



### Tax Arbitration and the European Court of Justice

#### An Original Portuguese Experience

**T**he implementation in 2011 of a legal framework to enable Arbitration in Tax Matters has placed Portugal in a vanguard position within Europe. Portugal is, apart from the United States of America, one of the few countries with experience in this legal area. The most conservative legal voices faced the im-

plementation of this mechanism with some concern and skepticism, arguing that the resolution of disputes between the taxpayers and the Tax Authorities was not compatible with the institution of arbitration as a private dispute resolution mechanism. Notwithstanding, those arguments were rebutted and the

possibility to commit tax disputes to arbitration was enabled.

Briefly, we may define tax arbitration as an alternative mechanism of dispute resolution, through neutral and impartial third parties - the arbitrators - whose decision has the same legal value as judicial decisions issued by tax courts. The arbitrators are usually former judges from the higher courts of appeal, tax experts and academics specialized in tax law. With the introduction of tax arbitration, the Government sought to strengthen the effective protection of the legally protected rights and interests of taxpayers, as well as to increase the promptness in resolving disputes between taxpayers and the tax administration.

*Rogério M Fernandes Ferreira is the Founding Partner of RFF Law Firm, former Secretary of State for Tax Affairs, Professor of Law (Tax Litigation and International taxation) in Lisbon and President of the International Fiscal Association (IFA) and of the Instituto Latinoamericano de Derecho Tributario (ILADT) Portuguese branches.*





Currently, the arbitration of tax matters is a well-established mechanism and, since its implementation, as seen an increase in cases. Naturally, it has experienced some instabilities and has a range of matters that must be improved over time, namely, regarding appeals and harmonization of tax decisions on identical tax issues. However, it has been living up to the expectation in which its implementation was based on; tax arbitration has been able to resolve a dispute in an average period of six months to a year, which shows greater flexibility regarding procedural formalities. In this regard we are certain that the Portuguese experience could be a valid contribution to the implementation of this type of alternative dispute resolution mechanism in other legal jurisdictions, especially in jurisdictions based on the Portuguese legal system.

### Arbital Court as "Jurisdictional Body"

In this context, one of the questions that was asked, upon the implementation of this mechanism, was if the arbitral courts operating under this regime would be qualified as a Portuguese "jurisdictional body" for purposes of the European Court of Justice ("ECJ") within the rules estab-

lished to access the preliminary ruling procedure. If so, the arbitral courts would be considered as a fully capable alternative to judicial tax courts.

This question was solved in 2014 by the ECJ in a case known as the *Ascendi* decision (ECJ case nr. C\_377/13, 12 June 2014), in which the court ruled in favour of the admissibility of requests for preliminary rulings submitted by the Portuguese Tax Arbitral Court. Although the decision issued by the ECJ did not represent an unexpected result since the characteristics of the Tax Arbitral Court and the interpretation that had been sustained by the ECJ concerning the preliminary ruling pointed to this favourable outcome, this decision has clarified an issue that had surrounded the arbitration regime from its initiation in 2011.

The Treaty on the Functioning of the European Union ("TFEU") establishes the ECJ's 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 ECJ. The question thus

arose as to 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 ECJ.

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 ECJ within the context of arbitral tax proceedings. Notwithstanding, the question remained whether the ECJ would consider itself competent to issue decisions on preliminary rulings presented by Tax Arbitral Court. This means that it was necessary to obtain a decision from the ECJ itself as to whether the Tax Arbitral Court would qualify as a Portuguese "jurisdictional body". In this regard, it should be also noted that the ECJ had already ruled, in the past, on the admissibility of preliminary rulings presented by arbitral courts from Member States in matters other than tax.

Taking into account the ECJ's case law, and in order for an entity of a Member State to qualify as a "jurisdictional body", the ECJ has been considering a number of elements, such as the legal origin of the entity, its permanence, the binding nature



How can I ensure my company doesn't overlook any tax savings during our international expansion?

Global expansion comes with its own unique set of tax challenges. While many tax incentives are offered worldwide to spur regional economic growth, they're not always easy to uncover — especially at the local level. With Thomson Reuters **Checkpoint Credits and Incentives Pinpointer: International** you can track credits and incentives that apply to your industry and specific business circumstances. When you have hard-to-find global credits and incentives information aggregated in one place you can easily compare and evaluate opportunities across multiple jurisdictions. That means whether you're doing business in Brazil or setting up new operations in India, you can be confident that you aren't missing out on potential investment aid opportunities.

[tax.tr.com/pinpointer](http://tax.tr.com/pinpointer)

The intelligence, technology and human expertise  
you need to find trusted answers.



the answer company™

THOMSON REUTERS®



## SERVICES AND INFORMATION

### Journal of International Taxation

#### TO ORDER

Subscription Department

1-800-431-9025

FAX .....1-800-452-9009

Internet

<http://store.tax.tr.com/accounting/Brand/WGL/c/3700>

Or mail to: Thomson Reuters

P.O. Box 115008

Carrollton, TX 75011-5008

#### CUSTOMER SERVICE

Billing Inquiries, Back Issues,  
and Change of Address

1-800-431-9025

Internet.....<http://support.rg.tr.com>

Or send correspondence to the above address.

#### TO PLACE AN AD

Display or Classified Advertising

651-687-7327

FAX .....651-687-7374

E-mail .....[terry.storholm@tr.com](mailto:terry.storholm@tr.com)

#### EDITORIAL INQUIRIES

Phone .....201-536-8367

E-mail.....[Jessica.Silbering-Meyer@tr.com](mailto:Jessica.Silbering-Meyer@tr.com)

Address to:

Journal of International Taxation

Thomson Reuters/WG&L

121 River Street, 10th Floor

Hoboken, NJ 07030

#### PERMISSION TO PHOTOCOPY

Contact: Copyright Clearance Center

978-750-8400

FAX .....978-646-8600

Or mail to:

222 Rosewood Drive

Danvers, MA 01923

**JOURNAL OF INTERNATIONAL  
TAXATION** is available on the Internet  
as part of **CHECKPOINT** from  
Thomson Reuters Tax & Accounting.

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 issued by the ECJ, it considered that the Tax Arbitral Court met all the aforementioned elements, thus qualifying as a "jurisdictional body" for the purposes of addressing preliminary rulings to the ECJ.

The ECJ considered that the Tax Arbitral Court is legally based, namely within the Portuguese Constitution and the Tax Arbitration Regime, under which the legislator foresees that the tax arbitration is an alternative means of dispute resolution on tax matters. The above mentioned Decision also sustained that the Tax Arbitral Court fulfils 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.

With respect to the binding character of the Tax Arbitral Court, the ECJ considered that, although there is no obligation, either in law or in fact, under which the involved 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 of rebuttal, the ECJ considered that such guarantee derives, expressly, from the legal diploma which introduced the Tax Arbitration Regime. On the other hand, the ECJ has also sustained, in the abovementioned 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.

On the independence of the Tax Arbitral Court, the Decision under analysis sustained that, not only are the tax arbitrators legally subject to the principles of impar-

tiality 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 *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.

**Conclusion.** In light of the above, it is clear from the *Ascendi* Decision that the new Portuguese Tax Arbitral Court met all the elements deemed as essential by the ECJ for the purposes of qualifying as a "jurisdictional body" of a Member State. The existence of this Decision, aside from the importance in clarifying the question about the qualification of the arbitral courts as "jurisdictional bodies" surrounding the Tax Arbitration Regime since its implementation, has helped to build trust in this regime and contributed to an increase in the number of cases.

Six years after the *Ascendi* Decision, it is safe to say that the arbitral courts have no reluctance in submitting cases for preliminary ruling before the ECJ, especially in matters related to the interpretation of VAT rules. In this context, we have preliminary rulings submitted by the arbitral courts on VAT issues such as VAT on the indemnities charged by telecommunications companies, in which the *MEO* decision (C-295/17) is an example, as well as decisions on VAT regularization rules related to immovable property operations, in the case of *Imofloresmira* (C-672/16).

Bearing all this in mind, this Portuguese original experience regarding arbitration in tax matters has been a good one, considering all the doubts raised about its applicability and legality from a constitutional standpoint. And for this successful implementation and development, the position of the ECJ had, from our perspective, an important contribution, through the recognition of the arbitral court as a "jurisdictional body" of a Member State for purposes of access to the preliminary ruling proceedings. ●