The Portuguese tax arbitration regime

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Main questions:

1) How did Portugal overcome the opposition/skepticism to settling domestic tax disputes through arbitration?

2) What are the key features of the regime that make it an attractive path for taxpayers?

3) What are the main takeaways from the Portuguese tax arbitration experience?
Overcoming opposition and skepticism

• Social and economic costs of judicial delays
• Recognition of the right to effective judicial protection within the framework of fundamental rights
• The arbitration tribunals are included in the list of national courts in Article 209 of the Constitution
• Tax arbitration as a realization of the rule of law
• Call to action: the role of the academic community and public opinion

Legal grounds

• Decree-Law no. 10/2011 + Ministerial Order + Regulations on fees and procedures
• Prohibition to resort to equity
• Arbitration tribunals as an element of the Portuguese judicial system on a par with the tax judicial courts
• An arbitral award has the same legal force as a judicial tax court decision
• Tax credit vs. disputed credit
Key features of the Portuguese tax arbitration regime

- Institutional arbitration through the CAAD
- Voluntary arbitration
- Selection/appointment/impediments of arbitrators
- Comparable costs of litigation
- Celerity of the proceedings
- Transparency /publicity / public scrutiny
- Simplicity and dematerialization

Limitation to the appeal

Objective: to ensure a faster final decision
Taxpayer’s right to appeal
Trade-off: possibility of appeal in cases expressly provided for by law:

(1) constitutionality
(2) opposing decisions or
(3) procedural irregularities

Fair balance between celerity and legal certainty
Fast-track to the European Court of Justice (ECJ)

- Tax arbitration tribunals have been classified as a “court or tribunal of a Member State” (Ascendi Judgement, C-377/13)
- ECJ have jurisdiction to reply to questions referred for a preliminary ruling by a tax arbitration tribunal
- Essential in the framework of taxes harmonized at the EU level (such as VAT or excise duties)

Tax arbitration in action!

- 11 years of practical experience
- Effective instrument for ensuring access to justice
- Reduction of pending cases and “suppressed litigation”
- Emphasis on transparency and celerity
- Special nature of the regime
Lessons from experience!

- Original tax dispute resolution model tailored to the Portuguese tax system
- Ruled out the application of the commercial arbitration regime
- Continuous improvements and adaptations over time
- Avoiding competition between arbitration centers and “taxpayers shopping”

Growing pains: limitations and future considerations

- Re-evaluating the scope of competence for tax arbitration tribunals
- Expanding jurisdiction to VAT on importation and other tax assessments
- Striking a balance between specificity and flexibility in the legal regime
Final remarks

Tax arbitration

- Celerity + Specialization
  - Correct course/fixed procedures
  - Guarantee effective judicial protection

- Transparency + Publicity
  - Predictability/security
  - Reinforces the role of case law

Opportunity to improve legislation

Preventive effect on the outbreak of litigation

Boosts External Investments

Economic Growth

Thank you for your attention!