



Cooperation in tax audits: The legal framework in Portugal

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Research Topic: Influential Factors in Portuguese Tax Inspection
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Abstract

The Portuguese tax system is the instrument that assures the performance of the functions of the state (article 103 - 1 CRP).

Consequently, is admissible to consider some restrictions to the rights of taxpayers, in order to prevent fraud that could endanger the normal functioning of the state (article 18 - 2 CRP).

This poster represents the Portuguese legal framework on applicable to the cooperation by the taxpayers in tax audits.

We highlight the differences between administrative and criminal investigations. We also explore the cooperation dilemma and the risk of antinomy, analysing the conflicting constitutional principles.

We conclude by exposing the risk of abuse of the duty to cooperate, showing clear examples of legal limitations to obtain evidence by tax authority.

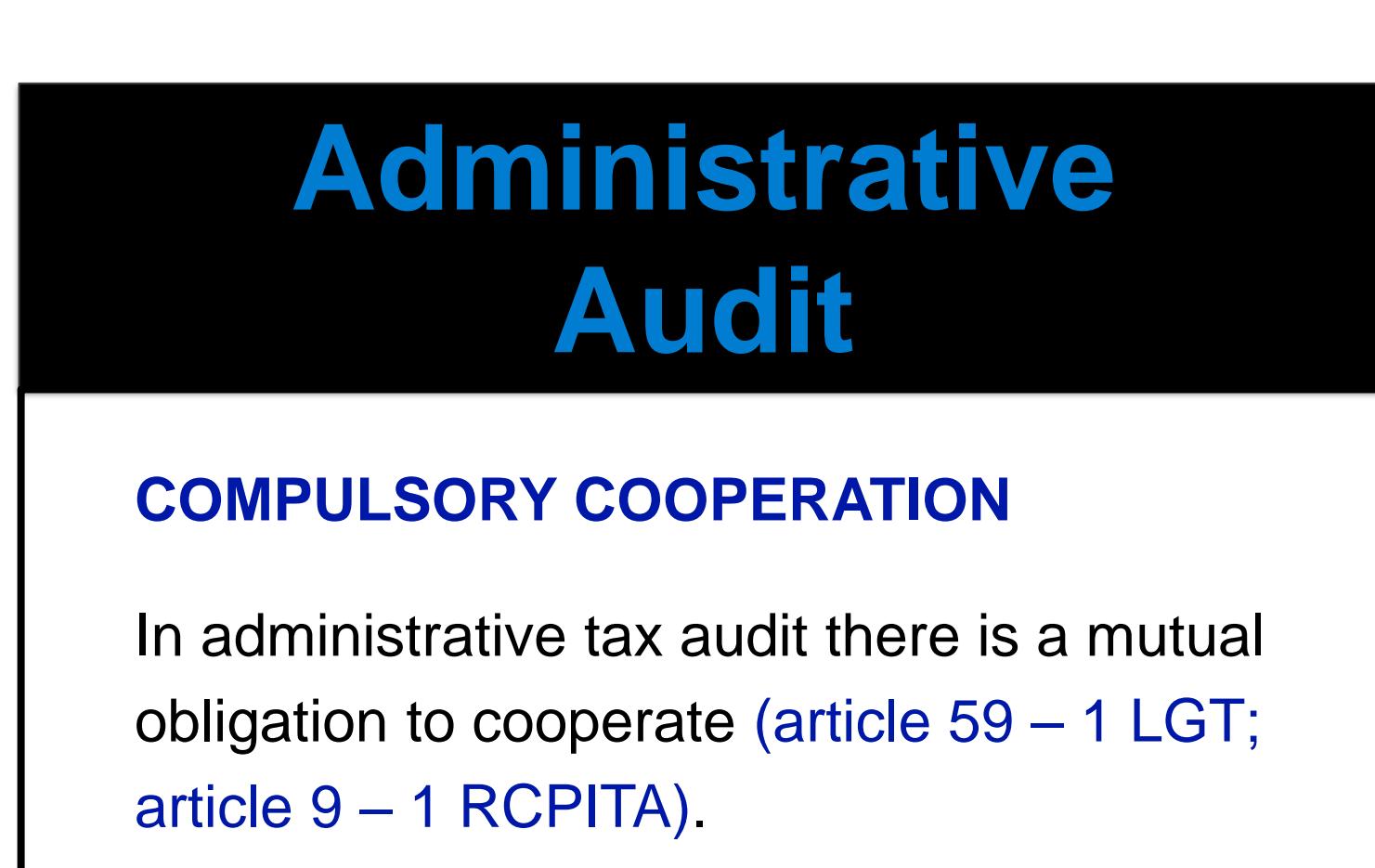
Abbreviations

Portuguese Legislation

- [1] CRP – Constitution of the Republic of Portugal
- [2] LGT – General Tax Law
- [3] RCPITA – Regime of the Tax and Customs Inspection Procedure
- [4] RGIT - General regime of tax and customs offences
- [5] CPP – Code of criminal procedure
- [6] CPA – Code of administrative procedure

Other

- [7] ECHR - European Court of Human Rights



Tax authority has legal prerogatives to assess taxpayer's affairs (article 63 – 1 LGT; articles 28 – 2, 29 – 1 and 30 – 1 RCPITA).
Taxpayers have a legal obligation to cooperate, including a general free-access to facilities, documents and information. (articles 31 – 2 and 59 - 4 LGT; article 28 – 1 RCPITA).

Administrative audit can often be an ANTECHAMBER to criminal investigation

MULTIPLE ROLE OF TAX AUTHORITY

Tax authority has a multiple role. Apart from being responsible for administrative audit, it also assumes the powers and functions that the Code of Criminal Procedure assigns to criminal police agencies and authorities (articles 40 – 2 and 41 -1 RGIT). In addition, tax authority is also the entity responsible to conduct administrative offence proceedings, that arise, for example, when lack of cooperation occurs (articles 52 and 59 RGIT).

Limitations to obtain evidence

THE NOTICE OF THE CRIME

If a suspicion of crime is detected in a administrative audit, this procedure must be suspended and a criminal investigation must start. (articles 36 – 5 c) RCPITA).

Criminal Investigation

OPTIONAL COOPERATION

Nemo temerum se ipsum accusare
The right to be silent and the privilege against self incrimination.



Are there conflicting principles?

As the Portuguese tax system is the constitutional instrument that assures the performance of the functions of the state, the same constitution admits some restrictions to the rights of taxpayers in order to prevent fraud that could endanger the normal functioning of the state. Therefore, Portuguese legal framework predicts compulsory cooperation in administrative tax audits. This compulsory cooperation is build upon international and constitutional laws



Article 6 – European Convention of Human Rights.



Article 14 – International Pact About Civil and Political Rights.



Articles 32-1, 32-2 and 20-4 – Constitution of the Portuguese Republic.



VERSUS



The right to silence and the privilege against self incrimination



The importance of cooperation in tax audits



THE RISK OF ABUSING TAXPAYER'S COOPERATION

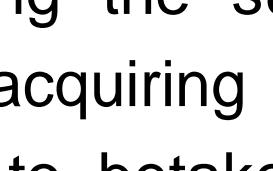
Tax authority might have the temptation to start an administrative audit having previously suspicions that a crime was committed or delaying the suspension of an ongoing audit after acquiring the practice of a tax crime, in order to betake compulsory cooperation. Both can be considered as abusing taxpayer's cooperation and therefore such evidence can be considered inadmissible in court.



EXAMPLES OF MALPRACTICE

When a taxpayer is already under suspicion of committing a crime, is illegal to:

- Sanctioning a taxpayer for non-cooperation (Cases of the ECHR Funke vs France, J.B. vs Switzerland and Shannon vs UK)
 - Use evidence collected in a administrative audit through taxpayer's cooperation, when he was warned for sanctions if he does not cooperate.
- (Case of the ECHR Saunders vs UK)



THE LEGITIMATE NON-COOPERATION

Taxpayers can argue violation of its constitutional rights to refuse cooperation in tax investigations (article 63-5 LGT). This can be seen as a legal possibility to claim the right to not cooperate as a privilege against self incrimination. (articles 117-2 CPA). If this opposition is legal, tax authority will need a court permission to execute the investigation action. (article 63-6 LGT).

If illegal, taxpayers can request to be formally accused of a crime, benefiting in that quality, the right to silence and the protection against self incrimination. (article 59-2 CPP).