



## TAX ARBITRATION: LEGAL EMBODIMENT

Decree-Law no. 10/2011, approving the framework that regulates arbitration in matters of taxation, was published on 20 January. The government's intention, which essentially involves quicker resolution of disputes, had already been stated in the 2010 State Budget law which authorised legislation on this matter.

### What is arbitration?

Arbitration is an alternative manner of resolving disputes via a neutral and impartial third party – the Arbitrator – whose ruling has the same legal value as court judgments. Generally speaking, its aims are procedural speed, freeing up the courts and greater flexibility in terms of procedural formalities, with growing importance in resolving disputes in different areas of law, particularly the resolution of international disputes and commercial disputes.

### Procedural speed

The legal instrument's primary objective is increasing procedural speed by implementing a process without special formalities, guided by the principle of autonomy of the arbitrators in driving the process, with a six month limit for issuing the arbitration ruling, extendable by six more months.

### The powers of the arbitration tribunals

Only those tribunals that operate under the auspices of the Administrative

Arbitration Centre (CAAD), a body which began operating on 28 January 2009, have the power to issue arbitration rulings.

The reason for including the tax arbitration tribunals within the structure of the CAAD pertains to the fact that it is the only arbitration centre to operate under the auspices of the Senior Council of Administrative and Tax Tribunals, which is the entity with the power to appoint the Chairman of the Professional Ethics Council of the Administrative Arbitration Centre.

### The composition of the arbitration tribunal

According to the arbitration tribunal legal framework with respect to taxation, the composition of the

Decree-Law no. 10/2011, approving the framework that regulates arbitration in matters of taxation, was published on 20 January. The government's intention, which essentially involves quicker resolution of disputes, had already been stated in the 2010 State Budget law which authorised legislation on this matter.

---

"Portuguese Law Firm of the Year"  
*Chambers Europe Excellence 2009, IFLR Awards 2006 & Who's Who legal Awards 2006, 2008, 2009*

"Corporate Law Firm of the Year - Southern Europe"  
*ACQ Finance Magazine, 2009*

"Best Portuguese Law Firm for Client Service"  
*Clients Choice Award - International Law Office, 2008, 2010*

"Best Portuguese Tax Firm of the Year"  
*International Tax Review - Tax Awards 2006, 2008*

Mind Leaders Awards™  
*Human Resources Suppliers 2007*

# TAX ARBITRATION: LEGAL EMBODIMENT

arbitration tribunal will depend firstly on whether or not the taxpayer appoints an arbitrator.

Accordingly, if the taxpayer appoints an arbitrator, the arbitration tribunal will operate collectively with three arbitrators, each party appointing one arbitrator and the appointed arbitrators appointing a third arbitrator to serve as the presiding arbitrator.

In cases in which the taxpayer decides not to appoint an arbitrator and the amount at stake in the case is less than the limit of the Central Administrative Court (€ 60,000), the tribunal will operate with a single arbitrator appointed by the Deontological Centre of the CAAD.

However, in cases in which the taxpayer decides not to appoint an arbitrator and the amount at stake in the case exceeds the limit of the Central Administrative Court (€ 60,000), the tribunal will operate with three arbitrators appointed by the Deontological Centre of the CAAD.

## **The subject matter of the arbitration tribunal**

The Tax Arbitration Tribunal may rule on various types of claims, in particular assessing the illegality of the payment of taxes, self-assessment of taxes, withholding at source and payments on account, along with assessment of the illegality of acts to determine taxable subject matter, acts to determine taxable amounts and acts determining equity values, and others.

In cases in which the taxpayer decides not to appoint an arbitrator and the amount at stake in the case is less than the limit of the Central Administrative Court (€ 60,000), the tribunal will operate with a single arbitrator appointed by the Deontological Centre of the CAAD.

## **No appeal against the arbitration tribunal's ruling**

The rulings handed down by the tax arbitration tribunals as a general rule cannot be appealed. However, there are exceptional cases in which an appeal may be lodged with the Constitutional Court, the Supreme Administrative Court or the Central Administrative Court and there may be situations of referral to the Court of Justice of the European Union for a preliminary ruling. These are, however, very exceptional situations.

As such, there may be an appeal made to the Constitutional Court in cases where the arbitration ruling prohibits application of any norm on the basis of its unconstitutionality or applies a norm whose constitutionality has been questioned.

However, there may be grounds for appealing to the Supreme Administrative Court when the arbitration ruling is, with respect to the same fundamental issue of law, contrary to a decision handed down by the Central Administrative Court or by the Supreme Administrative Court.

In turn, the decision handed down by the arbitration tribunal may also be overturned by the Central Administrative Court on the basis of lack of specification of the grounds of fact and law on which the decision was made, as well as in cases in which the grounds of the decision are contrary to the decision itself, cases of omission or excessive decision, or violation of the principles of and adversarial process and the equality of the parties.

Lastly, there may also be referral for a preliminary ruling by the Court of Justice of the European Union whenever an issue related to interpretation of the Treaties of the European Union is raised at the arbitration tribunal, or an issue regarding the validity and interpretation of the acts adopted by the institutions, bodies or entities of the European Union.

## **Requirements for appointing arbitrators**

The new framework stipulates rules for appointing arbitrators, determining

It should also be pointed out that the norm that establishes the possibility of appointing non-jurist arbitrators stipulates that, with the necessary adaptations, they will work under the same conditions as jurist arbitrators, i.e. they must be people of proven technical capacity, moral aptitude and a sense of public interest and have at least ten years of professional experience in economics or management.

who can perform an arbitrator's duties with respect to tax arbitration.

Arbitrators must be selected from "people with proven technical capacity, moral aptitude and a sense of public interest." Arbitrators may be jurists with at least ten years of professional experience, performing public duties as magistrate duties, lawyers, and so forth. However, the legal instrument also provides for the appointment of arbitrators with university degrees in economics or management, although only in relation to matters that require specialised knowledge in such non-judicial areas, and the non-jurist arbitrator may not perform the duties of presiding arbitrator,

It should also be pointed out that the norm that establishes the possibility of appointing non-jurist arbitrators stipulates that, with the necessary adaptations, they will work under the same conditions as jurist arbitrators, i.e. they must be people of proven technical capacity, moral aptitude and a sense of public interest and have at least ten years of professional experience in economics or management.

## **The effects of arbitration rulings**

Rulings ensuing from arbitration proceedings will have the same legal

This new framework came into force on 25 January. However, the binding of the tax authorities to the jurisdiction of the tribunals created under this framework will also depend on the order in council to be issued by the members of the government responsible for matters of finance and justice.

value and effects as rulings handed down by the administrative and tax courts and in the event of non-compliance by the tax authorities in relation to rulings that are unfavourable to them, taxpayers may avail themselves of the applicable means for enforcing judgments, in particular those specified in the Administrative Courts Code of Procedure.

#### **Pending court cases**

The recently approved legal instrument also provides for a temporary system that allows taxpayers with cases

pending in the tax courts for more than two years to submit the issues involved in these cases to the arbitration tribunals, and be exempt from paying court costs.

\*\*\*

This new framework came into force on 25 January. However, the binding of the tax authorities to the jurisdiction of the tribunals created under this framework will also depend on the order in council to be issued by the members of the government responsible for matters of finance and justice.

Rogério M. Fernandes Ferreira  
Francisco Carvalho de Furtado  
Marta Machado de Almeida  
Pedro Saraiva Nércio  
Maria José Sousa Leite

---

This Tax Information is intended for general distribution to clients and colleagues and the information contained herein is provided as a general and abstract overview. It should not be used as a basis on which to make decisions and professional legal advice should be sought for specific cases. The contents of this Tax Information may not be reproduced, in whole or in part, without the express consent of the author. If you should require further information on this topic, please contact [arfis@plmj.pt](mailto:arfis@plmj.pt).

Lisbon, 21 January 2010  
06/ 2011