claim is to be filed within three months as of the assessment payment deadline. Alternatively, should the chosen litigation course be tax arbitration, the corresponding tax arbitration request needs to be filed within 90 days as of the assessment payment deadline.

iii Other disputes

In addition to the prevalent disputes related to tax assessments, there is of course a myriad of actions and procedures by the tax authorities that may give rise to disputes with taxpayers. Broadly speaking, actions by the tax authorities that do not directly pertain to tax assessments may be judicially challenged by taxpayers via the general judicial administrative claim made available as a remedy against illegal action by governmental and other public entities.¹⁶ This is to be filed within three months as of the date the disputed action is notified to the taxpayer. In tax matters it applies, for instance, to cases such as the refusal or withdrawal of tax benefits or whenever taxpayers wish to challenge the outcome of binding information requests.

However, there are other disputes that take place in the tax field and do have specific procedures. Worth mentioning in this regard are actions taken by the tax authorities within tax audit procedures, such as accessing banking information or resorting to presumptive taxation on the grounds of wealth signs evidenced by the taxpayer held incompatible with the corresponding personal income tax returns. In such cases, taxpayers may challenge said actions via a specific judicial appeal to be lodged within 10 days as of knowledge of the tax authorities' intent.¹⁷ On the other hand, whenever indirect methods of taxation are applied, a special administrative procedure exists entailing an internal review procedure and a technical debate between designated experts, which is a precondition for the subsequent judicial claim.¹⁸ The taxpayer needs to request such review committee within the 30 days following the notification of the tax audit report.

11 See Articles 131(1) and 132(3) CPPT, and Article 140(2) of the Personal Income Tax Code (CIRS).

12 A tacit dismissal occurs when the deadline for a decision elapses. It grants the taxpayer the right to take the case immediately to court. Alternatively, the taxpayers may choose to wait for an express decision, which in that case remains due.

13 See Article 66(2) CPPT.

14 See Article 102(1) CPPT.

15 See Article 10(1) of the Tax Arbitration Legal Regime (RJAT).

16 The Administrative Courts' Procedure Code (CPTA) governs the general judicial administrative claim procedure.

17 See Article 146-B(2) CPPT.

18 This special administrative procedure applicable in cases of indirect methods of taxation is governed by Articles 91–94 LGT.

Tax procedure law additionally foresees legal actions that are ancillary in nature, such as judicial order requests to access and obtain copies of the tax authorities' records, to put an end to unlawful procedural delays or to force the tax authorities to comply with judicial decisions. Also available to the tax authorities are precautionary or interim measures, such as the seizure of goods or documents, and the sealing of premises to preserve evidence, the legality of which may be challenged by taxpayers within the corresponding procedures.¹⁹

A final note should be made regarding tax foreclosure procedures, which are conducted by the tax authorities under judicial oversight. Upon being summoned to such a procedure, taxpayers have 30 days to lodge a judicial opposition either challenging the legality of the foreclosure procedure or arguing their illegitimacy as debtor.²⁰ In addition to such judicial opposition, the legality of all other actions by the tax authorities while conducting the tax foreclosure may be challenged via a judicial claim to be lodged within 10 days of becoming aware of the action.²¹

III THE COURTS AND TRIBUNALS

As previously mentioned, prior to the court stage taxpayers may challenge the lawfulness of tax assessments internally within the tax authorities via the administrative claim procedure. Nevertheless, administrative claims prove to have little to no effect in successfully handling taxpayers' complaints. Indeed, especially when tax assessments result from a preceding tax audit procedure, it is very rare for the tax authorities to change their stance in administrative claim procedures. Realistically, a fair chance of success exists only regarding blatant errors of fact or law or if taxpayers can provide new documents or information that was not examined within the audit. Because of this, even if a decision is typically rendered within the four-month legal deadline, most taxpayer disputes end up in court. Likewise, the administrative appeal has similarly slim chances of success, with the added inconvenience that the 60-day deadline for a decision is a far cry from the 20 months such appeals take to be decided on average.²²

All things considered, the tax courts play a decisive role in handling tax disputes. These are judicial courts and therefore independent from both the government and the tax authorities. There are 16 first instance tax courts covering the entirety of the Portuguese territory. Tax cases are decided by a single judge and on average take approximately four years to be decided.²³ They have full jurisdiction to review and annul tax assessments, both on grounds of fact and of law.²⁴

First instance court decisions may be appealed to either one of the two central administrative courts (for a review both of facts and law) or to the Supreme Administrative Court (for a review solely on matters of law). Panels of three judges rule on the appeals.²⁵

19 See Article 146(1) CPPT.

20 See Articles 203 and 204 CPPT.

21 See Article 276 CPPT.

22 Statistics on the volume of administrative claims and appeals and the average time taken for a decision are taken from the 2020 Government Report on the Fight against Tax Fraud and Tax Evasion, pp. 137–142.

23 Information available at the Directorate-General on Justice Policy website (<https://estatisticas.justica.gov.pt/sites/siej/en-us>).

24 See Section II.i, *supra*.

25 See Article 280(1) CPPT.

Appeals vary significantly regarding the time taken for a decision, ranging from six months to several years depending on the complexity of the case.²⁶ Such appeals tend to be final given that further appeals, either to the full panel of judges of the Supreme Administrative Court or to the Constitutional Court, are very restricted.

Be that as it may, a second level of appeal to the Supreme Administrative Court may be based on conflicting rulings by the central administrative courts (with prior decisions from either the central administrative courts or the Supreme Administrative Court)²⁷ or by the Supreme Administrative Court (with prior decisions by the same Court).²⁸ Another possibility of appeal to the Supreme Administrative Court exists when such appeal is deemed as clearly necessary for a better application of the law or owing to the legal or social importance of the questions at hand.²⁹

Finally, cases pertaining to the constitutionality of legal provisions may ultimately be appealed to the Constitutional Court provided that such constitutionality issue has previously been raised during the proceedings before the lower courts.³⁰

IV PENALTIES AND REMEDIES

Failing to pay a tax or to surrender taxes withheld entails the payment of compensatory interest at a 4 per cent yearly rate.³¹ Whenever the taxpayer has assessed the tax amount at stake, late payment interest at a yearly rate currently set at 4.705 per cent is due instead.³² Such interest is assessed together with the tax assessment and may be challenged in the same dispute.

In addition to the charge of interest, infringing tax law provisions may have criminal or administrative misdemeanour consequences. These are foreseen in a specific statute that sets out in detail not only the different types of tax infringements, but also the corresponding procedural provisions regarding how penalties should be applied and how taxpayers may defend themselves.³³

Criminal penalties are punishable either with imprisonment or with pecuniary penalties. The latter are set out in a number of days of penance, to which a certain penalty amount is attributed ranging from €1 to €500 regarding convicted individuals or from €5 to €5,000 regarding corporate entities. Ancillary penalties such as interdiction of certain activities may also be applied.

26 For updated statistics on the duration of appeals, see the Directorate-General on Justice Policy website (<https://estatisticas.justica.gov.pt/sites/siej/en-us>).

27 See Article 280(2) CPPT.

28 See Article 152(1b) CPTA.

29 See Article 150(1) CPTA.

30 See Article 70(1) of the Constitutional Court Procedural Law (LTC).

31 See Article 35 LGT.

32 See Article 44 LGT.

33 See the General Regime on Tax Infringements (RGIT).

Among the various types of criminal offences, emphasis should be made on the crimes of tax fraud³⁴ and of tax embezzlement,³⁵ which are the most commonly prosecuted.³⁶

Tax fraud is punishable with up to eight years' imprisonment (for individuals) and up to 1,920 days of penance (for corporate entities). It occurs whenever a wilful misconduct is aimed at evading the assessment, payment or passing on of tax, or at unduly obtaining tax relief, refunds or other pecuniary advantages capable of generating a decrease in tax revenue, provided that the tax amount at stake is at least €15,000, notably via:

- a the concealment or misrepresentation of facts or figures that must be registered in accounting books or records, or on returns filed or provided to the tax authorities for the specific purpose of inspecting, determining, assessing or verifying taxable income;
- b the concealment of facts or figures that should be disclosed to the tax authorities; or
- c the carrying out of sham transactions, disguising the corresponding value or nature, or by interposing, omitting or replacing the corresponding intervening parties.

Tax embezzlement is punishable with up to five years' imprisonment (for individuals) and up to 1,200 days of penance (for corporate entities). It occurs whenever tax withheld, or in any way charged to a third party, in excess of €7,500, is not surrendered by the taxpayer to the tax authorities.

Like any other crimes, the Public Prosecution Service prosecutes tax criminal offences, albeit with technical assistance provided by the tax authorities. The defence of taxpayers takes place under the general criminal procedural law.

Administrative misdemeanours are punishable with fines, applied by the tax authorities, and only apply if criminal offences do not. The most relevant misdemeanour is the failure to surrender taxes withheld, assessed or charged to a third party.³⁷ Also relevant is the lack or inaccurate filing of tax returns or other tax-relevant documents.³⁸

The failure to surrender taxes withheld, assessed or charged to a third party is punishable with a fine of up to 200 per cent or 400 per cent of the tax at stake (for individuals and corporate entities respectively), capped at €82,500 (for individuals) and €165,000 (for corporate entities). The lack or inaccurate filing of tax returns or other tax-relevant documents is punishable with a fine of up to €22,750 (for individuals) or €45,500 (for corporate entities) of the tax at stake.

In addition to being able to defend themselves within the tax misdemeanour procedure prior to the application of fines, subsequently taxpayers are entitled to challenge the legality of any fines applied before the judicial tax courts.

Finally, if a dispute exists as to the tax assessment to which the tax infringement refers, as a rule, the corresponding criminal or administrative misdemeanour procedure is stayed until a final decision is reached as to the assessment's lawfulness.

34 See Articles 103 and 104 RGIT.

35 See Article 105 RGIT.

36 Tax embezzlement corresponded to 74 per cent of the total tax criminal procedures initiated in 2020, while tax fraud amounted to 9 per cent (see the 2020 Government Report on the Fight against Tax Fraud and Tax Evasion, p. 173).

37 See Article 114 RGIT. The failure to surrender taxes withheld, assessed or charged to a third party corresponded to 68 per cent of the total misdemeanour procedures started in 2020 (see the 2020 Government Report on the Fight against Tax Fraud and Tax Evasion, p. 147).

38 See Article 119 RGIT.

V TAX CLAIMS

i Recovering overpaid tax

Overpaid tax is typically seen as the result of an inaccurate tax assessment and, as such, it may be recovered by the taxpayer either via the filing of an amended tax return or through the normal tax dispute mechanisms discussed above.³⁹

Exceptionally, an *ex officio* review of tax assessments is possible on the grounds of an assessing error imputable to the tax authorities, of serious or blatant injustice, or of duplication of tax, within extended deadlines of up to four years as of the assessment date.⁴⁰

Special regimes are available to non-resident taxpayers entitled to refunds of taxes withheld at source under double tax treaties or European Union Directives. The deadline to request such refunds is typically two years as of the assessment date or from when the legal requirements necessary for the refund to be due are met.⁴¹

Finally, regarding VAT, there is a tax refund procedure for taxpayers established in Portugal within the normal VAT current account,⁴² which generally applies when the outstanding credit resulting from deducted input VAT exceeds €250. VAT taxpayers established in other EU Member States may request the refund of VAT borne in Portugal under the rules and procedure laid down pursuant to Council Directive 2008/9/EC of 12 February 2008.⁴³

ii Challenging administrative decisions

Administrative decisions are subject to judicial review and must comply both with ordinary law and with constitutional principles and provisions. Hence, they may be challenged before the tax authorities themselves or the tax courts on the grounds of any illegality or unconstitutionality, including serious injustice, abuse of power, acquired right or legitimate expectation.

Nevertheless, the tax authorities tend to focus on ordinary law and decide cases accordingly. For understandable reasons, such as ensuring an equal treatment of taxpayers, but primarily to secure an adequate level of control and homogeneity between different units within the hierarchy, the tax authorities are reluctant to set aside ordinary legal provisions on the grounds of an alleged disconformity with constitutional commands. In practical terms, this is a task left to the courts.

iii Claimants and related parties

Tax procedural law foresees a very wide range of potential claimants. It includes taxpayers, legal substitutes, representatives, entities legally liable for the tax debt (jointly and severally or subsidiarily), and any other individual or entity that proves to have a legally protected interest in the claim.⁴⁴

Hence, regarding VAT and other indirect taxes such as stamp duty, claimant status includes third parties that have borne the tax at stake. Moreover, when a tax has legally been

³⁹ See Section II, *supra*.

⁴⁰ See Article 78 LGT.

⁴¹ See Article 101–C CIRS and Article 98 CIRC, regarding individual and corporate taxpayers, respectively.

⁴² See Article 22 CIVA.

⁴³ Transposed into the Portuguese legal order by Decree-Law No. 186/2009 of 12 August 2009.

⁴⁴ See Article 9 CPPT.

passed onto a different taxpayer, the VAT Code expressly establishes that the original VAT taxpayer alone may not challenge the corresponding assessment, so as not to create situations of unjust or unjustified enrichment.⁴⁵

VI COSTS

Procedures before the tax authorities such as administrative claims and administrative appeals are free of charge. However, if the administrative claim is held to be clearly ungrounded, the tax authorities may decide to apply a charge of up to 5 per cent of the disputed taxable base.⁴⁶

By contrast, actions before the judicial tax courts are subject to court fees.⁴⁷ These are scaled in accordance with the value of the claim, ranging on the first instance tax courts from €51 (for claims of up to €2,000) to €1,632 (for claims of up to €275,000). Claims in excess of €275,000 are subject to a final surcharge of €306 for each additional €25,000. Appeal courts' fees are set at half the first instance tax courts' fees.

The winning party within a judicial tax claim is entitled to claim the refund of the court fees borne from the losing party. Moreover, as compensation for legal fees, the winning party may claim an amount of up to 50 per cent of the total court fees paid. As a rule, this falls short of the actual legal costs borne, with the probable exception of very high-value claims.

Tax arbitration is also subject to fees, which are slightly higher than judicial court fees.⁴⁸ These range from €306 (for claims of up to €2,000) to €4,896 (for claims of up to €275,000). Claims in excess of €275,000 are subject to a final surcharge of €306 for each additional €25,000.⁴⁹

The winning party within an arbitration tax claim is refunded by the Tax Arbitration Centre the amount of fees paid.⁵⁰ No amount is due as compensation for legal fees.

VII ALTERNATIVE DISPUTE RESOLUTION

As mentioned in Section I, in 2011, Portugal introduced tax arbitration as a measure to tackle the significant volume of cases pending in judicial tax courts. Perfectible as it may be, it must be said that it was a resounding success. It is seen increasingly as the forum of choice if a case is relatively simple and when claimants do not wish to wait several years for it to be decided.

The tax arbitration procedure was conceived and designed as an alternative to the judicial claim and is initiated at the taxpayer's request before the Tax Arbitration Centre. Ad hoc tax arbitration tribunals are set up by the Centre. A single arbitrator decides cases with a value of up to €60,000, while a panel of three arbitrators decides cases in excess of such

45 See Article 97(3) CIVA.

46 See Article 77 CPPT.

47 Court fees are levied in accordance with the Judicial Costs Regulation (RCJ), a statute that applies to all judicial court procedures, including tax courts.

48 Tax Arbitration fees are specifically set out in the Tax Arbitration Costs Regulation (RCAT).

49 Whenever the taxpayer exercises the right to choose one of the arbitrators (see Section VII, *infra*) the costs are significantly higher, ranging from €6,000 (for claims up to €60,000) to €120,000 (for claims up to €10 million).

50 No refunds exists when the taxpayer has exercised the right to choose an arbitrator.

amount – such panel also exists whenever a taxpayer exercises their right to choose a specific arbitrator.⁵¹ Arbitration tribunals must decide cases by applying the law. There is no room for settlement or equity judgments.

The types of cases that may be subject to arbitration are expressly defined and include:

- a claims upholding the illegality of additional tax assessments (including self-assessments, tax withholding and payments on account whenever preceded by an administrative claim); and
- b claims upholding the illegality of decisions that set taxable income but do not directly give rise to the assessment of any tax, of decisions determining the taxable base and decisions that set asset values for tax purposes (with the exception of those that result from the application of indirect methods of taxation).

Moreover, customs duties and related indirect taxes, as well as claims relating to the classification, origin and customs value of goods, may not be subject to tax arbitration. Finally, tax disputes with a value exceeding €10 million are also excluded from tax arbitration.

The main feature of tax arbitration is its swiftness, given that cases must be decided within six months (with the possible extension of an additional equal period when the complexity of the case justifies it). This deadline is consistently complied with and is seen as the most important factor underlying a taxpayer's choice to bring its dispute before an arbitration tribunal. Such swiftness is additionally secured by the fact that arbitration decisions tend to be final given that appeals are only admissible in very strict circumstances. Broadly speaking, a decision from an arbitration tribunal is equated for appeal purposes to a decision from a central administrative court and therefore only exceptionally may it be appealed either to the Supreme Administrative Court or to the Constitutional Court.

Apart from arbitration, other mechanisms exist that ultimately aim to prevent disputes such as binding information requests, advance clearing procedures (restricted to entities that qualify as 'large taxpayers') and advance pricing agreement procedures.⁵²

VIII ANTI-AVOIDANCE

Portugal has had a general anti-abuse rule (GAAR) for more than 20 years now.⁵³ It was highly controversial when introduced and seen by many as a threat to the constitutional principle of legality, which was and is still seen as the backbone of the tax system. To address such concerns, the actual resort to the GAAR was heavily conditioned by a set of formalities placing a special burden on the tax authorities.

Mostly because of this, for the first 10 years of its existence cases in which the Portuguese tax authorities had resorted to the GAAR were virtually unheard of. This changed in 2011 when it was successfully applied in a high-profile case that echoed throughout the Portuguese

51 Regardless of the value at stake, the taxpayer may opt to select a specific arbitrator, in which case the tax authorities will choose another and both will select a third arbitrator who will preside over the judgment. Mostly because of the related costs (see Section VI, *supra*) taxpayers, apart from very specific cases in which the expertise of a specific scholar is seen as crucial, seldom elect this option.

52 See Article 68 LGT (Binding Information), Article 12(3) RCPITA (Advance Clearing) and Article 138 CIRC (Advance Pricing Agreements).

53 See Article 38(2) LGT.

tax industry.⁵⁴ That was fuelled by the domestic and international stance against aggressive tax planning. In the years following that decision, there was a widespread resorting to the GAAR by the Portuguese tax authorities, which was nevertheless somewhat refrained by the courts. Nowadays, the tax authorities are still striving to strike the proper balance between applying the GAAR and accepting taxpayers' freedom to arrange affairs in a tax-efficient manner.

It is against this backdrop that the Base Erosion and Profit Shifting (BEPS) proposals and the corresponding European Commission initiatives should be seen. In general, both the tax authorities and the government welcome such measures, in particular since they all concur to increase the tools and mechanisms at the tax authorities' disposal. Indeed, Portugal is generally compliant with both the Organisation for Economic Co-operation and Development's (OECD) and European Union's legislative programmes, albeit with some delay, which is more because of poor organisation than reluctance or criticism. Accordingly, in May 2019 and pursuant to the implementation into domestic law of Council Directive (EU) 2016/1164, of 12 July 2016 (ATAD 1), that laid down rules against tax avoidance practices that directly affect the functioning of the internal market, Portugal's GAAR was amended and its wording now reflects a wider concept of tax abuse, focused on artificiality and on tackling tax-driven transactions in a more efficient manner. Although, understandably so, cases under this revised GAAR have yet to reach the tax courts, it is expected that the tax authorities will feel encouraged to make the most of its application.

IX DOUBLE TAXATION TREATIES

Double tax treaties⁵⁵ are interpreted and applied in accordance with the Vienna Convention on the Law of Treaties of which Portugal is a contracting state. In this context, it should be mentioned that the Portuguese legal order is monist, meaning that treaty provisions need not be transposed into the domestic legal order once the corresponding treaty is signed and ratified. This entails that taxpayers may invoke treaty provisions directly and that these prevail over strictly domestic law. Tax treaty override is therefore forbidden.

Having said this, regarding the practical application of double tax treaties, domestic law does foresee specific procedural requirements destined to establish exactly how non-resident taxpayers are required to prove their entitlement to treaty benefits. This typically is done through specific standardised forms that are to be certified by foreign tax authorities to attest the corresponding tax residence and other relevant facts and circumstances such as beneficial ownership of income.⁵⁶

Likewise, EU law provisions prevail over domestic tax law and may be invoked directly by taxpayers.

54 Case 04255/10, decided by the South Central Administrative Court on 15 February 2011.

55 The Portuguese double tax treaties network currently includes 78 treaties. For an updated list of the existing treaties see the tax authority's website (www.portaldasfinancas.gov.pt).

56 See Article 101–C CIRS and Article 98 CIRC.

X AREAS OF FOCUS

In recent years, significant investments made in the tax administration software and important legislative measures obliging businesses to upgrade and harmonise invoicing and accounting procedures to a point where the tax authorities may virtually access them in real time enabled a particularly efficient fight against the shadow economy.

Driven by such success and realising the importance of information as the decisive factor to a successful administration of taxes, the tax authorities are currently shifting their attention to cross-border situations and the exchange of information with their foreign counterparts. This is likely to be a major area of focus in the near future, as the tax authorities will certainly try to make the best use of the vast exchange of information network at their disposal.⁵⁷ In turn, this will put pressure on taxpayers and tax courts, which still tend to accept as truthful any information received from a foreign tax authority. One should not forget that these are no longer the days of information exchanged almost only by request and under careful preparation by conscious tax officials. Nowadays, most information is of course exchanged automatically and in bulk, with little to no human interference, which will inevitably augment the risk of errors and inaccuracies that may turn into a terrible ordeal for taxpayers.

XI OUTLOOK AND CONCLUSIONS

This short analysis has shown that the Portuguese legal framework relevant to taxpayer protection, perfectible as it may be, is reasonably satisfactory. Even so, in recent years budgetary constraints and a press for quantitative efficiency have brought a considerable curbing of taxpayers' rights, as government and tax officials concentrate above all on raising revenue. Unfortunately, this trend does not appear to be changing.

Eventually, it seems inevitable that a fresh look will be taken at taxpayers' rights, reconciling the much-needed efforts to fight tax evasion and aggressive tax planning with fundamental values such as legal certainty and proportionality, the importance of which cannot be forgotten and should not be downplayed.

Nevertheless, the major threat to taxpayers' rights in Portugal does not come from lack of or deficient legal statutes. It pertains to the quality with which tax law is applied and to the lack of technical preparation of those dealing with it. It is more of a social than a legal problem, but if tax officials wrongfully levy taxes, tax lawyers fail to properly present their clients' cases and tax judges decide cases simply in accordance with what they sense to be right or, even worse, take refuge in analysing form rather than merit, no legal right is really protected.

⁵⁷ In addition to the exchange of information provided by the existing double tax treaties, it is worth mentioning the Convention on Mutual Administrative Assistance in Tax Matters (developed jointly by the Organisation for Economic Co-operation and Development and the Council of Europe) of which Portugal is a contracting party, and of course the European Union Directives on exchange of information, which includes the recently implemented directive on the mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements (DAC6). Moreover, there are 15 bilateral exchange of information undertaken with jurisdictions with which no double tax treaty exists (for the corresponding list, see the tax authority's website: www.portaldasfinancas.gov.pt).

ABOUT THE AUTHORS

DIOGO ORTIGÃO RAMOS

Cuatrecasas

Diogo Ortigão Ramos is a partner at Cuatrecasas. He focuses his practice on European Union, national and international taxation, particularly regarding M&A, buyouts, corporate restructuring, financial transactions, real estate investment structuring and transactions, and tax and customs litigation.

He is a member of the Portuguese Bar Association since 1989, the Portuguese Tax Association, the International Fiscal Association, the Portuguese Association of Tax Consultants, the International Bar Association and the American Bar Association, and has been acknowledged by the Portuguese Bar as a specialist tax lawyer.

Diogo is a member of the European Tax Law Group, Tax Associates Meeting and of the Europe VAT Group, the members of which are renowned European law firms, leaders in their respective jurisdictions. He is the Portuguese representative of the Foreign Lawyers Forum of the American Bar Association.

Diogo obtained his law degree from Lusíada University (1989) and postgraduate degree in taxation from ISG – Business & Economics School (1995).

PEDRO VIDAL MATOS

Cuatrecasas

Pedro Vidal Matos is a partner and head of Cuatrecasas' tax practice in Portugal. He focuses his practice on tax litigation, both administrative and judicial. He has been a member of the Portuguese Bar Association since 2002, and is a member of the Portuguese Tax Association and of the International Fiscal Association. He is a lecturer at the postgraduate programmes in taxation and in tax litigation at the Catholic University of Portugal.

Pedro obtained his law degree from Nova University Lisbon (2002), completed a postgraduate degree in company law from the University of Coimbra, Portugal (2004), a postgraduate degree in taxation from ISG – Business & Economics School (2005), a postgraduate degree in administrative and tax justice from University of Coimbra (2007), a master's degree in public law from Nova University of Lisbon (2009) and a master's degree in taxation from the Institute of Advanced Legal Studies of London University (2012).

CUATRECASAS

Av. Fontes Pereira de Melo, 6
1050-121 Lisbon
Portugal
Tel: +351 213 553 800
dortigaoramos@cuatrecasas.com
pedro.matos@cuatrecasas.com
www.cuatrecasas.com

an LBR business

ISBN 978-1-83862-279-4