

PRELIMINARY RULINGS BY THE PORTUGUESE TAX ARBITRAL COURT (THE ASCENDI DECISION)



TAX & BUSINESS



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The Court of Justice of the European Union (CJEU) has pronounced itself in favor of the admissibility of requests for preliminary rulings, submitted by the Portuguese Tax Arbitral Court, by its Decision dated of the 12th of June and issued under the judicial proceeding no. 377/13 (known as the "Ascendi" decision).

Although expected, due to the characteristics of the Tax Arbitral Court and the interpretation that has been sustained by the CJEU concerning the preliminary ruling, this decision has clarified an opened issue since the introduction, in 2011, of the Portuguese Tax Arbitration Regime.

The Treaty on the Functioning of the European Union (TFEU) establishes the CJEU competence to decide, on a preliminary basis, on the interpretation of the Treaties, as well as on the validity and on the interpretation of the acts adopted by the institutions, bodies, offices or agencies of the European Union, whenever an issue of this nature is raised before any "jurisdictional body" of one of the Member States and such "jurisdictional body" asks for the intervention of the CJEU.

The question thus arose whether the Tax Arbitral Court could qualify as a Portuguese

“jurisdictional body”, for the purposes of the application of said TFEU provision and, consequently, whether the issues raised before the arbitral tax proceedings could be the object of preliminary rulings sent to the CJEU.

Under the terms of the preamble of the legal act that established the Tax Arbitration Regime, the Portuguese legislator had no doubt as to the possibility of presenting preliminary rulings before the CJEU, within the context of arbitral tax proceedings.

Notwithstanding, although the Portuguese legislator had expressed its understanding in favor of the possibility of presenting preliminary rulings before the CJEU, within the context of arbitral tax proceedings, the question remained whether the CJEU would consider itself competent to issue decisions on preliminary rulings presented by Tax Arbitral Court. This means it was necessary to obtain an answer from the CJEU itself as to whether the Tax Arbitral Court would qualify as a Portuguese “jurisdictional body”.

In this regard, it should be noted that the CJEU had already ruled, in the past, on the admissibility of preliminary rulings presented by arbitral courts from the Member States. Taking into account the CJEU’s case-law, and in order for an entity of a Member State to qualify as a “jurisdictional body”, the CJEU has been considering a number of elements, such as the legal origin of the entity, its permanence, the binding nature of its

jurisdiction, the contradictory nature of the procedure, the application, by such entity, of the law (not equity), as well as its independence.

In the "Ascendi" Decision, now issued by the CJEU, it considered that the Tax Arbitral Court meets all the aforementioned elements, thus qualifying, as such, as a “jurisdictional body”, namely for the purposes of addressing preliminary rulings to the CJEU.

In fact, the CJEU considered that the Tax Arbitral Court has legal origin, namely within the Portuguese Republic Constitution and the Tax Arbitration Regime, under which the legislator foresees that the tax arbitration is an alternative mean of dispute resolution on tax matters.

The above mentioned Decision also sustained that the Tax Arbitral Court fulfills the requirement of permanence for the purposes of qualifying as a resolution jurisdictional body, since, although the composition of the court is ephemeral and its activity ceases after a decision is issued, the Tax Arbitral Court has, on the whole, a permanent character, as part of the dispute resolution system.

In respect to the binding character of the Tax Arbitral Court, the CJEU considered that, although there is no obligation, either in law or in fact, under which the contracting parties should entrust their dispute resolution to arbitration, and despite the fact that the composition of the Tax Arbitral Court does not

depend on an agreement between parties, the decisions issued by arbitral courts benefit from a binding character, in particular, towards the Tax and Customs Authority, which means that this element is also present (as it was present in the "Merck Canada Inc." Decision, of the 13th of February 2014).

With regards to the guarantee of the right to contradiction, the CJEU considered that such guarantee derives, expressly, from the legal diploma which introduced the Tax Arbitration Regime.

On the other hand, the CJEU has also sustained, in the above mentioned Decision, that the Tax Arbitral Court issues its decisions in accordance with the existing law and pursuing criteria of strict legality, being unable to issue any decision based on equity, pursuant to the Tax Arbitration Regime.

In respect to the independence of the Tax Arbitral Court, the Decision under analysis sustained that, not only the tax arbitrators are legally subject to the principles of impartiality and independence, but the Tax Arbitration Regime also foresees cases of impediment of the exercise of the functions as tax arbitrator, such as any family or business connection between the tax arbitrator and any of the parties in the dispute, thus ensuring that the Tax Arbitration Court is actually a third party in relation to both sides in dispute.

Finally, the mentioned "Ascendi" Decision sustains that the decisions issued by the Tax

Arbitral Court are jurisdictional, being assimilated to, for feasibility purposes, to the decisions issued by the Administrative and Tax Courts.

Having said this, it derives very clearly from this recent Decision, that the Portuguese Tax Arbitral Court meets all the elements deemed as essential by the CJUE for the purposes of qualifying as a "jurisdictional body" of a Member State, thus admitting the CJEU its own competence to analyze and decide on the preliminary rulings that are submitted by such Tax Arbitral Court.

It is, therefore, clarified one of the issues raised, since the entry into force of the Tax Arbitration Regime, which has just celebrated its third anniversary.

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Rogério M. Fernandes Ferreira
Ana Moutinho Nascimento
Pedro Saraiva Nércio
Francisco Mascarenhas de Lemos