



TAX / INSOLVENCY

INSOLVENCY AND THE LIMITATION PERIOD FOR DEBTS: UNCONSTITUTIONALITY OF ARTICLE 100 OF THE CIRE

The practical question under consideration is whether, when tax debts are demanded from the subsidiary debtor in tax proceedings, (i) the subsidiary debtor can argue that those debts are time-barred, or (ii) whether, by virtue of the declaration of the debtor's insolvency, the limitation period will also be suspended.

Judgment no.557/18 of the Constitutional Court («CC»), handed down in Case no. 418/18, was published recently. This judgment confirmed the understanding already expressed in three previous cases on unconstitutionality and declared **unconstitutional**, with **general mandatory force**, the rule in article 100 of the Insolvency and Corporate Recovery Code (Código de Insolvência e da Recuperação de Empresas or «CIRE»), approved by Decree-Law no. 53/2004, of 18 March. The CC held that, interpreted in the sense that **the insolvency declaration suspends the limitation period for tax debts imputable to the subsidiary debtor (and not to the original debtor, found insolvent in the meantime) in the context of tax proceedings**, the rule is unconstitutional because it violates article 165(1)(i) of the Constitution of the Portuguese Republic («Constitution»).

Therefore, the practical question under consideration is whether, when tax debts are demanded from the subsidiary debtor in tax proceedings, (i) the subsidiary debtor can argue that those debts are time-barred, or (ii) whether, by virtue of the declaration of the debtor's insolvency, the limitation period will also be suspended.

The following questions were considered at the core of the decision analysed here:

- Whether the limitation period for tax debts, specifically its suspension, is one of the matters reserved to the legislative power of the Assembly of the Republic (the Portuguese parliament) by the Constitution;
- If so, whether the law of legislative authorisation granted to the Government to adopt the CIRE was a sufficient basis to legitimise the legislative intervention in question in relation to the subsidiary debtor in the context of tax proceedings.

Regarding the first question, the CC found that the limitation period is a matter that falls under the legislative power of the Assembly of the Republic. This is because, in its article 165(1)(i), the Constitution reserves the power to create taxes and the tax system to the Assembly of the Republic. This power encompasses the definition of the essential elements of taxes, including the limitation period as a taxpayer guarantee and, of course, the bases for its interruption and suspension.

As regards the second issue, the CC held that the legitimacy of the government to regulate the legal position of the insolvent does not, in itself, cover the possibility of modifying **guarantees for taxpayers** that are not involved in the insolvency proceedings, in particular, the subsidiary debtor by virtue of the insolvency declaration of the principal debtor. Therefore, the CC held that this would involve the establishment of a new cause for suspension of the limitation period in addition to those specifically provided for in the General Tax Law, and without the Government having been granted authorisation to do so.

It is universally accepted (by doctrine and case law) that the **limitation period for tax obligations is a taxpayer guarantee**. Therefore, the above normative interpretation of article 100 of the CIRE affects these guarantees and thus suffers from organic unconstitutionality, as was expressly recognised by the CC.



MARIA JOÃO VASCONCELOS
 Cat's Cradle II, 1998

Mista s/papel

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