

# TAX INFORMATION

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## TAX ARBITRATION IN PORTUGAL

### (BRIEF NOTE)

Tax arbitration was introduced to the Portuguese legal system in January of this year by Decree-Law 10/2011 of 20 January. However, for this new system to come into force and for tax arbitration to function in Portugal, it would be necessary for rules to be drafted on binding the tax authorities, the costs of tax arbitration tribunals and finally, the criteria for selection of arbiters.

Accordingly, in March of this year, Order in Council 112-A/2011 of 22 March - as approved by the ministers of finance, public administration and justice - was published to establish the terms under which the authorities are bound by tax arbitration proceedings. The regulations on costs of tax arbitration proceedings were published in April and, finally, the last piece, the regulations on selection of arbiters for tax arbitration were published on 1 June.

We can now set out the how, where and when of the functioning of those tax arbitration tribunals and carry out a more detailed analysis of arbitral procedure.

### THE ARBITRATION

Arbitration is an alternative means of dispute resolution using neutral and impartial third parties – the arbiters – whose decision takes on the same legal value as court judgments. Generically,

the objectives of arbitration are greater speed in the proceedings, a reduction in the burden on the courts and greater flexibility in terms of procedural formalities. Arbitration has seen its importance grow in a number of areas of the law, in particular, in the resolution of international disputes arising out of commercial activity.

### THE OBJECTIVES

With the introduction of tax arbitration, the Government aimed to strengthen the effective protection of the legally protected rights and interests of taxpayers, as well as to increase the speed of resolution of disputes that bring the tax authorities up against taxpayers. A further objective was the possibility of resolution of tax disputes by arbitration reducing the time taken to deal with administrative and tax cases.

### THE SPEED OF PROCEEDINGS

The legislation on of tax arbitration - as is legally known - had the primary objective of speeding up the proceedings, promising to achieve its objective by adopting a process without special formalities, guided by the principle of autonomy of the arbitrators in the conduct of the proceedings and imposing a deadline of six months for the issue of the arbitral award (although this may be extended for a further six months).

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## THE TAX ARBITRATION TRIBUNALS WITH JURISDICTION

The only tribunals that have jurisdiction to hand down tax arbitration awards are those that operate under the aegis of CAAD, the Centre for Administrative Arbitration. This is a body that came into operation on 28 January 2009 (resolving disputes through both mediation and arbitration). The Ministry of Justice and the Ministry of Culture come under the jurisdiction of CAAD under an Order in Council. Some tax administration bodies have now also come under this jurisdiction under the said Order in Council 112-A/2011 of 22 March, which will come into force on 1 July of this year.

The reason for the submission of the tax arbitration tribunals to organisation by CAAD arises from the fact that it is the only arbitration centre operating under the aegis of the Conselho Superior dos Tribunais Administrativos e Fiscais (Higher Council for Tax and Administrative Courts), which in turn is the body that has the power to appoint the president of the Conselho Deontológico do Centro de Arbitragem Administrativa (Professional Ethics Council for the Centre for Administrative Arbitration).

## MATTERS FOR THE TAX ARBITRATION TRIBUNAL

The tax arbitration tribunal may give judgment on a variety of claims including the declaration of illegality of the settlement of taxes, self-assessment, withholding taxes and payments on account. The tribunal may also pass judgment on the legality or otherwise of acts determining the basis of assessment for tax and acts setting values of assets for tax purposes. However, the Order in Council that established the rules for binding the tax authorities in arbitral proceedings restricted the matters in which the tax authorities are bound in such proceedings and this necessarily reduced its scope of application.

## THE TYPES OF CLAIMS ARE SUBJECT TO TAX ARBITRATION

The legislature did not aim to bind the tax authorities to arbitral proceedings in respect of every type of claim. It firstly established those claims over which the tax arbitrations tribunals do not have jurisdiction which are, therefore, excluded. These include:

- the declaration of illegality of self-assessment acts, withholding taxes and payments on account that have not been preceded by an administrative appeal;
- acts determining the basis of assessment for taxation by indirect means including the decision to proceed with the revision;
- customs rights over imports and other indirect taxes that apply to goods subject to importation rights; and
- the tariff classification, origin and customs value of the goods and the tariff quotas, or when the resolution of these issues depends on laboratory analysis or investigation to be carried out by another Member State in the context of administrative cooperation on customs matters.

There is a further limitation based on value. The legislature chose not to bind the tax authorities to arbitral proceedings in disputes with a value greater than €10 000 000, thereby establishing a rule of submission to arbitration on the basis of the amount at issues and, apparently, not trusting cases with greater value to these tribunals, at least, in the “initial” phase.

## THE SERVICES THAT ARE BOUND

Not all of the tax authorities are bound to these arbitral proceedings. Only the DGCI – directorate-general for taxes and the DGAIEC – directorate-general for customs and excise - come under the jurisdiction of the tax arbitration tribunals functioning at CAAD. This

means that some other authorities that have powers over tax issues are not bound to arbitral proceedings. These include municipal councils and the social security authorities even though they fall within the concept of tax authorities as set out in the Lei Geral Tributária or General Taxation Law.

## THE COMPOSITION OF THE TAX ARBITRATION TRIBUNAL

In accordance with the rules for tribunals dealing with tax arbitration cases, the composition of the tax arbitration tribunal will, in the first place, depend on whether or not the taxpayer nominates an arbiter. This issue will also influence the rules on costs which we will address later. This means that in the event the taxpayer nominates an arbiter, the tax arbitration tribunal will function as a collective (three arbiters), with each of the parties nominating one arbiter each and these two arbiters nominating the third presiding arbiter. In cases in which the taxpayer decides not to nominate an arbiter and the value of the case is below the jurisdictional limit of the Central Administrative Court (€60 000), the tribunal will function with a single arbiter to be appointed by the CAAD professional ethics council. In cases in which the taxpayer does not nominate an arbiter and the value at issue exceeds jurisdictional limit of the Central Administrative Court (€60 000), the tribunal will function as a collective of three arbiters, to be appointed by the CAAD professional ethics council.

## REQUIREMENTS FOR ARBITERS

The arbiters must be chosen from “people of proven technical capacity, moral character and a sense of the public interest”. They should come from a legal background and have at least ten years’ professional experience either in the exercise of duties in the public sector, or as judges or lawyers, among others.

The rules applicable to tax arbitration also provide for the possibility of

appointing arbiters with degrees in economics or management, although only for issues that require specialised knowledge of such a non-legal area, and this non-legal arbiter may not carry out the duties of presiding arbiter. It should be pointed out that the rule that establishes the possibility of appointing arbiters without a legal background also requires *mutatis mutandis* that these arbiters have the same characteristics as those with a legal background. In other words, they must also have proven technical capacity, moral character and a sense of the public interest and have at least ten years' professional experience in the areas of economics or management.

However, the Order in Council has established a specific rule which establishes that in disputes with a value equal to or greater than €500 000, the presiding arbiter must have carried out public duties as a judge in the tax courts or have a master's in tax law. In disputes with a value equal to or greater than €1 000 000 the requirements are even more demanding. The presiding arbiter must have carried out public duties as a judge in the tax courts or have a doctorate in tax law.

In relation to the means of appointing the arbiter, the said Order in Council provides for not only different values for costs depending on which body appoints arbiters (CAAD or the taxpayer) – this is why two distinct tables have been approved – but also specific rules as to who must bear them.

#### THE LIST OF ARBITERS

The list of arbiters will be prepared by the management of CAAD on the basis of a favourable vote by that institution's professional ethics council. Anyone wishing to go on the list of arbiters to carry out duties in the future tax tribunals needs to meet all the requirements set out above and to present their candidacy for the list of arbiters through the annual public consultation. This list will be ordered according to levels of specialisation and the same order will be used for the appointment of arbiters to the tax arbitration tribunals.

#### NO APPEAL AGAINST ARBITRAL AWARDS

As a rule, there is no appeal against the awards handed down by the tax arbitration tribunals. However, there will be exceptional cases in which there may be an appeal to the Constitutional Court, to the Supreme Administrative Court, to the Central Administrative Court and even a possible referral for a preliminary ruling to the Court of Justice of the European Union.

There may also be an appeal to the Constitutional Court in cases in which the arbitral award refuses to apply any rule on the basis of its unconstitutionality or applies a rule the constitutionality of which has been challenged. In turn, there may be an appeal to the Supreme Administrative Court in cases in which the arbitral award is in opposition to the same fundamental issue of law on which there is a judgment of the Central Administrative Courts or the Supreme Administrative Court. The award made by the tax arbitration tribunal may also be set aside by the Central Administrative Courts, on the basis of the failure to specify the factual and legal grounds on which the award was based, as well as in cases in which the grounds for the award contradict the award itself, cases where the tribunal fails to address relevant issues or where the award goes beyond the tribunals remit, or violation of adversarial principles or equality between the parties.

Finally, there may also be a referral for a preliminary ruling to the Court of Justice of the European Union, whenever a question as to the interpretation of the European Union treaties is raised in the tax arbitration tribunal or a question on the validity or interpretation of acts adopted by the institutions, organs or organisms of the European Union.

#### THE EFFECTS OF TAX ARBITRATION AWARDS

Awards handed down in arbitral proceedings will have the same legal value and effects as judgments handed down by the tax and administrative courts. This means that in the event of the

failure of the tax authorities to comply with awards that are unfavourable to them, taxpayers may have recourse to the means of enforcement of judgments provided for in the Code of Procedure in Administrative Courts.

#### THE COSTS OF TAX ARBITRATION

The costs of arbitral proceedings – generically referred to as arbitration fees – include the initial arbitration fee which corresponds to the amount due to start the proceedings, and the costs of the arbitral proceedings which make up the expenses resulting from the conduct of the arbitral proceedings (for example, the arbiters', expenses incurred in the production of evidence).

#### THE CRITERIA FOR THE ARBITRATION FEE

The arbitration fee is calculated on the basis of two fundamental criteria: the amount at issue and the way in which the arbiters are appointed. In respect of the amount at issue this will, as a rule, be determined on the basis of the provisions on the Code of Tax Procedure and Process. This will determine the proper amount for the purposes of costs and this should be the value of the settlement for which annulment is sought or the contested value. Having determined the value of the case, the arbitration fee should be that which is established from Tables I and II, annexed to the Regulations on Costs in Tax Arbitration Proceedings.

#### THE COSTS WITH AN ARBITER APPOINTED BY CAAD

Under the legislation applicable to tax arbitration, the arbiter(s) will be appointed by CAAD whenever the tax arbitration tribunal functions with a single arbiter or, when functioning with a group of arbiters, the parties do not appoint the arbiters and it falls to CAAD to do so. In these cases the Regulations provide that the initial arbitration fee, which corresponds to 50% of the arbitration fee, must

be paid by bank transfer to CAAD's account to begin the proceedings and paid at a point prior to the request for the tax arbitration tribunal to be convened. The remaining 50% will be due at the end of the proceedings when the amount of the final costs for the arbitration proceedings is established. At this point the tax arbitration tribunal may, as was already the result of the tax arbitration rules, decide on any possible sharing of the costs between the parties.

As regards the amounts due as arbitration fees, in these cases where the arbiter is appointed by CAAD, the minimum amount €306.00, which is applicable to cases with a value below €2000. The maximum amount on the table is €4896.00 for cases up to €275 000 (see Table I below). In cases where the value exceeds €275 000, the fee will rise by €306.00 for every €25 000.

there will be a collective tax arbitration tribunal. This can only happen in cases with a value exceeding €60 000 (an amount corresponding to twice the limit for the Central Administrative Court). This means that in cases where the tax arbitration tribunal functions as a collective and the parties appoint the arbiters, the payment will be borne in full by the taxpayer and must be made by bank transfer to CAAD's account before the request is made for the tax arbitration tribunal to be convened.

In these cases too the fee will be dependent on the amount at issue with a minimum limit of €12 000 – in cases with a value lower than €60 000 – and a maximum limit of €120 000 in cases with a value up to €10 000 000 (see Table II below).

Table I

From	To	Initial arbitration fee	Cost of arbitral proceedings
-	€ 2.000,00	€ 153,00	€ 306,00
€ 2.000,01	€ 8.000,00	€ 306,00	€ 612,00
€ 8.000,01	€ 16.000,00	€ 459,00	€ 918,00
€ 16.000,01	€ 24.000,00	€ 612,00	€ 1.224,00
€ 24.000,01	€ 30.000,00	€ 765,00	€ 1.530,00
€ 30.000,01	€ 40.000,00	€ 918,00	€ 1.836,00
€ 40.000,01	€ 60.000,00	€ 1.071,00	€ 2.142,00
€ 60.000,01	€ 80.000,00	€ 1.224,00	€ 2.448,00
€ 80.000,01	€ 100.000,00	€ 1.377,00	€ 2.754,00
€ 100.000,01	€ 150.000,00	€ 1.530,00	€ 3.060,00
€ 150.000,01	€ 200.000,00	€ 1.836,00	€ 3.672,00
€ 200.000,01	€ 250.000,00	€ 2.142,00	€ 4.284,00
€ 250.000,01	€ 275.000,00	€ 2.448,00	€ 4.896,00

Table II

From	To	Initial Arbitration Fee
-	€ 60.000,00	€ 12.000,00
€ 60.000,01	€ 100.000,00	€ 16.000,00
€ 100.000,01	€ 150.000,00	€ 23.250,00
€ 150.000,01	€ 200.000,00	€ 30.000,00
€ 200.000,01	€ 250.000,00	€ 36.250,00
€ 250.000,01	€ 300.000,00	€ 42.000,00
€ 300.000,01	€ 350.000,00	€ 47.250,00
€ 350.000,01	€ 400.000,00	€ 52.000,00
€ 400.000,01	€ 600.000,00	€ 75.000,00
€ 600.000,01	€ 10.000.000,00	€ 120.000,00

### THE COST WITH AN ARBITER APPOINTED BY THE TAXPAYER

Under the legislation applicable to tax arbitration, the appointment of the arbiter by the taxpayer is only possible in cases where

### THE TRANSITIONAL ARRANGEMENTS

The decree-law that governs tax arbitration also makes provision for transitional arrangements that give taxpayers with cases pending before the tax courts for more than two years the possibility of submitting the issues in these cases to consideration by the tax arbitration tribunal and without being required to pay the legal fees.

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