

Separation of powers

1 Relationship between the Parliament and the Tax Authorities: The influence of the tax authorities on tax legislation

1.1 Does your government have legislative competence on tax matters?

Portugal is a Republic based on the rule of law as well as democratic and social principles. The principle of separation of powers, a corollary of the rule of law and democratic principle embodies a *triple perspective*: horizontal (between the legislative, the executive and the judicial powers, being that the President of Republic is empowered with a type of moderating power), vertical, namely between the autonomous regions and the central State and the separation of powers between government and opposition.

From a legal and political point of view, the main competence on tax matters (creation of taxes and creation of the tax system) belongs to the Parliament (*Assembleia da República*), in accordance with the principle of no taxation without representation and with the safety principle in order to provide taxpayers with the possibility of foreseeing the *an* and the *quantum* of tax obligation.

However, the Portuguese government has two types of competence on tax matters: a *delegated competence* by the Parliament (within the framework, the limits and the political orientation of this institution) in matters considered by the Constitution as a partial exclusive competence of Parliament (*reserva relativa*), concerning essential elements of taxation (tax subject and tax object, exemptions, rates, taxpayers' rights, penalties) and a *shared competence*, in competition with the Parliament, in other tax matters (recovery, inspection, procedure, for example). Nevertheless, in all

these cases, the Parliament may have the final word, because it has the right to exercise an *ex post* control of government legislation.

The government still has two important powers concerning taxation: the power of negotiation of double taxation agreements, even if the final approval is a parliamentary competence, and the power to participate in tax law process as a member of the Council of the European Union.

1.2 Does your government draft tax bills proposals and present them to Parliament?

In all matters, including the right to propose to the Parliament tax bills, the Government is endowed with the right of *legislative initiative*, side by side with the assigned concurrent competence of Parliament. In taxation, a main part of the use of this tax competence occurs, each year, during the presentation of the State Budget proposal. Numerous tax modifications are normally introduced at this precise moment in time, even alterations without a correlative relationship with the Budget itself, such as procedural matters.

As far as current tax legislation drafting is concerned, we can also observe the enormous influence of tax administration.

1.3 In case of your answer to 1.1 and 1.2 is positive:

1.3.1 Does your government usually exercise that competence?

The most common form to enact tax laws comes from a government proposal. However, on occasion we can also observe the approval by Parliament of tax proposals originating from a parliamentary party group.

Hence we can go so far as to say that until present day, the main reforms in taxation were approved by the Government based on the use of delegated

legislative power by Parliament, outside State Budget context. This was the case of the tax reform of the mid-nineteen eighties during which the introduction of VAT was approved, new legislation concerning personal income tax and corporate tax was enacted and important modifications in procedure and sanctions as well as the restructuring of tax benefits were implemented. Furthermore, the same thing occurred in 1999 with the introduction of a General Tax Law and the reform of others taxes (notably, excise tax and stamp duty tax) or during the abolishment of inheritance tax. From a technical point of view, the drafting of this legislation was prepared by *ad hoc* committees of tax experts whose members were appointed by the Government although committee members exercised their prerogatives with considerable independence as far as the end result is concerned.

1.3.2 Does your Parliament passively accept the draft bills provided by tax authorities or does it discuss them in detail and introduce changes to them?

Normally, the Parliament doesn't accept passively the draft bills submitted by the Government, even when the party supporting the government has a majority in the Parliament.

On a regular basis, tax proposals undergo fierce scrutiny (more politically than technically), namely in the Commission of Budget and Financial Affairs and it is very common for opposition to submit proposals for substantive change, some of which are accepted. One of the main factors concerning the level of openness regarding the probability that proposed modifications may pass is the existence or not of a parliamentary majority supporting the Government. All in all, it is safe to say that the executive branch wields great influence as regards to the drafting of tax laws.

1.4 How does the literature in your country and your domestic Courts interpret the situation as you described it in 1.3?

This situation doesn't pose any juridical or political problem. The immense importance of the Government in tax matters is recognized by Portuguese literature and accepted by national courts. The tax constitution is very clear concerning this point. Moreover, we can even highlight the fact that before the democratic constitution, the executive branch already had the main role in tax matters.

This situation is normally explained by the difficulties that the vast majority of members of Parliament have in dealing with tax matters, namely as a specialized knowledge area. Literature in general underlines the knowledge gap of the most members of Parliament in matters relating to tax law and other complementary areas.

2 The meaning of legal indeterminacy in tax matters

2.1 Is your domestic tax legislation vague, when defining the tax object, tax subject and/or tax base, leaving a large margin for discretion, or, is it, on the contrary, very detailed, avoiding indeterminate concepts?

Normally, Portuguese tax legislation tries not to be very vague concerning the defining of tax object, tax subject and tax base. In particular, there is a tendency to define in a detailed manner tax object and even tax subject more than tax base.

Nevertheless, indeterminate concepts, general clauses and narrow and limited discretion are used in defining tax object and tax subject; tax base could, in certain circumstances, be defined with the permission to adopt indirect forms of evaluation and administrative discretion of the tax

administration is allowed in reference to the application of law, within certain conditions, for instance, pertaining to tax benefits or tax agreements.

When Portuguese law needs to develop or explain indeterminate concepts, secondary legislation is provided for by the executive branch or instructions or administration guidelines are implemented by tax administration.

2.2 How do you/ does the literature in your country evaluate the use of both techniques in tax legislation?

There are contrasting views concerning the use of indeterminate concepts in tax legislation. After the Revolution (1974), tax law has remained almost unchanged, despite the tax reform program enshrined in the Constitution. Therefore, the main concern of literature was to avoid or to prevent any abuse of power by tax administration. Great attention was given to the principle of legality, to the construction of closed types and to ensure the legal certainty of taxpayers.

With the consolidation of the democracy, the new tax reform and the introduction of informatics and information systems in tax administration, the climate was appropriate for a change of heart in literature. Nevertheless, some authors (Nuno Sá Gomes, Manuel Pires and others, following Alberto Xavier) had continued to defend the former position, being very critical in relation to the adoption of indeterminate concepts, the discretion of tax administration, the approval of general clauses, and so on. However, a new generation of authors (Saldanha Sanches, Casalta Nabais, Ana Paula Dourado) had recognised, in different ways, the impossibility or even the danger of rejecting indeterminate concepts, of constructing closed types and of not adopting general clauses.

In fact, a position only based on the predominance of the rule of law (namely, the letter of the law) could damage the principle of equality, proving difficult to implement in a new information environment, could facilitate tax avoidance and, in the end, violate the principle of legality, seen from a substantive point of view. For that reason, it was important to strike a balance between all these principles. This new approach, with some variations and within certain conditions, accepts indeterminate concepts and a margin of discretion of tax administration. The administration or a constant judicial practice could fulfil the vacuity of the legal text, thus the text becoming more and more dense.

2.3 Are there independent domestic Courts obliged to control the constitutionality of tax legislation?

The control of constitutionality (organic, formal and material) of all laws, including tax law, belongs to the Constitutional Court. This Court can pass rulings regarding not only the unconstitutionality by action (the existence of legal norms violating the Constitution) but also the unconstitutionality by omission (a failure of legislation to fulfil the objectives of the Constitution).

There is a preventive control (*ex ante*, before the law enters in force) and a successive control (*ex post*). While the first one only can be demanded by institutional persons (President of Republic, Prime Minister, a certain number of members of the Parliament), the second one can, in a concrete way, be argued by taxpayers in tax courts. In fact, in accordance to the Portuguese Constitution, all kind of Courts should appreciate and decide a concrete question of constitutionality, even though it is the Constitutional Court who issues the final decision.

When the Constitutional Court has decided in three concrete cases, the unconstitutionality of a legal norm, this Court should declare the unconstitutionality of this norm, with general and mandatory force.

2.4. Is legal indeterminacy considered to be unconstitutional/ has a tax rule ever been declared unconstitutional due to legal indeterminacy?

If we think about the concept of supply of services in VAT, we conclude that legal indeterminacy in tax matters can not be avoided.

However, an excessive indeterminacy of a tax rule (vg., the absence of a sufficient density with the attribution to the tax administration of an arbitrary power) could be considered to be unconstitutional, because that would compromise the principles of legality and juridical safety and damage jurisdictional control over its application by tax administration.

One case of unconstitutionality concerning legal indeterminacy is the case where the executive branch approves tax laws acting under delegation of the parliament, but this parliamentary authorisation is generic or undetermined, namely concerning the absence of a clear political orientation.

3. The consequences of legal indeterminacy in tax matters

3.1. In case of legal indeterminacy not considered to be unconstitutional, who has the final word regarding the interpretation of the rule – the tax authorities or the domestic Courts?

The interpretation of tax law follows, bearing in mind the specificities to this particular field of law, the general rules of law interpretation. Tax authorities interpret and apply tax law, including the indeterminate

concepts. They can exercise a certain margin of appreciation regarding the legal interpretation of certain tax norms. They can also create rulings (to make more substantial and tangible these concepts) to concretize these concepts in a transparent way, especially in order to quantify the amount of the tax owed.

However, in case of a dispute between the Tax Administration and the taxpayer, the latter has the right of appeal to the Court with jurisdiction in tax matters. It is a vexed question to determine in these cases who has the final word regarding the interpretation of the rule, the Tax Administration or the Courts.

The traditional doctrine advocates that this role is a competence of the Courts. However, a new outlook (Ana Paula Dourado) defends that in cases where a certain margin of appreciation belongs to the Tax Administration, as in cases pertaining to the determination of the quantum of taxes, Courts should only control the limits of the decisions of Tax authorities (i.e., the legality of the decision), but not its contents, if these decisions are plausible (defensible).

Therefore, when the dispute is about tax object or tax subject (being the doubt to tax or not to tax), Courts have the final word. In matters of tax quantification, when the issue is situated within the margins of the concept and more than one solution is possible, then, the Court may accept the interpretation adopted by the Tax Administration, if it is a plausible one.

In accordance with the abovementioned author's point of view, this solution is the one that better suits the principles of equality and of practicability without compromising the principle of legality.

3.2. Is there a constitutional basis for either the tax authorities or the domestic Courts having the final word on interpretation of indeterminate legal rules?

In a concrete case, the constitutional basis for the domestic Courts having the final word on interpretation of an indeterminate legal rule is the fundamental principles of *legality* and of *court protection*.

The Tax Administration is always bound by the law. For that reason, even when interpreting and determining the content of indeterminate concepts, the Tax Administration's margin of appreciation remains subjected to the limits of law. Thus the judicial control over the administrative activity is a constitutional imperative.

In the same way, citizens have the fundamental right of access to the courts as a way of protecting their basic tax rights. In case of a dispute between taxpayers and Tax Administration, the former may appeal to the courts – This mode of protection of basic rights is inherent to a State based on the rule of law. Tax Administration activity cannot be left outside the reach of judicial control.

On the other hand, the constitutional basis for the attribution to the Tax Administration of the final word on the interpretation of indeterminate legal rules, in the event of a legal prerogative concerning a margin of appreciation belonging to the Tax Administration, is the principle of tax equality in articulation with the principle of practicability.

3.3. Is legal indeterminacy normally fulfilled by regulations, administrative rulings and/or case law?

The Tax Administration may issue general rulings in reference to the manner in which indeterminate legal concepts should be interpreted. Administrative regulations may develop and complete legal regimes. They can even be used in the development of technical aspects concerning

essential elements of taxation (subjected to partial exclusive competence of Parliament). This possibility is recognized in the name of tax system *practicability*.

Case law is also very important concerning the densification of legal indeterminacy. We can see some examples in matter of anti-abuse clauses.

3.4. Are administrative rulings binding to the taxpayer and/or the Courts?

In keeping with the current interpretation of the General Tax Law and the Code of Tax Procedure and Process, administrative guidelines or instructions are only mandatory to the tax officers, not legally binding neither to the Courts nor to the taxpayers. According to mainstream opinion, they cannot be considered or be deemed as being “authentic interpretation” of legal rules. Otherwise, the Tax Administration would be substituting the legislator and as a direct result, colliding with the separation of powers.

Consequently, taxpayers may interpret indeterminate legal rules in a different way than the interpretation given by the Tax Administration. In this case, taxpayers may appeal to domestic Courts.

However, this position is now under discussion.

4. Relationship between the Tax Administration and the Domestic Tax Courts

4.1. Do your domestic Courts control application of tax law by your Tax Administration?

Domestic Courts control the application of tax law by Tax Administration in concrete cases when taxpayers appeal to them. A legal prohibition of judicial control over administrative rulings would be unconstitutional. Despite these principles, during a long period, Courts did not control the so-called technical discretion.

Nowadays, there is a slight tendency to increase the number of judicial proceedings and control of the Courts in concrete cases due to the failure of the administrative procedures and the conciliatory commissions to solve in an efficient way the disputes that arise between taxpayers and Tax Administration.

4.2. Do your domestic Courts, in their case law, take into account rulings and binding information emerging from your Tax Administration?

Tax Administration is bound to the rules that it issues as well as to written information given to taxpayers about their tax situation and the compliance of their respective tax duties. Therefore, in the presence of a dispute between a taxpayer and Tax Administration involving those rules or binding information, the Court must take them into account in the name of the constitutional principle of citizen's legal certainty.

As seen above (*supra*, 3.4), in certain cases, Courts may take into account the interpretation of tax rules (including indeterminate concepts) adopted by Tax Administration as long as the interpretation is a plausible one. As a consequence, in those cases Administrative rulings may be taken into consideration by domestic Courts.

4.3. Does your Tax Administration take into account the domestic courts case law/or the ECJ case law when applying the law?

Courts decisions only bind Tax Administration within the case in dispute. Other cases that involve the same tax rules may be decided by Tax Administration in a different way. Normally, Tax Administration does not base its decisions on the domestic Courts sentences. It is more difficult to ignore the EEC case law (mainly concerning VAT) in particular if EEC case law is invoked by taxpayers.

Let it be said that the submittal of proposals by Tax Administration intended to modify certain laws interpreted by the judicial power in an unfavourable fashion to the Treasury's interests is very commonplace.

4.4. Is there a principle of reciprocal observation of the interpretation of tax law by the Tax Administration and domestic Courts?

No, there is no legal principle to this effect. Nevertheless, the feeling we have is that, in fact, domestic Courts adhere more frequently to the interpretation of tax law issued by the Tax Administration, namely through the observation of general instructions/guidelines in comparison with the level of adoption by the Tax Administration of the interpretation provided for by Tax Courts of First Instance.

II

Please answer the following questionnaire, which aims at confirming your answers in I

1. Relationship between the Parliament and the Tax Authorities: The influence of the tax authorities on tax legislation

1.1. Does your Parliament control tax authorities in an efficient way? yes - **no**

1.2. Do tax authorities influence tax legislation to a major degree? **yes** - no

1.3. Does your Parliament a) usually accept the bills provided by tax authorities?
yes - no

b) refuse the bills provided by tax authorities? never -
sometimes - often

c) improve the bills provided by tax authorities? never -
sometimes - **often**

1.4. Is your Parliament able to discuss the bills thoroughly? yes - **no**

1.5. Is there sufficient knowledge of tax law in Parliament? yes - **no**

1.6. Are tax rules often so vague, that tax authorities have to fill the gaps themselves by administrative regulations? never - **sometimes** - often

1.7. Have tax authorities the competence to typify and fill out the legal gaps without control by the Parliament? never - sometimes - **often**

2. Relationship between the Parliament and the Domestic Tax Courts **yes**

2.1. Are there independent (Tax) Courts in your country entitled to control legislation?
yes

2.2. If "yes", do Tax Courts control tax legislation: 0 ex ante or **0** ex post?

2.3. Are Courts competent to clarify whether a specific written tax rule is compatible with constitutional standards? yes - no

2.4. If a high Court is convinced that a specific tax law violates constitutional standards, is the court in this case allowed to ignore the law? **yes** - no

3. Relationship between the Tax Administration and the Domestic Tax Courts

3.1. Are there independent (Tax) Courts in your country, obliged to control your Tax Administration? **yes**

3.2. Are your domestic Courts bound to administrative regulations/orders/rulings, which are issued by tax authorities? yes - **no**

If "no", do the courts follow them in fact? never - sometimes – **often** - very often

3.3. Are first instance Court decisions on a tax case, normally accepted by the Tax Administration (i.e. do they not try to appeal against the decision)? never - **sometimes** - often - very often

3.4. Is a final judicial decision on a single tax case, followed by the Tax Administration not only in this case but also in all other similar cases? never - **sometimes** - often - very often

3.5. How does the Tax Administration react when it is convinced that the final judicial decision is wrong or not "acceptable" because, e.g., it is too expensive for the public?

a) Does it accept the (from their point of view) wrong decision? never - **sometimes** - often - very often

b) Does it try in another similar case to convince the Court to decide in a different way? never - sometimes - often - **very often**

c) Does it try to influence the Parliament to change the law? never - sometimes - **often** - very often

d) Does it make sure that the Internal Revenue Service will not follow this decision in similar cases?

never - sometimes - often - very often

e) Does it try "to hide" such a decision, e.g., not publishing the decision with the result that the Internal Revenue Service does not know this decision? never - sometimes - often - very often

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